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Congress enacted the Jencks Act[1] in response to the Supreme Court's holding in *Jencks v. United States*.[2] The Act allows federal criminal defendants to seek discovery of relevant statements previously made by government witnesses.[3] These "statements" enable the defense to impeach government witnesses on cross-examination.[4] The Act commands the prosecution, upon the defendant's request, to produce any prior statement of a government witness after that witness has testified on direct examination. Failure to comply with the court's order to produce the witness' prior statement results in exclusion of that witness' testimony from the record.[5]

The Jencks Act spawned a great deal of litigation,[6] much of which concerns the statutory meaning of "statement." Congress defined "statement" as (1) written statements signed or otherwise adopted by the witness, or (2) substantially verbatim recordings of

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1. 18 U.S.C. § 3500 (1976).

2. 353 U.S. 657 (1957). The Court held that in Federal criminal prosecutions, the government is required to produce "relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at trial." 353 U.S. at 672.

3. 18 U.S.C. § 3500(b) (1976) provides:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

4. The Supreme Court has clearly espoused the value of the impeachment process in Jencks v. United States, 353 U.S. 657, 667 (1957), and how "recorded" prior statements of the witness promote this process: "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory."

Commentators have also emphasized how important prior statements are to the defendant's effective cross-examination of a witness. *See, e.g.*, Note, *Protecting a Defendant's Constitutional Rights: The Jencks Act and the Inadequacy of the Good Faith Exception,* 59 B.U. L. REV. 695, 708 (1979):

> The most effective and most frequently employed method of impeachment is to use a witness' prior inconsistent statements. Professor McCormick notes that such statements, "having been made when memory was more recent and when less time for the play of influence has elapsed are often inherently more trustworthy than the [trial] testimony itself. *A limitation on the use of such statements will prevent an effective cross-examination of a witness, and, absent other evidentiary concerns, is unconstitutional.*

(emphasis added) (footnotes omitted).

5. 18 U.S.C. § 3500(d) (1976) provides:

> If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

6. *See, e.g.*, United States v. Harrison, 524 F.2d 421, 430 n.25 (D.C. Cir. 1975) (giving a sample of the number of cases litigated).

an oral statement made by the witness.[7] The uncertainty concerning the meaning of "statement" reflects the somewhat conflicting purposes[8] of the Act: Congress sought both to "preserve the rights of any defendant under due process of law,"[9] and to dispel the notion that defendants are entitled to a "broad or blind fishing expedition among [government] documents . . . on the chance that something impeaching might turn up."[10] Thus, the Act both reaffirms a defendant's right to relevant witness' statements, and limits this right by protecting basic government interests.[11] Whether a particular document falls within the statutory definition of a statement depends largely upon the interplay between these policies.

An issue that often arises is whether a government agent's rough interview notes constitute a Jencks Act "statement." Typically, government agents take notes during interviews with prospective witnesses. Sometime following the interview, the agent prepares a formal report[12] relying on the notes. Thereafter, the government destroys the notes. When the witness testifies at trial, and the defendant requests Jencks Act statements, the government only produces the agent's formal report.[13] The practice of routinely destroying

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7. 18 U.S.C. § 3500(e) (1976) provides:

> The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means — (1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Paragraph (3) was added to the Act in 1970. This subsection will not be discussed because it has no relevance to the issues discussed in this Note.

8. That these purposes are somewhat conflicting is evident from the manner in which the Jencks Act modifies the *Jencks* decision. In *Jencks*, the Supreme Court focused on the rights of the defendant and concluded that justice required that he be able to view *initially* any witness statement in the possession of the government. 353 U.S. at 667-69. Fearing that through this decision the Court had "opened [government] files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets," 353 U.S. at 681-82 (Clark, J., dissenting), Congress reacted quickly by legislating against this perceived evil. While stressing that the act was intended to uphold the basic policies of the *Jencks* decision, *see* S. REP. No. 981, 85th Cong., 1st Sess. 2 (1957), *reprinted in* 1957 U.S. CODE CONG. & AD. NEWS 1861, 1862, Congress overturned the notion that a defendant has a right to inspect the documents himself. The Act delegates this function to the court by providing for an *in camera* inspection of arguably relevant documents. *See* 18 U.S.C. § 3500(c) (1976).

9. S. REP. No. 981, *supra* note 8, at 2.

10. *Id.*

11. Such governmental interests include protection of vital national secrets or other confidential information which may be included in its files. *See, e.g.*, 103 CONG. REC. 15,918 (1957) (statement of Sen. Hruska): "Examination of the full files would also divulge investigation and law-enforcement techniques, as well as sources of intelligence. All of these things would be harmful to the cause of good government."

12. FBI formal reports are FD-302 reports. *See* United States v. Harrison, 524 F.2d 421, 425-28 (D.C. Cir. 1975), for a discussion of the nature of these notes.

13. The final report prepared by a government agent who testifies as a government witness

rough interview notes raises the question whether the Jencks Act requires the government to retain and produce[14] the notes an agent takes during an interview with a government witness.

Most courts that have considered the issue have concluded that the Jencks Act does not require the government to retain and produce rough interview notes.[15] This Note examines the language and purpose of the Act to determine whether interview notes should be considered Jencks Act statements. Part I examines the policy underlying the Jencks Act and argues that the majority position sanctioning pre-trial destruction of interview notes conflicts with these statutory purposes. Part II discusses the statutory language and argues that the status of the witness as a government agent or a private individual determines the applicable section of the Act. This Part then analyzes the proper operation of the statute in both contexts. The Note concludes that in both situations, a statutory[16] duty exists

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is a Jencks Act statement. *See* Clancy v. United States, 365 U.S. 312 (1961); United States v. Sink, 586 F.2d 1041, 1051 (5th Cir. 1978); United States v. Cleveland, 477 F.2d 310, 316 (7th Cir. 1973); Lewis v. United States, 340 F.2d 678, 682 (8th Cir. 1965); Mims v. United States, 332 F.2d 944, 948 (10th Cir. 1964) (government conceded point); United States v. McCarthy, 301 F.2d 796, 797-99 (3d Cir. 1962); United States v. Sheer, 278 F.2d 65, 67-68 (7th Cir. 1960); Karp v. United States, 277 F.2d 843, 848-49 (8th Cir. 1960); United States v. Berry, 277 F.2d 826, 828 (7th Cir. 1960). *But see* United States v. Nickell, 552 F.2d 684, 689 (6th Cir. 1977); United States v. Long, 468 F.2d 755, 756 n.1 (8th Cir. 1972) (both holding that agent's report need not be produced even though he testified at trial).

14. If interview notes fell within the Act's definition of a statement, then the government has a duty to preserve them. "The Jencks Act is no less violated by the destruction of a statement than by its non-production. To hold otherwise would create an exception as broad as the Act itself." United States v. Carrasco, 537 F.2d 372, 377 (9th Cir. 1976).

Many government agencies have regulations (either formal or informal) calling for the destruction of interview notes after a formal report has been prepared, although some agencies have discontinued this practice due to decisions condemning such regulations. *See, e.g.*, United States v. Harris, 543 F.2d 1247, 1251 (9th Cir. 1976); United States v. Harrison, 524 F.2d 421, 427-28 (D.C. Cir. 1975). The government has not, however, willingly adopted such procedures: "We believe this added burden on law enforcement is unnecessary and should eventually be declared such in order that resources soon to be dedicated to the preservation of rough notes can be better used." United States v. Vella, 562 F.2d 275, 276 n.1 (3d Cir. 1977). Similarly, this Note does not assume that the adoption of procedures to preserve rough notes by some agencies has resolved the issue. The question remains whether the Act requires such procedures for *all* government agencies.

15. In fact, only the D.C., Third and Ninth Circuits have held that there *is* a duty to retain notes. *See* United States v. Vella, 562 F.2d 275 (3d Cir. 1977); United States v. Harris, 543 F.2d 1247 (9th Cir. 1976); United States v. Harrison, 524 F.2d 421, 421 (D.C. Cir. 1975). In the other circuits "the FBI practice of destroying rough interview notes has generally been sanctioned by the courts in cases involving Jencks Act issues . . . ." 543 F.2d at 1251.

For a sample of the majority approach, *see, e.g.*, United States v. Martin, 565 F.2d 362 (5th Cir. 1978); United States v. Hurst, 510 F.2d 1035 (6th Cir. 1975); United States v. Mechanic, 454 F.2d 849 (8th Cir. 1971), *cert. denied*, 406 U.S. 929 (1972); United States v. Covello, 410 F.2d 536 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); United States v. Spatuzza, 331 F.2d 214 (7th Cir. 1964).

16. This Note focuses on the statutory duty to retain interview notes. Some courts, *see, e.g.*, United States v. Harrison, 524 F.2d 421, 421 (D.C. Cir. 1975), and commentators, *see, e.g.*, Wexler, *The Constitutional Disclosure Duty and the Jencks Act*, 40 ST. JOHN'S L. REV. 206 (1966); Note, *supra* note 4; Comment, *Judicial Response to Governmental Loss or Destruction of Evidence*, 39 U. CHI. L. REV. 542 (1972); Note, *Toward a Constitutional Right to an Adequate*

to retain and, in most cases, produce rough interview notes.

I. Routine Destruction of Rough Interview Notes Contravenes the Policies Underlying the Jencks Act

With the adoption of the Jencks Act, Congress responded to perceived "widespread misinterpretations and popular misunderstandings of the [*Jencks*] opinion."[17] The Act has a dual purpose: (1) to prevent blind fishing expeditions into sensitive government files in search of impeaching materials;[18] and (2) to insure that "the Government which prosecutes an accused [recognizes its] duty to see that justice is done [by not depriving] the accused of anything which might be material to his defense."[19] Rough interview notes, viewed in light of these goals, should be considered Jencks Act materials.

Three major reasons support this conclusion. First, routine destruction of interview notes does not materially advance the statutory purpose of preventing "blind fishing expeditions." Interview notes are specifically identifiable documents, and comprise a "well-delineated category of materials."[20] The inclusion of these notes within the ambit of the Jencks Act neither entitles a defendant "to rove at will through Government files," nor risks disclosure of sensitive government information.[21] Accordingly, the courts should not deem a discovery request for such a discrete and precisely identifiable

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Police Investigation: A Step Beyond Brady, 53 N.Y.U. L. Rev. 835 (1978), have suggested that suppression of interview notes may violate the due process clause of the fifth amendment. This line of reasoning is based on Brady v. Maryland, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process . . . .") It is not clear whether the Supreme Court would adopt this approach for interview notes. *See* Palermo v. United States, 360 U.S. 343, 350-51 (1959), stating in dicta that the Jencks Act should be the exclusive vehicle for production of statements in the government's possession. *But see* Brennan, J., concurring: "I see no necessity in the circumstances of this case which calls for a decision whether § 3500 is the sole vehicle whereby production of prior statements of government witnesses to government agents may be made to the defense." 360 U.S. at 361. Although the Supreme Court has not fully addressed the relationship between the Jencks Act and *Brady*, commentators have discussed the issue. *See, e.g.*, Wexler, *supra*, at 211; Note, *supra* note 4, at 710-11.

17. S. Rep. No. 981, *supra* note 8, at 3.

18. *Id.* at 2-3.

19. Jencks v. United States, 353 U.S. at 670-71 (quoting from United States v. Reynolds, 345 U.S. 1, 12 (1953)).

20. United States v. Harrison, 524 F.2d 421, 428 n.18 (D.C. Cir. 1975).

21. S. Rep. No. 981, *supra* note 8, at 5 (noting that neither the Act nor the *Jencks* opinion denies the government any privilege it might otherwise claim, and that the Act specifically provides for *in camera* inspection of statements whose relevance to the witness' testimony the government contests. The trial judge, under the Act, determines the sections of the statement which are competent and relevant, and permits discovery of only those sections). Quite aside from these safeguards built into the Act, it is difficult to visualize information contained in the rough notes, but not the final report, of sufficient importance to provoke concern for the integrity of the investigative record, unless the agents deliberately or unconsciously censor the interview record.

document a "broad or blind fishing expedition."[22]

The specific statutory purpose of preventing adverse general reviews of government investigative files reflects Congressional sensitivity to the more general need to minimize the administrative burden of enforcing the criminal law. Despite contrary assertions by the government, however, mandatory retention of rough interview notes would impose only a minimal additional administrative responsibility on law enforcement agencies.[23] Government agents presently incorporate their rough notes into formal reports, which routinely are retained. The filing of even extensive interview notes, attached to the final report, would not intolerably burden the administrative capacities of federal agencies.[24] More importantly, as distinct from the need to preserve the integrity of sensitive government information, "administrative convenience has traditionally fared poorly as an asserted justification for government action infringing important rights of individuals . . . . [T]he minimal burden here does not outweigh the significant values to be served by preservation"[25] of interview notes.

Second, retention of interview notes may prove essential to the vindication of a defendant's Jencks Act rights.[26] The *Jencks* court stressed that access to statements made by a government witness before "time dulls treacherous memory"[27] may be crucial to the impeachment process. Courts that sanction the destruction of interview notes therefore must assume that all government agents fully and accurately incorporate their notes into formal reports,[28] thus preserving the statements for the defendant.[29] This assumption, however, is

22. Gordon v. United States, 344 U.S. 414, 418-19 (1953).

23. *See, e.g.*, United States v. Harrison, 524 F.2d 421, 429 (D.C. Cir. 1975) (Government argued that "preservation of FBI agents' rough notes will impose an intolerable administrative burden" on the Bureau); *but see* United States v. Comulada, 340 F.2d 449, 451 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965) ("[E]very consideration of efficiency and economy would seem to require the destruction of such fragmentary memoranda as soon as they are no longer needed.").

24. *See* United States v. Harrison, 524 F.2d 421, 429 (D.C. Cir. 1975) ("We are not convinced that addition of a page or two for each witness creates insuperable space problems. . . . [T]here is plainly no need for elaborate new systems to keep track of the notes. They could simply be stapled to the . . . reports.").

25. United States v. Harrison, 524 F.2d 421, 429 (D.C. Cir. 1975).

26. *See* Note, *supra* note 4, at 708 ("A limitation on the use of [a witness' prior inconsistent] statements will prevent an effective cross examination of a witness . . .") (footnote omitted).

27. Jencks v. United States, 353 U.S. 657, 667 (1957).

28. Even courts that have not imposed a duty on the government to preserve notes, have noted that it would be in the government's interest to do so. *See* United States v. Anzalone, 555 F.2d 317, 321 (2d Cir. 1977) ("To protect itself against the day when the witness may claim that the typed summary (which is discoverable . . .), was contrary to what he said, we think that the FBI would be well advised, however, to retain the handwritten notes until the prosecution is terminated."). *See also* United States v. Batchelder, 581 F.2d 626, 635 (7th Cir. 1978).

29. *See* United States v. Harrison, 524 F.2d 421, 429 (D.C. Cir. 1975).

unrealistic. Even the most conscientious agents may err in transferring information from interview notes to final reports.[30] And it is not "beyond the bounds of possibility that a report [may] be distorted because of overzealousness on the part of the agent preparing it."[31] Destruction of rough interview notes, however, deprives the defendant of the opportunity to prove, and perhaps even to learn of, inaccuracies in the formal report.[32] Accordingly, routine destruction of interview notes abridges a defendant's Jencks Act rights.

Routine destruction of interview notes, finally, deprives the court of its duty to determine whether the notes are discoverable under the Jencks Act. The Act explicitly provides *in camera* inspection for materials the government claims that it need not produce.[33] Evaluation of a defendant's Jencks Act rights lies properly within the purview of the courts, not of law enforcement agents.[34] The government effectively usurps this important judicial function when it decides unilaterally to destroy relevant materials before trial. Neither the purposes behind the Act, nor its language, contemplates favoring the government in this manner.

The statutory provision for *judicial* determination of the defendant's right to materials under the Act effectively negates any argument in defense of routine destruction of interview notes based on the merits of their ultimate discovery. Insofar as discovery of rough interview notes would somehow offend critical governmental interests, the courts can prevent this result by denying discovery on a case-by-case basis, whenever *in camera* inspection reveals a sound basis for such fears. The only legitimate argument against the *retention* of interview notes is therefore the claim of administrative inconvenience. As earlier discussed, mandatory retention of interview

30. *See* United States v. Harrison, 524 F.2d 421, 429 (D.C. Cir. 1975).

31. *See* United States v. Harrison, 524 F.2d 421, 430 (D.C. Cir. 1975).

32. Without interview notes, it is nearly impossible for a defendant to show an inconsistency between the notes and the formal report. United States v. Harrison, 524 F.2d 421, 432 (D.C. Cir. 1975) ("Without the notes, . . . [the defendant] is reduced to trying to show a discrepancy in the [formal] report by cross-examining the witness who was the subject of the interview, a witness who was prepared for testifying, not by reading the rough notes, by using the [formal] report. There could hardly be a less auspicious setting for eliciting testimony that will cast doubt on the accuracy of the interview report."). *See* United States v. Anzalone, 555 F.2d 317, 321 (2d Cir. 1977); United States v. Harris, 543 F.2d 1247, 1249-52 (9th Cir. 1976); Comment, *supra* note 16, at 549-51. Placing this burden on the defendant has been criticized. *See* Note, *supra* note 4, at 717; Comment, *supra* note 16, at 548-52.

33. 18 U.S.C. § 3500(c) (1976) provides:

> If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*.

34. *See* United States v. Harrison, 524 F.2d 421, 428 (D.C. Cir. 1975) ("[T]he ultimate decision is not . . . for the agent to make. The decision on discoverability is emphatically a judicial decision").

notes implicates this concern too slightly to justify the risk to defendants' statutory rights posed by the routine destruction policy.

II. Discovery of Rough Interview Notes

The first Part of this Note advanced the argument, derived from the policies animating the Jencks Act, that the statute imposes the duty to retain rough interview notes on government law enforcement agencies. This Part examines the defendant's right to actual discovery of interview notes in light of the statutory language. This language suggests an important distinction between requests for interview notes, depending on whether the notes will be used to impeach the testimony of a government agent or a private citizen. In both cases, however, interview notes will prove generally, if not universally, discoverable.

Subsection (e) of the Jencks Act defines "statement" as (1) "a written statement made by [the] witness and signed or otherwise adopted or approved by him;"[35] or (2) a recording or transcript "which is a substantially verbatim recital of an oral statement made by [the] witness . . . and recorded contemporaneously with the making of [the statement]."[36] Most courts, however, fail to analyze carefully the statutory language and merely state summarily that "the Jencks Act . . . imposes no duty . . . to retain rough notes when their contents are incorporated into official records and [the notes have been destroyed] in good faith."[37] Specifically, most courts fail

35. 18 U.S.C. § 3500(e)(1) (1976). A written statement need not be signed, nor even written by the witness to be producible under the Jencks Act. *See* Campbell v. United States, 373 U.S. 487, 492 n.6 (1963).

36. 18 U.S.C. § 3500(e)(2) (1976).

37. United States v. Terrell, 474 F.2d 872, 877 (2d Cir. 1973). *See also* United States v. Williams, 604 F.2d 1102, 1116 (8th Cir. 1979); United States v. Jiminez, 484 F.2d 91 (5th Cir. 1973); United States v. Lane, 479 F.2d 1134, 1136 (6th Cir.), *cert. denied*, 414 U.S. 861 (1973), citing United States v. Fruchtman, 421 F.2d 1019, 1021-22 (6th Cir. 1970).

The majority reliance on good faith is misplaced. *See* United States v. Lonardo, 350 F.2d 523, 529 (6th Cir. 1965) ("[W]e see no need to characterize the destruction of these statements as in good faith or bad — as honest or corrupt . . . . The fact that the agent who destroyed them may have done so [in good faith] does not alter the nature of the sanctions imposed by the statute."). *But see* Killian v. United States, 368 U.S. 231 (1961), where the defendant sought materials relating to the testimony of government informers. The FBI admitted that notes covering oral reports of the informers had been destroyed. The Supreme Court remanded the case, stating that if the notes were made solely to transfer data to receipts to be signed by the informants, and "they were [later] destroyed by the agents *in good faith* and in accord with their normal practice, . . . their destruction did not . . . deprive petitioner of any right." 368 U.S. at 242 (emphasis added).

Killian, however, is distinguishable because the witness signed the receipts, thereby adopting them within (e)(1). Interview notes and formal reports, however, are not usually adopted by the witness. Thus, there is not the added safeguard that everything in the notes was put into the report. Further, the government emphasized that nothing in the receipts (and, therefore, the notes upon which these receipts were based) related to the direct testimony of the witness as required by the Act. This is not an argument that can be maintained in the interview note situation, as generally the formal report will directly relate to the witness' testimony.

to recognize that proper application of the Jencks Act to rough interview notes requires different analyses depending on who the witness is.[38]

When a defendant seeks discovery of rough interview notes under the Jencks Act, the trial court must decide whether the notes constitute a statement previously made by the witness. Typically, a private individual testifies at trial, and the defendant seeks the notes prepared by the government agent during an investigative interview.[39] Occasionally, the government agent will testify in court concerning a particular interview or other knowledge he acquired during the course of the government's investigation.[40] In this case, the defendant may seek the rough interview notes as a Jencks Act statement made by the agent. Whether the witness whose statement is sought is a government agent or a private individual determines the applicable section of the statute.

For example, when a defendant seeks interview notes to impeach a government agent, subsection (e)(2) does not apply because the agent made no oral statement that could have been recorded. Interview notes may, nonetheless, constitute a Jencks Act statement if the agent adopted or approved the interview notes under subsection (e)(1).[41] Similarly when a defendant seeks interview notes to impeach a private individual who has testified at trial, the witness will have made an oral statement, and therefore, the notes must fulfill the substantially verbatim requirement to be discoverable under subsection (e)(2).[42] Subsection (e)(1) will rarely apply when the witness is a private individual because the witness usually does not adopt or approve the agents notes.[43] The following sections examine the appli-

38. *See* United States v. Martin, 565 F.2d 362 (5th Cir. 1978), where the court stated summarily that if destruction was in good faith there was no reversible error. 565 F.2d 363-64. Later, the Fifth Circuit realized that there may be some significance in whether the witness is a government agent or private individual. *See* United States v. Cole, 634 F.2d 866, 868 n.1 (5th Cir. 1981) (where the court noted that its prior holdings denying that defendants had a right to interview notes of an *agent who testified at trial* "necessarily determined only that the notes were not (e)(1) statements." The court agreed with the defendant that there was a separate (e)(2) argument when a nonagent was the witness, although it ultimately rejected this claim. 634 F.2d at 868-69).

39. This is the situation Congress primarily anticipated when it enacted the Jencks Act. *See, e.g.*, Holmes v. United States, 271 F.2d 635, 638 (4th Cir. 1959) ("In the Jencks [*sic*] case, itself, the defendant sought the production of FBI reports in order to obtain material with which to cross examine an FBI informer, and clearly that was the situation which Congress had principally in mind when it enacted the Jencks Act.").

40. *See* United States v. Nickell, 552 F.2d 684, 690 (6th Cir. 1977) (McCree, J., dissenting).

41. *See* notes 44-56 *infra* and accompanying text.

42. *See* notes 57-69 *infra* and accompanying text.

43. Of course, there are occasions when a nonagent will read over an agent's interview notes and will sign or express his "adoption" of such notes in some other manner. In this situation, the notes are clearly producible under (e)(1). *See* Campbell v. United States, 373 U.S. 487 (1963). However, this Note is primarily concerned with the more common situation in which the interviewee has not approved the agent's notes in any manner.

cation of the Jencks Act to interview notes in light of this distinction.

A. *The Government Agent Witness*

When the witness is the government agent who conducted the interview, subsection (e)(1) defines the scope of discoverability under the statute.[44] Interview notes will constitute a Jencks Act statement if the agent has adopted or approved them in some manner. The courts have not clearly identified what constitutes adoption or approval of interview notes within the meaning of the Jencks Act.[45]

Persuasive reasons exists, however, to view interview notes as approved or adopted by the agent. They contain the agents own written record of what occurred during the interview. These notes constitute the agent's primary factual resource for preparing the formal report, which itself often proves discoverable under the Jencks Act.[46] Because the reports, presumably, fully incorporate the interview notes,[47] the defendant is entitled to all the information contained in the notes via the formal reports.[48] In short, because the agent bases the formal report on the interview notes "it would be an exercise in illogic to conclude that he had adopted the former but not the latter."[49] Accordingly, where an agent relies on the interview notes to prepare a Jencks Act statement, the notes themselves become Jencks Act statements.

The government may argue that destruction of interview notes does not violate the Jencks Act because the reports preserve all the information in the notes, which therefore merely duplicate the report.[50] However, as noted earlier, the determination of whether the Jencks Act applies to particular documents properly belongs to the trial court.[51] In fact, the most compelling case for judicial determination of this question occurs when the defendant seeks to impeach

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44. *See* notes 40-41 *supra* and accompanying text.

45. Many courts have been liberal in their interpretations of what constitutes adoptions. *See* Campbell v. United States, 373 U.S. 487, 492 n.6 (1963), and cases cited therein. The *Campbell* court held that a private individual had adopted a *formal report* where the private individual had read and approved the *interview notes* which were used to prepare the formal report and were subsequently destroyed.

46. *See, e.g.*, Karp v. United States, 277 F.2d 843, 848-49 (8th Cir. 1960); Holmes v. United States, 271 F.2d 635, 638 (4th Cir. 1959).

47. The government often argues that interview notes are fully incorporated into formal reports, and the notes need not be retained. *See* note 50 *infra*.

48. *See* note 14 *supra*.

49. United States v. Walden, 465 F. Supp. 255, 261 (E.D. Pa. 1978). The court, on remand, held that a government agent, who had adopted a formal report, had also adopted earlier drafts of the report which had been sent to his supervisor. The court held that the drafts were Jencks Act statements in part because drafts and the report were identical. Though formal reports and interview notes are not identical, this reasoning is applicable to them because all of the information contained in the notes had been incorporated into the formal report.

50. *See, e.g.*, United States v. Harrison, 524 F.2d 421, 429 (D.C. Cir. 1975).

51. *See* notes 36-37 *supra* and accompanying text.

the very agent who contends that the destroyed notes would not be helpful for impeachment purposes.[52] In such a case, the government agent's unilateral decision to destroy the primary source of impeaching evidence clearly threatens the defendant's Jencks Act rights.

The government may further argue that if fully incorporating interview notes into the final report constitutes adoption, an agent's failure to incorporate completely the notes into the report precludes adoption of the notes. That is, because agents may exclude some information contained in their notes from the reports, they have implicitly declined to adopt the notes themselves. Yet, the majority approach, which allows destruction of interview notes, rests on the assumption that the agent has fully incorporated the notes into official records.[53] The government's admission that the defendant has not been supplied "the very same information contained in the statement which has been destroyed,"[54] establishes an independent violation of the Jencks Act. At the very least, the trial court, and not the agent whose testimony is at issue, should determine whether the witness somehow disapproved his own interview notes at the report stage.

In sum, when the government fails to produce an agent's rough interview notes after the agent testifies at trial, the trial court should strike the agent's testimony from the record.[55] Therefore, because "law enforcement agents . . . are often called to tesitify,"[56] government agencies should discontinue the practice of routine destruction of interview notes, or risk the imposition of the Jencks Act sanctions.

B. *The Nonagent Witness*

When a private individual testifies, subsection (e)(2) of the Act may require production of the interviewer's notes as a contemporaneous recording of the witness' statement.[57] To constitute a statement within subsection (e)(2), the notes must be a "substantially verbatim" recording of the witness' words. Because the Act does not define "substantially verbatim" the proper application of this re-

52. *See* United States v. Johnson, 521 F.2d 1318, 1320 (9th Cir. 1975) (stating that "the question of whether an otherwise producible statement is useful for impeachment must be left to the defendant. . . . Certainly the answer should not rest with the very witness whose testimony the defendant seeks to impeach."); United States v. Johnson, 337 F.2d 180, 202 (4th Cir. 1964), *aff'd.*, 383 U.S. 169 (1966) ("Where the agent testifies to matter he claims not to be in the notes and the defendant insists on a different version, an issue arises which may not be satisfactorily resolved in the absence of the original notes. If the notes were available, they might confirm or refute one version or the other.").

53. *See* note 37 *supra* and accompanying text.

54. United States v. Lonardo, 350 F.2d 523, 529 (6th Cir. 1965).

55. *See* note 5 *supra*.

56. United States v. Nickell, 552 F.2d 684, 690 (6th Cir. 1977) (McCree, J., dissenting).

57. *See* note 42 *supra* and accompanying text.

quirement depends on an examination of the purposes behind it.[58] The Supreme Court has noted that Congress intended subsection (e)(2) to prevent impeachment of a witness with a statement that is not his own.[59] Thus, the requirement limiting Jencks Act statements to "substantially verbatim" recordings is intended to allow production of only those statements that fairly reflect the interviewee's actual words.[60]

When the government has not destroyed the interview notes, their classification as "substantially verbatim" lies uniquely within the competence of the trial court, whose decision will survive appellate review unless clearly erroneous.[61] In reaching its decision, the court must consider the risk that selective and episodic notes[62] will enable the defense to impeach the witness unfairly. Because only statements which can "properly be called the witness' own words should be made available to the defense for purposes of impeachment,"[63] the government need not produce inaccurate or incomplete interview notes.

While the differences between one set of notes and the next preclude conclusive generalizations, the willingness of the courts to require the preservation and production of the formal reports under subsection (e)(2)[64] suggests a powerful comparison in favor of classi-

58. One argument for a narrow construction of the "substantially verbatim" requirement concerns the specific means of recording approved of in subsection (e)(2) of the Act, *i.e.*, electrical recording, stenography, etc. Adherence to a view of congressional intent predicated on *ejusdem generis* might lead to the conclusion that only such word-for-word transcriptions fall within the ambit of the statute. The required production of formal investigative reports would suggest that the courts have rejected this approach in favor of a more liberal interpretation. *See* note 64 *infra*. In keeping with the statutory purpose to avoid unfairness to the witness, rather than to set a standard of academic accuracy, "[t]he phrase 'substantially verbatim' does not mean 'precisely verbatim' though the writing must not contain the comments, impressions, or opinions of the agent." NLRB v. Safway Steel Scaffolds Co., 383 F.2d 273, 278 (5th Cir. 1967). *See also* Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964); United States v. McKeever, 271 F.2d 669 (2d Cir. 1959).

59. *See* Palermo v. United States, 360 U.S. 343, 352 (1959).

60. The *Palermo* court denied production of an agents 600-word memorandum summarizing parts of a three and one-half hour interview. The court held that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own . . . ." 360 U.S. at 350.

61. Campbell v. United States (Campbell II), 373 U.S. 487, 492-93 (1963); United States v. Cuesta, 597 F.2d 903 (5th Cir.), *cert. denied,* 444 U.S. 964 (1979); United States v. Thomas, 282 F.2d 191, 195 (2d Cir. 1960).

62. *See, e.g.*, Goldberg v. United States, 425 U.S. 94, 126 (1976) (Powell, J., concurring).

63. Palermo v. United States, 360 U.S. 343, 352 (1959).

64. "These reports are generally provided routinely at trial as Jencks material, albeit excised to delete the conclusion of the interviewing agent." United States v. Narciso, 446 F. Supp. 252, 268 (E.D. Mich. 1977). The court noted that the 302 forms presumptively constitute Jencks Act statements "as either statements approved by witnesses or substantially verbatim recital of such statements." 446 F. Supp. at 269.

Indeed, the justification offered for refusing to apply the Jencks Act sanctions in cases of routine good faith destruction of the notes depends on the availability of the interview reports. *See* United States v. Mechanic, 454 F.2d 849, 857 (8th Cir. 1971), *cert. denied,* 406 U.S. 929

fying interview notes as Jencks Act "statements." A determination that the report provides a substantially verbatim recording of the witness' words entitles the defense to the agent's formal report.[65] Courts that deny the same treatment to interview notes must assume that the notes are less reliable sources of an interviewee's words. These reports, however, often are prepared days after the interview, and contain the "agent's narrative account of the witness's statement, prepared partly from the rough notes and partly from the agent's recollection of the interview."[66] An agent may attempt to capture the essence of his notes in subsequent reports, but he enjoys no guarantee of success in this endeavor. When the agent drafts a formal report, he may reflect back on the interview with additional information and a different perspective, and may emphasize different aspects of the interview.[67] Similarly, the agent may overlook parts of his notes entirely or fail to appreciate their importance when he drafts the report.[68] Accordingly, interview notes may reflect the witness'

(1972) ("Here, it appears the notes were destroyed in good faith in the course of normal procedure and only after they had been substantially incorporated into the typed summaries *which were produced.*" (emphasis added)); United States v. Covello, 410 F.2d 536, 545 (2d Cir.), *cert. denied,* 396 U.S. 879 (1969) ("Absent an indication that the notes were destroyed for an improper purpose or that the handwritten data was not preserved in the formal reports *the reports satisfy the requirements of § 3500.*") (emphasis added); United States v. Spatuzza, 331 F.2d 214, 218 (7th Cir. 1964) ("The agents testified, however, that the reports furnished defendants accurately reflected these notes . . . .").

65. One of the purposes of the final report is to "preserve the final copy of a witness statement whenever it is anticipated that the witness might testify in court." United States v. Harrison, 524 F.2d 421, 425 (D.C. Cir. 1975).

66. United States v. Harrison, 524 F.2d 421, 427 (D.C. Cir. 1975).

67. Consider where an agent interviews a prospective witness during the initial stages of an investigation. Days later the investigation yields evidence incriminating the defendant. The agent's interview with the first witness will take on a new significance. It is not unlikely that the agent, in transferring his notes to a more formal report, will tend to emphasize those statements of the witness that support his new evidence. Similarly, he may under emphasize or ignore those statements that would undercut his case. One can see how, in this situation, it would be very helpful to the defendant to examine the original notes before a jury. This possibility was discussed in United States v. Bundy, 472 F.2d 1266 (D.C. Cir. 1972).

> The initial description of an assailant by the victim or other eyewitness is crucial evidence, and the notes taken of that description should be kept and produced. The formal written police report of the crime does, of course, contain a description of the offender, but that report is often prepared after a suspect is arrested and the danger that the description in the formal report may be subconsciously influenced by the viewing of the suspect by the author of the report is very great.

472 F.2d at 1267 (footnote omitted). *See also* United States v. Carrasco, 537 F.2d 372, 377 (9th Cir. 1976) ("It may be that the agent . . . who adopts a final report from preliminary memoranda will tailor his observations to fit his conclusions . . . .").

68. *See, e.g.*, United States v. Pope, 574 F.2d 320 (6th Cir. 1978).

> In conference in the judge's chambers the Assistant United States Attorney represented that he had inadvertently forgotten the statement because it related to an incident occurring after the conspiracy had ended and concerned matters which the government had no intention originally of proving at the instant trial. During the course of the interrogation of Blackmon, however, the government concluded that Blackmon's knowledge concerning the later events was relevant as bearing upon scheme and plan under Rule 404(b) . . . .

574 F.2d at 322.

words more accurately and competently than the formal report.[69] Because these notes may be more accurate, preservation of interview notes for *in camera* inspection may insure that a witness can only be impeached by his own words.[70]

Admitting that the notes may prove more accurate than the final report, of course, does not amount to an argument for automatically requiring production of either the notes or the report.[71] Vague or fragmentary records of an interview, whether classified as "notes" or a "report," would not conform to the substantially verbatim standard set by the Act. Similarly, some sections of the same document may meet that standard, while other sections do not. The statute wisely entrusts these judgments to the sound discretion of the trial court, a discretion wholly frustrated when law enforcement agencies routinely destroy rough interview notes. And insofar as formal investigative reports fulfill the statute's "substantially verbatim" requirement, rough interview notes *a fortiori* comply with that criterion.

CONCLUSION

A careful analysis of the policies animating the Jencks Act suggests that the routine destruction of law enforcement agents' rough interview notes seriously undermines the statutory purpose of preserving defendants' due process rights without furthering the statutory purpose of preventing fishing expeditions into government files. The Act entrusts the balancing of these purposes to the trial court. Such a judicial determination, after *in camera* review of the re-

69. Indeed it is arguable that the notes are a more reliable source of the non-agent's words than the final reports because they will generally contain less of the agent's own interpretations or opinions. In Campbell v. United States, 373 U.S. 487, 499 (1963), Justice Clark (dissenting) noted that: "Every lawyer — indeed every layman experienced in the taking of interviews — knows full well that it is extremely unlikely that any two narratives, even *though prepared from identical notes*, will be alike." (emphasis added).

70. The structure of the notes themselves may contain valuable hints as to their adequacy. For example, extensive use of quotation marks will indicate an agent's effort to record the interviewee's exact words as opposed to the general nature of his responses. Similarly, notes which are of a length that corresponds to the length of the interview may indicate a comprehensive treatment by the agent. *See* Williams v. United States, 338 F.2d 286, 288-89 (D.C. Cir. 1964).

71. Occasionally, the courts will uphold a refusal by the government to provide copies of the interview reports to the defense. United States v. Judon, 581 F.2d 553 (5th Cir. 1978); United States v. Blackburn, 446 F.2d 1089 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972). Where the reports do not contain "substantially verbatim" accounts of prior statements, this result complies with the statute. But when the government refuses to provide reports to the defense, the routine destruction of the original interview notes becomes especially difficult to justify. Given the differences between the notes and the reports, the defense in such a situation is denied both the procedural right to judicial determination of whether the notes amounted to Jencks Act statements and the substantive information contained in the reports. Since the availability of the reports underlies much of the courts' reluctance to require retention of the original notes, a refusal to provide the defense with a copy of the government's own reports should be met with considerable judicial skepticism. *See* note 64 *supra*.

quested documents, would fully satisfy the government's interests under the Act. But the routine destruction of interview notes by the agencies themselves amounts to a usurpation of this judicial prerogative, a usurpation inimical to the purposes and provisions of the statute.

The trial court's determination of whether the government must produce interview notes will turn on the status of the witness as a government agent or a private citizen. Where the defense seeks the notes to impeach the testimony of a government agent, the court should generally require production of the notes as statements approved or adopted by the witness under subsection (e)(1) of the Act. Where the notes relate to the testimony of a private citizen, the court must test the notes against the "substantially verbatim" standard of subsection (e)(2). Given that formal reports derived from these notes often fulfill this statutory requirement, the courts should compel the parallel production of the notes themselves. Routine destruction of rough interview notes is inconsistent with both the substantive provisions and the judicial procedure of the statute. The courts should revise their approach accordingly.