Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts

Edward H. Cooper
*University of Michigan Law School*

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EXTRAORDINARY WRIT PRACTICE IN CRIMINAL CASES: ANALOGIES FOR THE MILITARY COURTS

by

EDWARD H. COOPER *

INTRODUCTION

Extraordinary writs have two central functions in the hands of appellate courts. One is to enforce the court's mandate; there is no particular difficulty with this use of the writs, and no more need be said about it. The other function is to circumvent the ordinary channels of appellate review. In this function, writs operate as appeals in all but name. As this use has become more and more routine, it would be more appropriate to speak of them as "appeals writs" rather than extraordinary writs. My assignment is to speak of the experience with appeals writs in criminal cases in civilian courts, in hopes that some profitable analogies may be drawn to the system of military justice. The assignment is limited to this scope because I am entirely innocent of any knowledge about the structure, procedures, or substantive law applied within the military justice system. As ungracious as it may seem, I must begin by suggesting the reasons why the analogies are very perilous. The most I can really hope to do is to suggest the kinds of concerns that must be addressed in shaping your own writ practice.

The most important factors that control the appellate use of extraordinary writs depend on the full institutional context of the entire court system involved. The most important part of my talk is the first part, which addresses the multitude of institutional factors that must be accounted for. There is no lesson more useful than to learn to reflect wisely on these factors. As a general proposition, these factors appear to have led to similar conclusions for both civilian and military courts: in the ordinary course of events, proceedings should be completed at one judicial level before review is had in another level. In the civilian courts, this conclusion is expressed through the "final judgment rule." As to criminal cases, the final judgment rule provides virtually the only path of appeal. The second part of my talk will illustrate some of the ways in which the final judgment rule has been applied and manipulated in criminal cases. Appeals by defendants and by the government must be

* Professor of Law, University of Michigan. This paper is the text of an address delivered on May 18, 1983, to the Eighth Annual Homer Ferguson Conference of the United States Court of Military Appeals. Readers who need supporting authority can find it in Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction, Volumes 15-16, particularly §§ 3918-3919, 3932-3936.
discussed separately in this setting, because substantially different concerns are reflected in the developed doctrine.

The third and fourth parts of this talk go directly to the use of extraordinary writs to avoid the limits of appeal jurisdiction. Here the more general part is perhaps less important—the formal pronouncements that define the role of the writs are familiar to most of us, and do not shed much light on the specific questions you are apt to encounter. The more detailed part is, I hope, more interesting, and is most likely the sort of discussion that was bargained for in setting this topic for discussion. Civilian courts have employed writs to control trial court actions in a wide variety of circumstances, at the behest both of criminal defendants and of the government. For all of the reasons that will be detailed before we get there, these specific illustrations cannot be carried over directly to military practice. Nonetheless they provide a context for testing the more general suggestions.

I. FINAL JUDGMENT RULE: THE IMPORTANCE OF CONTEXT

A truly final judgment is one that marks the completion of all the events that will occur in a trial court. Nothing more remains to be done, unless it be execution of a judgment against the defendant.

The advantages that may be gained by deferring appeals until entry of a truly final judgment are familiar, and can be summarized in short order. Immediate review of every ruling made by a trial court could not be tolerated. Repeated interruptions and delays could put the trial process beyond any reasonable control, even if appeals were taken only when there was a good faith and reasonable belief that the court was wrong. The opportunities for less honorable delay and harassment of an adversary also would not go entirely unexploited. More limited opportunities for interlocutory review would not be so disastrous, but would carry some part of the same costs. The possible advantages to be set against these costs arise from the opportunity to correct a wrong ruling. These advantages, however, are reduced by the prospects that most trial court rulings are correct; that wrong rulings often are corrected by the trial court; and that uncorrected wrong rulings will not, in the end, taint the final judgment.

The price that is paid for a final judgment rule, however, can be high. An erroneous ruling may taint everything that follows. If appeal must be delayed until final judgment, it may become necessary to repeat the entire trial proceedings. The costs of repeating the trial go beyond the obvious costs of expense and anxiety. The further proceedings will be held later, and may suffer from lapses of memory, inconsequential inconsistencies that are blown into exaggerated importance, and actual loss of evidence. Beyond these defects, the retrial proceedings often will be affected by lessons learned at the first trial. Trial lawyers well know that there is nothing attractive about reliving an exciting trial on the morning after. The problem is more than one of boredom; strategies
have been revealed and must be revised, opportunities to sustain truth by impeachment are diminished, and so on.

It is bad enough that erroneous rulings may taint subsequent trial proceedings. It may be worse that they can have consequences outside the courtroom. All of the many values protected by a testimonial privilege, for example, can be destroyed if testimony is erroneously compelled. A defendant who has been wrongly denied release pending trial can never have those days of freedom restored.

Beyond the impact on individual cases, loss of the opportunity for interlocutory review means that some areas of law must develop without much opportunity for appellate guidance. Questions of discovery, for example, may confuse and divide trial courts for years without the guidance and uniformity that appeals could provide.

It would be comforting to be able to conclude that these conflicting considerations can be reconciled by firm adherence to a rule that allows appeals only from truly final judgments. Federal civilian courts have long since discarded any such simple conclusion. In both civil and criminal cases, opportunities have multiplied for interlocutory review. In civil cases, the paths of review have evolved through elaborations of the final judgment rule; perhaps the best known and most general of these is the “collateral order” rule. In addition, statutes have permitted interlocutory appeal as a matter of right in some designated circumstances, and have permitted interlocutory appeal as a matter of special permission from the district court and court of appeals together. Extraordinary writs have become an increasingly frequent supplement to these appeal provisions. In criminal cases, similar developments have occurred. The final judgment rule has been expanded, although in ways somewhat different from civil cases. A small number of special statutes permit interlocutory appeal by defendants in narrowly defined circumstances. Interlocutory appeal is allowed to the government as a means of challenging suppression orders. And the extraordinary writs have again played an expanding role.

The rules that have come to surround the occasions for appeal in federal civilian courts are elaborate, and they have been spun into ever more refined elaborations as the courts confront new problems and reconsider old problems. A modest number of lawyers actually understand the basic premises built into the rules; many do not. Even those who understand the basic premises know that it is often difficult to find a clear answer for a specific question of appealability. This complexity is, by itself, a substantial reason for wondering whether a different system of courts—such as the military courts—should seek to borrow much of the developed doctrine.

Quite apart from these problems of complexity, there are much more fundamental reasons for caution in seeking to borrow the criminal appeals doctrine of the federal courts. The most general way of stating these reasons is to observe that the desirability of departing from the final judgment rule is controlled by an array of institutional factors that
are unique to each particular system of courts. Rules that work—if they do—for federal criminal courts may not be good for military courts.

The institutional factors that must be considered in developing rules for interlocutory review can be grouped around a deceptively simple set of poles. It is important to understand the nature of the trial tribunals, the appeals tribunals, the bar, the procedures of all tribunals, and the substantive law being applied. If the only path of interlocutory review is to be by writ practice, as seems to be the case for military courts, all that need be done is to understand the role of all these factors. Unfortunately, that is no small task.

Let us begin with the nature of trial tribunals. The single most important factor is the quality of the various persons who collectively may comprise the first level of court-martial proceedings. The better they are in discharging their functions, the less need there is to create an intrusive means of regular interlocutory review. If appellate courts are willing to allow matters to go to an uninterrupted conclusion at the court-martial level, moreover, it is likely that these initial tribunals actually will perform better. Beyond the quality of the judges, account must be taken of the scope of review. Interlocutory review is less profitable if there is no more than a slight chance of reversal; a narrow scope of review obviously suggests that reversal is unlikely. The nature of trial level procedure also must be considered. Military procedure is no doubt unique in many ways. If the procedure is well adapted to the character of the court-martial tribunals, there is less need for interlocutory supervision. Finally, the very nature of the case-load has a bearing on the desirability of writ review. Interlocutory review is more important as trial courts become burdened with substantial loads of complex, lengthy litigation that involves new and uncertain areas of law or procedure. If the main work of the trial courts involves generally familiar bodies of substantive and procedural law, there is less need to worry about interlocutory review. Review on appeal from final disposition is adequate.

The structure and character of the appellate courts are as important to the calculus as the quality of the trial courts. If there is a two-level system of appeals courts, the first chore is to determine the primary responsibility for interlocutory review—whether it should lie first in the intermediate courts, here the individual service Courts of Military Review, or with the supreme court, here the Court of Military Appeals. Ordinarily, at least, it makes sense to place primary responsibility with the intermediate courts. Wherever responsibility is placed, a major concern must be the capacity of the courts to respond quickly and constructively. The costs of interlocutory review are reduced in measure as the appeals court can reach a prompt decision that in fact improves the course of trial proceedings.

The character of the bar is perhaps more important than we tend to think. A flexible system of interlocutory review can work very well if lawyers are well aware of the need to invoke review with restraint. It
can prove disastrous if it is abused by counsel who seek delay, or misused by counsel who simply do not know better.

By now it should be apparent that the military courts can look to the experience of federal criminal courts for no more than illustrations of the problems that are likely to be encountered. Courts-martial, whether general, special, or summary, are not structured or staffed in the same ways as federal district courts. Court-martial procedure is unique in many ways. The substantive rules applied are apt to be more cohesive and better known than the incredible array of rules applied in the district courts. The relationships between the appellate tribunals and the courts-martial also are different, and the appellate courts themselves are differently composed. The corps of military lawyers may be capable of more sophisticated use of a flexible appeals system than is the heterogeneous civilian bar. The procedures that work and do not work for the civilian courts cannot be adopted or rejected without careful reflection.

In short, all that follows is no more than food for thought. You will have to develop for the military courts an indigenous, home-grown, unique system of writ review. You should not disdain the experience of civilian courts; upon independent examination, it may prove that much of that experience offers lessons valuable for military courts. At the same time, you must critically examine the civilian experience against the background of your own system. With care, you may do better by yourselves than the civilian courts have done for themselves.

Finally, the military court system must confront a special set of distinctions that, mercifully, have had little analogue in the civilian courts. Systems of review that work well in times of peace may be ill-suited to the special exigencies that arise from combat. The problems of review presented by courts-martial held in circumstances of combat or combat-readiness must be resolved on their own. Little or nothing in contemporary civilian practice can help to illuminate these unique problems.

II. FINAL JUDGMENT VALUES: THE FOUNDATION OF ANALYSIS

Extraordinary writ practice in federal courts is powerfully influenced by the premise that very good reason must be found for ignoring the final judgment rule. In criminal cases, it is common ground that the final judgment rule is even more important than in civil cases. In order to approach the writ decisions, then, it is necessary to look first at the evolution of final judgment doctrine in criminal cases. Appeals by defendants have followed one path, which will be explored first. Government appeals have been constrained by quite different considerations, particularly the tortured concepts of double jeopardy, and will be treated separately.
A. Defendant Appeals

Discussion of the final judgment rule in criminal cases must begin with an obligatory citation to *Cobbledick v. U.S.*, 1940, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783. Justice Frankfurter there stated clearly a theme that has been repeated ever since: the final judgment rule applies in criminal cases with greater force than in civil cases. The delays and disruptions of intermediate appeal are especially inimical to the effective and fair administration of justice. *DiBella v. U.S.*, 1962, 369 U.S. 121, 126, 82 S.Ct. 654, 657, 7 L.Ed.2d 614. This perception has translated into the general rule that in criminal cases, "'Final judgment * * * means sentence. The sentence is the judgment.'" *Parr v. U.S.*, 1956, 351 U.S. 513, 76 S.Ct. 912, 100 L.Ed. 1377.

There is a clear statutory provision for interlocutory appeals in the Bail Reform Act of 1966. The desire to provide prompt review of matters that affect freedom pending trial is easily understandable. Even before passage of the Act, collateral order appeal was available to challenge at least some bail determinations on the theory that even before trial, the consequences of such determinations are so important that they can be treated as if "final" judgments.

A much more general method of invoking interlocutory review is through the doctrine just mentioned, the "collateral order" doctrine that was first clearly articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528. This doctrine permits appeal under the final judgment statute, § 1291, on the theory that a seemingly interlocutory order has such important consequences that immediate appeal must be afforded. There are three, or perhaps four, requirements for appeal. Three are commonly summarized in statements that

the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

The fourth requirement, invoked in some opinions but not others, is that the order involve a serious and unsettled question of law.

By far the most prominent application of collateral order doctrine to appeals by criminal defendants is found in *Abney v. U.S.*, 1977, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651. The ordinary rule is that denial of a defendant’s motion to dismiss a prosecution is not a final judgment. In Abney, the Court ruled that collateral order doctrine permits appeal from denial of a motion to dismiss that rests on double jeopardy grounds. To appeal, the defendant must show that the district court has finally resolved the double jeopardy claim. Once this is shown, the claim is found to be separable from the issue on the merits, which is guilt of the offense charged. The most important part of the decision, however, is the portion that concludes that immediate appeal is necessary to protect double jeopardy rights. The double jeopardy clause is intended to protect against the personal strain, public embarrassment, and expense of trial. This protection is defeated if appeal must await conviction.
Two divergent lessons must be noted about experience under the Abney rule. The first lesson is direct: Abney appeals on double jeopardy grounds have proliferated. The courts of appeals have had to develop special procedures to dispatch quickly a substantial number of ill-founded appeals based on hopeless double jeopardy claims, so as to avoid undue interference with trial court processes. In extreme cases, it has been necessary to conclude that a trial court can proceed notwithstanding the notice of appeal. If a colorable double jeopardy claim is presented, it may prove impossible to avoid this unhappy experience. Nonetheless, the Abney doctrine should not be embraced without careful attention to the ameliorating procedural details that can make it more bearable.

The second lesson from Abney has doubtless been shaped by the first. The key to this particular theory of collateral order appeal has been found in the concept that some doctrines are specifically intended to create a right not to be tried, as with double jeopardy. One illustration that is not likely to occur in military practice is provided by the rule that the privileges conferred on members of Congress by the Speech or Debate Clause are intended to protect against the burdens of trial. Much more often than not, the conclusion is that appeal is not available. In U.S. v. Hollywood Motor Car Co., 1982, — U.S. ——, 102 S.Ct. 3081, 73 L.Ed.2d 754, the Court ruled that denial of a motion to dismiss for vindictive prosecution is not eligible for collateral order appeal. It held squarely that appeal is available only if there is “a right not to be tried,” and that it is important to guard against ever-multiplying exceptions that might swallow up the policy against piecemeal appeal in criminal prosecutions. Other decisions have ruled that the right to a speedy trial is not to be protected by collateral order appeal, and have rejected appeals rested on breach of plea bargaining agreements and statutes of limitations. Collateral order appeals are not apt to be warmly embraced in other settings.

As might be expected, much of the lore surrounding defendant appeals goes to matters of discovery and suppression. As to discovery, the ordinary rule is the same as the rule in civil cases: orders that grant or deny discovery are not appealable. Exceptions ordinarily are denied even as to claims of privilege, although in extreme cases that pose particularly important questions of national security or especially sensitive questions of relations to other branches of government, appeal may be allowed on collateral order reasoning.

As to pretrial motions to suppress, the courts have concocted a nearly impenetrable body of doctrine. The leading decision is DiBella v. U.S., 1962, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614. The central concern is that care should be taken to guard against interference with a pending prosecution, in light of the expectation that denial of suppression can be tested by appeal if a conviction ensues. The complications have developed out of the difficulties that arise when it is clear that there may be a criminal prosecution, but it is equally clear that there may not. Defendants often have plausible claims to the return of property, and there is no assurance that an opportunity for appeal ever will arise after denial of the motion to suppress. The details of the ensuing rules defy easy
summary; with the hope that military procedure is apt to be more expeditious than other criminal procedures, they are simply put aside here.

A wide variety of other pretrial and trial rulings have prompted attempts to appeal. Among pretrial rulings, particular note may be made of denials of motions to disqualify opposing counsel. It is now settled that collateral order doctrine does not permit appeal in civil cases. The experience of the courts of appeals that had experimented with such appeals was disastrous. It seems likely that the same rule will be followed in criminal cases, lest motions to disqualify government counsel be made with an eye as much to the strategic opportunity for delay by appeal as to any real need for disqualification.

Some post-trial rulings also are held non-final; the clearest example is provided by orders granting new trials. Orders entered after completion of the original criminal proceeding, however, often are appealable because there is no clear prospect that any later proceedings will occur to afford an opportunity for appeal. Here too, there is little reason to linger on possible analogies to military practice.

It may be useful to note one last feature of ordinary criminal practice. The Supreme Court has just sent to Congress an amendment to Criminal Rule 11(a)(2) that would confirm the practice of conditional guilty pleas that had been adopted by a few courts of appeals, even as it was rejected by others. Under this procedure, a defendant can enter a plea of guilty or nolo contendere that reserves the right to appeal denial of any specified pretrial motion. Approval of the court and consent of the government are required. This procedure promises substantial benefits to some defendants who are persuaded that there is no reason to endure the strains and delays of trial on the facts after pretrial disposition of controlling questions of law or procedure. This procedure seems uniquely tailored to review by appeal rather than extraordinary writ; if you are to emulate it, it must be directly.

B. Government Appeals

In the Omnibus Crime Control Act of 1970, Congress drastically amended the provision for government appeals in criminal cases, 18 U.S.C. § 3731. The Supreme Court has said repeatedly that the new statute was intended to remove all statutory barriers to appeals by the government, a bit of hyperbole that must be taken with a grain of salt in light of several well-reasoned decisions that attach final judgment doctrine to some aspects of the statute.

Two quite different applications of § 3731 must be distinguished. One part of the statute provides a right of pretrial appeal from orders that suppress or exclude evidence. Pretrial appeal is necessary in criminal cases, even though it would be denied in civil cases, because of the prospect that the government would not be allowed to appeal after a fact-based acquittal at a trial that was limited by an erroneous exclusion of evidence. The statute contains built-in safeguards to ensure that
appeals are taken only if the ruling is important to the prosecution of the case, and that they are taken promptly so as to avoid delay. This portion of the statute appears to have worked well; a great many appeals are decided under it without further discussion of appealability, and without apparent abuse. This is an area in which it may prove very attractive to create an extraordinary writ substitute in a military justice system that has no analogous appeal procedure.

A separate aspect of § 3731 permits appeal from a judgment dismissing a prosecution, “except that no appeal shall lie where the double jeopardy clause * * * prohibits further prosecution.” This portion of the statute has generated an extraordinarily confusing body of Supreme Court decisions. It is my understanding that there is no analogous provision for appeal within the military justice system. The double jeopardy rulings that have shaped application of the statute may be relevant nonetheless, since they will control any effort to substitute writ appeals for formal appeals. Any effort at brief summary is risky; it is all the more risky for me, since I am uncertain as to the very premises of statute and constitution that have shaped double jeopardy thinking in this area. Nonetheless, the following summary is offered without further apology.

Two or three themes can be identified in the current decisions that wrestle with the appeals implications of double jeopardy. The government should not be afforded a second opportunity to convict that might enable it to supply deficiencies in its case that were revealed by the first trial; it should not be allowed a chance to persuade a second factfinder, who might be more favorably inclined than the first; and it should not be able to wear down defendants whose resources are insufficient to withstand repeated trials.

The decisions that elaborate these concerns into specific rules have created distinctions that seem artificial or worse. Heavy emphasis has been placed on an unarticulated concept of “acquittal” that defeats appeal even though the trial court acted solely on the basis of mistaken legal theories, and that permits appeal even though the result may be to require a complete retrial of the case. It is still possible that important consequences will hang on the verbal formula chosen by the trial court, whether it be to “dismiss” or to “acquit,” even though the underlying reason for the disposition be the same. The litany of case names could be extended to great length; the most important are *Fitch v. U.S.*, 1977, 433 U.S. 627, 97 S.Ct. 2909, 53 L.Ed.2d 1048; *Sanabria v. U.S.*, 1978, 437 U.S. 54, 91 S.Ct. 2170, 57 L.Ed.2d 43; *U.S. v. Scott*, 1978, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65; *Lee v. U.S.*, 1977, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80; and *U.S. v. Martin Linen Supply Co.*, 1977, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642. Without attempting to summarize the decisions individually, an illustration may help to suggest the directions they seem to take.

An easy illustration can be drawn around a prosecution for armed robbery. Before trial, the defendant moves to dismiss for preindictment delay, and renews the motion twice during trial. At the close of all the evidence, the motion is granted. The government can appeal, even
though victory will require a complete new trial. *Scott.* The Court explained that in such circumstances there has not been an acquittal based on determination of the factual elements of the offense charged, and that by seeking dismissal the defendant has invited the burdens of a second trial.

Suppose instead the defendant seeks acquittal at the close of trial on the ground that the government failed to prove that the hammer had been cocked on the automatic pistol he held during the robbery. If the trial court rules that the offense requires proof that the hammer was cocked, and acquits on that ground, the government cannot appeal. It makes no difference that the trial court was completely wrong in its belief that such proof is required; it is sufficient that its decision rests on an evaluation of the factual sufficiency of the case. *Sanabria.*

Suppose instead that upon the defendant's motion to dismiss for failure to prove that the hammer was cocked, the district court ruled that the government had proved an offense other than armed robbery, perhaps robbery by threat of force, and "dismissed" for failure to charge the offense proved. The lesson of the Lee case seems to be that this dismissal is more a "mistrial" than an "acquittal," and that the government can appeal.

Finally, suppose trial was held to the court without a jury. If the court simply states an erroneous view of the law and enters a judgment of acquittal, apparently appeal is foreclosed. But if the court makes detailed findings of fact, states that the defendant is guilty if the law is as claimed by the government, but concludes that the defendant must be acquitted for failure to prove that the hammer was cocked, the Fitch case seems to say that appeal can be taken.

These distinctions do not respond to any obvious sense of purpose. The easiest explanation may be that trial judges should have broad power to terminate all proceedings on a given criminal charge, as a matter of protecting defendants. This explanation would make more sense if it were translated into an explicit rule that a trial judge has this power, that it cannot be reviewed, and that it must be exercised by an express order dismissing with prejudice. As a matter of desirable criminal procedure, this is at least understandable. As a matter of constitutional compulsion, drawn from the double jeopardy clause and fixed on state courts, it is very difficult to understand.

Translation of these concerns into the setting of military justice requires a bit of an effort. There is no appeal procedure for the government analogous to § 3731. Double jeopardy rules are likely to be encountered, however, if writ practice is pushed even to the limits that have characterized the federal courts of appeals practices in criminal cases. If writ practice is pushed further, in an effort to create a substitute for an appeals statute, the double jeopardy rules must be reckoned with in a very serious way.
III. EXTRAORDINARY WRITS: GENERAL RULES

There are so many misleading statements about the general role of the extraordinary writs that it is best to begin by noting that they must not be taken seriously. The double jurisdictional characterizations are the most prominent of the misleading rules. Traditional rules had it that mandamus was available only to compel action that a lower court lacked authority to withhold, and that prohibition was available only to prevent action beyond the court's jurisdiction. The concept of "jurisdiction" in these cases quickly moved beyond any familiar or useful concepts, and has degenerated to a point at which it can safely be ignored. More trouble is caused by the notion that the limits on proper writ practice are jurisdictional, so that obedience to the limits is required even when it would be more sensible to bend or ignore them. This notion too should be put aside. If a writ proceeding has carried to a point at which it is better to resolve the issues presented, they should be resolved; that it might have been better not to start down that road is no longer controlling. A third notion is that the writs are not to be used as substitutes for appeals. The plain fact is that writs are used as an appeals process, and that courts have benefited from this use.

A. Power

The first and most important limit on writ power is that it can be exercised only in aid of the court's jurisdiction. This much is required by the language of § 1651(a). This limit, however, does not mean much. As to the federal courts of appeals, it means essentially that a writ cannot issue to an inferior tribunal if it is clear that the court of appeals could not ever acquire jurisdiction of an appeal in that particular case. A court of appeals for one circuit cannot issue a writ to a district court in another circuit. Potential appellate jurisdiction, however, clearly is enough. It is not required that an appeal have been taken. Neither is it required that a writ be the only conceivable means of controlling the district court or preserving eventual appellate jurisdiction. A writ may be found in aid of jurisdiction simply because it is more efficient to provide present review of an order that could effectively be reviewed on a subsequent appeal. For the federal courts of appeals, the central concepts of power embodied in the "aid of jurisdiction" notion present very little practical problem indeed.

I do not know enough of the structure of the military justice system to guess accurately whether there may be more serious problems of power presented by the "aid of jurisdiction" limit. The practice of the Supreme Court makes it clear that a court at the apex of the judicial pyramid can issue a writ directly to a court at the base, without waiting action by an intermediate court. Hence it is appropriate for the Court of Military Appeals to undertake writ control of proceedings in a court-martial tribunal, and perhaps quasi-judicial officers, without insisting on prior application to the appropriate Court of Military Review.
A much more difficult question is presented by the prospect of cases that never can come before a Court of Military Review or the Court of Military Appeals. It may be clear from the very inception of a court-martial proceeding that the case never will fall within these channels of review. Alternatively, a case may progress from an ambiguous posture to one in which it has become clear that these courts will not ever have appellate jurisdiction. There is an obvious argument that in these circumstances, a writ issued by these courts would not be in aid of any prospective appellate jurisdiction. Perhaps this argument should prevail. It would be a mistake, however, to accept this conclusion without further inquiry. There may be important reasons for ensuring effective control over the proceedings in some of these cases. The courts of the military justice system have much to contribute both to achieving uniformity of law and procedure and to ensuring individual justice. The special obligations and abilities of these courts, as courts, must be considered carefully. If indeed the system can be made to work better by adopting a limited writ practice in these cases, the opportunity should not be put aside by any process of analogy to civilian courts. Both the flexible process of interpretation that has characterized the growth of § 1651 learning in other areas, and more diffuse notions of "inherent power" drawn from the particular needs of the military justice system, may be enough. Final determination of this question must turn on a sophisticated familiarity with the system and a clear determination whether insuperable obstacles are raised by the history of the Uniform Code of Military Justice. For me, it is enough to raise the question and to urge that it be resolved as a matter of the needs of this system of courts, not by analogy to other court systems.

A second limitation on writ power is found in the frequently repeated exhortation that the writs are not to be used as substitutes for appeal. This rule has been noted a few moments ago. It serves the valid function of reminding us that the final judgment rule has values, and that they should be taken into account. It cannot obscure the simple fact that writ practice has become a form of appellate review in all but name. The real rule is that writs should be used as a form of appeal whenever that makes good institutional sense.

One possible difficulty with treating the writs as a form of appeal arises from the procedure. Formally, the writ process is initiated by an initial application to the court of appeals. The judge of the lower court is traditionally named as the respondent. The federal courts of appeals, however, have moved increasingly away from the traditional practices. Many now have rules that reduce the role of the trial judge to that of nominal participant in most cases. These rules are very desirable, and should be adopted generally.

B. Traditional Limits of the Writs

Long enough ago, there were technical limits that defined the respective limits of the various writs used to control—among other things—ju-
dicial action. Mandamus, prohibition, certiorari, and habeas corpus each had defined roles. Habeas corpus has retained its distinctive identity. The other writs, however, have come to be used interchangeably—mandamus and prohibition need not be distinguished at all, and if an unusual case presents a need that formerly would have been filled by certiorari it is difficult to imagine denial of relief simply because the wrong caption was used.

Whatever the form, the clearest traditional function of the writs was to control jurisdictional excesses. The writs were used to confine lower courts to lawful exercise of their prescribed jurisdiction, or to compel an exercise of authority that could not lawfully be withheld. Roche v. Evaporated Milk Assn., 1943, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185. Even within this area, however, it was clearly established that use of the writs is discretionary. An appellate court is not obliged to make a thorough and complete determination of the jurisdictional issues raised by a writ petition; it can deny the petition as a matter of discretion without deciding whether there is jurisdiction in the lower court. Guidance is sought in the clarity of the alleged jurisdictional violation and in its importance. Particularly if later review by appeal seems a sufficient remedy, writ control may be denied.

For many years, it has been established that the writs can go beyond "jurisdictional" usurpation or default of lower courts. It is a relatively easy extension to control a "usurpation of power" even in cases that otherwise are within a court's jurisdiction. An order sequestering property that the district court had no power to sequester, for example, was controlled by mandamus in De Beers Consolidated Mines v. U.S., 1945, 325 U.S. 212, 65 S.Ct. 1130, 89 L.Ed. 1566. More recent cases have gone further, recognizing a power to control "a clear abuse of discretion." Although it was easily said that the writs "need not run the gauntlet of reversible errors," it was clear that they had gone beyond any limits of controlling excesses of lower court jurisdiction.

The discretionary character of writ jurisdiction was reflected in areas other than the limits of writ "power." Cases involving the timing of the writ application are the most general and interesting. The writs simply are not used to control disposition of a matter on which a district court has not ruled, unless it be to compel the district court to make a ruling that has been too long delayed. At the other end of the time line, a writ may be denied because the application was too long delayed.

C. Supervisory and Advisory Mandamus

The roots of the greatest modern expansion of writ practice lie in La Buy v. Howes Leather Company, 1957, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 209. A bare two years earlier, Chief Judge Magruder had protested that § 1651 does not grant "a general roving commission to supervise the administration of justice." His protest was embraced by the four justices who dissented in the La Buy case. The majority, however, chose a different view. The actual ruling was that it was
proper to use mandamus to set aside reference of complex antitrust litigation to a master; in part, the decision seemed to rest on the fact that the same judge had referred several cases to masters, and that other judges on his court appeared to have used masters too often. The Court then observed that:

We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here.

Since the La Buy case, courts of appeals have slowly evolved a practice known as supervisory or advisory mandamus. Appeals writs are used to resolve questions that seem important, and likely to avoid timely or effective determination in the ordinary processes of appeal. These are the cases that help to solidify the conclusion. The writs have become an extraordinary appeal process, and one that is not so very far out of the ordinary at that. The ways in which this function of the writs may become involved with criminal cases are all that remain to be explored.

IV. WRITS IN CRIMINAL CASES

At last we come to direct discussion of the topic you had expected to be regaled with. Extraordinary writs are used in criminal cases, both on petition by defendants and at the request of the government. The practice has been shaped by the perception that the final judgment rule has special importance in criminal prosecutions, but it has not been stunted on this account. It is best to introduce this topic by recounting the decision in the Will case, before turning to the separate problems posed by defendant and government petitions.

A. Will v. United States, 1967, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305

The Will case is the necessary point of departure for discussing writ practice in criminal cases. Judge Will had ordered the government to provide a bill of particulars that would provide substantial information about witnesses to any statements of the defendant that were relied upon by the government to support the charge in the indictment. The court of appeals issued a writ of mandamus to set aside this order, but did not explain why the order was erroneous, much less why the error was of such proportion as to warrant mandamus. The Supreme Court reversed. Even in reversing, however, it observed that it was not deciding whether mandamus might be appropriate "upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals." The fact that the way was left open for ultimate issuance of a writ may be more important than many of the observations made along the way.

The opening portions of the Will opinion, however, seem to call for very sparing use of writs in criminal cases. The Court described all of the
traditional formulas that limit the extraordinary writs to extraordinary cases, and emphasized that the general policy against piecemeal appellate review is even stronger in criminal cases because of the interest in speedy resolution of the charges. The policies of double jeopardy were found a further and special limit on the writs.

Turning to the specific circumstances of the case, the Court emphasized that there was no claim that Judge Will lacked "power" to enter his order, and no reliance on any wrongful general practice of Judge Will or other members of his court. Up to this point, the opinion seems to suggest that very special circumstances are required to support a writ in a criminal case, at least at the behest of the government.

The concluding paragraphs of the Will opinion then appear to turn in a different direction. The government argued that mandamus serves "a vital corrective and didactic function." The Court apparently agreed that "these aims lay at the core of this Court's decisions in La Buy [v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290] and Schlagenhauf [v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152]." It explained, however, that these purposes could not justify a writ in a case that lacked any showings or findings to support use of mandamus as a "corrective measure," and that lacked any opinion that could serve to guide district courts in the correct directions. The Court concluded as just noted—it remanded for further proceedings, noting that it was not deciding what result might be proper on a more complete record and with a supporting court of appeals decision.

The Will decision, in short, speaks clearly of the caution that should be used in exerting writ control in criminal cases. Although it is not as clear, it also seems to recognize that writ control remains appropriate. Certainly subsequent decisions in the courts of appeals have concluded that there is ample room for extraordinary writ practice in criminal cases, and have exercised control through the writs.

B. Defendant Writ Applications

In the wake of the Will decision, several courts have noted that the Court's special concerns with appellate use of the writs in criminal cases are much reduced if it is the defendant who applies. The reluctance to interfere with criminal proceedings by piecemeal appellate review remains, but it is far from controlling.

Writs in fact have issued to review an order to appear in a lineup; denial of dismissal; revocation of bail; gag orders; refusal to hold a probable cause hearing; denial of jury trial; limitations on discovery; and refusal to permit out-state counsel to appear pro hac vice. An order transferring a defendant from the district of arrest to the district of indictment has been similarly set aside. Nonparties also may have access to the writs; the most likely example is shown by cases that permit newspapers to set aside gag orders by mandamus. It seems probable that over time, mandamus in these cases will come close to the practice in civil cases. Some classes of orders will prove particularly susceptible to writ
control. In civil cases, mandamus has become routinely available to preserve the right to jury trial; it is not unlikely that in criminal cases, it will be relatively accessible to control the nature of the trial forum. If there should be disputes about the composition of a court martial, they seem particularly likely to be susceptible to mandamus control. Matters of "discovery" have figured in many civil cases, particularly when there is a plausible claim that a testimonial privilege requires protection. Criminal and military trial cases seem likely to follow suit. Disqualification of trial judges has often been reviewed by mandamus in civil cases; so it may easily come to be in criminal and military cases.

There are few illustrations in criminal cases to parallel the traditional uses of mandamus to control jurisdiction. Here too, however, there are particularly strong arguments to be made for mandamus control. The policies that limit military tribunals to trial of service-connected offenses, and to jurisdiction over people who in fact are in service, represent vitally important limits that deserve prompt and effective protection. The respective Courts of Military Review and the Court of Military Appeals should not be bashful about using the writs to protect against seeming disregard of these limits. If I am swimming against the current tide of decisions in this respect, let me respectfully urge your further consideration.

C. Government Writ Applications

The best is properly saved for last. Writ applications by the government have provoked the greatest judicial concern, at least when the prospect is viewed from a distance and without distinguishing three quite distinct variations on the general theme. On closer examination, two of the three settings in which writs may be sought by the government are not particularly challenging. Perhaps the least difficulty is presented by writ applications that arise after conviction, when there is little threat either to speedy trial or double jeopardy interests. Somewhat greater difficulty is presented by writ applications filed prior to trial of a case that remains alive and proceeding toward trial. In these cases, there may be an interference with the speedy trial interest, but there is little risk to double jeopardy interests. The most difficult cases arise from applications that are specifically designed to forestall an order that will foreclose any further prospect of conviction. These cases will be treated last.

The best accepted use of mandamus following conviction has grown up in cases involving reduction or suspension of sentence. Several cases have granted mandamus to set aside orders that unlawfully reduced or suspended sentences previously imposed. Although such orders interfere with the defendant's sense of repose, it is difficult to believe that double jeopardy principles prohibit this practice; the ruling in U.S. v. DiFrancesco, 1980, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328, that Congress can validly provide for appeal from a criminal sentence seems to settle the matter. Mandamus also has issued to set aside denial of a government motion for resentencing. There should be little difficulty in generalizing
this practice to other settings, unless they become entangled with discretionary authority that is not subject to a finding of illegality. A presidential decision to pardon an offender, for example, would hardly be subject to control by mandamus.

Cases can be found that have used mandamus to set aside the erroneous grant of a new trial sought by a criminal defendant. Most recent decisions, however, refuse mandamus. In civil cases, it is clear that there is at least a very strong presumption against such uses of mandamus; it seems likely that the same stinginess will be carried over into criminal cases. Nonetheless, criminal cases present a special problem not encountered in civil cases. Should the defendant be acquitted at the new trial, there may be a double jeopardy bar against the appellate remedy utilized in civil cases—appeal from the judgment entered after the new trial, with reinstatement of the verdict rendered at the first trial. Until it is established whether there is a double jeopardy bar, there will be a corresponding role for writ review in truly exigent cases.

Applications for a writ designed to control the course of trial court proceedings that are continuing toward trial also have been granted. Some of the issues have involved challenges by the government to a grant of discovery requested by the defendant, denial of a government request to depose its own witness for trial purposes, a proposal by the trial judge that he reveal to the defendant the sentence that would be imposed if a not guilty plea were changed to a guilty plea, or anticipatory rulings that would exclude evidence at trial. Mandamus also has been used to set aside a release on cash bail, and to control the composition of the trial jury. Cases of this sort present a potential interference with the defendant’s interest in a speedy trial. Nonetheless, writ proceedings can be handled with considerable dispatch in these settings, and the most that can be said is that the appellate court should consider the need for speed and its own ability to act quickly, the apparent importance of the issue, and the probability that error has been committed before deciding to entertain the writ proceeding.

Writ review presents the greatest temptations and the greatest potential problems when it is sought as a means of controlling trial court action that is designed to terminate all further proceedings. The problems, of course, are those of double jeopardy; speedy trial interests are also implicated, since there is inevitably some delay in getting matters set for trial, but these interests are in large measure incorporated in the broad scope of double jeopardy in any event.

The temptations of writ review in this setting are particularly clear in the setting of a court system that does not provide for appeal by the government. It is necessary to begin from the premise that simple resort to a writ form of proceeding cannot evade the double jeopardy constraints that would attach to an “appeal.” Even if you should disagree with the double jeopardy-appeal concepts that have been adopted by the Supreme Court—and that is not difficult to do—they should be honored. This lesson is engraved by the ruling in Fong Foo v. U.S., 1962, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629, that mandamus cannot issue to set aside a
directed verdict of acquittal, no matter how egregiously erroneous the acquittal may have been.

If double jeopardy would permit a government appeal, however, it also should permit a writ application. The next step must be to determine whether the absence of any explicit statutory provision for government appeal should of itself defeat resort to writ procedure. If there were clear legislative history that the issue had been confronted and resolved, perhaps it should be controlling. Absent such history, however, it is tempting to go further. The temptation is particularly strong unless the matter of prosecution appeals in military cases has been explicitly reconsidered since 1970. The practice of government appeals in criminal cases has been transformed since 1970, and a mere failure to provide for such appeals before 1970 cannot reflect any considered evaluation of the lessons that have been learned since then. It does not seem at all likely that there is any legislative history that would distinguish between government resort to the writs to test pretrial rulings in military cases, and resort to the writs to control unfounded dismissals. The case for writ control of pretrial rulings is so strong that by itself it should shape the approach to be taken to statutory silence.

One additional potential obstacle must be put aside. Once again it must be determined whether a writ would be in aid of the court's jurisdiction. This problem has been encountered in an analogous setting and overcome. On government applications for pretrial writs, it has been objected that the case might be disposed of on grounds that would foreclose any government appeal. In this setting, the courts of appeals have responded that it is sufficient that the case is one that, in other postures, might come before them. Future jurisdiction need not be assured in order to support a writ as one issued in aid of jurisdiction. This argument, however, cannot be applied directly to cases in which the certain prospect of dismissal by the trial tribunal ensures that appeal is foreclosed. Nonetheless, it is possible to argue that had the trial tribunal reached a correct result, the judgment could have been appealed. So long as double jeopardy does not preclude review, the appellate courts should have power to protect their jurisdiction against defeat by wrong orders.

This suggestion may seem daring. It is supported, however, by a number of cases in the federal courts of appeals that arose before the current government appeal statute. In these cases, mandamus was used to effect the kinds of review that today would be available by appeal. Because these cases are so directly relevant to the problems that will confront the military courts, they are worth noting in some detail.

The earliest of these cases is U.S. v. Igoe, C.A.7th, 1964, 331 F.2d 766, cert. den. 380 U.S. 942, 85 S.Ct. 1020, 13 L.Ed.2d 961. The district court erroneously accepted a waiver of jury trial by the defendant without the government's consent, and then dismissed the case upon the government's refusal to proceed with trial to the court. Mandamus issued to set aside the dismissal. This course is fully consistent with current appeal doctrine.

The next case was U.S. v. Dooling, 2d Cir.1969, 406 F.2d 192, cert. den. 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224. The defendants were
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convicted at the fourth trial held to prove their guilt; the convictions were reversed, and a fifth trial was held. The defendants were again convicted. The district judge, Judge Dooling, indicated that he intended to enter an order dismissing the indictment solely because of delay between the reversal of the convictions at the fourth trial and the institution of the fifth trial. He suggested that government counsel find some way to frame the order so that appellate review would be possible. Instead, a petition for mandamus was filed before the order was entered; the writ was granted, pursuant to the court's supervisory power and its responsibility "for preventing gross disruption in the administration of criminal justice."

A third case is *U.S. v. Weinstein*, 2d Cir.1971, 452 F.2d 704, cert. den. 406 U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116. Judge Weinstein was convinced that the jury had erred in convicting the defendant, but that there was no particularly good reason for a new trial. Accordingly, in an effort to make review possible he first entered a judgment of conviction, and then entered an order setting aside the conviction. Mandamus issued to set aside the dismissal, on the ground that he had acted beyond his "jurisdiction" and in the interests of the sound administration of criminal justice.

A final case is *U.S. v. Lasker*, 2d Cir.1973, 481 F.2d 229, cert. den. 415 U.S. 975, 94 S.Ct. 1560, 39 L.Ed.2d 871. Judge Lasker dismissed the indictments in that case for failure to proceed promptly to trial. Mandamus again issued, drawing from the court's power to prevent potential disruption of the orderly administration of justice.

It must be observed that in all of the cases from the Second Circuit, the trial judge was anxious to cooperate in achieving appellate review. This cooperation was manifested by actions that made it possible to achieve review within the limits of currently received double jeopardy doctrine. So long as trial courts are willing to provide such assistance, there is a particularly strong reason to permit use of the extraordinary writs. Appellate review can be helpful to trial judges who are uncertain of the law; as a cooperative endeavor in which all judges seek alike to conform to the law, it is an aid rather than an intrusion.

If trial judges are anxious to defeat writ review, however, matters will be much more difficult. No more need be done than to frame the judgment as a fact-based acquittal; no matter how erroneous it may be, indeed no matter how transparent the errors of law that may infect the acquittal, double jeopardy principles apparently preclude review [*Sanabria v. U.S.*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43; *Fong Foo*].

Within the limits of double jeopardy, then, it may be possible to do much to provide appellate review in the most pressing cases, even after a final disposition by the trial court. If the federal courts of appeals could do it before enlargement of the criminal appeals statute, the military courts can do it now.
CONCLUSION

No more than a few words are needed by way of conclusion. The central point was stated at the outset. The extraordinary writs have become appeals writs in the federal courts of appeals. There is every reason to expect that the process will continue to evolve, until it becomes an appeal process in form as well as fact. Military courts can experiment with expanding the writs in similar fashion. The similarities, however, are not perfect. The appeals rules and relationships that make best sense for civilian courts need not make the best sense for military courts. You will be able to forge strong and good answers for yourselves, but you must take time in doing it. Experience will teach you the proper relationships, and how to change the relationships as your institutional framework continues to evolve. Do not worry about finding the ideal answer; you never will find it, and cannot adhere to it for long even if you should stumble upon it for a while. You can do no more than to respond to your own needs as best you can understand them. I am confident that you will do that, and wish you a good outcome.