NOTE

DOUBLE JEOPARDY LIMITS ON PROSECUTORIAL APPEAL OF SENTENCES

The double jeopardy clause of the fifth amendment provides that no person shall "be twice put in jeopardy" for the same offense.[1] The courts have experienced considerable confusion in applying this clause to criminal proceedings, partly because of the variety of situations that may raise double jeopardy questions. The Supreme Court has determined that the double jeopardy clause protects defendants not only from prosecution for the same offense after an acquittal, but also from a second prosecution after a conviction and from multiple punishments for a single offense.[2]

In 1970 Congress enacted the Dangerous Special Offender Sentencing Statutes,[3] which for the first time empowered appellate courts to hear appeals by government prosecutors seeking increases in the sentences imposed by trial courts.[4] This statute raised the question whether appellate review of sentences violates the double jeopardy clause's prohibition of multiple punishments.[5] In *United States v. DiFrancesco*,[6] the first case in which the United States petitioned for appellate review of a sentence under the Act, the Court of Appeals for the Second Circuit found that the provisions of the statute providing for prosecutorial appeal were unconstitutional[7] under the double jeop-

1. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

2. United States v. Wilson, 420 U.S. 332, 343 (1975) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). *See also* Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 263-66 (1965).

3. 18 U.S.C. §§ 3575-3578 (1976). For a discussion of the statutes see notes 14-16 *infra* and text accompanying notes 13-16 *infra*.

4. 18 U.S.C. § 3576 (1976). Government appeal power also exists under 21 U.S.C. § 849(h) (1976), which deals with dangerous special drug offenders. Legislation currently pending in Congress would permit appellate review, at the government's behest, of sentences that are not within specified guidelines. *See* S. 1722, 96th Cong., 1st Sess. § 3225(b) (1979).

5. The few states that have permitted appellate courts to increase sentences have done so only when the defendant sought review. No state statute presently authorizes the government to seek an increase in a valid original sentence. *See, e.g.*, ALASKA STAT. § 12.55.120 (1979); COLO. REV. STAT. § 1801.409 (1973); CONN. GEN. STAT. ANN. §§ 51-194 to -197 (West 1960); ME. REV. STAT. tit. 5, §§ 2141-2144 (1980); MD. ANN. CODE art. 27, §§ 645JA-645JG (1976); MASS. GEN. LAWS ANN. ch. 278 §§ 28A-28D (West 1979); MONT. REV. CODES ANN. §§ 95-2501 to -2504 (1969); N.H. REV. STAT. ANN. §§ 651:57-:61 (1979).

6. 604 F.2d 769 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980) (No. 79-567).

7. The court of appeals implied that state statutory provisions providing for appeal by the defendant are constitutional because the defendant voluntarily chooses to seek review. 604 F.2d at 786.

ardy clause. The court based its decision on the hostility of the double jeopardy clause both to government appeals in criminal cases and to multiple punishment through increasing sentences.[8] This Note will examine the constitutionality of appellate court review of sentences in light of the double jeopardy clause's limitations on government appeals and prohibition of multiple punishments. The Note will conclude that the double jeopardy clause is not always hostile to government appeals and that Congress may provide for a sentencing process that includes appellate review without transgressing the limits imposed by the double jeopardy clause's multiple punishment doctrine.

I. UNITED STATES V. DIFRANCESCO

In *United States v. DiFrancesco* the government petitioned the court of appeals for review of the sentence of a dangerous special offender,[9] pursuant to section 3576 of the Criminal Code.[10] This provi-

8. *Id.* at 782, 785-87.

9. Eugene DiFrancesco was convicted of racketeering and bombing in two separate jury trials. Prior to his trial on the racketeering charges the government filed a notice with the district court alleging that DiFrancesco was a dangerous special offender as defined in 18 U.S.C. § 3575(e)(3) and (f) (1976). The notice indicated that the government intended to seek imposition of an enhanced sentence under section 3575(b) in the event DiFrancesco was convicted. Pursuant to section 3575(b), see note 13 *infra*, the district court held a special sentencing hearing at which it ruled that DiFrancesco was a dangerous special offender. The court sentenced DiFrancesco to concurrent terms of 10 years' imprisonment for the racketeering charges, to be served concurrently with the nine-year sentence imposed in connection with his second trial and conviction for bombing. 604 F.2d at 780. Under the authority granted by 18 U.S.C. § 3576 (1976), the government appealed the sentence. DiFrancesco appealed from both convictions, but did not seek review of the sentence. The court of appeals affirmed the convictions. 604 F.2d at 773-79.

10. 18 U.S.C. § 3576 (1976) provides:

> With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the

sion is part of the Dangerous Special Offender Sentencing Statutes,[11] which were enacted to remove unwarranted disparities in sentences and to promote equal treatment of similarly situated offenders.[12] Section 3576 provides that the sentences of felons designated as dangerous offenders[13] may be reviewed in the courts of appeals upon a motion by either the defendant or the United States.[14] The statute provides that when the United States seeks review of a sentence, the court of appeals must automatically review the sentence and the conviction on behalf of the defendant.[15] The appellate court must determine whether the sentencing court employed a lawful procedure, whether its findings were clearly erroneous, and whether it abused its discretion. After considering the record, including the entire pre-sentence report, information submitted during the trial and sentence hearing, and the findings of the sentencing court, the court of appeals may affirm the sentence, impose any sentence that the sentencing court could have originally imposed, or remand to the trial court for further sentencing proceedings.[16] The severity of the sentence can be inereased only if the United States is the party seeking review.

The court of appeals in *DiFrancesco* dismissed the government's petition for review of the sentence on the ground that the portion of

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sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

11. Title X of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3575-3578 (1976).

12. *See* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 317 (1971).

13. Under 18 U.S.C. § 3575(b) (1976), the district court holds a special sentencing hearing to determine if the defendant is a dangerous special offender. The statute provides in part:

> Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. . . . If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

14. If the United States seeks review of the sentence, it must appeal at least five days before expiration of the time in which the defendant may seek a review of his sentence or conviction. 18 U.S.C. § 3576 (1976).

15. *Id.*

16. The court of appeals must state the reasons for its disposition of the appeal in writing. *Id.*

section 3576 authorizing the government's appeal violated the double jeopardy clause of the fifth amendment.[17] The court analyzed two specific issues. First it considered whether the double jeopardy clause protects a defendant from sentence review when he has not voluntarily submitted to such review. The court observed that government appeals to obtain an increase in a valid, enforceable sentence were unknown to the American legal system throughout most of the nation's history.[18] In the few states in which appellate courts have the power to increase a sentence, they can exercise that power only when the defendant initiates the appellate proceeding by seeking review of the sentence.[19]

In light of this history, the Second Circuit believed it should scrutinize the statute with suspicion. Hence, the court rejected the government's argument that the initial sentence was merely "tentative,"[20] on the ground that "appeals by the Government in criminal cases are something unusual, exceptional, not favored, at least in part because they *always* threaten to offend the policies behind the double jeopardy prohibition."[21] The court later re-emphasized the apparent conflict be-

17. In a concurring opinion, Judge Haight argued that the government's appeal should have been dismissed because sections 3575 and 3576 did not apply to the defendant. 604 F.2d at 787-89 (Haight, J., concurring). He considered section 3575(b) inapplicable because it provides for a maximum term of twenty-five years' imprisonment, but DiFrancesco was already subject to a total sentence of forty years, consisting of consecutive twenty-year terms for each of the two counts for which he was convicted. 604 F.2d at 787-89 (Haight, J., concurring). Section 3575(b) is set out in part in note 13 *supra*. Judge Haight concluded that the inapplicability of section 3575(b) made section 3576 inapplicable as well. The majority of the court disagreed, concluding that section 3575 applies to the particular felony in question, not an aggregate of all felonies for which the defendant may have been convicted. 604 F.2d at 780-81 n.13 ("Since the maximum sentence . . . for each of DiFrancesco's two felony convictions was less than the twenty-five year term available under § 3575, the district court properly could find that the statute was applicable").

18. 604 F.2d at 781.

19. For a list of state statutes that provide for appellate review on petition by the defendant, see note 5 *supra*. The court of appeals reached no conclusion regarding whether the failure of states to provide for government review was based on policy reasons or double jeopardy protections. Congress's failure to provide for appellate review of sentences prior to 1970 apparently was based on its desire to place the sentencing function in the sole discretion of the trial judge. See notes 167-170 *infra* and accompanying text.

20. 604 F.2d at 786-87. A trial court's determination of the finality or immediate effect of a sentence is not dispositive. Congress determines whether or not a trial court sentence is final. See notes 167-170 *supra* and accompanying text.

21. 604 F.2d at 782 (emphasis added) (quoting Will v. United States, 389 U.S. 90, 96 (1967)). *Will* cited Carroll v. United States, 354 U.S. 394, 400 (1957), for the proposition that government appeals are "something unusual, exceptional, not favored." The *Carroll* Court stated that the presumption against government appeals was based on the lack of an express statutory authorization for such appeals.

> That is the concept that in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it

tween double jeopardy and government appeals. The court referred to *North Carolina v. Pearce*,[22] in which a defendant successfully appealed his first conviction and received a retrial. The Supreme Court in *Pearce* had held that the double jeopardy clause did not prevent imposition of a harsher sentence following the second conviction.[23] The Second Circuit distinguished *Pearce* because DiFrancesco had not chosen voluntarily to subject himself to the risk of an increased sentence, but faced "jeopardy for a second time" solely because the government sought to appeal the severity of the trial court's sentence.[24] Thus, while the Second Circuit did not rely solely on the impermissibility of government appeals, it plainly was influenced by the notion that DiFrancesco was placed in jeopardy for a second time, against his will.

The court then considered whether an increase of a sentence by congressionally authorized appellate court review violated the double jeopardy clause. The court reasoned that the defendant's conviction and sentence in the district court placed him in jeopardy a first time;[25] the possibility of an additional penalty as a result of the government's appeal constituted double jeopardy.[26] The court compared DiFrancesco with the defendant in *Kepner v. United States*,[27] in which a double jeopardy attack succeeded. The defendant in *Kepner* was acquitted in the first trial, but subsequently was convicted after a government appeal. Because the Second Circuit found the cases indistinguishable in principle, "the conclusion [was] inescapable" that the government's successful appeal in *DiFrancesco* violated the double jeopardy clause.[28]

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was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by the statute.

Id. at 400. Thus, the original hostility to government appeals was not based on the double jeopardy clause, but on the lack of requisite statutory authorization. The Supreme Court has determined that Congress removed any statutory barriers to government appeals when it adopted the Criminal Appeals Act, 18 U.S.C. § 3731 (1976), in 1970. See notes 42-43 *infra* and accompanying text.

In recent cases the Supreme Court has asserted that there is no bar to government appeals unless they offend the double jeopardy clause. *See* United States v. Scott, 437 U.S. 82, 85-86 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 570-71 (1977); United States v. Wilson, 420 U.S. 332, 345-46 (1975). This assertion is an implicit repudiation of the language in *Will* that all government appeals offend the double jeopardy clause.

22. 395 U.S. 711 (1969).

23. *Id.* at 719-23.

24. 604 F.2d at 786.

25. *Id.* at 783.

26. *Id.*

27. 195 U.S. 100 (1904).

28. 604 F.2d at 783. The court observed that *Kepner* and subsequent cases have rejected Justice Holmes's "continuing jeopardy" theory, which postulated that "logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be

In support of its conclusion, the court reviewed the objectives of the double jeopardy clause. Emphasizing that the clause protects defendants not merely from a second trial for the same offense, but also from more than one punishment for a single offense,[29] the court asserted that an increase in the sentence imposed by the trial court would constitute multiple punishment. The court reached this conclusion by relying heavily on dictum in *United States v. Benz*[30] and on statements by several courts of appeals that a punishment partly served cannot be increased.[31]

The *DiFrancesco* decision thus has two themes. The first—the apparent basis for the holding—is that a procedure in which an appellate court *increases* the punishment imposed by the trial court violates the multiple punishment aspect of the double jeopardy clause. This conclusion rests on the presumption that the congressional authorization of prosecutorial appeal of lenient sentences violates double jeopardy limits. The second theme is that the double jeopardy clause is, in the view of the Second Circuit, hostile to government appeals in criminal cases. Other decisions on the permissibility of government appeals, though, indicate that the Second Circuit displayed an unreasonably harsh attitude toward the concept of government appeals. These cases provide an understanding of the relationship between double jeopardy principles and government appeals, suggesting a framework for analyzing whether a particular government appeal violates the double jeopardy clause.

II. DOUBLE JEOPARDY LIMITATIONS ON GOVERNMENT APPEALS

The *DiFrancesco* court, in emphasizing the fact that the case involved a government appeal, intimated that the double jeopardy clause

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tried." Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting), *quoted in* United States v. DiFrancesco, 604 F.2d 769, 783 (2d Cir. 1979), *cert. granted*, 100 S.Ct. 1012 (1980) (No. 79-567). Justice Holmes had explained:

> If a statute should give a right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.

195 U.S. at 135 (Holmes, J., dissenting). Justice Holmes's theory greatly simplifies the problem of government appeals. United States v. Scott, 437 U.S. 82, 90 n.6 (1978).

29. 604 F.2d at 784. The court so held despite the Supreme Court's statements that the underlying principle of the double jeopardy clause "is not against being twice punished, but against being twice put in jeopardy . . . ," United States v. Ball, 163 U.S. 662, 669 (1896), and despite the language of the clause itself, which "is written in terms of potential or risk of *trial* and conviction, not punishment," Breed v. Jones, 421 U.S. 519, 532 (1975) (emphasis in original).

30. 282 U.S. 304, 307 (1931).

31. 604 F.2d at 785.

is hostile to such appeals. Analysis of double jeopardy cases, however, reveals that government appeals in criminal cases are permissible unless the appeal gives rise to practices considered unacceptable under double jeopardy principles forbidding multiple punishment or multiple prosecutions. In a line of cases addressing acquittals, convictions, and midtrial terminations of cases favorable to defendants, the Supreme Court has articulated principles to be applied to government appeals. The *DiFrancesco* court failed to apply these principles to determine whether appellate court review of sentences is unconstitutional multiple punishmcnt.

A. *The Relationship Between Government Appeals and the Prohibition Against Multiple Prosecutions.*

1. *The Government's Right to Appeal.* The United States can appeal a criminal case only when Congress has granted it explicit authority to do so.[32] At the time of the ratification of the fifth amendment, most criminal prosecutions proceeded to final judgment, and neither the United States nor the defendant had any right to appeal.[33]

In 1802, however, Congress provided for review of some criminal cases by the Supreme Court, but only upon a certificate of division from the circuit court, and not at the instigation of the defendant.[34] These requirements were changed in 1889, when Congress enacted legislation permitting criminal defendants in capital cases to seek a writ of error from the Supreme Court.[35] Two years later, Congress extended the right to appeal to defendants in all federal criminal cases.[36] This expansion of defendants' rights did not remove the limitation on the government's right to appeal. The Supreme Court held that the provisions of the Judiciary Act of 1891[37] were not sufficiently explicit to satisfy the common law rule requiring an express grant by the legislature before the government could issue a writ of error in a criminal case.[38]

In 1907 Congress passed the first Criminal Appeals Act, which allowed appeals by the government in limited situations.[39] The Act permitted the government to appeal from a decision dismissing an

32. *See* Abney v. United States, 431 U.S. 651, 656 (1977). In the case of dangerous special offenders the applicable statute is 18 U.S.C. § 3576 (1976).

33. *See* Abney v. United States, 431 U.S. 651, 656 (1977).

34. Act of April 29, 1802, ch. XXXI, § 6, 2 Stat. 159.

35. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656.

36. Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 827.

37. *Id.*

38. United States v. Sanges, 144 U.S. 310, 318, 322-23 (1892).

39. Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246 (current version at 18 U.S.C. § 3731 (1976)).

indictment or arresting judgment when the decision was based on the construction of a statute or on a finding that a statute is invalid.[40] The Criminal Appeals Act was amended in 1942 to permit appeals by the government from decisions granting dismissal or arrest of judgment on grounds other than the construction or invalidity of a statute.[41]

Congress repealed the 1907 Act in 1970 and replaced it with a new Criminal Appeals Act.[42] The legislative history makes it clear that Congress intended to remove all statutory barriers to government appeals, thereby allowing appeals whenever constitutionally permissible.[43] This change shifted the focus of attention in government appeals cases from questions of statutory construction to the scope and meaning of the double jeopardy clause.[44]

2. *Double Jeopardy Clause Limitations on Government Appeals.*

The double jeopardy clause had its origin in the three common law pleas of autrefois acquit, autrefois convict, and pardon.[45] These three pleas prevented the retrial of a person who had been previously acquitted, convicted, or pardoned for the same offense. On the basis of this common law background, the Supreme Court has concluded that the "controlling constitutional principle" of the double jeopardy clause is the prohibition against multiple trials.[46] At the heart of this policy is the concern that permitting the sovereign to subject a citizen to a second trial for the same offense would arm the government with a potent instrument of oppression.[47]

Cases applying these principles indicate, however, that the double jeopardy clause does not automatically bar a government appeal after a

40. The Act also permitted the government to appeal from a decision sustaining a special plea in bar when the defendant had not been put in jeopardy. Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246 (current version at 18 U.S.C. § 3731 (1976)).

41. Act of May 9, 1942, ch. 295, 56 Stat. 271. In 1968, the statute was further amended to authorize prosecutorial appeals from pretrial rulings granting motions to suppress or return seized property. Title VIII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 237 (codified at 18 U.S.C. § 3731 (1976)).

42. Congress enacted the new statute as Title III of the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1890 (codified at 18 U.S.C. § 3731 (1976)).

43. *See* United States v. Wilson, 420 U.S. 332, 337 (1975). For a thorough account of the enactment and development of the Act, see United States v. Sisson, 399 U.S. 267, 291-96 (1970). *See generally* Green v. United States, 355 U.S. 184, 187-88 (1957).

44. United States v. Scott, 437 U.S. 82, 85-86 (1978).

45. W. BLACKSTONE, COMMENTARIES *335-37. As early as the 15th century the English courts used the term "jeopardy" in connection with the prohibition against multiple trials. *See* Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. PA. L. REV. 602, 613 (1934).

46. United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (quoting United States v. Wilson, 420 U.S. 332, 346 (1975)). See note 29 *supra*.

47. Green v. United States, 355 U.S. 184, 187-88 (1957).

defendant has been acquitted;[48] nor does it automatically prohibit a second prosecution when the defendant appeals a conviction[49] or the government appeals a midtrial termination of a case favorable to the defendant.[50] An examination of the relationship of government appeals to acquittals, convictions, and midtrial termination of cases reveals that the double jeopardy clause proscribes government appeals only when there is a danger of government oppression through multiple prosecutions.

(a) *Acquittals.* The Supreme Court has determined that the double jeopardy guarantee against multiple prosecutions consists of three separate constitutional protections. The first is a protection against a second prosccution for the same offense after an acquittal.[51] *United States v. Ball*[52] presented to the Supreme Court, for the first time, a challenge to a second prosecution after an acquittal. In *Ball*, three persons had been tried together for murder; two were convicted, and the other was acquitted. The Supreme Court reversed the convictions because the indictment was defective.[53] In a second trial, in which the defendant originally acquitted was retricd along with the defendants origmally convicted, all three defendants were convicted. The Supreme Court held that the double jeopardy clause prohibited the second prosecution of the formerly acquitted defendant, but that the clause did not bar the prosecution of those defendants who had been convicted in the earlier proccedmg.[54] The Court explained that the fifth amendment did not allow the government to prosecute the defendant after a finder of fact had already ruled in his favor.[55]

In the 1904 case of *Kepner v. United States*,[56] the Supreme Court applied the *Ball* principle to a government appeal. Although statutory restrictions limited the government's right to appeal prior to 1970,[57] *Kepner* presented an unusual situation. Kepner had been acquitted in

48. See notes 69-70 *infra* and accompanying text.

49. See notes 72-88 *infra* and accompanying text.

50. See note 112 *infra* and accompanying text.

51. *See* United States v. Wilson, 420 U.S. 332, 343 (1975); United States v. Lasater, 535 F.2d 1041, 1047 (8th Cir. 1976); United States v. Jacamillo, 510 F.2d 808, 811 (8th Cir. 1975); United States v. Southern Ry., 485 F.2d 309, 312 (4th Cir. 1973); United States v. Findley, 439 F.2d 970, 972 (1st Cir. 1971).

52. 163 U.S. 662 (1896).

53. Ball v. United States, 140 U.S. 118 (1891).

54. United States v. Ball, 163 U.S. 662, 671-72 (1896). See text accompanying notes 71-73 *infra*.

55. 163 U.S. at 672.

56. 195 U.S. 100 (1904).

57. See notes 33-43 *supra* and accompanying text.

his original trial in the Philippine Islands, but traditional Philippine procedure provided for a trial de novo upon appeal.[58] The appellate court convicted Kepner in the trial de novo. The Supreme Court reversed, holding that the proceeding in the appellate court was a second trial on the merits, in violation of the double jeopardy clause prohibition against placing a person in jeopardy for the same offense after acquittal.[59] In subsequent cases, the Court has applied *Kepner* to forbid retrial of an acquitted defendant.[60]

The Court next dealt with these issues in *Green v. United States*.[61] Green had been tried and convicted of first-degree murder after an appellate court had reversed his earlier conviction of the lesser included offense of second-degree murder. The Court first rejected the argument that the defendant's appeal of the second-degree murder conviction operated as a waiver of his plea of former jeopardy with regard to the charge of first-degree murder. The Court then reversed the conviction obtained at the retrial, on the ground that the first jury's verdict of guilty on the second-degree murder charge was an "implicit acquittal" on the charge of first-degree murder.[62] Furthermore, the Court reasoned that the defendant had been placed in jeopardy on the greater charge when the jury in the first trial "was given a full opportunity to return a verdict" on that charge, even though the jury instead returned a guilty verdict on the lesser charge.[63] The Court described its conclusion as consistent with the purpose underlying the prohibition against multiple prosecutions:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated at-

58. An act of Congress had expressly made the principles of the double jeopardy clause applicable to criminal prosecutions in the Philippine Islands, a territory of the United States. 195 U.S. at 133-34.

59. Although *Kepner* technically involved only a single proceeding, the Court regarded the practice as equivalent to two separate trials. *Id.* at 133.

60. *See* United States v. Wilson, 420 U.S. 332, 347 n.16 (1975); Palko v. Connecticut, 302 U.S. 319, 322-23 (1937); Stroud v. United States, 251 U.S. 15, 18 (1919).

61. 355 U.S. 184 (1957).

62. *Id.* at 190.

63. *Id.* at 191. Similarly, in Price v. Georgia, 398 U.S. 323 (1970), the defendant was tried for murder and convicted of second-degree murder, the lesser included offense. Following a reversal of the conviction, the defendant was retried for murder and again found guilty of second-degree murder. The Supreme Court held that the second trial violated the double jeopardy clause. Although the defendant was not convicted of the greater charge on retrial, the Court found that "[t]he Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not the ultimate legal consequences of the verdict." *Id.* at 331. *See also* United States v. Barket, 530 F.2d 181, 186 (8th Cir. 1975), *cert. denied*, 429 U.S. 917 (1976); United States *ex rel.* Rogers v. La Vallee, 517 F.2d 1330, 1332-33 (2d Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976); United States v. Lansdown, 460 F.2d 164, 171 (4th Cir. 1972).

> tempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[64]

The *Ball*, *Kepner*, and *Green* decisions demonstrate that the double jeopardy clause protects a defendant from a second prosecution after he has been acquitted by the trier of fact. These cases did not, however, present the question whether the double jeopardy clause prevents the government from appealing an acquittal when a successful appeal would not necessitate a second prosecution. This situation arises when the government appeals an acquittal by a trial judge after the jury has returned a verdict of guilty. The defendant is not placed in jeopardy of a second prosecution; he risks only having the trial judge's acquittal vacated and the jury's guilty verdict reinstated.

The Court addressed this question in *United States v. Wilson*.[65] In *Wilson* a jury had entered a verdict of guilty against the defendant for a federal offense, but the district court dismissed the indictment on the defendant's post-verdict motion, alleging pre-indictment delay. The court of appeals determined that the post-verdict dismissal of the indictment was an acquittal and, to avoid double jeopardy, dismissed the government's appeal.[66] Reversing the court of appeals, the Supreme Court held that the government may, without violating the double jeopardy clause, appeal from a trial judge's ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact.[67] The Court concluded that the double jeopardy clause prohibits government appeals after an acquittal only when there is a danger of subjecting the defendant to a second trial for the same offense:

> Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.[68]

Because reversal of the trial judge's post-verdict action would merely reinstate the jury verdict and would not grant the prosecution a new

64. 355 U.S. at 187-88.

65. 420 U.S. 332 (1975). *See also* United States v. Cravero, 530 F.2d 666, 669 (5th Cir. 1976); United States v. Burnette, 524 F.2d 29-30 (5th Cir. 1975), *cert. denied*, 425 U.S. 939 (1976).

66. 492 F.2d 1345, 1348 (3d Cir. 1973).

67. 420 U.S. at 352-53. The Court found that because there was no danger of subjecting the defendant to a second trial, any controversy respecting whether the trial court's order was an actual acquittal or simply a dismissal of the indictment was irrelevant in determining protections afforded by the double jeopardy clause. *Id.* at 336.

68. *Id.* at 345.

trial or subject the defendant to multiple prosecution, the government's appeal in *Wilson* did not violate the double jeopardy clause.[69]

In sum, the double jeopardy clause's protection against multiple prosecutions does not automatically prevent the government from appealing an acquittal. An appeal is impermissible only when it threatens the defendant with a second prosecution.[70]

(b) *Convictions.* Along with determining that the double jeopardy clause precludes further prosecution of a defendant who has been acquitted at the original trial, *United States v. Ball*[71] established that the clause does not prohibit a second trial following a defendant's successful appeal of a conviction.[72] Referring to the two defendants formerly found guilty, the Court stated:

> Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. . . . [I]t is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment for the same offense of which he had been convicted.[73]

Supreme Court decisions after *Ball* lacked consistency and clarity regarding what circumstances, other than reversal of a conviction because of a faulty indictment, would permit the retrial of a defendant who successfully appealed his conviction.[74] Much of the conceptual

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69. [W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended . . . . Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution.

Id. at 344-45.

70. The Court applied this principle in United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). It held that the double jeopardy clause barred an appeal by the government from a trial judge's judgment of acquittal after a deadlocked jury was discharged. The Court recognized that the "controlling constitutional principle" of the double jeopardy clause focuses on prohibitions against multiple trials, and "where a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *Id.* at 569-70. In *Martin Linen Supply* a second prosecution would have been required had the government's appeal been successful; accordingly, the government appeal was barred.

71. 163 U.S. 662 (1896). See notes 52-55 *supra* and accompanying text.

72. *See* United States v. Scott, 437 U.S. 82, 89 (1978). The Court, referring to *Ball*, stated: "In the very first case presenting the issues [of challenging verdicts on appeal], the Court established principles that have been adhered to ever since." *Id.* at 88.

73. 163 U.S. 662, 671-72 (1896) (citations omitted).

74. *See* Forman v. United States, 361 U.S. 416, 425 (1960) (where a conviction was reversed because of trial error, the double jeopardy clause did not prevent a new trial); Yates v. United States, 354 U.S. 298, 328 (1957) (implying that appellate courts have authority to order a new trial as a remedy for evidentiary insufficiency, even when the defendant has moved only for a judgment of acquittal); Sapir v. United States, 348 U.S. 373 (1955) (a defendant whose conviction was reversed because of insufficient evidence could not be retried); Bryan v. United States, 338 U.S.

confusion in this area of the law was caused by the Court's failure to distinguish between reversals due to trial errors and those resulting from evidentiary insufficiency.[75] Further confusion arose when the Court attempted to distinguish between defendants seeking only a judgment of acquittal and those seeking either a judgment of acquittal or a new trial.[76]

The Supreme Court recently resolved these issues in *Burks v. United States.*[77] In *Burks* the jury rejected the defendant's insanity defense and found him guilty of bank robbery. The defendant moved for a new trial on the ground that the evidence was insufficient to support the verdict, but the trial court denied the motion. The Court of Appeals for the Sixth Circuit, holding that the government had failed to rebut the defendant's proof of insanity, reversed and remanded the case to the district court to determine whether a directed verdict of acquittal should be entered or a new trial ordered.[78] The Supreme Court reversed the court of appeals and remanded the case, finding that because the double jeopardy clause "precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for the court is the direction of a judgment of acquittal."[79]

The *Burks* Court distinguished a reversal for trial error from a reversal for evidentiary insufficiency. It justified the use of a retrial to correct trial error by explaining, "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error on the proceedings leading to conviction."[80] Because a reversal for trial error does not indicate that the government failed to prove its case, the reversal provides no implication that the defendant is innocent. It simply determines that the defendant was convicted in a defective judicial proceeding.[81] Therefore, the Court concluded, the accused has a strong interest in obtaining a fair adjudication of his guilt free from error, just as society has a valid interest in insuring that the guilty are punished.[82]

552 (1950) (where a conviction was reversed because of insufficient evidence, the defendant could be retried).

75. See cases cited in note 74 *supra.*

76. See text accompanying notes 86-87 *infra* and cases cited in note 74 *supra.*

77. 437 U.S. 1 (1978).

78. United States v. Burks, 547 F.2d 968, 970 (6th Cir. 1976), *rev'd,* 437 U.S. 1 (1978).

79. 437 U.S. at 18.

80. *Id.* at 15 (quoting United States v. Tateo, 377 U.S. 463, 466 (1964)). *See also* United States v. Wilson, 420 U.S. 332, 343-44 n.11 (1975); Wade v. Hunter, 336 U.S. 684, 688-89 (1949).

81. 437 U.S. at 15.

82. *Id.* (citing Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence,* 31 U. CHI. L. REV. 365, 370 (1964)).

The Court relied strongly on *Ball*, which also involved trial error (the failure to dismiss a faulty indictment).[83]

In contrast, when a conviction has been set aside because of insufficient evidence, as in *Burks*, the prosecution has been given a fair opportunity to offer whatever proof it could assemble.[84] The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. Thus, when an appellate reversal means the government's case was so lacking that it should not have been submitted to the jury, the defendant should receive the same double jeopardy protections afforded to a defendant receiving a jury's verdict of acquittal.[85]

The *Burks* decision overruled a line of cases that held that a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency by moving for a new trial.[86] The *Burks* Court decided that a defendant's voluntary choice to seek a new trial does not preclude the application of double jeopardy principles.[87] Reversal of the defendant's conviction because the evidence was insufficient operates as an acquittal which bars a second prosecution. Only when the reversal of a conviction is due to trial error is a defendant subject to a new trial.[88]

(c) *Midtrial terminations.* The issue of the relationship between double jeopardy protections and government appeals also arises when a trial is terminated before final judgment is entered. For example, the trial judge may grant a motion for mistrial or terminate the proceeding favorably to the defendant on a basis not related to a factual determi-

83. The cases cited as precedent in *Ball* involved trial error as well. *See* Hopt v. Utah, 120 U.S. 430 (1887); Commonwealth v. Gould, 78 Mass. (12 Gray) 171 (1858) (defendant was tried on a superseding indictment after the original indictment had been challenged); Regina v. Drury, 175 Eng. Rep. 517 (Q.B. 1849) (improper sentence).

Hopt was the last of four appeals from a murder conviction in the territory of Utah. The first three convictions were reversed because of trial errors, including improper instruction, Hopt v. People, 104 U.S. 631 (1881); absence of the accused during a portion of the trial, improper admission of hearsay evidence, and prejudicial instruction, Hopt v. Utah, 110 U.S. 574 (1884); and inadequacy of the record because the jury instructions were not recorded, Hopt v. Utah, 114 U.S. 488 (1885).

84. 437 U.S. at 16. The Court decided that an appellate court's finding that the evidence was insufficient is equivalent to a determination that the prosecution failed to prove guilt beyond a reasonable doubt. *Id.* at 16 n.10 (citing American Tobacco Co. v. United States, 328 U.S. 781, 787 n.4 (1946)).

85. 437 U.S. at 16.

86. *Id.* at 18. See cases cited in note 83 *supra*.

87. 437 U.S. at 18.

88. *See also* United States v. Jaramillo, 510 F.2d 808, 810 (8th Cir. 1975); United States v. Rothfelder, 474 F.2d 606, 608 (6th Cir.), *cert. denied*, 413 U.S. 922 (1973).

nation of guilt or innocence.[89] According to the Supreme Court, the double jeopardy clause does not forbid a new trial when the court declares a mistrial for "manifest necessity,"[90] or in the absence of prosecutorial or judicial overreaching;[91] when an indictment is dismissed at the defendant's request in circumstances functionally equivalent to a mistrial;[92] or when the defendant requests the dismissal of an indictment without any submission to the judge or jury of the question of his guilt.[93]

Recently, in *United States v. Scott*,[94] the Court firmly established the relevant principles in determining whether a midtrial termination of a case bars a government appeal. The issue in *Scott* was whether the dismissal of an indictment for pre-indictment delay barred an appeal by the government under the double jeopardy clause. Three terms earlier the Court had held in *Jenkins v. United States*[95] that regardless of whether an acquittal was on the merits of the prosecution's case, the government had no right to appeal after jeopardy had attached[96] because "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand."[97] Acknowledging "vastly increased exposure to the various facets of the Double Jeopardy Clause,"[98] the *Scott* Court overruled *Jenkins* and held that when the

89. United States v. Scott, 437 U.S. 82, 92 (1978).

90. Wade v. Hunter, 336 U.S. 684, 689-90 (1949). See notes 102-03 *infra* and accompanying text.

91. United States v. Dinitz, 424 U.S. 600, 607 (1976).

92. Lee v. United States, 432 U.S. 23 (1977). *See also* Jeffers v. United States, 432 U.S. 137 (1977).

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

94. *Id.*

95. 420 U.S. 358 (1975), *overruled*, United States v. Scott, 437 U.S. 82 (1978).

96. The courts have developed the concept of "attachment of jeopardy" in order to define the point in criminal proceedings at which the prohibitions of the double jeopardy clause can be invoked. Serfass v. United States, 420 U.S. 377, 389-93 (1975). In a jury trial, jeopardy attaches when the jury is impaneled and sworn in. Illinois v. Somerville, 410 U.S. 458 (1973); Downum v. United States, 372 U.S. 734 (1963). In a nonjury trial jeopardy attaches when the court begins to hear evidence. McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir. 1936); *see* Wade v. Hunter, 336 U.S. 684, 688 (1949). The defendant is not subjected to jeopardy until he "is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.' " Serfass v. United States, 420 U.S. 377, 388 (1975) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)). *See* Collins v. Loisel, 262 U.S. 426, 429 (1923); Bassing v. Cady, 208 U.S. 386, 391-92 (1908); United States v. Macdonald, 207 U.S. 120, 127 (1907).

97. 420 U.S. at 370.

98. 437 U.S. 82, 86 (1978). The Court explained that it had previously placed an "unwarrantedly great emphasis on the defendant's right to have his guilt decided" by the first trier of fact regardless of whether the defendant himself had been responsible for termination of the trial. *Id.* at 87.

defendant seeks to have the trial terminated without any determination of his guilt or innocence, the government can appeal.[99]

After discussing the double jeopardy protections that arise once a final judgment has been entered,[100] the Court considered the protections that apply to trials terminated prior to final judgment. With regard to mistrials, the Court had previously determined that a trial judge who declares a mistrial invariably contemplates that a second trial will take place.[101] Because the contemplations of the judge are not conclusive on the issue of double jeopardy, the propriety of declaring a mistrial is determined by balancing " 'the valued right of a defendant to have his trial completed by [a] particular tribunal' . . . against the public interest . . . that justice [be] meted out to offenders."[102] If there is a "manifest necessity" for a mistrial, or if the ends of public justice would otherwise be defeated, the declaration of a mistrial is proper and a second prosecution is not barred.[103]

Next the Court considered the double jeopardy implications of a case in which the defendant moves for a mistrial. The Court reaffirmed previous determinations[104] that a mistrial granted at the defendant's request ordinarily removes any barrier to a second prosecution.[105] The defendant's motion is regarded as a deliberate election to forego the right to have the first trier of fact determine his guilt or innocence. The Court noted the importance of the defendant's retention of primary control over the course to be followed when there is prosecutorial or judicial error before a determination of guilt.[106] Unless the govern-

99. Despite the principle of stare decisis, the Court "bow[ed] to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Id.* at 101 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting)).

100. The Court summarized the double jeopardy protections that arise after a final judgment has been entered:

> (1) the appeal of a conviction on grounds other than insufficiency of evidence poses no bar to further prosecution and (2) a judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed when a second prosecution would be necessitated by a reversal.

437 U.S. at 90-91. The Court noted that the law attaches particular significance to an acquittal because of the risk of government oppression, *see* Fong Foo v. United States, 369 U.S. 141 (1962) (even though judgment of acquittal was entered erroneously by trial judge, the double jeopardy clause barred a second trial); Kepner v. United States, 195 U.S. 100 (1904), but that the same risk of oppression does not exist upon the retrial of an individual who has had his conviction overturned on appeal. 437 U.S. at 91.

101. 437 U.S. at 92. *See* Lee v. United States, 432 U.S. 23, 30 (1977).

102. 437 U.S. at 92 (quoting Downum v. United States, 322 U.S. 734, 736 (1963)).

103. 437 U.S. at 93 (quoting United States v. Perez, 22 U.S. (9 Wheat.) 194, 194 (1824)).

104. United States v. Dinitz, 424 U.S. 600, 609 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971).

105. 437 U.S. at 93.

106. *Id.* at 93-94. *See* United States v. Dinitz, 424 U.S. 600, 609 (1976).

ment's actions are intended to provoke a mistrial, thereby subjecting a defendant to the substantial burdens imposed by successive prosecutions, the double jeopardy clause does not protect a defendant who obtains a mistrial from a second prosecution.[107]

After laying this foundation, the *Scott* Court turned to the relationship between the double jeopardy clause and a second prosecution after a defendant has successfully terminated the trial in his favor before a determination of guilt or innocence. Unlike a declaration of mistrial, the Court observed, "the granting of a motion such as this . . . contemplates that the proceedings will terminate then and there in favor of the defendant."[108] The prosecution must appeal the decision of the trial court in order to reinstate the proceedings. Moreover, the Court observed that the underlying purpose of the double jeopardy clause is to prevent the government, with all of its resources and power, from making repeated attempts to convict an individual for an alleged offense.[109] The Court concluded that because there is no government oppression where the defendant elects to seek termination of the trial before the issue of guilt is submitted to the jury, the double jeopardy clause should not bar a subsequent government appeal.[110] The Court indicated that it was not adopting a doctrine of "waiver" of double jeopardy, but that the double jeopardy clause simply does not relieve a defendant from the consequences of his voluntary choice.[111] The Court therefore determined "that Government appeals from midtrial dismissals requested by the defendant would significantly advance the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case, without 'enhancing the possibility that even though innocent he may be found guilty.' "[112]

B. *Double Jeopardy Restrictions on Government Appeals.*

As discussed above, a court determining whether the double jeopardy clause protects a defendant from a government appeal must avoid rejecting altogether the concept of government appeals and instead

107. 437 U.S. at 96.

108. *Id.* at 94.

109. *Id.* at 96.

110. *Id.*

111. The court distinguished the appeal of a conviction from a voluntary choice to terminate a trial without any finding of guilt or innocence. *Id.* at 100-101. In the appeal of a conviction, as in *Burks*, the appellate court can determine that a criminal defendant lacked criminal culpability. 437 U.S. at 97-98. By contrast, the dismissal of an indictment "represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation." *Id.* at 98-99. In the latter case, an appeal by the government does not offend the double jeopardy clause. *Id.*

112. *Id.* at 101 (quoting Green v. United States, 355 U.S. 184, 188 (1957)).

must consider whether the actions of the government oppress the defendant by subjecting him to multiple prosecutions or multiple punishment.[113] This consideration requires a court to focus on the principles underlying the multiple prosecution and multiple punishment doctrines. The rule against multiple prosecutions is based on the principle that the government "should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to the embarrassment, expense, and ordeal [of a second prosecution,] as well as enhancing the possibility that though innocent he may be found guilty."[114] When the second prosecution of a defendant does not violate this principle, the second prosecution is not barred. Thus, although the government cannot appeal an acquittal which will require a second prosecution, it can appeal an acquittal which will reinstate a jury's verdict of guilty;[115] and although the government cannot appeal a mistrial declared by a judge absent a "manifest necessity," it can appeal a mistrial declared by a judge in the absence of judicial or prosecutorial overreaching.[116] In each of the above instances, the court must go beyond determining whether a second prosecution will result and ask whether the practice in question violates the defendant's right to be free from repeated attempts by the government to convict him.

The Supreme Court has determined that the principle underlying the prohibition against multiple punishment is that an individual should not be penalized twice for the same offense.[117] In *United States v. DiFrancesco*[118] the court of appeals concluded that the government could not, consistent with the double jeopardy clause's prohibition of multiple punishment, seek to increase through the appellate process the sentence imposed by the trial court. The court reasoned that the double jeopardy clause reflects disapproval of government appeals, and that the appeal would subject the defendant to jeopardy in the appellate court. This analysis, however, is unsound. The multiple prosecution cases demonstrate that the double jeopardy clause does not forbid all government appeals,[119] and that the clause does not protect the de-

113. As stated in United States v. Martin Linen Supply Co., 430 U.S. 564, 569-70 (1977), in reference to the relationship of government appeals to multiple prosecutions (and relevant also to multiple punishment): "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended."

114. Green v. United States, 355 U.S. 184, 187-88 (1957). See notes 109-10 *supra* and accompanying text.

115. United States v. Wilson, 420 U.S. 332, 352-53 (1975). See notes 65-70 *supra* and accompanying text.

116. See notes 90-91 *supra* and accompanying text.

117. One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235-36 (1972); Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

118. 604 F.2d 769 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980) (No. 79-567).

119. The appellate court strongly emphasized that the government's appeal would violate the

fendant from jeopardy unless oppression is present.[120] Although the *DiFrancesco* court engaged in a cursory discussion of cases prohibiting a *trial* court from increasing a sentence after the completion of the sentencing procedure,[121] it failed to analyze the quite different question of whether congressional redefinition of the sentencing procedure to include *appellate* review constituted an oppressive multiple punishment forbidden by the clause. The next section of this Note will address this issue.

III. GOVERNMENT APPEALS OF SENTENCES AS MULTIPLE PUNISHMENT

A. *Application of the Multiple Punishment Doctrine to Criminal Proceedings.*

Questions concerning the application of the multiple punishment doctrine[122] arise with respect to each of the doctrine's three principal areas of protection. First, when a defendant's conduct in a single act or transaction violates two statutes, may the defendant be punished under both?[123] Second, when a statute proscribes designated conduct, can the defendant's conduct constitute more than one violation of the proscrip-

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double jeopardy clause because the defendant had not chosen voluntarily to seek review. 604 F.2d at 785-86. Voluntary consent would be required, however, only when the government's appeal otherwise would be barred. See notes 109-12 *supra* and accompanying text.

120. See note 113 *supra*.

121. 604 F.2d at 784-85. See notes 152-57 *infra* and accompanying text.

122. *See* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235-36 (1972); Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

At the time the fifth amendment was adopted, imprisonment had only recently emerged as an alternative to the death penalty, whippings, and confinement in public stocks. *See* United States v. Grayson, 438 U.S. 41, 45 (1978). In most instances the legislature prescribed the period of incarceration for each crime with specificity. *Id.* Mandatory sentences, however, soon gave way in some jurisdictions to schemes permitting the sentencing judge, or jury, to consider aggravating and mitigating circumstances and to select a sentence within a range defined by the legislature. *Id.* at 45-46. *See also* Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, 529 (1958). Although the original purpose of incarceration had been retribution and punishment, *see* S. RUBIN, LAW OF CRIMINAL CORRECTION 132-33 (2d ed. 1973), rehabilitation later became an additional element, making the system of punishment more flexible. *Id.* See also Williams v. New York, 337 U.S. 241 (1949), in which Justice Black observed that the "prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime," and that, accordingly, sentences should be determined with an eye toward the "[r]eformation and rehabilitation of offenders." *Id.* at 247-48.

Today the length of a federal prisoner's confinement is determined initially by the sentencing judge, who selects a term within an often broad, congressionally prescribed range. The United States Parole Board may, as a general rule, conditionally release a prisoner at any time after he serves one-third of the judicially fixed term. *See* 18 U.S.C. § 4205 (1976).

123. *See* Brown v. Ohio, 432 U.S. 161, 166 (1977); Iannelli v. United States, 420 U.S. 770, 785-86 (1975); Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Jackson, 482 F.2d 1167, 1176 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974); Henley v. United States, 433

tion?[124] Third, does a court's increasing a validly imposed sentence or superimposing a new sentence upon one already served constitute double punishment?[125] In the above instances, the double jeopardy guarantee against multiple punishment serves primarily as a restraint on prosecutors and the courts,[126] who determine the charges to be brought and the sentences to be imposed. In effect, the clause serves principally to ensure that neither the courts nor the prosecutors subject defendants to a greater punishment than the legislature has authorized.[127]

The application of the double jeopardy clause to these situations is consistent with the goal of preventing individuals from being punished twice for the same offense. When a defendant is prosecuted for two separate offenses arising from the same act or transaction, courts apply a test[128] which asks whether each offense "requires proof of an additional fact which the other does not."[129] Substantial overlapping of the proof offered to establish the crime satisfies the test so long as each crime requires an additional element.[130] If the offenses are the same under this test, however, consecutive sentences at a single trial are barred.[131]

The second context in which the multiple punishment doctrine arises illustrates that Congress has great latitude under the double jeopardy clause to define crimes and establish sentences.[132] Courts are guided by congressional intent in determining whether numerous viola-

F.2d 960, 961 (5th Cir. 1970); United States v. Minchew, 417 F.2d 218, 220 (5th Cir. 1969), *cert. denied*, 397 U.S. 1014 (1970).

124. *See* Bell v. United States, 349 U.S. 81, 83-84 (1955); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952); United States v. Canty, 469 F.2d 114, 126-27 (D.C. Cir. 1972).

125. *See* United States v. Benz, 282 U.S. 304, 307 (1931); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 175-78 (1873); United States v. Durbin, 542 F.2d 486, 487-88 (8th Cir. 1976); United States v. Chiarella, 214 F.2d 838, 841 (2d Cir.), *cert. denied*, 348 U.S. 902 (1954); *cf.* Robinson v. Warden, Md. House of Correction, 455 F.2d 1172, 1175 (4th Cir. 1972) (multiple punishment could not arise until the original sentence had been completely served).

126. Brown v. Ohio, 432 U.S. 161, 165 (1977).

127. *Id.*

128. The test, known as the *Blockburger* test, was adopted by the Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932).

129. *Id.* at 304. *See also* Brown v. United States, 432 U.S. 161, 166 (1977).

130. Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

131. See note 126 *supra*. For example, "selling liquor on a Sunday might warrant two punishments for violating a prohibition law and a blue law, but feloniously entering a bank and robbing a bank, though violative of two statutes, might warrant but a single punishment." Gore v. United States, 357 U.S. 386, 394 (1958) (Warren, C.J., dissenting).

132. Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 665 (1974); *see* Gore v. United States, 357 U.S. 386, 393 (1958); Bell v. United States, 349 U.S. 81, 82 (1955).

tions of a single statute are multiple offenses.[133] There is no violation of the rule against multiple punishment if Congress has provided for cumulative punishment for multiple violations of a statute.[134] A defendant can be punished for only one offense, however, when Congress does not provide for cumulative punishment, or if the intent of Congress is unclear.[135] In *Bell v. United States*[136] the Supreme Court addressed the question whether the simultaneous transportation of two women in interstate commerce constituted two offenses under the Mann Act.

> Once more it becomes necessary to determine 'What Congress has made the allowable unit of prosecution' . . . under a statute which does not explicitly give the answer . . . . The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment. Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so?[137]

The Court concluded that Congress had not expressed a clear intent to authorize cumulative punishment under the Mann Act, and that absent a clear expression, "doubt will be resolved against turning a single transaction into multiple offenses."[138]

The third goal of the multiple punishment doctrine is to prevent the courts from increasing a sentence after the sentencing procedure for a defendant has been concluded. The Supreme Court established in *Ex Parte Lange*[139] that a court may not add a new sentence to one already completed. In *Lange* the defendant had been fined, one of the alternative penalties prescribed by a statute. The Court found that the double jeopardy clause protected him from the subsequent imposition of a prison sentence.[140] The Supreme Court has subsequently indicated in dictum,[141] and a majority of lower courts have held,[142] that increasing a

133. Bell v. United States, 349 U.S. 81, 82-83 (1955).

134. *Id.*

135. See cases cited in note 124 *supra*.

136. 349 U.S. 81 (1955).

137. *Id.* at 81-83 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952)).

138. 349 U.S. at 84.

139. 85 U.S. (18 Wall.) 163, 175-78 (1874).

140. *Id.* See text accompanying notes 155-56 *infra*.

141. United States v. Benz, 282 U.S. 304, 307 (1931). See notes 152-56 *infra* and accompanying text.

142. *See* United States v. Durbin, 542 F.2d 486, 487-88 (8th Cir. 1976); United States v. Chiarella, 214 F.2d 838, 841 (2d Cir.), *cert. denied*, 348 U.S. 902 (1954); Oxman v. United States, 148 F.2d 750, 753 (8th Cir.), *cert. denied*, 325 U.S. 887 (1945); Frankel v. United States, 131 F.2d 756, 758 (6th Cir. 1942).

validly imposed and partially served sentence constitutes multiple punishment. If, however, the sentence initially imposed is not valid, such as when the court sentences the defendant to less than the minimum term required by statute, the defendant has not suffered lawful punishment and an appellate court may correct the invalid sentence by increasing the punishment.[143] Under such circumstances, the increase does not violate the rule against multiple punishment.[144]

B. *The Multiple Punishment Doctrine's Restrictions on Congress.*

The multiple punishment restrictions discussed thus far operate primarily as restraints on the actions of courts and prosecutors.[145] Congress remains free to define separate crimes and to fix punishments for a defendant's behavior during a single act or transaction.[146] The protection against increases of a validly imposed sentence mandates only that once a defendant has received punishment authorized by Congress, the courts cannot increase it. As long as Congress acts within its power to establish crimes and fix punishments, it does not violate the principles of the multiple punishment doctrine.[147]

Congressional action could conceivably contravene the third aspect of the doctrine by authorizing or directing courts or prosecutors to increase a sentence after the sentencing procedure for the defendant has been concluded. In contrast, congressional authorization of double punishment would not violate the first prohibition of the multiple punishment doctrine.[148] If Congress intended to define certain acts as constituting more than one crime, or to punish repeated acts as repeated violations of a statute, congressional intent would prevail over double jeopardy concerns. Thus, with respect to appellate review of sentences,

143. *See* Bozza v. United States, 330 U.S. 160, 166, 167 n.2 (1947); Murphy v. Massachusetts, 177 U.S. 155, 157 (1900); United States *ex rel.* Ferrari v. Henderson, 474 F.2d 510, 513 (2d Cir. 1973); United States v. Solomon, 468 F.2d 848, 852 n.8 (7th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973); United States v. Evans, 459 F.2d 1134, 1136 (D.C. Cir. 1972).

144. See cases cited in note 143 *supra*.

145. Brown v. Ohio, 432 U.S. 161, 165-66 (1977); Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 391-93, 280 N.W.2d 793, 796-97 (1979). As the Court stated in *Brown*, "once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure the punishment in more than one trial." 432 U.S. at 165.

146. See notes 132-38 *supra* and accompanying text.

147. See cases cited in note 145 *supra*. The *Brown* Court stated: "The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments . . . ." 432 U.S. at 165.

148. For an argument that Congress has the power to punish an individual twice for the same offense, notwithstanding the double jeopardy clause, see Note, *supra* note 2, at 302-04. The author contended that "double jeopardy's prohibition of multiple punishment would be absurd as a substantive limitation on the legislature," and concluded that "increasing penalties is clearly within the power of the legislature." *Id.* 302.

the only question is whether Congress violated the third protection of the multiple punishment doctrine by authorizing the appellate courts to increase a validly imposed sentence.[149]

C. *The Constitutionality of Appellate Review of Sentences.*

1. *The* DiFrancesco *Court's Discussion.* The *DiFrancesco* court discussed various cases purportedly supporting its conclusion that increasing sentences during appellate review constitutes multiple punishment.[150] Although these cases do contain dicta to that effect, they confront only the usual restrictions on the courts after a valid sentence has been imposed and the sentencing process has been completed.[151] The *DiFrancesco* court did not consider whether congressionally authorized review of sentences should be treated as a part of the initial sentencing process. If sentencing by the trial court and review by the appellate court are treated as a single congressionally mandated sentencing process, the increased sentence problem does not arise because there is no final sentence until the entire process is complete.

The dictum cited most often to prohibit increases in sentences is from *United States v. Benz.*[152] In *Benz* the Court faced the question whether a district judge has the power, upon petition by a defendant, to reduce the defendant's sentence. The Court noted the then-prevailing general rule that judgments, decrees, and orders could be amended, modified, or vacated by the court that made them, provided the punishment was not augmented.[153] The Court held that because the district court had decreased the sentence, it had acted within its power. The Court argued that "to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution . . . ."[154] The *Benz* dictum does not pertain to *DiFrancesco*, because *Benz* dealt with the problem of a trial judge exceeding his statutory authority, not with whether increases in sentences authorized by Congress are unconstitutional.

149. At least one federal court of appeals has concluded that the risk of multiple punishment does not arise until after the first sentence has been entirely served; thus, an increase in a sentence still being served would not be considered multiple punishment. Robinson v. Warden, Md. House of Correction, 455 F.2d 1172, 1176 (4th Cir. 1972). The same view is expressed in Dunsky, *The Constitutionality of Increasing Sentence in Appellate Review*, 69 J. CRIM. L. & CRIMINOLOGY 19 (1978).

150. 604 F.2d at 784-85.

151. See note 149 *supra* and notes 167-70 *infra* and accompanying text.

152. 282 U.S. 304 (1931).

153. *Id.* at 306-07.

154. *Id.* at 307.

The inapplicability of the *Benz* dictum to *DiFrancesco* is further demonstrated by *Ex Parte Lange*,[155] cited in *Benz* as supporting authority. In *Lange* the defendant had been convicted of violating a statute which prescribed a penalty of either imprisonment or a fine; the court inadvertently imposed both. After Lange had paid his fine, he sought discharge from prison. The court vacated the original sentence and sentenced Lange to prison. The Supreme Court held that because Lange had been penalized by a fine, one of the alternative penalties prescribed by the statute, the double jeopardy clause protected him from being punished again by the subsequent imposition of a prison sentence. Like *Benz*, however, *Lange* presented the double jeopardy issue in the context of a trial judge who exceeded his statutory authority by imposing a sentence contrary to Congress's specifications. Neither case considered whether Congress could provide for the procedures described if it so desired.[156]

The *DiFrancesco* court is not the only court to misapply *Benz* to appellate review of sentences. The confusion regarding the relation of the double jeopardy clause to appellate court review of sentences is also exemplified by *Walsh v. Picard*.[157] In *Walsh* the Court of Appeals for the First Circuit upheld appellate issuance of a longer sentence to a defendant under a Massachusetts statute that allowed a defendant to appeal his sentence on the condition that the state have a right to cross appeal. The court mentioned in dictum, however, that permitting the state to appeal the sentence on its own initiative "would of course violate the proscription against double jeopardy."[158] The court relied primarily on the dictum in *Benz* to reach this conclusion.[159]

The *Walsh* court did not consider whether the state legislature had the power to expand the sentencing function of the courts to include

155. 85 U.S. (18 Wall.) 163 (1874).

156. *See* Robinson v. Warden, Md. House of Correction, 455 F.2d 1172, 1176 (4th Cir. 1972).

157. 446 F.2d 1209 (1st Cir. 1971).

158. *Id.* at 1211. Commentators have also argued that appellate review of sentencing violates the guarantee against double jeopardy. *E.g.*, Spence, *The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?*, 37 MD. L. REV. 739 (1978); Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325 (1977). These commentators, however, have not addressed the issue whether Congress has the power to expand the sentencing process to include appellate review of sentences. See notes 167-83 *infra* and accompanying text. They have based their conclusion that appellate review of sentences constitutes multiple punishment on the purported hostility of the double jeopardy clause to government appeals, and the traditional limitations on courts and prosecutors when Congress vests the sentencing function exclusively in the trial courts. *See* Spence, *supra*, at 774-78; Note, *supra*, at 334-37, 346-47.

159. 446 F.2d at 1211. *But cf.* Robinson v. Warden, Md. House of Correction, 455 F.2d 1172, 1175-76 (4th Cir. 1972) (rejecting the dictum in *Benz* that a sentence partially served cannot be increased).

appellate review of sentences on government appeal. Instead, the court applied the test used in *North Carolina v. Pearce*,[160] in which the Supreme Court held that under reasonable circumstances a state may condition a defendant's right to appeal a conviction on his being subject to a retrial if the appeal succeeds.[161]

The problem with the analysis in *Walsh* is that the court did not apply the correct double jeopardy test—whether the appellate court would be increasing a validly imposed sentence.[162] The *Pearce* test determines whether an increase of a sentence on retrial violates the fourteenth amendment due process clause.[163] Under this test, the *Walsh* court simply had to establish that the defendant would be given credit for time already served once it concluded that appellate review of sentences on a defendant's appeal was constitutional. In reference to the double jeopardy clause, the *Pearce* court simply stated:

> We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense . . . . Long-established constitutional doctrine makes clear that, beyond [this requirement], the guarantee against double jeopardy imposes no restrictions upon reconviction.[164]

The *Walsh* court's improper determination in dictum that the appellate

160. 395 U.S. 711 (1969).

161. *Id.* at 724-29. The *Walsh* court supported its determination of reasonableness by arguing that trial courts in doubt about the appropriate sentence might otherwise impose long sentences with knowledge that such sentences could be reduced but that sentences that were too short could not be increased. The court also argued that reducing untoward disparities in sentences would improve prison morale. 446 F.2d at 1212. Similarly, the *Pearce* Court found that a retrial serves the defendant's rights as well as the interests of society. The Court doubted that appellate courts would be as zealous in protecting defendant's rights if reversal of a conviction would put the accused beyond the reach of further prosecution. 395 U.S. at 721 n.18 (citing United States v. Tateo, 377 U.S. 463, 466 (1964)).

162. See note 149 *supra* and accompanying text.

163. 395 U.S. at 723-25. The court cannot penalize a defendant by imposing a harsher sentence after retrial merely because the individual exercised his right to appeal his conviction. To ensure that the judge has not acted vindictively, he must state his reasons for lengthening the punishment in writing. *Id.* Similarly, the Dangerous Special Offender Sentencing Statutes require that the court of appeals state in writing the reasons for its action on review of a sentence. 18 U.S.C. § 3576 (1976).

In Robinson v. Warden, Md. House of Correction, 455 F.2d 1172 (4th Cir. 1972), the court held that the Maryland Sentence Review Statute, MD. ANN. CODE art. 26, § 132 (1973), which permitted the appellate court to increase the sentence if the defendant sought review, satisfied due process because sentences imposed on appeal were not excessive compared to trial court sentences for the same offense; because there was not a pattern of increased sentences which would discourage individuals from seeking relief; and because the statute required that the defendant be notified that the review panel could alter sentences because they were too short as well as too long. 455 F.2d at 1176.

164. 395 U.S. at 718-19.

review of sentences could not be initiated by the government relied partly on *Benz* for authority that increases in sentences offend the double jeopardy clause. The First Circuit also misperceived the legislature's role in the sentencing process; that misperception is indicated by the court's discussion of the statute in question. Under that statute, the court claimed that the defendant would be choosing to "open up the issue."[165] Actually, the sentencing process is not "closed" until the legislature intends it to be.[166] Under the Massachusetts statute, a defendant challenging his sentence is not reopening the sentencing process but, rather, is making use of the means that the legislature had provided for appellate court review. Similarly, legislative definition of the sentencing process determines whether the government is allowed to cross-appeal; this determination is not contingent for double jeopardy purposes on the right of the defendant to appeal. The Massachusetts legislature determined that the finality of the sentence imposed by the trial judge was subject to the defendant's seeking review and the government's cross-appealing. If the court of appeals had analyzed the statute in this manner, it would have been more difficult to conclude that government-initiated review violates the double jeopardy clause, because such review could also be perceived as included within the legislature's definition of the sentencing process.

2. *Congressional Power to Expand the Sentencing Process to Include Appellate Review.* The sentencing function traditionally has been vested exclusively in the federal trial courts.[167] It is well established that the appellate court has no control over a sentence that is within the limits prescribed by a statute.[168] The Supreme Court has stated in dictum, however, the Congress's tradition of vesting the sentencing function exclusively in the trial court is subject to congressional amendment permitting appellate review.[169] This power to provide for appellate review of sentences is based on Congress's power to fix punishment.[170] In

165. 446 F.2d at 1211.

166. See notes 167-70 *infra* and accompanying text.

167. Dorszynski v. United States, 418 U.S. 424, 441 (1974). The Court quoted Judge (now Chief Judge) Kaufman of the Court of Appeals for the Second Circuit: "At present the United States is the only nation in the free world where one judge can determine conclusively, decisively and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination." 418 U.S. at 441 n.14 (quoting Symposium, *Appellate Review of Sentences*, 32 F.R.D. 257, 260-61 (1962)).

168. 418 U.S. at 440-41 (quoting Gurera v. United States, 40 F.2d 338, 340-41 (8th Cir. 1930)). *See also* Gore v. United States, 357 U.S. 386, 393 (1958); Townsend v. Bruke, 334 U.S. 736 (1948); Blockburger v. United States, 284 U.S. 299, 305 (1932).

169. Dorszynski v. United States, 418 U.S. 424, 442-44 (1974); Gore v. United States, 357 U.S. 386, 393 (1958); Blockburger v. United States, 284 U.S. 299, 305 (1932); Gurera v. United States, 40 F.2d 338, 340-41 (8th Cir. 1930).

170. See cases cited in note 169 *supra*.

Blockburger v. United States[171] the Supreme Court indicated that Congress has the power to establish crimes and fix punishments, and that by exercising this power, Congress may limit the discretion of the sentencing courts. The Court found that several successive sales of narcotics constituted distinct offenses. It determined that multiple sentences did not violate the double jeopardy clause here, for each offense which constituted a separate violation of the statute was subject to the prescribed penalty.[172] Concerning the severity of the punishment, the Court stated: "The plain meaning of the provision is that each offense is subject to the penalty prescribed; and, if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction."[173]

A quarter-century later, in *Gore v. United States*,[174] the Court stated for the first time that the propriety of appellate review of sentences is a question of legislative intent. The *Gore* Court held that it is not multiple punishment for a defendant to be convicted of three distinct narcotic violations committed in a single transaction. After holding that under the *Blockburger* test the offenses were not single and identical, the Court discussed the severity of the sentences the trial judge had imposed, stating:

> In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . *these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences.* First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. . . . This Court has no such power.[175]

Because the *Gore* Court confronted the double jeopardy issue of multiple punishment, recognizing in dictum that the propriety of appellate review of sentences was a question of legislative policy and that England and Scotland permitted increase of sentences on appeal, it is reasonable to expect that the Court would have mentioned any double jeopardy limitations that would arise if Congress decided to permit ap-

171. 284 U.S. 299 (1932).

172. *Id.* at 304-05. The Court established the *Blockburger* test to determine whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment. See notes 128-31 *supra* and accompanying text.

173. 284 U.S. at 305. The trial judge had imposed the full penalty of fine and imprisonment upon each count.

174. 357 U.S. 386 (1958).

175. *Id.* at 393 (citations omitted) (emphasis added).

pellate review of sentences. The dictum in *Gore* strongly implies that the question of increasing sentences on appeal is one for Congress to answer.

The ability of Congress to authorize appellate review of sentences is referred to repeatedly in *Dorszynski v. United States*.[176] In *Dorszynski* the Supreme Court dealt with the Youth Correction Act,[177] addressing whether Congress intended to limit the trial court's sentencing discretion by subjecting sentences to appellate review. Although the Court concluded that Congress did not intend to provide for appellate review, the Court's opinion left the clear impression that if Congress had desired, it could have done so. The *Dorszynski* Court stated:

> The "no benefit" finding required by the Act is not to be read as a substantive standard which must be satisfied to support a sentence outside the Act, for such a reading would subject the sentence to appellate review even though the sentence was permitted by the Act's term, thereby limiting the sentencing court's discretion. *We will not assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it.* As our review has shown, the exclusive sentencing power of district judges was acknowledged, and Congress' intention to affirm that power was clearly indicated.[178]

The apparent invitation to Congress to depart from the usual practice through some clear expression of intent implies that Congress could provide for appellate review of an otherwise valid sentence.

The *Dorszynski* Court quoted *Gurera v. United States*[179] as authority for the "firmly established [rule] that the appellate court has no control over a sentence which is within the limits allowed by a statute." The *Gurera* case also gives significant insight into the limitations on appellate review of sentences. *Gurera* arose from a violation of the Jones Act,[180] which increased penalties for violating prohibition law. The court considered the power of Congress to provide for appellate review:

176. 418 U.S. 424 (1974).

177. 18 U.S.C. §§ 5005, 5010(b)-(d) (1976).

178. 418 U.S. 424, 441 (1974) (emphasis added). The Court relied partly on the legislative history of the Youth Corrections Act, which affirms Congress's intention to preserve the exclusive sentencing power of district judges. 418 U.S. at 436-41. The legislative history of the Dangerous Special Offender Sentencing Statutes, however, clearly demonstrates that Congress meant to depart from the doctrine of vesting the exclusive sentencing power in the district judge, and to provide for appellate review that limits trial judges' discretion. *See* S. REP. No. 91-617, 91st Cong., 1st Sess. 93-98 (1969).

179. 40 F.2d 338 (8th Cir. 1930).

180. Act of Mar. 2, 1929, ch. 473, 45 Stat. 1446 (repealed 1935).

> If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute. If Congress had intended to change that rule in regard to violations of the liquor laws, we would have expected a very clear and definite expression of that intent and a workable expression of the rules which should guide the trial courts in assessing punishments and the appellate courts in reviewing such assessments.[181]

Thus, *Gurera* also indicates that although the appellate courts as a general rule have no control over the sentences imposed by lower courts, Congress established the rule and has the power to change it. Neither *Dorszynski* nor *Gurera* held that the double jeopardy clause limits congressional provision for appellate review of sentences.

Expanding the sentencing process to include review by appellate courts would not impose multiple punishment by increasing validly imposed sentences. Until the sentencing procedure established by Congress has been completed, a valid sentence has not been imposed and multiple punishment is not possible. Under past practice the sentencing discretion rested entirely with the trial judge, and the procedure was complete when the judge pronounced sentence. The sole difference under an appellate review statute is that the sentencing process includes an additional step.

Gore, *Gurera*, and *Dorszynski* support this conclusion by suggesting that Congress may expand the sentencing process to include appellate review of sentences. This congressional power stems from the authority to fix punishment for federal crimes.[182] This authority includes the power to establish the sentencing procedure in the courts. Although sentence review in an appellate court under the Dangeous Special Offender Sentencing Statutes[183] subjects a defendant to a possible increase in punishment, the increase does not constitute "punishment twice, or an attempt to punish twice, for the same offense," because the determination of punishment has not been completed before the sentence has been reviewed.

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181. 40 F.2d at 340-41.

182. Even though Congress removed all statutory restrictions to appeals in 18 U.S.C. § 3731 (1976), Congress would have to explicitly authorize appellate court review of sentences, under its power to fix the punishment and sentencing process for individuals convicted of crimes, to overcome the rule that the sentencing function vests exclusively in the trial judge. See note 178 *supra* and accompanying text. Congress made the explicit authorization in 18 U.S.C. § 3576 (1976). See notes 13-16 *supra* and accompanying text.

183. 18 U.S.C. §§ 3575-3576 (1976).

IV. CONCLUSION

The double jeopardy clause protects individuals from multiple punishment and from multiple prosecutions. Prior to the passage of the Dangerous Special Offender Sentencing Statutes, cases considering the constitutionality of government appeals focused exclusively on the double jeopardy protection from multiple prosecutions—a combination of the protection from a second prosecution for the same offense after an acquittal and the protection from a second prosecution after a conviction. These cases established that government appeals do not offend the double jeopardy clause unless the defendant is subjected to multiple prosecutions. As appellate review of a sentence does not expose the defendant to the threat of a second prosecution, it clearly does not offend the double jeopardy clause's protection from multiple prosecutions.

To determine if the government's appeal of the sentence violates the multiple punishment doctrine, a court must consider whether the legislature has provided that the appeal in question is a part of the sentencing process. Congress has the authority to define crimes and to fix punishments. Traditionally, Congress has vested the sentencing function exclusively in the trial courts. In fixing the punishment for dangerous special offenders, however, Congress intentionally and expressly departed from this tradition and expanded the sentencing process to include appellate review, thereby limiting the trial court's discretion. When an appellate court reviews the sentence imposed by a trial court, determines that the sentencing court abused its discretion, and accordingly increases an otherwise valid sentence, the appellate court does not violate the rule against multiple punishment. The review by the appellate court occurs during the original sentencing process, as defined by Congress. Moreover, the appeal ensures that the punishment Congress intended to impose upon an individual convicted of a crime is in fact imposed upon him. A defendant has not been punished a second time, in violation of the double jeopardy clause, until his first punishment is fixed. For dangerous special offenders, the first punishment is not fixed in the trial court if one of the parties requests appellate review. Hence the expansion of the sentencing function by Congress to include appellate courts does not constitute multiple punishment.

In regard to appellate review of sentences, the multiple punishment protection does not focus on the courts and the prosecutors but upon Congress itself. Congress's expansion of the sentencing process to include appellate review of sentences, empowering the appellate courts to increase or decrease sentences, is a question of legislative policy. The expansion of the sentencing function does not offend the double jeopardy clause's prohibition of multiple punishment; congressionally authorized government appeals therefore are entirely proper.

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