# NEW YORK COUNCIL OF DEFENSE LAWYERS

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06 - CR - 020

February 14, 2007

**VIA FEDERAL EXPRESS AND EMAIL**

The Honorable Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
1 Columbus Circle, N.E.
Washington, DC 20544

Re: Comments on Proposed Amendment Rule 29 to the Federal Rules of Criminal Procedure, Published for Comment in August 2006

Dear Mr. McCabe and Members of the Committee:

Please accept this submission on behalf of the New York Council of Defense Lawyers ("NYCDL") in opposition to the proposed amendment to Rule 29. The NYCDL is a not-for-profit professional association of approximately 200 lawyers (many of whom are former federal prosecutors) whose principal area of practice is criminal defense in the federal courts of New York. The NYCDL offers the Committee the perspective of practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

We have divided this submission into four principal categories: (1) the non-constitutional objections to the proposal, including the asymmetry between the proposed rule and the intended objectives of the Rules, the asserted statistical justification

and supposed need for the amendment; (2) the inherent conflicts between the proposed rule and the rules governing standards of review and preservation of objections; (3) constitutional objections that arise from the due process and double jeopardy clauses of the Constitution; and (4) objections based on principles of the separation of powers. In sum, we submit that the proposed amendment is unnecessary, inappropriate and unconstitutional. We urge the Committee to reject it.

1.

Rule 2 of the Federal Rules of Criminal Procedure provides that the rules "are to be interpreted to provide for [1] the just determination of every criminal proceeding, [2] to secure simplicity in procedure and fairness in administration, and [3] to eliminate unjustifiable expense and delay."[1] Fed. R. Crim. P. 2; see also 28 U.S.C.§ 331 (directing the Judicial Conference to recommend to the Supreme Court "[s]uch changes in and additions to [the Federal Rules of Criminal Procedure] as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay"). The proposed amendment is dysfunctional and violates each of these guiding principles.

First, the proposed rule does not provide for a "just" determination of criminal proceedings because it creates the danger that juries will convict defendants of offenses where the presiding Article III judge has concluded that the Government's evidence is legally insufficient. Second, the proposed rule does not "secure simplicity in procedure and fairness in administration" because it deprives district judges of the ability to manage increasingly complex cases. Third, rather than eliminating "unjustifiable expense and delay," the proposed rule actually prolongs cases where an experienced trial judge (selected by the President with the advice and consent of the Senate) has concluded that no reasonable juror could vote to convict. Not only will the proposed rule extend

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1. In 2002, Rule 2 was amended to substitute "are to be interpreted" for "are intended." The explanation for that change in nomenclature was set out in the Advisory Committee Notes:

> Rule 2 has been amended to clarify the purpose of the Rules of Criminal Procedure. The words "are intended" have been changed to read "are to be interpreted." The Committee believed that that was the original intent of the drafters and more accurately reflects the purpose of the rules.

proceedings, but it will do so at substantial cost to the Courts (including Courts of Appeals that would be required to hear appeals now barred by statute), the defense, and the Government itself.

### A. The Proposed Rule Will Not Lead to a Just Determination of Every Case

As currently drafted, Rule 29 strikes a careful balance between a defendant's right to have the jury only consider counts as to which the Government has presented legally sufficient evidence, and the Government's right to a jury determination of counts as to which its proof is adequate to support a conviction. The current rule provides trial judges with the ability to ensure that a defendant is not convicted of an offense for which the Government has presented legally insufficient evidence. This result is constitutionally required. See infra at 11 - 12. Moreover, it avoids subjecting a defendant to the stigma attached to a jury conviction when, in fact, the Government has not presented sufficient evidence to permit a reasonable juror to convict.

The proposed amendment finds its genesis in the Government's suggestion that district judges are abusing the limited discretion accorded them under Rule 29(a). In their submissions, Chief Judge Holderman, Peter Goldberger of the NACDL, and Thomas Hillier, II of the Federal Defenders, dismantle both the relevance and reliability of the statistical arguments which the Department of Justice has made in support of a supposed need for the amendment. We do not repeat their arguments here.

At page 10 of his submission, Mr. Hillier lists 14 cases, selected randomly over a 12-month period, in which federal Courts of Appeals have found that defendants have been erroneously convicted. He sagaciously observes that, "[n]ecessarily, in each of those cases, a district judge had erred under Rule 29 in failing to enter a judgment of acquittal." Unlike the Department of Justice, the NYCDL does not have the resources to compile, much less to massage, the "statistics" from the thousands of prosecutions the Department has mounted over the years. Like Brendan Sullivan, our experience has uniformly been that judges in the Southern and Eastern Districts of New York have been extremely reluctant to grant pre-verdict motions for acquittal, even though the evidence was legally insufficient to warrant a conviction. Rather, judges most commonly deny Rule 29 motions outright, occasionally reserve decision, and only rarely grant an in-trial outright acquittal of an individual defendant.

As a result, the Second Circuit Court of Appeals has, in numerous instances, entered judgments dismissing charges for the insufficiency of the evidence.[2] These cases, we submit, suggest that rather than impeding district courts from granting proper pre-verdict motions for acquittal, any change made to Rule 29 should endorse the granting of such motions; restoring meaning to the Rule's mandate that the Court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a) (emphasis added).[3]

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2. See, e.g., United States v. Bruno, 383 F.3d 65 (2d Cir. 2004) (reversing convictions of two defendants on sufficiency grounds where no rational juror could have found that defendants committed elements of the RICO violations charged); United States v. Ceballos, 340 F.3d 115, 125 (2d Cir. 2003) ("The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion [or] speculation ...; its verdict must be reasonably based on evidence presented at trial.") (quoting Goldhirsh Group, Inc. v. Alpert, 107 F.3d 105, 108 (2d Cir.1997)); United States v. D'Amato, 39 F.2d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise alone cannot stand . . ."); United States v. Miller, 997 F.2d 1010 (2d Cir. 1993) (holding that the charged conduct did not constitute a violation of the federal mail fraud statute because the defendants did not obtain "money or property" by fraud as defined in the statute ); United States v. Mulheren, 938 F.2d 364 (2d Cir. 1991) (jury engaged in false surmise and speculation); United States v. Starr, 816 F.2d 94 (2d Cir. 1987) (reversing conviction and dismissing indictment of two defendants previously found guilty of mail and wire fraud because of insufficient evidence); United States v. Pisani, 773 F.2d 397 (2d Cir. 1985) (reversing a conviction for ten counts of mail fraud because the defendant, a former state senator who used campaign funds for personal purposes, could not be convicted of mail fraud under the New York State Election Law), pet. for reh. denied, 787 F.2d 21 (1986); United States v. Mankani, 738 F.2d 538 (2d Cir. 1984) (Reversing a conviction against one defendant holding that evidence was insufficient "without statements made by codefendants that were inadmissible hearsay against defendant due to Government's failure to prove that defendant was a coconspirator with codefendants"); United States v. Infanti, 474 F.2d 522 (2d Cir. 1973) (reversing conviction of one defendant where there was no evidence that he ever had actual possession of stolen stock certificates at any time and there was no evidence that he could set the price for the securities); United States v. Buffalino, 285 F.2d 408 (2d Cir. 1960) (holding that evidence was insufficient to sustain convictions for conspiracy to commit perjury and obstruct justice.)

3. As originally formulated, Rule 29 enjoined the district court in this language: "The court on motion of a defendant, or on its own motion shall order the entry of a

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**B. The Proposed Rule Will Add Complexity and Potential Unfairness**

Not only do we disagree with the Government's fundamental premise that the proposed amendment is necessary to further the interests of justice, but the proposed amendment will restrict district judge's ability to manage complex trials and lead to potential unfairness. In our experience, indictments generally charge multiple defendants with multiple counts. Naturally, the evidence at trial, both in terms of the individual defendants and counts, runs the gamut from overwhelming to absurdly thin. Currently, Rule 29 provides the district judge with the full range of trial management option: she can deny the motion and present the case to the jury, she can eliminate counts and/or defendants as to which the evidence is clearly legally insufficient, or in a closer case, she can reserve on the motion. This last route enables the judge to revisit the motion and grant it post-conviction based on the record as it stood at the time, and thereby provides the Government with the ability to seek appellate review.[4]

By narrowing the case presented to the jury, the trial judge avoids the very real danger of jurors trading votes, with some sacrificing their view that a defendant should be acquitted of all counts in exchange for others agreeing to acquit on counts that never should have been presented for their consideration. See Mark S. Brodin, Accuracy, Efficiency, and Accountability in the Litigation Process: The Case for the Fact Verdict, 59 U. Cin. L. Rev. 15 (1990) (discussing so-called "lets-make-a-deal" jury decision

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3. (...continued)
judgment of acquittal . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offense." (emphasis added). In later versions, "shall" became "must."

4. Rule 29(b) was amended in 1994 to permit district judges to reserve decision on a motion for a judgment of acquittal made at the close of the Government's case. The Advisory Committee Notes make clear that this amendment was intended to "permit[] the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the Government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but then set aside by the granting of a judgment of acquittal." Recognizing that reserving decision at the close of the Government's case puts the defendant in the difficult position of presenting evidence that might support conviction, the 1994 amendment makes clear that, in deciding the reserved upon motion, "the trial court is to consider only the evidence submitted at the time of the motion."

making, which many studies have found to be widespread); see also Michael H. Hoffheimer, The Future of Constitutionally Required Lesser Included Offenses, 67 U. Pitt. L. Rev. 585, 595-96 (2006) ("[b]ecause it is settled law in almost every American jurisdiction that juries have no right to disregard the law, there is no independent value to be served by permitting juries to convict improperly of lesser included offenses when such convictions are not factually accurate").

By presenting legally insufficient counts to the jury, the district court creates the danger that, through jury compromise, the defendant will stand convicted of one or more counts that, while supported by evidence that barely meets the "legally sufficient" threshold, would not have resulted in a conviction if it had been submitted alone.

If forced to choose between dismissal under Rule 29, with the associated cost of foregoing the chance of an unassailable acquittal by the jury, the emotional and economic costs of delay, and the potential impact of a retrial, many defendants will forego valid Rule 29 motions. Not only will the defendant be prejudiced by the resulting submission of legally insufficient counts to the jury, but the complexity of the case submitted to the jury will be unnecessarily enhanced, and the danger of an unfair verdict increased. Thus, the proposed amendment would scuttle the most compelling purpose of a pre-verdict acquittal to serve the Government's bidding in an unidentifiable and, at best, infinitesimally small category of cases. There is simply no basis for concluding that district courts are so abusing their authority to warrant such a radical shift in the rules governing trial management.[5]

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5. In 1975, the Advisory Committee rejected a DOJ proposal that would have taken from the Court, and vested with the prosecution, the responsibility of deciding whether, under Rule 4(a), a summons or warrant shall issue. The Advisory Committee stated, in words which apply equally here: "The Committee rejects the notion that the federal judiciary cannot be trusted to exercise discretion wisely and in the public interest." The Rules also recognize the preeminent position of the Court in matters of public interest in Rule 11(c)(3), which generally provides the Court with the authority to reject plea agreements. The proposed amendment is premised on an assumption that federal district judges have all of a sudden become renegades opening the courthouse doors to let out guilty defendants and that it is somehow against the "public interest" for a defendant, whose guilt the Government did not prove, to be released from the jeopardy of an erroneous jury verdict.

### C. The Proposed Rule Will Increase Expense and Delay

Rather than contributing to a just and simple resolution of cases, the proposed amendment will increase the cost of litigation and delay the final resolution of cases. In those cases in which the defendant waives his double jeopardy rights and successfully moves for the dismissal of an insufficient count before submission to the jury, the defendant will be deprived of the finality that currently accompanies an acquittal. Regardless of the ultimate resolution of a Government appeal, the conclusion of the prosecution will be delayed, and the Courts, the defendant and the Government will all be required to devote additional resources to the case.[6] The defendant who has been acquitted by the district court will be forced to incur the emotional and economic expense associated with defending that dismissal on appeal. And, in the event of a reversal, the defendant will also suffer the additional expense of a retrial. Not only does this include the substantial emotional and economic cost, but because the Government will be able to adjust its trial strategy based on the "dress rehearsal" of the first trial, the already substantial risk of conviction is unfairly enhanced.[7]

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6. Without ascribing bad faith to the Government in general, it is a reality that prosecutors become vested in their cases. Thus, even in the case of a defendant who is acquitted on the counts submitted to the jury, the Government might seek to pursue an appeal of those counts dismissed by the Court in an effort to get a "second bite" at the apple. While such an approach might be inconsistent with the prosecutor's duty to seek justice, see Model Code of Professional Responsibility EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); United States v. Vaccaro, 115 F.3d 1211, 1216 (5th Cir. 1997) (arguing that prosecutors should be zealous, but not to the point that ambition for a conviction jeopardizes integrity); Symposium Article, Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality, 9 Lewis & Clark L. Rev. 559 (2005) (noting that the role of a prosecutor is "not to win a case . . . but, rather, to behave in a fair and lawful manner to promote the cause of justice"), we submit that it is more likely that a prosecutor would lack the experience, maturity and balance necessary to "let go" of a case, than that an Article III judge will abuse his authority under Rule 29 to dismiss only those counts where the evidence is legally insufficient.

7. See United States v. Scott, 437 U.S. 82, 105 (1978) (Brennan, *J.*, dissenting) (noting that "[t]he purpose of the [Double Jeopardy] Clause . . . is to protect the accused against the agony and risks attendant upon undergoing more than one criminal trial for any single offense. A retrial increases the financial and emotional burden that any

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Indeed, no Rule deliberately places in jeopardy a defendant's constitutional right in order to achieve an expedient end for the Government.[8] Moreover, no Rule sacrifices the district court's prerogatives in order to achieve an expedient result desired by the Government. The current proposal, however, does not merely strip a Court of its long-held power to acquit, but it takes the extraordinary step of putting the Court in the position of securing the defendant's waiver of his Constitutional rights.

2.

The proposed rule provides, in part, that a court "can grant [a Rule 29] motion before the verdict only if the defendant agrees that the Government can appeal that ruling." Proposed Rule at (b)(2)(A)(i). The proposed rule is, however, unclear as to when in the process a defendant must affirmatively waive his double jeopardy rights.

Must a defendant waive his double jeopardy rights when he makes the motion, or will his double jeopardy waiver be required only after the judge decides to grant the motion? Either answer reveals serious structural flaws with the proposed rule that directly conflict with existing rules and policies. In particular, can a defendant preserve his challenge to the sufficiency of the evidence at the close of the Government's case, if he does not waive his double jeopardy rights?

When a criminal defendant appeals from the denial of a properly preserved Rule 29 motion the Court of Appeals will review the sufficiency of the Government's case de novo:

> [T]he relevant question is whether . . . after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319 (1979). However, if the defendant fails to make a Rule 29 motion (or consciously decides not to make the motion for fear of waiving his

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7. (...continued)
criminal trial represents for the accused, prolongs the period of the unresolved accusation of wrongdoing, and enhances the risk that an innocent defendant may be convicted") (citations omitted).

8. The waivers required by Rule 11, which governs guilty pleas, is a process which is outside the accusatorial adversarial process.

double jeopardy rights), his objection will go unpreserved[9] and the appellate court will examine the record only for "plain error." See United States v. Muniz, 60 F.3d 65 (2d Cir. 1995).

Rule 56 of the Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." A defendant challenging the sufficiency of the Government's case under the plain error standard of review will certainly find the standard of review different than that described by Justice Stewart in Jackson. For example, in Muniz, the Second Circuit stated:

> Because of the defendant's failure to make timely objection, nothing turns on whether the evidence meets the usual test of legal sufficiency. The test is that prescribed by Fed.R.Crim.P. 52(b), ordinarily described as "plain error." This test imposes less exacting demands on the strength of the government's evidence than the ordinary test of sufficiency.

Muniz, 60 F.3d at 70.

The rationale for having a separate "plain error" standard is reasonable; an efficient system of justice requires vigilant counsel to object to perceived errors so the trial judge may correct them. See, e.g., Jackson v. United States, 386 F.2d 641, 643 (D.C. Cir. 1967) ("[a] principal office of the making of objections by counsel in adversary proceedings is not only to assure justice but also to achieve efficiency and expedition in its administration."); United States. v. Walker, 449 F.2d 1171, 1173 (D.C. Cir. 1971) ("[an objection] assures that the trial judge makes an informed decision, and allows the judge and opposing counsel to take whatever corrective action is needed.")

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9. Fed. R. Crim. P. 51 provides, in part:

> (b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court--when the court ruling or order is made or sought--of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

When viewed in this context, the proposed rule works against the efficiency envisioned by Rule 51(b). The proposed rule does not state that the required waiver is not required at the time the motion is made.The defendant might, quite reasonably, not argue the insufficiency of the Government's case, not out of a lack of vigilance, but because he does not want to waive his double jeopardy rights. In a system where defendants are penalized for not properly preserving issues, this is a truly an unacceptable result. Even where the defendant has preserved the issue for appeal, he faces "an uphill battle", United States v. Jones, 30 F.3d 276, 281 (2d Cir.1994), and "bears a very heavy burden," United States v. Rivera, 971 F.2d 876, 890 (2d Cir.1992); to further increase that burden by relegating a defendant to the more onerous plain error standard of review tilts an already difficult test more to the favor of the Government. See John O. Newman, Madison Lecture: Beyond "Reasonable Doubt", 68 N.Y.U. L.Rev. 979 (1993).

Alternatively, the proposed rule can be read to allow the defendant to wait until the Court has indicated it will grant the Rule 29 motion before deciding whether to waive his double jeopardy rights. While this seems to be the more logical reading of the proposed Rule, it unnecessarily burdens the Court. In deciding a Rule 29 motion, trial judges, not to mention defense and Government counsel, frequently invest substantial amounts of time and effort in reaching a decision. See, e.g., United States v. RW Professional Leasing Services Corp., 452 F.Supp.2d 159 (E.D.N.Y. 2006) (twenty-plus page Rule 29 order analyzing complex wire fraud allegations). If a defendant intends to "decline" the Rule 29 judicial acquittal, fearing, perhaps, the economic burden of being placed in jeopardy twice and hoping to gain a favorable verdict from the jury, the careful analysis of the judge is wasted. This would be a curious addition to a body of rules that purports to value "simplicity in procedure", and endeavors to "eliminate unjustifiable expense and delay." Rule 2, Fed. R. Crim. P.[10]

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10. Finally, it bears noting that, if a "waiver" version of Rule 29 is adopted, the district court will be faced with fashioning one of the most daunting inquiries to determine whether the defendant's waiver is "knowing and voluntary." One can only imagine the litigation which will be spawned in the circumstance where a defendant foregoes the dismissal, deciding not to waive his double jeopardy rights in order to gain a judicial acquittal. The proposed Rule blithely ignores the obvious collateral consequences attendant to the Rule changes proposed, particularly with respect to an allocution which would need to account for innumerable permutations.

3.

The proposed amendment does more than undermine the needed and prudent exercise of judicial authority under the Rules. It does so at the expense of principles that have long guided our system of justice. It employs a methodology that is at odds with the structural purpose of the Rules, that is, to protect, not abridge, the constitutional rights of defendants. See 28 U.S.C. § 2072(b) (proving that any rules adopted "shall not abridge, enlarge, or modify any substantive right"). A requirement that a defendant sacrifice one constitutional right for another has long been seen as inconsistent with fundamental principles of justice. Yet this is precisely what the proposed rule will require: defendants will be forced to choose between the due process right to be convicted only upon proof beyond a reasonable doubt and the protections of the double jeopardy clause.

A.

It is a cornerstone of criminal jurisprudence that the Government can only secure a conviction when it carries its burden of proving, beyond a reasonable doubt, that the defendant committed every element of the offense for which he is charged. This "ancient and honored" principle dictates that it is:

> the duty of the government to establish . . . guilt beyond a reasonable doubt. This notion – basic in our law and rightly one of the boasts of a free society – is a requirement and a safeguard of due process of law in the historic, procedural content of due process.

Victor v. Nebraska, 511 U.S. 1, 5 (1994); see also In re Winship, 397 U.S. 358, 362 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). This burden is to assure that our criminal justice system "is an accusatorial and not an inquisitorial system." Rogers v. Richmond, 365 U.S. 534, 541 (1961).

"[A] fundamental of the jury trial guaranteed by the Constitution [is] that the jury acts, not at large, but under the supervision of a judge." United States v. Taylor, 464 F.2d 240, 242 (2d Cir. 1972) (Friendly, *J.*). In Taylor, the Second Circuit adopted Judge Prettyman's formulation of the trial judge's role to serve as the gatekeeper, the supervisor, as it were, of the jury:

> [i]t is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point is this boundary is the existence or non-existence of reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal because no other result is permissible within the fixed bounds of jury consideration.

Id. at 543 (quoting Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947) (emphasis added).

B.

Equally important as the right not to be convicted absent proof beyond a reasonable doubt is the right to be free from being twice placed in jeopardy. Courts and legal scholars consider the double jeopardy protection to be a fundamental legal right. Benton v. Maryland, 395 U.S. 784, 795 (1969) ("[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted"). Double jeopardy protection was embraced by the Founders to ensure that defendants were not made "[t]o live in a continuing state of anxiety and insecurity." Green v. United States, 355 U.S. 184, 187 (1957) (noting that "it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous"); see also id. at 200 (Frankfurter, *J.*, dissenting) (describing double jeopardy as "an indispensable requirement of a civilized criminal procedure"). In fact, the guarantee against double jeopardy is "one of the oldest ideas found in western civilization." Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, *J.*, dissenting) (reviewing a number of historical roots, including Greek, Roman, English and American Colonial double jeopardy principles). The double jeopardy clause is meant to guard against prosecutorial overreaching, Garrett v. United States, 471 U.S. 773, 795 (1985) (O'Connor, *J.*, concurring), and also it allows the defendant to conclude his confrontation with society in one proceeding. United States v. Jorn, 400 U.S. 470, 479 (1971). As the Seventh Circuit stated in United States v. Anderson, a court should particularly scrutinize a claim of waiver when it relates to a right as fundamental as protection against double jeopardy." 514 F.2d 583, 586 (7th Cir. 1975) (noting that "[a] double jeopardy defense is normally not the type of claim that would be foregone for some strategic purpose").

C.

Rule 29 is a time-honored mechanism by which a defendant can assert his right to be convicted only on constitutionally sufficient evidence. The duty of district courts to exercise their constitutional authority to acquit following the close of the Government's case has been provided for, unbroken, until this proposed amendment. In Jackson v. Virginia, Justice Stewart recognized that Rule 29 serves "to highlight the traditional understanding in our system that the application of the beyond-a-reasonable-doubt standard is not irretrievably committed to jury discretion." 443 at 317 n.10; see also Ex parte United States, 101 F.2d 870 (7th Cir.), *aff'd. by an equally divided Court in* United States v. Stone, 308 U.S. 519 (1939).

Under the proposed amendment, the defendant is forced to jettison one Constitutional right in order to attain another. In order to challenge the sufficiency of the Government's case under the due process clause, he must waive his rights under the double jeopardy clause.[11] If he chooses not to file the motion, he risks being convicted by a jury, despite the fact that the Government has not proven every element of the crime beyond a reasonable doubt – a constitutionally reprehensible conclusion to the proceedings. See Fiore v. White, 531 U.S. 225, 228-29 (2001). The other path leads to the defendant filing the motion and waiving his double jeopardy rights.[12] If the Court

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11. It is settled law that an acquittal under Rule 29 is a judgment on the merits for the purpose of double jeopardy analysis. See Smith v. Massachusetts, 543 U.S. 462, 467 (2005) ("[W]e have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict."). Rule 29's use of the term "Acquittal," in its caption has always been coterminous with the essential meaning of that term in double jeopardy jurisprudence which is that a defendant, once acquitted, cannot be tried again on the same charges. See Advisory Committee Notes to Fed. R. Crim. P. 29, 1944(a)(1) (noting that "[t]he purpose of changing the name of a motion for a directed verdict to a motion for judgment of acquittal is to make the nomenclature accord with the realities").

12. The DOJ had previously championed an amendment to Rule 29 which would have directly stripped that authority from the district courts, but it was sensibly rejected by the Committee. See Report of the Advisory Committee dates May 20, 2006 discussion at pp. 9–10. That earlier rejection was consistent with the history of Rule 29. The 1944 Advisory Committee Notes recognized that "Federal courts have recognized and approved the use of a judgment non obstante veredicto [citing Ex Parte United States,

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grants his motion, but the Government successfully appeals, he now must face a second trial – one at which the Government will have every opportunity to examine the weaknesses in his case and trial strategy.

The Government has long been prohibited from demanding that defendants sacrifice one constitutional right to exercise another. As Justice Holmes said in Kepner v. United States, 195 U.S. 100, 135 (1904), "it cannot be imagined that the law would deny to a [defendant] the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." The proposed amendment is a manifestation of Justice Holmes' fear: the only way the defendant can secure his Constitutional right to sufficient evidence is to sacrifice his double jeopardy rights. The Supreme Court has recognized that a defendant is entitled to all of his protections under the Constitution; he cannot be forced to prioritize those which he thinks are most important and jettison the others. Simmons v. United States, 390 U.S. 377, 394 (1968) ("Thus, in this case [the defendant] was obliged either to give up . . . a valid Fourth Amendment claim or . . . waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."). Similarly, in United States v. Jackson, 390 U.S. 570 (1968), the Court noted that "[C]ongress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." Id. at 583; see also Sherbert v. Verner, 374 U.S. 398 (1963) (holding that an unemployment benefits plan unconstitutionally burdened the plaintiff's free exercise of religion).

A proposed rule that allows for legally dubious charges to reach a jury unless the defendant waives his double jeopardy protection creates an irresolvable conflict between Constitutional rights. It forces defendants to make an impossible choice between core protections and puts district judges in the unseemly (and unconstitutional) position of forcing defendants to choose between rights. For this reason alone, the Government's proposal should be rejected.

4.

The practical, intended effect of the proposed amendment is to dilute the district courts' authority to enter a pre-verdict acquittal by interposing a forced waiver by the defendant of his double jeopardy rights, thus making the Courts of Appeals the sole

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12. (...continued)
supra]. The rule sanctions this practice."

authority to review the sufficiency of evidence. We believe that the proposed amendment, so sedulously advanced by the DOJ, impermissibly diminishes the district courts' inherent and express power to grant judgments of acquittal. As such, it intrudes upon and violates the separation of powers doctrine.

There are two aspects of the separation of powers doctrine that are implicated by the proposed rule. One is the structural principle that serves as "an inseparable element of the constitutional system of checks and balances," Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 850 (1986), quoting Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982). The second is "an impartial and independent federal adjudication of claims within the judicial power of the United States [that] serves to protect primarily personal, rather than structural, interests." Id; see also Mistretta v. United States, 488 U.S. 361, 380 (1989) ("the separation into three coordinate Branches is essential to the preservation of liberty"); Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

Concurring in Carlisle v. United States, 517 U.S. 416, 434 (1996), Justice Souter agreed with the majority opinion (Scalia, *J.*) that the "inherent authority" of a district judge to enter a judgment of acquittal did not extend to entering an acquittal, post verdict and sua sponte, in the absence of a timely defense motion under Rule 29(c). Justice Souter did agree, however, with Justice Scalia's observation in Chambers v. NASCO, Inc., 501 U.S. 32, 58 (1991) (dissenting opinion), that some elements of the court's "inherent authority are so essential to '[t]he judicial power,' U.S. Const., Art. III, § 1, that they are indefeasible." In Carlisle, Justice Souter believed that the seven-day time limit set forth in Rule 29(c) was not "an unconstitutional interference with the court's inherent authority" to enter a judgment of acquittal. Carlisle, 517 U.S. at 434. The proposed amendment, however, imposes a restriction far more significant than a time limit and should be soundly rejected as intruding upon the Court's "indefeasible" authority.

It is not a novel idea that no branch of government should relinquish its power when another branch seeks to encroach on that power. In the Federalist No. 51, p. 349, (J. Cooke ed. 1961), James Madison observed:

> But the greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

This proposed amendment to Rule 29 represents the principal ambition of the Department of Justice to whittle away the Constitutional right of a defendant to secure a judicial acquittal by a district judge. At the same time, the DOJ seeks to curtail the authority of the Judiciary to apportion that acquittal authority between the trial and appellate Article III courts. The amendment directly interferes with that authority and, as such, affects the structural relationship between the Judicial Branch and the Executive Branch.

Given such an agenda of the Executive branch, why should this Committee, which serves the Judiciary, be instrumental in curtailing the Courts' inherent prerogatives and, in that process, denigrate the constitutional rights of defendants who, after all, are presumed innocent? The Judicial Branch would not be idle if Congress sought to impose such a change. See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).[13] It should not, therefore, consistent with the "motives" and "ambition" which Madison believed essential to preserving the separation of powers, relinquish the "control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Chambers, 501 U.S. at 43 (quoting Link v. Wabash R. Co., 370 U.S. 626, 630-631, (1962)); see also Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, dissenting) ("But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials.").

Acceptance of this proposed act of cannibalization would defeat the very principle that "the 'Judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." Northern Pipeline, 458 U.S. at 60. The Judiciary should not give away what could not be taken from it.

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13. In Northern Pipeline, the Court recognized that Congress was barred from granting to "legislative," Article I, courts the inherent powers of an Article III court. Justice Brennan stated that Congress "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court . . ." Northern Pipeline, 458 U.S. at 87.

Thank you for the opportunity to have made this submission.

Respectfully submitted,

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We wish to acknowledge the invaluable assistance of Brian C. Danahy and Duncan Levin, associate attorneys at Mr. Bergman's and Mr. Temkin's firms, and also James E. Heavey, a student at Fordham University Law School, in the preparation of this submission.