

By Jeanne M. Kempthorne

# Naked and Arbitrary Power

## Judicial Judgments of Acquittal



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Our system of criminal justice is characterized by the checks and balances among three sources of power: the executive branch, which enforces the criminal laws, the judiciary, which presides at trial and sentences the defendant, and the people, who decide whether there is probable cause to indict and sufficient evidence to convict. A key feature of this system is that none of the three participants in the criminal justice system has complete, unreviewable authority to mete out justice as it sees fit.

With two exceptions. Appropriately, a jury's decision to acquit, however misguided, is absolutely final. The second exception is, I argue, inappropriate: Federal Rule of Criminal Procedure 29 and comparable state rules permit a judge, after the jury is empaneled and sworn but before a verdict is reached, to short circuit the trial by entering a judgment of acquittal before the jury reaches a verdict. This judicial acquittal ends the case, depriving the petit jury of the right to reach a verdict and the prosecution of the right to seek appellate review of the trial court's rulings of law. Unlike almost every other decision a trial court makes, a pre-verdict judgment of acquittal is unreviewable by a higher court.

The perniciousness of this rule both to the fair administration of justice and, ironically, to the institution of the judiciary, can hardly be overstated. A saavy trial judge who doesn't "like" the prosecution's case can deny pretrial motions to dismiss the indictment or to suppress evidence – granting such pretrial motions would subject the decision to appellate scrutiny – and then, once the jury is sworn, eviscerate the case by ruling key evidence inadmissible. After the government hobbles through trial with its case in shreds, the trial court can then declare the government's proof insufficient to sustain a verdict of guilty and enter

a judgment of acquittal pursuant to Rule 29. End of case. No review whatsoever.

Let us be clear here. It matters not a whit whether there is any basis in fact or law for the ruling. No matter what influenced the trial judge – a personal view that tax cases should not be prosecuted criminally or that the drug sentencing guidelines are too high, a personal relationship with a party or lawyer, a mistaken view of the law, or a belief that the government's witnesses are not credible – under Rule 29, a patently erroneous decision to acquit stands. Double jeopardy prevents the government from appealing the ruling or re-prosecuting the defendant. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

Courts occasionally struggle with the limits of this rule in cases of judicial corruption or where the trial judge has obviously manipulated the trial procedure in order to avoid review. The First Circuit tested the limits of Rule 29 in *In the Matter of United States of America*, 286 F.2d 556 (1<sup>st</sup> Cir. 1961), ruling that an unquestionably improper grant of a judgment of acquittal after only three government witnesses had testified was beyond the trial judge's power and therefore a nullity. Judge Aldrich, concurring, stated:

While courts can do, and must be permitted to do, unwise and even foolish things, I think there must be some limit to naked, arbitrary power. As against a defendant's right to be free from double jeopardy, there is the interest of the public in the prosecution and conviction of criminals. . . . Whatever may be the correct philosophy of judicial power, I am unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it, should deprive the government of its day in court.

By Amy Baron-Evans

# An Important But Modest Check

on Prosecutorial Overreaching and Wrongful Conviction



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Rule 29(a) permits a judge to enter a judgment of acquittal if no rational jury could convict on the prosecution's admissible evidence when viewed most favorably to guilt. In our system of checks and balances, the judge's acquittal operates as a check on unbridled prosecutorial power to subject such a case to a jury determination and potential appeal. It prevents some erroneous convictions, and provides finality and certainty to defendants who are not guilty.

This is no improper end run around juries. As Judge Friendly put it, "It is the function of the judge to deny the jury any opportunity to operate beyond its province," and "[t]he critical point in this boundary is the existence or non-existence of reasonable doubt as to guilt." *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). The standard by which a judge may acquit is significantly higher than that for acquittal by a jury, and the same as the appellate standard but with the benefit of having seen and heard the evidence.

Juries are not infallible, as the one hundred and forty-four DNA exonerations since 1992 attest, see [www.innocenceproject.org](http://www.innocenceproject.org), and there is no reason to think the problem is confined to cases involving body fluids or hair. Empirical research shows that defendants begin with a presumption of guilt, see William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 372 (1995), that jurors retain an alarmingly low comprehension of their instructions, and that they often apply a preponderance of the evidence standard in criminal trials. See John P. Cronon, *Is Any of This Making Sense?*, 39 Am. Crim. L. Rev. 1187, 1188-89 (2002). In our imperfect system, juries do make mistakes, and relief on appeal or in post-conviction proceedings is unlikely.

When a judge grants a Rule 29 motion, a defendant who is not guilty but has already suffered the stigma, expense, and loss of employment attendant to indictment and most of a trial, can at least avoid the further burden and uncertainty of appeal. The jurors are relieved of the burden of deliberating to a verdict. A magistrate judge in North Carolina reports that "the jury spontaneously stood up and applauded" when a judge in his district recently granted a Rule 29 motion. See Carl Horn III, *How to Deal Effectively with Indifferent, Hostile, or Otherwise Difficult Federal Prosecutors*, *Champion* (March 2003). The public is spared some expense. The government itself sometimes acknowledges that its charging decisions were wrong. In a recent health care fraud case involving multiple defendants, the government, after a three-month presentation of its case, assented to a Rule 29 acquittal as to one defendant. (Judge Woodlock acquitted another over the government's objection, and the jury acquitted the rest.)

The premise that district court judges have it in for the prosecution, are corrupt, or are prone to error is unsupported. In fact, judges use Rule 29 with care and restraint. In almost every case in which an appellate court reverses for insufficiency of the evidence, the district court denied a motion for judgment of acquittal that should have been granted. Judges agonize over Rule 29 motions and deny them if the question is at all close. *E.g.*, *United States v. Evans*, 149 F.Supp.2d 1331 (M.D. Fla. 2001) (denying Rule 29 on basis that there was evidence, "albeit scant"). In the rare cases in which the motion is granted, the rulings are not hidden, but are made in open court, often in published opinions, and appear on the docket. Judges do not "broom" cases for improper reasons.