DIRECT APPEAL TO THE SUPREME COURT BY THE UNITED STATES IN CRIMINAL CASES*

PHILIP B. KURLAND†
RICHARD F. WOLFSON††

The Controlling Statute: History, Purpose and Constitutionality. The *Sanges* case,[1] decided in 1892, disclosed that the Circuit Court of Appeals Act of 1891[2] had left the United States without any right to appellate review of an adverse decision of a trial court in a criminal case, even when a review would not involve double jeopardy. It was to remedy this situation—whereby "through inadvertence, the decision of a single judge in a criminal case was allowed to nullify an act of Congress or construe it out of existence"[3]—that the Criminal Appeals Act of 1907[4] was enacted. This Act was amended in 1942[5] to provide for appeals to the Courts of Appeals in situations where direct appeal to the Supreme Court was improper and for transfer of appeals from the Supreme Court to the Courts of Appeals and from the Courts of Appeals to the Supreme Court when the appeal was erroneously taken to the wrong court. In 1948, at the time of the enactment of Title 18 of the United States Code into positive law,[6] the Criminal Appeals Act, as

---

* This article is a draft of part of a revision of ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1936) in which the authors of this article are now engaged. The views expressed by the authors of this article as to the wisdom of the jurisdictional statute discussed herein, do not necessarily reflect the views of Mr. Robertson and Mr. Kirkham.

† A.B. 1942, University of Pennsylvania; LL.B. 1944, Harvard. Member of the New York and the United States Supreme Court Bars. Guggenheim Fellow, 1949-50.

†† A.B. 1942, Harvard, LL.B. 1944, Yale. Member of the New York and the United States Supreme Court Bars. Guggenheim Fellow, 1949-50.

1. United States v. Sanges, 144 U. S. 310 (1891).

2. Act of March 3, 1891, c. 517; 26 STAT. 826 (1891).

3. FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT 113 (1927).

4. Act of March 2, 1907, c. 2564, 34 STAT. 1246. The legislative and political history of this statute is interestingly recounted in FRANKFURTER AND LANDIS, *op. cit., supra* note 3, 113-126.

5. Act of May 9, 1942, c. 295; 56 STAT. 271 (1942).

6. Title 18 of the United States Code was renumbered, codified, and enacted into positive law in 1948. Act of June 25, 1948, c. 645, 62 STAT. 862. Prior thereto Title 18 was only "prima facie" evidence of the law. Stephan v. United States, 319 U. S. 423, 426. At the time of the codification some changes were made in the language of the

amended, was reenacted as § 3731 of Title 18. The statute now reads:

> The appeal may be taken by and on behalf of[7] the United States from the district courts[8] direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> * * * * * * * * * *[9]

---

statute which appear not to have resulted in any substantive change; thus, the words "setting aside, or dismissing" an indictment were substituted for "quashing, setting aside, or sustaining a demurrer" to an indictment. This brought the statute into conformity with the Rules of Criminal Procedure for the United States District Courts. Rule 54 (c). The scope of the language was extended to include "informations" as well as "indictments" in conformity with the decisions of the Supreme Court. *See, e.g.*, United States v. Johnson, 323 U. S. 273 (1944); United States v. Walsh, 331 U. S. 432 (1947); United States v. Hoy, 330 U. S. 724 (1946).

7. In Kinnane v. Detroit Creamery Company, 255 U. S. 102 (1920), the appeal was taken by the United States Attorney and not by the United States. The United States need not have been a party in name to the proceeedings in the trial court. It is sufficient that it is "in any relevant sense, a party to the proceedings." United States v. Hoffman, 335 U. S. 77, 79 (1947).

8. Originally, the Criminal Appeals Act was held inapplicable to the District Court for the District of Columbia. United States v. Burroughs, 289 U. S. 159 (1932); Burroughs v. United States, 290 U. S. 534 (1933). The 1942 amendment, adding the transfer provisions, clearly indicated that the United States Courts in the District of Columbia are governed by the terms of the statute governing direct appeals by the United States in criminal cases. And the Supreme Court has acted in accordance with the principle that the statute should be applied to the District of Columbia courts. *See* United States v. Hoffman, 335 U. S. 77 (1947); United States v. Maryland & Virginia Milk Producers Ass'n, 335 U. S. 802 (1947); *see also*, United States v. Hoffman, 161 F.2d 881 (App. D. C.) (1946).

9. The deleted portions of § 3731 refer to appeals from district courts to courts of appeals:

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals, in all circumstances, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

> The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.
>
> If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals,[10] the Supreme Court of the United States shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.
>
> If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

On its face, the statute reveals three categories of questions which the Supreme Court can entertain on direct appeal from the District Court by the United States:

1) Those directed to the validity of a statute on which the indictment is based, whether raised before or after judgment;

2) Those directed to the construction of the statute on which the indictment is based, whether raised on motion before or after judgment;

3) Those directed to the sufficiency of motions in bar, but only "when the defendant has not been put in jeopardy."

These provisions have been the source of a steady and

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section."

This portion of the statute was added by the Act of May 9, 1942, c. 295, 56 STAT. 271.

10. Section 43 of the revision of Title 28, effective on the same date as the revision of Title 18, changed the names of the intermediate federal appellate courts from "United States Circuit Court of Appeals" to "United States Court of Appeals" for the circuits, Act of June 25, 1948, c. 646, 62 STAT. 992.

28 U. S. C. § 41 changed the number of circuits from ten to eleven to include the Court of Appeals for the District of Columbia as a court to be designated as are the other intermediate appellate courts. See note 8 *ante*. Title 18 originally did not conform to these changes. The statute was amended by the Act of May 24, 1949, c. 139, § 58 to affect conformity.

important, though not heavy, proportion of the business of the Court.[11]

---

11. FRANKFURTER AND LANDIS, *op. cit. supra*, note 3, 119.
In addition to the cases cited elsewhere in this article which deal specifically with the jurisdiction of the Supreme Court, the Court has accepted jurisdiction without question and delivered opinions in the following cases decided under this statute.
United States v. Thayer, 209 U. S. 39 (1907); United States v. Herr, 211 U. S. 406 (1908); United States v. Sullenberger, 211 U. S. 522 (1908); United States v. Union Supply Co., 215 U. S. 50 (1909); United States v. Stevenson, 215 U. S. 200 (1909); United States v. Mason, 218 U. S. 517 (1909); United States v. Grimaud, 220 U. S. 506 (1910); United States v. Hammers, 221 U. S. 220 (1910); United States v. Johnson, 221 U. S. 488 (1910); United States v. Baltimore & Ohio S. W. R. Co., 222 U. S. 8 (1911); United States v. Plyler, 222 U. S. 15 (1911); United States v. Stever, 222 U. S. 167 (1911); United States v. Munday, 222 U. S. 175 (1911); United States v. Garbish, 222 U. S. 257 (1911); United States v. Morgan, 222 U. S. 274 (1911); United States v. Barnes, 222 U. S. 513 (1911); United States v. Anderson, 228 U. S. 52 (1912); United States v. Chavez, 228 U. S. 525 (1912); United States v. Mesa, 228 U. S. 533 (1912); United States v. Shelley, 229 U. S. 239 (1912); United States v. Buchanan, 232 U. S. 72 (1913); United States v. Pelican, 232 U. S. 442 (1913); United States v. Reynolds, 235 U. S. 133 (1914); United States v. Salen, 235 U. S. 237 (1914); United States v. Wigger, 235 U. S. 276 (1914); United States v. Lewis, 235 U. S. 282 (1914); United States v. Erie R. Co., 235 U. S. 513 (1914); United States v. Holte, 236 U. S. 140 (1914); United States v. Smull, 236 U. S. 405 (1914); United States v. Rabinowich, 238 U. S. 78 (1914); United States v. Freeman, 239 U. S. 117 (1915); United States v. Union Mfg. Company, 240 U. S. 605 (1915); United States v. Lombardo, 241 U. S. 73 (1915); United States v. Jin Fuey Moy, 241 U. S. 394 (1915); United States v. Nice, 241 U. S. 591 (1915); United States v. Quiver, 241 U. S. 602 (1915); United States v. Kenofskey, 243 U. S. 440 (1916); United States v. Gradwell, 243 U. S. 476 (1916); United States v. Morehead, 243 U. S. 607 (1916); United States v. Bathgate, 246 U. S. 220 (1917); United States v. Schider, 246 U. S. 519 (1917); United States v. Soldama, 246 U. S. 530 (1917); United States v. Weitzel, 246 U. S. 533 (1917); United States v. Hill, 248 U. S. 420 (1918); United States v. Doremus, 249 U. S. 86 (1918); United States v. Gudger, 249 U. S. 373 (1918); United States v. Ferger (No. 2), 250 U. S. 207 (1918); United States v. Standard Brewery, 251 U. S. 210 (1919); United States v. Simpson, 252 U. S. 465 (1919); United States v. Butt, 254 U. S. 38 (1920); United States v. Wheeler, 254 U. S. 281 (1920); United States v. Strang, 254 U. S. 491 (1920); Kinnane v. Detroit Creamery Co., 255 U. S. 102 (1920); United States v. Russell, 255 U. S. 138 (1920); United States v. Hutto (No. 1), 256 U. S. 524 (1920); United States v. Hutto (No. 2), 256 U. S. 530 (1920); United States v. Sacks, 257 U. S. 37 (1921); United States v. Janowitz, 257 U. S. 42 (1921); United States v. Balint, 258 U. S. 250 (1921); United States v. Behrman, 258 U. S. 280 (1921); United States v. Wong Sing, 260 U .S. 18 (1922); United States v. Bowman, 260 U. S. 94 (1922); United States v. Lanza, 260 U. S. 377 (1922); United States v. Stafoff, 260 U. S. 477 (1922); United States v. Walter, 263 U. S. 15 (1923); United States v. Dickey, 268 U. S. 378 (1924); United States v. The Baltimore Post, 268 U. S. 388 (1924); United States v. P. Koenig Coal Co., 270 U. S. 512 (1925); United States v. Michigan Portland Cement Co., 270 U. S. 521 (1925); United States v. Noveck, 271 U. S. 201 (1925); United States v. Katz, 271 U. S. 354 (1925); United States v. Ramsey, 271 U. S. 467 (1925); United States v. McElvain, 272 U. S. 633 (1926); United States v. Noveck, 273 U. S. 202 (1926); United States v. Alford, 274 U. S. 262 (1926);

Attacks on the constitutionality of these provisions have been few. The Court has sustained the statute against contentions that it violates the Fifth Amendment.[12] Nor is the statute unconstitutional because it allows the United States to appeal where a demurrer to the indictment is sustained, and gives the accused no similar right where the demurrer is overruled.[13] Similarly, the statute is not open to attack on the ground that it calls for advisory opinions.[14]

The Rule of Strict Construction. The Supreme Court has generally construed the criminal appeals statute strictly against the right of the United States to appeal directly to it from an adverse District Court decision. The "exceptional right to review in favor of the United States"[15] is "an innovation in criminal jurisdiction in certain classes of prosecutions, which cannot be extended beyond its terms."[16]

One exception to this strict construction, however, is to be observed in the ruling that informations brought by the United States for the punishment of criminal contempts constitute offenses against the United States and are "criminal cases" within the meaning of the statute,[17] although not

United States v. Fruit Growers Exp. Co., 279 U. S. 363 (1928); United States v. Wurzbach, 280 U. S. 396 (1929); United States v. Unzeuta, 281 U. S. 138 (1929); United States v. Adams, 281 U. S. 202 (1929); United States v. Farrar, 281 U. S. 624 (1929); United States v. Sprague, 282 U. S. 716 (1930); United States v. Limehouse, 285 U. S. 424 (1931); United States v. Scharton, 285 U. S. 518 (1931); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932); United States v. Darby, 290 U. S. 224 (1933); United States v. Chambers, 291 U. S. 217 (1933); United States v. Troy, 293 U. S. 58 (1934); United States v. Resnick, 299 U. S. 207 (1936); United States v. Curtis Wright Export Corp., 299 U. S. 304 (1936); United States v. Carolene Products Co., 304 U. S. 144 (1937); United States v. Durkee Famous Foods, 306 U. S. 68 (1938); United States v. Miller, 307 U. S. 174 (1938); United States v. Powers, 307 U. S. 214 (1938); United States v. Harris, 311 U. S. 292 (1940); United States v. Darby, 312 U. S. 100 (1940); United States v. Resler, 313 U. S. 57 (1940); United States v. Monia, 317 U. S. 424 (1942); United States v. Lepowitch, 318 U. S. 702 (1942); United States v. Gaskin, 320 U. S. 527 (1943); United States v. Saylor, 322 U. S. 385 (1943); United States v. Rosenwasser, 323 U. S. 360 (1944); United States v. Evans, 333 U. S. 483 (1947).

12. "We do not perceive the difficulty. No doubt of the power of Congress is intimated in United States v. Sanges, 144 U. S. 310 (1891). If the Fifth Amendment has any bearing, the Act of 1907 is directed to judgment rendered before the moment of jeopardy is reached." Taylor v. United States, 297 U. S. 120, 127 (1935).

13. United States v. Bifty, 208 U. S. 393, 394, 400 (1907); United States v. Heinze, 218 U. S. 532, 545, 546 (1909).

14. United States v. Evans, 213 U. S. 297, 300, 301 (1908).

15. United States v. Keitel, 211 U. S. 370, 399 (1908).

16. United States v. Dickinson, 213 U. S. 92, 103 (1908).

17. United States v. Goldman, 277 U. S. 229, 235, 236 (1927).

criminal prosecutions within the meaning of the Sixth Amendment.[18] When the contempt proceedings are both civil and criminal in nature, apparently an appeal to the Supreme Court will lie.[19] When the contempt proceedings are purely civil, though the United States or one of its agencies be seeking the relief, a direct appeal to the Supreme Court would not be proper[20] under this statute.

Time for Taking Appeals. The statute provides that "the appeal shall be taken within thirty days after the decision or judgment has been rendered. . . ." The words "decision or judgment"[21] have been construed where possible to mean the entry of the order or judgment rather than the filing of the opinion or a clerical docket entry.[22] Thus, the statute is in accord with Rule 37(a) (2) of the Rules of Criminal Procedure for the United States District Courts which provides: "An appeal by the government when authorized by statute may be taken within thirty days after entry of the judgment or order appealed from."[23]

Prior to the promulgation of the Rules of Criminal Procedure for the United States District Courts,[24] the Court had

---

18. Myers v. United States, 264 U. S. 95, 105 (1923); Blackmer v. United States, 284 U. S. 421, 440 (1931).

Criminal contempt proceedings need not be begun by indictment. The formalities are specified in the Rules of Criminal Procedure for the United States District Courts, Rule 42.

19. "Where a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character for the purposes of procedure or review." Penfield Co. v. Securities and Exchange Commission, 330 U. S. 585, 591 (1946).

20. Penfield Co. v. Securities and Exchange Commission, 330 U. S. 585 (1946).

21. "The words 'decision' and 'judgment' as used in the [Criminal Appeals] Act are not intended to describe two judicial acts, but a single act described in alternative phrases. *Cf.* Ex parte Tiffany, 252 U. S. 32, 36 (1919)." United States v. Hark, 320 U. S. 531, 533 n. 5 (1942).

22. United States v. Midstate Horticultural Co., 306 U. S. 161, 162 n. 1 (1938). United States v. Hark, 320 U. S. 531, 535 (1942). Absent uniform procedure in the trial courts, the term order or judgment can have no fixed meaning.

23. Unlike the "Rules of Practice and Procedure, After Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases Brought in the District Courts of the United States and in the Supreme Court of the District of Columbia," promulgated by the Supreme Court on May 7, 1934, 292 U. S. 661 (1933), there can be no doubt that the Rules of Criminal Procedure are fully applicable to authorized appeals to the Supreme Court by the United States in criminal cases. Rule 54 (a) (1); see also Advisory Committee Notes to Rules 37 (a) (2) and 54 (c).

24. The rules became effective on March 21, 1946. Rule 59.

held that the time to appeal could not be extended.[25] And this ruling has been restated in Rule 45(b).[26]

The District Court's Decision must be Based on a Construction of the Statute. It is essential to the maintenance of an appeal purportedly raising an issue as to the construction of a statute underlying the indictment that the District Court's decision be based on a construction of the statute and not on a construction of the indictment or a ruling upon its sufficiency upon matters not involving the statute.[27] Where the decision holding the indictment insufficient is based entirely on a construction of the indictment itself, that ruling is not subject to review by direct appeal to the Supreme Court,[28] and where such a ruling may be the ground for the appeal, the appeal will be referred to the appropriate Court of Appeals for consideration on the merits.[29]

No Appeal Lies to the Supreme Court Where An Independent Non-Appealable Ground is one of the Bases for the District Court Judgment. Although it was clear, soon after enactment of the Criminal Appeals Act of 1907, that the Supreme Court could review on direct appeal only the particular questions mentioned therein, this limitation upon the scope of review promptly created the issue as to what dispositions should be made of the case where the District Court had not placed its decision solely on the invalidity or construction of the statute but had also sustained the defense motion directed to the indictment on wholly independent grounds. Doubts as to jurisdiction were at first resolved in favor of the right to appeal: it was held that

---

25. United States v. Hark, 320 U. S. 531, 533 (1943): "Neither the District Court nor this court has power to extend the period."

26. Rule 45 (b) of the Rules of Criminal Procedure for the United States District Courts states: "(b) ENLARGEMENT. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34, and 35, except as otherwise provided in those rules, or the period for taking an appeal."

27. United States v. Borden Co., 308 U. S. 188, 193 (1939).

28. United States v. Pacific & Arctic R. & Nav. Co., 228 U. S. 87, 108 (1912); United States v. New South Farm & Home Co., 241 U. S. 64, 71, 72, 73 (1915).

29. United States v. Maryland & Virginia Milk Producers, 335 U. S. 802 (1947).

the Supreme Court could consider the questions specified in the statute, although the decision of the District Court on other grounds could not be reviewed.[30] Under this ruling, however, the Supreme Court found itself in the position of reviewing "a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination," and thus, in effect, of rendering "an abstract opinion, which might or might not fit a subsequent prosecution of the same defendant or others but would not determine the instant case."[31] Accordingly, the Court reversed its earlier position and held that the provisions limit the right to appeal to those situations where the decision or judgment of the District Court is "based" solely upon the invalidity or construction of the statute.[32] The Court has adhered to this position since its decision in the *Hastings* case.[33] Adherence to this doctrine has been made easier by the 1942 amendment to the statute, since the United States may still have relief in the Courts of Appeals where the Supreme Court refuses jurisdiction on this ground.[34]

Rules for Determining Whether a District Court Decision is Based on Construction of Statute. The question whether the decision of the District Court is, in a particular case, based upon construction of the statute or upon construction of the indictment not infrequently presents difficulties. The clear case of a decision based upon a construction of the indictment only is where the District Court has found the indictment fails to allege sufficient facts to satisfy some admitted requirement of the statute, or to connect the defendant with the crime charged, or is otherwise insufficient as a criminal pleading.[35] But no general rule can be stated. The Supreme Court must determine the point in each case by interpreting the decision of the District Court "as accurately as may be."[36] The meaning of the opinion

30. United States v. Stevenson, 215 U. S. 190, 195, 196 (1909).

31. United States v. Hastings, 296 U. S. 188, 193 (1935). *See also* United States v. Davis, 243 U. S. 570, 571 (1916).

32. United States v. Borden Co., 308 U. S. 188 (1939); Petrillo v. United States, 332 U. S. 1 (1946).

33. *Ibid*; United States v. Wayne Pump Co., 317 U. S. 200 (1942); United States v. Swift & Co., 318 U. S. 442 (1942).

34. United States v. Swift & Co., 318 U. S. 442 (1942).

35. United States v. Pacific & Arctic R. & Nav. Co., 228 U. S. 87, 108 (1912); United States v. New South Farm & Home Co., 241 U. S. 64, 73 (1915); United States v. Oppenheimer, 242 U. S. 85, 86 (1916).

36. United States v. Colgate & Co., 250 U. S. 300, 306 (1918).

of the District Court in this aspect has more than once been "the subject of serious controversy" in the Supreme Court on appeals under this statute.[37] "The difficulty," said the Court in *United States v. New South Farm & Home Co.*,[38] "is to indicate a distinction" between the construction of the statute and the construction of the indictment on which it is founded.

Nevertheless, some rules have evolved. It has been decided that although there may be an abstract distinction between the "construction" and the "interpretation" of a statute, both are within the concept of the statute governing these appeals.[39] It is settled that when the District Court holds that the acts charged do not fall within the condemnation of the statute the court necessarily has construed the statute and an appeal will lie.[40] A statute may be misconstrued within the meaning of the appeals statute not only by misinterpreting its language but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms.[41] And a ruling that the indictment does not charge an offense under any federal statute necessarily involves the construction of any statute to which the indictment can be referred.[42]

A question of the propriety of the venue has been held to require a construction of the statute, not only where the venue provisions are a part of the substantive statute,[43] but even where the venue provisions are contained in a separate statute.[44]

---

37. United States v. A. Schrader's Son, Inc., 252 U. S. 85, 98, 99 (1919); United States v. Colgate & Co., 250 U. S. 300, 302, 306 (1918); United States v. Patten, 226 U. S. 525, 544 (1912); United States v. Carbone, 327 U. S. 633 (1945); United States v. Swift & Co., 318 U. S. 442 (1942).

38. 241 U. S. 64, 73 (1915).

39. United States v. Keitel, 211 U. S. 370, 385, 386 (1908); United States v. Biggs, 211 U. S. 507, 518 (1908).

40. United States v. Patten, 226 U. S. 525, 535 (1912); United States v. Birdsall, 233 U. S. 223, 230 (1913); United States v. Nixon, 235 U. S. 231 (1914); United States v. Mosley, 238 U. S. 383, 385 (1914); United States v. Cohn, 270 U. S. 339, 342, 343 (1925); United States v. Borden Co., 308 U. S. 188 (1939); United States v. South-Eastern Underwriters Ass'n, 322 U. S. 533 (1943).

41. United States v. Malphurs, 316 U. S. 1 (1941).

42. United States v. Nixon, 235 U. S. 231, 235 (1914); *see also* United States v. Malphurs, 316 U. S. 1 (1941).

43. United States v. Anderson, 328 U. S. 699 (1945); United States v. Midstate Horticultural Co., 306 U. S. 161 (1938).

44. United States v. Johnson, 323 U. S. 273 (1944).

Where the indictment charges a violation of regulations issued in amplification of a criminal statute, a ruling that the regulations are invalid may involve a construction of the statute.[45] And a review of a decision quashing an indictment, when such decision is based on a construction of the statute on which the indictment is founded, is not to be defeated by the contention that a motion to quash involves the exercise of the discretion of the trial court.[46]

Appeals Where Decision is Based on Invalidity of Statute. The Supreme Court has not had the occasion, under this statute, to resolve the niceties of issues as to when the validity of a federal statute is called into question.[47] For appeals under this statute lie whether the ruling that the indictment is bad be based on the construction or on the invalidity of the statute. Thus decisions sustaining demurrers to indictments have been held to be appealable under the statute, as being based on the invalidity of the law on which the indictment was founded, where the ruling was that the statute, properly construed, embraced the act or acts charged in the indictment, but that, so construed, the statute was void as beyond the constitutional powers of Congress.[48] Such rulings would, however, have been reviewable under the statute even if the decisions of the District Courts had been interpreted as ruling that the statutes could not be construed as embracing the act or acts charged.

If questions of both construction and validity are present in the same case, the Supreme Court, of course, will turn the decision of the case upon the former, where that is possible,[49] in deference to the established principle that questions of a constitutional nature will not be decided unless absolutely necessary to a decision of the case.[50] Where more

45. United States v. Anderson, 328 U. S. 699, 702 n. 5 (1945); United States v. Foster, 233 U. S. 515, 522, 523 (1913). See United States v. Grimaud, 220 U. S. 506, 514 (1910); United States v. Birdsall, 233 U. S. 230 (1913).

46. United States v. Heinze (No. 2), 218 U. S. 547, 550, 551 (1909).

47. Compare 62 Stat. 992, 28 U. S. C. § 1254 (1) (1948).

48. United States v. Ferger, 250 U. S. 199, 202 (1918).

49. United States v. Congress of Industrial Organizations, 325 U. S. 106 (1944); United States v. Petrillo, 322 U. S. 1 (1943). *See* United States v. L. Cohen Grocery Co., 255 U. S. 81, 88 (1920).

50. *E.g.*, Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 345, 346 (1935); Alabama State Federation of Labor v. McAdory, 325 U. S. 450 (1944); Alma Motor Co. v. Timkin-Detroit Axle Co., 329 U. S. 129 (1946); United Public Workers v. Mitchell, 330 U. S. 75 (1946); Rescue Army v. Municipal Court, 331 U. S. 549 (1946).

than one constitutional question is raised, the Court will decide those ripe for decision and remand the case as to the others which cannot be determined on a motion to dismiss for invalidity.[51]

Necessity for Showing that Decision or Judgment Setting Aside or Dismissing An Indictment or Information or Arresting Judgment is Based on Invalidity or Construction of Statute. Prior to the 1942 amendment, where the ground of decision of the District Court did not clearly appear, the appeal was dismissed for failure of an affirmative showing that the judgment or decision turned upon a controverted construction of the statute upon which the indictment was founded or upon its invalidity.[52] Under the statute as it now reads, the Court instead of dismissing "shall" transfer the case to the proper Court of Appeals.[53] Where the grounds of the District Court's decision are ambiguous, the Court may refuse, in the absence of a clear expression of the grounds of decision, to review the entire record or to analyze the indictment in order to ascertain whether the action of the Court below might have been based on the construction or invalidity of the statute.[54] Or it may resolve for itself the ambiguity and then go on to determine its jurisdiction.[55] In order to guard against problems of this character, the United States has sought in some cases to have the District Court execute a certificate declaring that its judgment was put entirely on the construction or the invalidity of the statute upon which the indictment was founded and to include such certificate in the transcript of the record on appeal.[56] Unfortunately, the practice of preparing such certi-

51. United States v. Petrillo, 322 U. S. 1 (1943); United States v. Swift & Co., 318 U. S. 442 (1942).

52. United States v. Moist, 231 U. S. 701, 702, 703 (1913); United States v. Halsey, Stuart & Co., 296 U. S. 451 (1935). *Cf.* United States v. Nixon, 235 U. S. 231, 236 (1914).

53. *Cf.* United States v. Wayne Pump Co., 317 U. S. 200 (1942), United States v. Swift & Co., 318 U. S. 442 (1942); United States v. Maryland & Virginia Milk Producers, 335 U. S. 802 (1948).

54. United States v. Carter, 231 U. S. 492, 493-494 (1913).

55. United States v. Carbone, 327 U. S. 633 (1945); United States v. Swift & Co., 318 U. S. 442 (1942).

56. *See* United States v. Chavez, 290 U. S. 357, 359 (1933); United States v. Flores, 289 U. S. 137, 145 (1932); United States v. Hastings, 296 U. S. 188, 191 (1935). *See also*, United States v. Storrs, 272 U. S. 652 (1926).

In United States v. Halsey, Stuart & Co., 296 U. S. 451, (1935), the district judge refused to sign such a certificate, but on the contrary

ficate has not become uniform.[57] And in any event, the Supreme Court will determine for itself what was actually decided below, and for this purpose will look to the judgment which was actually entered. The Court is not bound by the stipulation of the parties.[58]

Since the basis for the appeals in the first two categories authorized by the statute is a decision grounded upon the construction or invalidity of the particular statute upon which the indictment is based, the record should contain an explicit declaration as to which statute the indictment is founded upon as well as an explicit ruling upon its invalidity or construction.[59] Where the ruling of the District Court is that the indictment does not charge an offense under any federal statute, the Supreme Court will inquire whether, as a matter of law, the facts alleged in the indictment state an offense under any statute of the United States.[60] Where the District Court rules that the indictment is bad under a specified statute and on the appeal the United States seeks to sustain the indictment under a different statute, the Court will remand the case to the District Court to consider the newly raised issue,[61] although it has jurisdiction to resolve the new question thus raised by itself.[62]

---

certified that his "decision and order quashing the indictment herein were not based in any respect upon the invalidity or construction of section 215 of the Criminal Code upon which the indictment in said case is founded." The Supreme Court dismissed the appeal for want of an affirmative showing of jurisdiction.

57. *See, e.g.*, cases cited in notes 55 and 56 *ante*.

58. United States v. Barber, 219 U. S. 72, 77, 78 (1910).

59. United States v. George, 228 U. S. 14, 18, 19 (1912); United States v. Malphurs, 316 U. S. 1 (1941).

60. United States v. Nixon, 235 U. S. 231, 233-236 (1914). In this case the indictment did not on its face disclose the statute under which it was drawn, but both the endorsement and the caption described it as being for the violation of a designated statute. In sustaining a demurrer the District Court filed a memorandum correctly stating that that statute did not create an offense for which the defendants could be punished. The Supreme Court ruled that the caption and endorsement were not controlling, and that the statute upon which the indictment was founded was to be ascertained as a matter of law from the facts therein charged. The exact language of the District Court's ruling on demurrer was that "the indictment does not charge any offense for which the (defendants) can be held." This was held necessarily to involve the question whether there was any federal statute which punished the acts charged, and this required a construction of any statute to which the indictment could be referred. Finding such a statute, the Supreme Court reversed.

61. United States v. Malphurs, 316 U. S. 1 (1941).

62. "While we have jurisdiction under the Criminal Appeals Act to pass upon the correctness of the order entered below, United States

Scope of Review of District Court Decisions Based on Construction or Invalidity of Statute. The scope of review of the Supreme Court on direct appeals to it by the United States in criminal cases is set forth in *United States v. Borden Co.*:[63]

> "The established principles governing our review are these: (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment.[64] (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statutes but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract.[65] (3) This Court must accept the construction given to the indictment by the District Court as this is a matter we are not authorized to review.[66] (4) When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute.[67] When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctuess of that construction and consider other objections to the indictment.[68] The Government's appeal does not open the whole case.[69]"

Where, however, the District Court has ruled in favor of the United States on several points of attack on the validity of the underlying statute and against it on another such attack, the indictment will be dismissed and an appeal to the Supreme Court will lie.[70] And if the Court rules in

---

v. Nixon, 235 U. S. 231 (1914), we think that it is advisable to vacate the judgment and remand the case in its entirety." 316 U. S. at 3. *See also* United States v. Hutcheson, 312 U. S. 219, 229 (1940); United States v. Kapp, 302 U. S. 214 (1937).

63. 308 U. S. 188, 193 (1939).

64. United States v. Hastings, 296 U. S. 188, 192-194 (1935). In this event the appeal will be transferred to the appropriate court of appeals. United States v. Swift & Co., 318 U. S. 412 (1942).

65. United States v. South-Eastern Underwriters Ass'n, 322 U. S. 583 (1943); United States v. Gilliland, 312 U. S. 86 (1940).

66. United States v. Petrillo, 332 U. S. 1 (1946); United States v. Classic, 313 U. S. 299 (1940).

67. United States v. Petrillo, 332 U. S. 1 (1946).

68. United States v. Curtiss-Wright Export Co., 299 U. S. 304 (1936).

69. *Ibid.*

70. United States v. Biggs, 211 U. S. 507, 522 (1908).

favor of the United States on the question appealed, the Court will go on to consider the other objections to the validity of the statute.[71]

Of course, if the District Court sustains the motion on two grounds; each of which presents an appealable question on direct appeal, the Supreme Court need determine only one of them if its ruling thereon will preclude further prosecution of the case.[72] If the United States is to prevail, however, the Court must necessarily pass on all questions open to it and resolve each of them in favor of the appellant.[73] And where the Supreme Court determines the issues of construction and validity in favor of the United States, it will so frame its decree, in an appropriate case, as to preserve to the defendant his right to have the trial court pass upon questions relating to the construction of the indictment and its sufficiency as a criminal pleading upon general principles.[74]

Criteria for Maintenance of Appeal from Decision Sustaining Motion in Bar. The third and final category of appeals provided for by the statute consists of those "From the decision or judgment sustaining a motion[75] in bar, when

---

71. United States v. South-Eastern Underwriters Ass'n, 322 U. S. 583 (1943).

72. United States v. Biggs, 211 U. S. 507, 522 (1908).

73. United States v. South-Eastern Underwriters Ass'n, 322 U. S. 583 (1943).

74. United States v. Portale, 235 U. S. 27, 31 (1914); United States v. New South Farm & Home Co., 241 U. S. 64 (1915); United States v. Pacific & Arctic R. & Nav. Co., 228 U. S. 87, 108 (1912).

One of the limitations on the right of defendant to raise the issues of validity and constitutionality apart from considerations of sufficiency of the statute on other grounds is to be found in Rule 14 (b) (2) of the Rules of Criminal Procedure for the United States District Courts:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant, failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceedings.

75. The word "motion" was substituted for the words "special plea" at the time of the codification of Title 18. This change conforms the statute to Rule 12 of the Rules of Criminal Procedure for the United States District Courts: "All other pleas, demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or grant appropriate relief as provided in the rules." See also Note 1 to Rule 12 (a).

the defendant has not been put in jeopardy." The only criteria are that a motion in bar shall have been sustained and that the defendant shall not have been put in jeopardy. It is not a prerequisite to appeals under this clause that the District Court ruling shall have been based upon the invalidity or construction of the statute upon which the indictment is founded.[76] Unlike the two preceding clauses in the statute, this provision gives the Supreme Court the right to review the precise question decided by the trial court in sustaining a motion in bar, although the decision involves the application rather than the invalidity or construction of the statute underlying the indictment.[77] Indeed, the validity or construction of the indictment is not open for consideration where the appeal is from a judgment sustaining such a motion.[78]

Meaning of "Decision or Judgment Sustaining a Motion in Bar." In determining whether the decision of the District Court is appealable under this provision, the Supreme Court is not concluded by the particular form or designation of the pleading which was in fact filed by the defendant, or by the order made thereon, or the propriety of either.[79] The Court looks to substance and not to form. If the issue raised by the motion is such that the rule sustaining it, *ex proprio vigore* and not by reason of extrinsic circumstances, bars further prosecution for the offense charged unless reversed, an appeal will lie. Thus, it has been immaterial that the plea was erroneously designated as a plea in abatement, instead of a plea in bar;[80] or that the ruling took the form of granting motions to dismiss[81] or to quash,[82] which were in

76. United States v. Oppenheimer, 242 U. S. 85, 86 (1916).

77. United States v. Celestine, 215 U. S. 278, 283 (1909).

78. United States v. Kissel, 218 U. S. 601 (1909); United States v. Barber, 219 U. S. 72 (1910).

79. "The material question is not how the defendant's pleading is styled but the effect of the ruling sought to be reviewed * * *. The defense here was in bar of the prosecution; to sustain it was to end the cause and exculpate the defendants." United States v. Hark, 320 U. S. 531, 536 (1943).

80. United States v. Barber, 219 U. S. 72, 78 (1910).

81. United States v. Goldman, 277 U. S. 229, 236, 237 (1927).

82. United States v. Hark, 320 U. S. 531 (1943); United States v. Oppenheimer, 242 U. S. 85, 86 (1916); United States v. Thompson, 251 U. S. 407, 412 (1919). *Compare* United States v. Adams Express Co., 229 U. S. 381, 388 (1912), where the District Court treated a motion to quash service as a demurrer to the indictment and sustained it, basing the decision on construction of the statute. The Supreme

substance motions in bar. But a motion to dismiss, based upon the indictment, the bill of particulars and an affidavit of defendant's counsel, and challenging the sufficiency of the indictment in light of the bill of particulars, has been held not to be "in substance" a motion in bar.[83] And a plea in abatement which is such in substance as well as in form does not become a motion in bar within the meaning of the statute, nor is the decision sustaining it reviewable directly by the Supreme Court, merely by reason of the fact that at the time the motion was sustained the statute of limitations had intervened to bar further prosecution.[84]

The elimination of the terms "pleas to the jurisdiction, pleas in abatement, demurrers, special pleas in bar, and motions to quash," by Rule 12 of the Rules of Criminal Procedure for the United States District Courts, gives added emphasis to the Supreme Court's practice of looking through the designation to the substance of the motion.

Appeals from Decisions Sustaining Motions in Bar—Jeopardy. The provisions authorizing appeal from decisions sustaining motions in bar are qualified by the condition: "when the defendant has not been put in jeopardy."[85] One is not put in jeopardy within the meaning of this provision when the case has not been put upon trial,[86] nor is one put in jeopardy, prior to the beginning of the trial, by the entry of a preliminary order to take testimony for use at the trial.[87]

Scope of Review on Appeals from Decisions Sustaining Motions in Bar. When an appeal is taken from a decision sustaining a motion in bar, the only question open in the

---

Court held that the ruling was appealable as one "setting aside" the indictment on a construction of the underlying statute, within the meaning of the first clause of the Criminal Appeals Act; therefore it did not determine whether it was proper to treat the motion to quash service as a demurrer to the indictment.

83. United States v. Halsey, Stuart & Co., 296 U. S. 451 (1935).

84. United States v. Storrs, 272 U. S. 653, 654 (1926).

85. In answer to a constitutional argument against the maintenance of an appeal by the United States from a decision quashing an indictment on the trial court's construction of the statute (the appeal being taken under the first clause of the statute), the Supreme Court said that the statute "is directed to judgments rendered before the moment of jeopardy is reached." Taylor v. United States, 207 U. S. 120, 127 (1907). The only provision of the statute containing an express limitation to that effect is that relating to appeals from decisions sustaining motions in bar.

86. United States v. Celestine, 215 U. S. 278, 283 (1909).

87. United States v. Goldman, 277 U. S. 229, 237 (1927).

Supreme Court is whether the motion in bar can be sustained.[88] The purpose of the statute, to confine the United States to a limited review in the Supreme Court, has been effected by decisions limiting the consideration on appeal to the grounds of decision mentioned in the statute, as well where the decision is taken from a decision sustaining a motion in bar,[89] as where it is taken under either of the two preceding clauses of the statute.[90] Thus, the sufficiency of the indictment will not be considered on appeals from decisions sustaining motions in bar,[91] for the Supreme Court has only the "right to review the precise question decided by a trial court in sustaining a plea in bar."[92]

Transfer of Appeals Taken to Wrong Court. In 1942, Congress amended the governing statute so that appeals by the United States involving attacks on the indictment but not concerned with the validity or construction of the underlying statutes might be taken to the Courts of Appeals. At the same time it provided for the transfer of the appeal to the appropriate tribunal where the United States had appealed to the wrong court.

The purposes of the amendments, which were made at the instance of the Attorney General[93] are manifest. Successful motions by the defendant directed to the indictment and attacking the construction of the indictment as well as the validity and construction of the underlying statute could not be heard by the Supreme Court. Similarly, successful motions by the defendant directed solely to the construction of the indictment were outside the authority of the Supreme Court to hear. It was to give the United States a remedy in these situations that the Court of Appeals jurisdiction was created.[94] The transfer provisions were inserted "to

88. United States v. Kissel, 218 U. S. 601, 606 (1909).

89. United States v. Mason, 213 U. S. 115, 122 (1908); United States v. Kissel, 218 U. S. 601, 606 (1909).

90. United States v. Keitel, 211 U. S. 370, 399 (1908).

91. United States v. Oppenheimer, 242 U. S. 85, 86 (1916); United States v. Kissel, 218 U. S. 601 (1909); United States v. Mason, 213 U. S. 115, 122 (1908).

92. United States v. Celestine, 215 U. S. 278, 283 (1909).

93. H. R. Rep. No. 45, 77th Cong., 1st Sess. (1941); S. Rep. No. 868, 77th Cong., 1st Sess. (1941); H. R. Rep. No. 2052, 78th Cong., 2d Sess. (1942).

94. United States v. Wayne Pump Co., 317 U. S. 200, 209 (1942); United States v. Swift & Co., 318 U. S. 442, 445 (1942); United States v. Carbone, 327 U. S. 633, 642-43 (dissenting opinion) (1942); United

save the Government the right of appeal which might otherwise be lost by its erroneous view as to the proper appellate tribunal."[95] The transfer provisions, necessarily supplemental to the creation of jurisdiction in the Courts of Appeals, were held not to be applicable to an appeal taken to the Supreme Court before the effective date of the amendment but dismissed by the Court after that date.[96]

The Court has made use of the power to transfer where the case involved several questions some of which were not cognizable by the Supreme Court under the statute.[97] The Court has also acted in this manner where it is not clear whether the question raised could be considered by it on direct appeal.[98] Where the case is transferred to the Court of Appeals because it involves questions in addition to those directed to the validity and construction of the underlying statute, the Court of Appeals will consider all the questions presented including the validity and construction of the statute basing the indictment.[99]

In one case involving a motion in bar, the Court of Appeals for the District of Columbia Circuit, to which the appeal had erroneously been taken, certified the case to the Supreme Court under the provisions of this Section.[100] The same Court certified a case to the Supreme Court where the issue on appeal was the construction of the statute.[101]

Appeal by United States after Verdict in Favor of Defendant. Prior to the codification of Title 18, the governing statute provided "That no appeal[102] shall be taken by or allowed the United States in any case where there has been

---

States v. Petrillo, 332 U. S. 1, 10-11 (1946); 332 U. S. at 14-15 (concurring opinion) (1946).

95. United States v. Wayne Pump Co., 317 U. S. 200, 209 (1938).

96. Ibid.

97. United States v. Swift & Co., 318 U. S. 442 (1942).

98. United States v. Maryland & Virginia Milk Producers Ass'n, 335 U. S. 802 (1947).

99. United States v. Swift & Co., 318 U. S. 442, 445 (1942). Presumably, therefore, on a direct appeal to a Court of Appeals, that court will review all questions raised, including those going to validity or construction of the underlying statute.

100. United States v. Hoffman, 161 F.2d 881 (App. D. C. 1946). The opinion of the Court makes no mention of this unique way of securing jurisdiction. It refers to the case as one on direct appeal from the district court.

101. United States v. Waters, 175 F.2d 340 (App. D. C. 1949). 335 U. S. 77.

102. Originally read "writ of error."

a verdict in favor of the defendant." This proviso was held to preclude appeal even though the verdict had been directed before any proceedings in the trial court and although the verdict was directed on the ground "that the indictment was invalid because no offense was properly charged."[103] The Court in holding that no appeal would lie relied solely on the proviso quoted above and without consideration of "other objections."[104] This proviso was eliminated from the statute at the time of the codification of Title 18. No suggestion exists in the legislative history of the codification, however, that the revisers proposed to make any such substantial change as would follow from the intentional elimination of this proviso. Nevertheless, the omission, whether deliberate or inadvertent, reopens a question heretofore foreclosed by *United States v. Weissman*.[105]

The right of the United States to appeal directly to the Supreme Court from certain adverse District Court judgments in criminal cases is only an historical vestige. Logic there may be in permitting review of District Court decisions construing or holding invalid important Congressional enactments. But there is no reason for not placing this power of review where it belongs, in the Courts of Appeals, which in turn would be subject to supervision by the Supreme Court through its certiorari power. The Supreme Court docket is crowded enough without imposing on the Court the obligation to review every District Court decision misconstruing a federal criminal statute. The right of appeal here, as in other instances where appeals of right exist,[106] is based on a mistrust of the judiciary on the lower levels of the federal court system. Even if such lack of faith were warranted, which it is not, the remedy cannot be by way of compulsory review by the Supreme Court. Only history speaks for the continuance of this compulsory review and it does not speak loudly.

---

103. United States v. Weissman, 266 U. S. 377, 378 (1924).

104. *Ibid.*

105. 266 U. S. 377 (1924). Since the decision of this case in 1924, it has never been cited, apparently for the reason that the question has never again been raised.

106. *E.g.*, 28 U. S. C. § 1252 (1948).