entitled to deference. This approach perhaps rehabilitates the result if not the reasoning in *Gori* and maintains the result and much of the reasoning of *Jorn*.[88]

Of course, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error."[89] "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."[90] In *United States v. Dinitz*,[91] the trial judge had excluded defendant's principal attorney for misbehavior and had then given defendant the option of recess while he appealed the exclusion, a mistrial, or continuation with an assistant defense counsel. Holding that the defendant could be retried after he chose a mistrial, the Court reasoned that, although the exclusion might have been in error, it was not done in bad faith to goad the defendant into requesting a mistrial or to prejudice his prospects for acquittal. The defendant's choice, even though difficult, to terminate the trial and go on to a new trial should be respected and a new trial not barred. To hold otherwise would necessitate requiring the defendant to shoulder the burden and anxiety of proceeding to a probable conviction followed by an appeal, which if successful would lead to a new trial, and neither the public interest nor the defendant's interests would thereby be served.

But the Court has also reserved the possibility that the defendant's motion might be necessitated by prosecutorial or judicial overreaching motivated by bad faith or undertaken to harass or prejudice, and in those cases retrial would be barred. It was unclear what prosecutorial or judicial misconduct would constitute such overreaching,[92] but, in *Oregon v. Kennedy*,[93] the Court adopted a narrow "intent" test, so that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial

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[88] Arizona v. Washington, 434 U.S. 497, 514, 515–16 (1978). *See also* Illinois v. Somerville, 410 U.S. 458, 462, 465–66, 469–71 (1973) (discussing *Gori* and *Jorn*.)

[89] United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion).

[90] United States v. Scott, 437 U.S. 82, 93 (1978).

[91] 424 U.S. 600 (1976). *See also* Lee v. United States, 432 U.S. 23 (1977) (defendant's motion to dismiss because the information was improperly drawn made after opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial, Court emphasizing that defendant by his timing brought about foreclosure of opportunity to stay before the same trial).

[92] *Compare* United States v. Dinitz, 424 U.S. 600, 611 (1976), *with* United States v. Tateo, 377 U.S. 463, 468 n.3 (1964).

[93] 456 U.S. 667, 676 (1982). The Court thought a broader standard requiring an evaluation of whether acts of the prosecutor or the judge prejudiced the defendant would be unmanageable and would be counterproductive because courts would be loath to grant motions for mistrials knowing that reprosecution would be barred. Id. at 676–77. The defendant had moved for mistrial after the prosecutor had asked a