may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Therefore, ordinarily, a defendant who moves for or acquiesces in a mistrial is bound by his decision and may be required to stand for retrial.

**Reprosecution Following Acquittal**

That a defendant may not be retried following an acquittal is "the most fundamental rule in the history of double jeopardy jurisprudence." [94] "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" [95] Thus, an acquittal resting on the trial judge's misreading of an offense precludes further prosecution.[96] Although in other areas of double jeopardy doctrine consideration is given to the public-safety interest in having a criminal trial proceed to an error-free conclusion, no such balancing of interests is permitted with respect to acquittals, "no matter how erroneous," no matter even if they were "egregiously erroneous." [97]

The acquittal being final, there is no governmental appeal constitutionally possible from such a judgment. This was firmly established in *Kepner v. United States*,[98] which arose under a Philippines appeals system in which the appellate court could make an independent review of the record, set aside the trial judge's deci-

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key witness a prejudicial question. Four Justices concurred, noting that the question did not constitute overreaching or harassment and objecting both to the Court's reaching the broader issue and to its narrowing the exception. Id. at 681.

[94] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[95] United States v. Scott, 437 U.S. 82, 91 (1978) (quoting Green v. United States, 355 U.S. 184, 188 (1957)). For the conceptually related problem of trial for a "separate" offense arising out of the same "transaction," *see* discussion under "The 'Same Transaction' Problem," *infra*.

[96] Evans v. Michigan, 568 U.S. ___, No. 11–1327, slip op. (2013) (acquittal after judge ruled the prosecution failed to prove that a burned building was not a dwelling, but such proof was not legally required for the arson offense charged).

[97] Burks v. United States, 437 U.S. 1, 16 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962). For evaluation of those interests of the defendant that might support the absolute rule of finality, and rejection of all such interests save the right of the jury to acquit against the evidence and the trial judge's ability to temper legislative rules with leniency, *see* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122–37.

[98] 195 U.S. 100 (1904). The case interpreted not the constitutional provision but a statutory provision extending double jeopardy protection to the Philippines. The Court has described the case, however, as correctly stating constitutional principles. *See, e.g.*, United States v. Wilson, 420 U.S. 332, 346 n.15 (1975); United States v. DiFrancesco, 449 U.S. 117, 113 n.13 (1980).