port for a mistrial order can be found in the trial record, no specific statement of "manifest necessity" need be made by the trial judge.[84]

Emphasis upon the trial judge's discretion has an impact upon the cases in which it is the judge's error, in granting *sua sponte* a mistrial or granting the prosecutor's motion. The cases are in doctrinal disarray. Thus, in *Gori v. United States*,[85] the Court permitted retrial of the defendant when the trial judge had, on his own motion and with no indication of the wishes of defense counsel, declared a mistrial because he thought the prosecutor's line of questioning was intended to expose the defendant's criminal record, which would have constituted prejudicial error. Although the Court thought that the judge's action was an abuse of discretion, it approved retrial on the grounds that the judge's decision had been taken for defendant's benefit. This rationale was disapproved in the next case, in which the trial judge discharged the jury erroneously and in abuse of his discretion, because he disbelieved the prosecutor's assurance that certain witnesses had been properly apprised of their constitutional rights.[86] Refusing to permit retrial, the Court observed that the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to go to the first jury and perhaps obtain an acquittal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."[87] The later cases appear to accept *Jorn* as an example of a case where the trial judge "acts irrationally or irresponsibly." But if the trial judge acts deliberately, giving prosecution and defense the opportunity to explain their positions, and according respect to defendant's interest in concluding the matter before the one jury, then he is

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[84] "Manifest necessity" characterizes the burden the prosecutor must shoulder in justifying retrial. 434 U.S. at 505–06. But "necessity" cannot be interpreted literally; it means rather a "high degree" of necessity, and some instances, such as hung juries, easily meet that standard. Id. at 506–07. In a situation like that presented in this case, great deference must be paid to the trial judge's decision because he was in the best position to determine the extent of the possible bias, having observed the jury's response, and to respond by the course he deems best suited to deal with it. Id. at 510–14. Here, "the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. . . . [H]e exercised 'sound discretion.' . . . " Id. at 516.

[85] 367 U.S. 364 (1961). *See also* United States v. Tateo, 377 U.S. 463 (1964) (reprosecution permitted after the setting aside of a guilty plea found to be involuntary because of coercion by the trial judge).

[86] United States v. Jorn, 400 U.S. 470, 483 (1971).

[87] 400 U.S. at 485. The opinion of the Court was by a plurality of four, but two other Justices joined it after first arguing that jurisdiction was lacking to hear the government's appeal.