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## Constitutional Law - Due Process and Right of Confrontation- Jencks Act

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## COMMENTS

CONSTITUTIONAL LAW — DUE PROCESS AND RIGHT OF CONFRONTATION — JENCKS ACT — The Jencks Act<sup>1</sup> like the rule it purportedly reaffirmed, was designed to insure "justice."<sup>2</sup> Although the stated purpose of the act was to preserve the rights of any defendant under due process of law, the question remains unresolved whether, in articulating the rule in terms of "justice," the Court in *Jencks v. United States*<sup>3</sup> incorporated it into the requirements of due process. To be sure, the underlying intent of both the Court and Congress is unclear, but of far more concern than the intent is whether the Jencks Act, in fact, violates the constitutional mandates of the Fifth<sup>4</sup> and Sixth<sup>5</sup> Amendments, even if the *Jencks* case itself was not based on constitutional grounds.

The Court in *Jencks* clarified four procedural matters dealing with a defendant's right to inspect extra-judicial statements made by government witnesses to government agents: (1) defendant is not required to establish a foundation of inconsistency in order to inspect prior statements of witnesses; (2) whereas inspection of prior statements had formerly rested in the trial court's discretion, the *Jencks* decision indicates that defendant is entitled to inspect them as a matter of right; (3) the Court specifically disapproved of the procedure whereby the requested documents are submitted to the trial judge for his determination of relevancy and materiality; (4) the Court ruled that a refusal by the government to comply with an order for production must result in

<sup>1</sup> 18 U.S.C. (1958) §3500. The full text of the statute is set out in the appendix infra.

<sup>2</sup> See S. Rep. 981, 85th Cong., 1st sess., p. 1862 (1957).

<sup>3</sup> 353 U.S. 657 (1957). Petitioner, a labor union official, had been convicted of making false statements in a noncommunist affidavit filed pursuant to §9(h) of the Taft-Hartley Act. At the trial, two crucial government witnesses, both of whom were Communist Party members, admitted making prior statements to the F. B. I. concerning activities of petitioner about which they testified. Petitioner's counsel moved for production of these statements for examination by the trial judge in camera, and delivery to the counsel of those portions found to be admissible for impeachment purposes. The motion was denied, and the court of appeals affirmed on the ground that no foundation of inconsistency had been laid. The Supreme Court reversed, finding the previous practice of requiring the defendant to lay a preliminary foundation of inconsistency between the contents of the report and the testimony before being entitled to inspect such reports to be in error. In addition, the Court disapproved the accepted practice of an in camera examination by the trial judge to determine relevancy and materiality. The dissent, on the other hand, declared that unless Congress immediately changed the rule announced by the Court, agencies of the federal government engaged in law enforcement might as well close up shop, for the majority opinion has opened their files to the criminal.

<sup>4</sup> U.S. CONST., Amend. V.

<sup>5</sup> U.S. CONST., Amend. VI.

a dismissal. As to (1) and (2), the act embodies the Court's holding. With respect to (3) and (4), the act appears to limit the holding; this will be discussed later in this comment.

It is indisputable that the *Jencks* case did, both in fact and in effect, make sweeping changes in the development of rules applicable to a defendant's right of access to government documents for the cross-examination and impeachment of government witnesses.<sup>6</sup> Congress, prompted by misinterpretation and the intrusion of the *Jencks* decision into often totally unrelated areas, drafted legislation to clarify and delimit the reach of *Jencks*.<sup>7</sup> However, it appears that in attempting to reaffirm the *Jencks* rule, Congress passed an act which is not only defective and ambiguous in some respects, but which is also unduly restrictive, for it forecloses access to impeachment materials in situations seemingly not contemplated by Congress. The act seeks to establish a rule governing the production of statements and reports of witnesses made to government agents which protects confidential information in the possession of the government and at the same time provides the means for a defendant's presentation of an adequate defense during criminal prosecutions.

In reading the act and the interpretation of it by the Court in *Palermo v. United States*,<sup>8</sup> it is questionable whether Congress was aware of the fact that, in attempting to remedy the "Roman Holiday" referred to in Justice Clark's dissent in *Jencks*,<sup>9</sup> it was creating in the act itself several means of evading its requirements while at the same time preserving the government's advantage

<sup>6</sup> Prior to *Jencks* case, the reasoning, based on the Supreme Court's decision in *Gordon v. United States*, 344 U.S. 414 (1953), had been that a foundation of inconsistency was necessarily required before the defendant could have access to statements of witnesses. See also *Herzog v. United States*, (9th Cir. 1955) 226 F. (2d) 561, cert. den. 352 U.S. 844 (1956); *Scanlon v. United States*, (1st Cir. 1955) 223 F. (2d) 382. Furthermore, the accepted practice required production of the requested statements to the trial judge for his inspection *in camera*, with the judge being obligated to turn over to the defendant such portions of the statements as were admissible in evidence for impeachment purposes. See *United States v. Krulewitch*, (2d Cir. 1944) 145 F. (2d) 76; *United States v. Cohen*, (2d Cir. 1944) 145 F. (2d) 82, cert. den. 323 U.S. 799 (1945); *United States v. Beekman*, (2d Cir. 1946) 155 F. (2d) 580; *United States v. Grayson*, (2d Cir. 1948) 166 F. (2d) 863; *United States v. Mesarosh*, (W. D. Pa. 1953) 116 F. Supp. 345, affd. (3d Cir. 1955) 223 F. (2d) 449, revd. on other grounds, 352 U.S. 1 (1956). However, there was a decided lack of harmony among the circuits as to the foundation upon which the right to such evidence was based as well as to the application of the right itself. See comment, 106 UNIV. PA. L. REV. 110 (1957); note, 56 MICH. L. REV. 314 (1957).

<sup>7</sup> For a discussion, see the brief of Senator O'Mahoney, 103 CONG. REC. 15938-15941 (1957). See also Keefe, "Jinks and Jencks," 7 CATH. UNIV. L. REV. 91 (1958); comment, 67 YALE L.J. 674 at 680-682 (1958).

<sup>8</sup> 360 U.S. 343 (1959).

<sup>9</sup> 353 U.S. 657 at 681-682 (1957).

in using informer reports. For example, in *Palermo*, the defendant, being prosecuted for criminal tax evasion, requested production by the government of a conference memorandum made by a government agent. The memorandum, consisting of a 600-word summary of a conference which had lasted three and one-half hours, was made up after the conference and represented the agent's selection of those items of information deemed appropriate. The trial judge denied production of the memorandum on the ground that it was not within the definition of the term "statement" in paragraph (e) of the Jencks Act. The defendant was convicted, and his conviction was affirmed on appeal.<sup>10</sup> On certiorari, the Supreme Court unanimously affirmed, with four justices concurring in the result only.<sup>11</sup> Justice Frankfurter, writing the opinion of the Court, held that the act was the *exclusive* means of compelling production of statements made by government witnesses to agents of the government, and that the court below was justified in determining that the memorandum was not within the act's definition of "statement."

No doubt the legislation was intended to limit types of statements and reports a defendant is entitled to examine in a criminal suit. But in seeking to implement the principles of the *Jencks* case, has Congress passed legislation invalid in itself? To a great extent the answer to this lies in a determination of the true basis of the *Jencks* case.<sup>12</sup> To formulate answers to whether the act was intended to be exclusive, and, if so, whether it violates the Fifth Amendment due process clause or the Sixth Amendment compulsory process and right of confrontation clauses, a consideration of the Jencks Act in light of the decision it purported to clarify is necessary.

### I. WAS THE JENCKS ACT INTENDED TO BE EXCLUSIVE?

The original bills drafted by the Justice Department contained language broad enough to have completely vitiated almost every right a defendant might have had to obtain statements and

<sup>10</sup> *United States v. Palermo*, (2d Cir. 1953) 258 F. (2d) 397.

<sup>11</sup> Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, concurred in the result only because they felt that the memorandum did not come within the term "statement" as defined by paragraph (e) of the Jencks Act. However, they felt that the majority decided much more than the situation called for when it extended its opinion to the question of the act's exclusivity. See 360 U.S. 343 at 360 (1959).

<sup>12</sup> For articles which take the position that the Jencks case was based on constitutional grounds, see Keeffe, "Jinks and Jencks," 7 CATH. UNIV. REV. 91 (1958); comment, 31 SO. CAL. L. REV. 78 (1957). For articles which take the position that the Jencks case merely sets out a rule of criminal procedure, see comment, 106 UNIV. PA. L. REV. 110 (1957).

reports of government witnesses in the possession of the government. The bills declared:

"(a) In any criminal prosecution brought by the United States, *any rule of court or procedure to the contrary notwithstanding*, no statement or report of any . . . person other than the defendant which is in the possession of the United States shall be the subject of subpoena, discovery, or inspection, except as provided in paragraph (b) of this section."<sup>13</sup>

Paragraph (b) allowed inspection of statements and reports of government witnesses relating to the subject matter to which the witness had testified. Certainly this broad language would seem to embrace the procedures defined by the federal rules prior to the *Jencks* case as well as the limitations of the *Jencks* case itself. Moreover, when the apparently absolute limitations of paragraph (a) were combined with the restrictive definition of "statement" in paragraph (e) of the proposed bills and the final enactment, there appeared to be very little left of the original policies and purposes of the *Jencks* case. However, the final enactment was not so worded, for the language of the original bills was considerably modified to resemble more closely the Court's decision in the *Jencks* case. Certainly it would seem that the deletion of this broad language of exclusivity in conference compels an inference negating absolute exclusivity in the act as passed.<sup>14</sup> Clearly Congress has not defined all of the possible situations which fall outside of the act in which statements would be invaluable to the defendant for purposes of cross-examination: for example, where the government agent makes use of the reports, but the prosecution does not call the witness; where a written statement is given by the witness yet not signed or otherwise adopted by him; where an oral report is summarized substantially verbatim though not contemporaneously with the recital of the witness; and where the statements would be consistent with the testimony of the witness or would not relate to his testimony yet would indicate strong bias on the part of the witness.<sup>15</sup> In these instances, the undesirability of denying the accused access to such statements on the grounds of the exclusivity of the act becomes particularly pronounced if the testimony of the witness is the turning point of

<sup>13</sup> Emphasis added. For the complete text of the bills, see S. Rep. 569, 85th Cong., 1st sess., pp. 10-11 (1957), and H. Rep. 700, 85th Cong., 1st sess., p. 15 (1957).

<sup>14</sup> See the concurring opinion of Justice Clark in *Palermo v. United States*, 360 U.S. 343 at 363 (1959).

<sup>15</sup> See comment, 67 YALE L.J. 674 at 693 (1958).

the prosecution's case and the basis of guilt or innocence in the mind of the jury.

The Court in *Palermo*, although admitting that "exclusiveness" is nowhere expressed in the act, maintains the somewhat dubious theory that, "Some things [exclusivity] too clearly evince a legislative enactment to call for a redundancy of utterance."<sup>16</sup> To be sure, the act does not provide for the inspection of unauthenticated statements or reports or oral statements transcribed by a government agent in summary fashion, for the procedure of paragraphs (b) and (c) is limited to forms of authenticating statements as defined in paragraph (e). However, paragraph (a) is not so limited.<sup>17</sup> Furthermore, the conspicuous absence of the phrase "any rule of court or procedure to the contrary notwithstanding" in the final enactment, even though a precise standard of authenticity is required by paragraph (e), should not suggest a similarity of exclusive prohibitory purposes.<sup>18</sup> Keeping in mind the legislative intent to clarify and reaffirm the *Jencks* case, this reasoning appears even more valid, for certainly the Court in *Jencks* did not limit its ruling to any precise definitions or forms of authenticity.

But even if it is assumed that the act was intended to be exclusive, to what was this exclusivity intended to apply? If the act is merely a procedural device for obtaining the types of documents within its definition, it does not necessarily follow that the rationale of the *Jencks* case cannot be utilized to obtain those documents that fall without the purview of the act.<sup>19</sup> It is entirely conceivable that

<sup>16</sup> 360 U.S. 343 at 350 (1959).

<sup>17</sup> Interestingly, the word "report" is not mentioned after paragraph (a). Unlike the word "statement," the word "report" is not defined. It seems to have been entirely forgotten to the point of its not having even been argued in any cases to which paragraph (e) has been applied. Apparently the thought must be that the two words are used interchangeably despite the use of the disjunctive "or" in paragraph (a). But it certainly seems that the possible distinction ought to be argued.

<sup>18</sup> Congressman Celler stated: "The proposed legislation is not designed to touch in any way the decision of the Supreme Court insofar as due process is concerned. It seeks only to set up a procedural device for the setting up of standards of interpretation for safeguarding the needless disclosure of confidential information in Government files and, at the same time, assuring defendants access to the material in those files pertinent to the testimony of the Government witness. . . . [W]e are simply attempting to provide a procedural process. In doing so, this procedure concerns itself with and limits itself to those kinds of statements, documents, and so forth." 103 CONG. REC. 16738 (1957).

"It is the specific intent of the bill to provide for the production only of written statements previously made by a Government witness in the possession of the United States which are signed by him or otherwise adopted or approved by him, and any transcription or recordings of oral statements made by the witness to a Federal law officer, relating to the matter as to which the witness has testified." S. Rep. 981, 85th Cong., 1st sess., p. 3 (1957). This does not suggest that exclusiveness should extend beyond the limitations of the act.

<sup>19</sup> See comment, 31 So. CAL. L. REV. 78 at 86 (1957).

the act is merely the exclusive method for obtaining "statements" within its definition. Certainly the act does not purport to supplant discovery under rules 16 and 17 (c) of the Federal Rules of Criminal Procedure.<sup>20</sup> In fact, reference to these rules was expressly made in the early drafts of the bill,<sup>21</sup> but was omitted from the act as adopted in order to preclude any thoughts that the act was intended to modify or reduce their use.<sup>22</sup> Thus, since Congress intended the Federal Rules of Criminal Procedure to remain applicable in situations covered by the rules and not by the Jencks Act, there seems to be no reason militating against concluding similarly that because the rule set forth in the *Jencks* case is broader than that prescribed by the act, the *Jencks* case should control in those situations not provided for in the act.

## II. THE JENCKS ACT AND THE SIXTH AMENDMENT

Assuming arguendo that the Jencks Act is exclusive not only as to statements and reports that fall within its definition but as to that information outside of its specific words as well, it is questionable whether the act satisfies the dictates of the Sixth Amendment.

As necessary and desirable as constitutional flexibility is, the inevitable effect is the element of uncertainty. But whatever the reaches of uncertainty are, the right to cross-examine, whether defined as a rule of evidence or stated in principles of constitutional law, has been firmly embedded in our judicial system. Of course,

<sup>20</sup> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. . . ." Rule 16, Fed. Rules Crim. Proc., 18 U.S.C. App. (1958).

"A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. . . . The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys." *Id.*, Rule 17 (c).

For a very thorough discussion of the operation of rule 16 and rule 17 (c), see Orfield, "Discovery and Inspection in Federal Criminal Procedure," 59 VA. L. REV. 221, 312 (1957). The Supreme Court has read into rule 17 (c) the requirement that the materials designated in the subpoena be evidentiary, i.e., "admissible in evidence." *Bowman Dairy Co. v. United States*, 341 U.S. 214 at 221 (1951) (dictum); note, 67 HARV. L. REV. 492 (1954).

<sup>21</sup> See 103 CONG. REC. 16130 (1957).

<sup>22</sup> See discussion in Keefe, "Jinks and Jencks," 7 CATH. UNIV. L. REV. 91 (1958); comment, 67 YALE L.J. 674 (1958).

there are many instances when practical necessity justifies modification of the right of cross-examination, but even these departures are permitted only to the extent they promote fairness to the accused rather than prejudice his rights.<sup>23</sup>

Dean Wigmore has defined the right of confrontation as the indispensable opportunity to cross-examine, and in stating its essentiality in the most positive and absolute of terms has said,

" . . . [I]t is beyond any doubt the greatest legal engine ever invented for the discovery of truth. . . . If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.<sup>24</sup>

"In short, however radically the jury-trial rules of Evidence may be dispensed with, [the right of cross-examination] . . . remains as a fundamental of fair and intelligent investigation of disputed facts."<sup>25</sup>

The need for the constitutional inquiry is raised forcefully by the suggestion of these words that the right of cross-examination is part of that "fundamental fairness" essential to a fair trial. If the effect of the exclusive application of the Jencks Act is such that it hampers the accused in his defense by denying him access to prior inconsistent statements related to the testimony of an actual witness in order to cross-examine effectively, then the act may well be violative of the Sixth Amendment.<sup>26</sup> In the *Palermo* case, Justice Brennan, in his concurring opinion, pointed out the fact that a statute which restrains the trial judge from ordering the production of such statements as might aid the defendant raises an obvious threat of deprival of the Sixth Amendment right of confrontation.<sup>27</sup>

In the *Jencks* case, the Court ruled that to require the accused to establish an inconsistency between the testimony of a witness at the trial and his extrajudicial statements to government agents before the accused is allowed access to the statements would be to deny him evidence relevant to his defense.<sup>28</sup> This latter phrase, "evidence relevant to his defense," was used in prior decisions

<sup>23</sup> See 5 WIGMORE, EVIDENCE, 3d ed., §1401 (1940).

<sup>24</sup> Id., §1367.

<sup>25</sup> Id., §1400.

<sup>26</sup> See the discussion in *United States v. Burr*, (C.C. Va. 1807) 25 Fed. Cas. 187 at 193. Although the case dealt with the production of a letter used by a witness to refresh his recollection, the policies announced by the court are applicable here.

<sup>27</sup> See the concurring opinion of Justice Brennan, 360 U.S. 345 at 363 (1959).

<sup>28</sup> 353 U.S. 657 at 667 (1957).



when questions of Sixth Amendment violations were raised.<sup>29</sup> In *United States v. Schneiderman*,<sup>30</sup> the court in effect held that reports used to test the credibility of witnesses in reality become witnesses in the defendant's favor. In that case the government claimed privilege under a Department of Justice order which classified reports of witnesses as confidential, thereby precluding their disclosure for any purpose whatsoever. Nevertheless, the court compelled production and justified its decision on Sixth Amendment grounds.<sup>31</sup> The Court in *Jencks*, citing *Schneiderman* in footnote 13 of its opinion,<sup>32</sup> reasoned similarly when it said that the Attorney General labors under a duty to see that "justice be done." The Court's opinion, moreover, embodied the *Schneiderman* rationale that to that end the Attorney General may not withhold "evidence essential to the proper disposition of the case, including, *a fortiori*, any evidence which may be material to the defense of the accused."<sup>33</sup> In view of the fact that the withholding by the Department of Justice has raised questions of Sixth Amendment violations, it would be fair to assume that a legislative procedural rule which precludes disclosure of an unsigned written statement or of an oral statement recorded substantially verbatim, though not contemporaneously with its recital, could not accomplish what the Attorney General or the Department of Justice order could not accomplish constitutionally.<sup>34</sup>

<sup>29</sup> E.g., *United States v. Schneiderman*, (S.D. Cal. 1952) 106 F. Supp. 731; *United States v. Coplon*, (2d Cir. 1950) 185 F. (2d) 629. See also Eagleton, "A State Prosecutor Looks at the Jencks Case," 4 St. Louis Univ. L.J. 405 (1957).

<sup>30</sup> (S.D. Cal. 1952) 106 F. Supp. 731. Defendants, indicted under the Smith Act for conspiring to commit offenses against the United States, sought an order directing the government to produce for inspection and use by the defense on cross-examination of government witnesses certain reports made by those witnesses to the F.B.I. The government asserted a claim of privilege. The district court held that any privilege on the part of the government to withhold the reports from inspection had been waived by the government by questions asked by it on direct examination of the witnesses. While the interpretation might be considered rather tenuous, it nevertheless seems that the court equated reports and witnesses.

<sup>31</sup> *Id.* at 736.

<sup>32</sup> 353 U.S. 657 at 668 (1957).

<sup>33</sup> *United States v. Schneiderman*, (S.D. Cal. 1952) 106 F. Supp. 731 at 739. And see *Jencks v. United States*, 353 U.S. 657 at 668, n. 13, citing Canon 5, A.B.A., CANONS OF PROFESSIONAL ETHICS (1947) ["The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." Thus, it would seem that if the government is aware of the inconsistency it is under a duty to disclose to and provide the defendant with the material necessary to reveal the inconsistency.] See also *Berger v. United States*, 295 U.S. 78 at 88 (1934).

<sup>34</sup> See comment, 31 So. CAL. L. REV. 78 (1957).

In *United States v. Coplon*,<sup>35</sup> the Second Circuit stated that when the government chooses to prosecute an individual, the right of that individual to meet the charges against him by introducing relevant documents to his defense cannot be subject to the control and caprice of the government. The court reasoned that whenever the government claim of privilege conflicts with the right of the accused "to have compulsory process [and other evidence] in his favor," the Attorney General must decide whether the public prejudice of allowing the crime to go unpunished is greater than the attendant public prejudice in disclosing confidential information in the possession of the government which might be relevant to the defense.<sup>36</sup>

In the *Coplon* case, the prosecution argued that the government privilege precluded disclosure of informer statements and state secrets. And it must be recognized that traditionally there is a government privilege in this area. However, it would seem that the arguments for government privilege and the limitations on right of access should apply with even less vigor than in *Coplon* to the situations under discussion here. Since the Jencks Act establishes a rule concerning information already disclosed by government witnesses during the course of the trial, a situation calling for the production of state secrets rarely, if ever, will arise. Thus, when the basis for secrecy is removed or when none exists initially, there should be no reason operating against disclosure directly to the defendant.<sup>37</sup> If the identity of the witness is known, if the government uses his statements as a basis for prosecution, or if the informer testifies at the trial concerning those same statements, the suppression of possible exculpatory statements seems illogical.<sup>38</sup> On the other hand, the extrajudicial statements may be highly relevant to the defense and, consequently, the disposition to disclose these statements

<sup>35</sup> (2d Cir. 1950) 185 F. (2d) 629.

<sup>36</sup> Id. at 638. See also *United States v. Burr*, (C.C. Va. 1807) 25 Fed. Cas. 187. Chief Justice Marshall stated at 191-193: "... Let it be supposed that the letter may not contain anything respecting the person now before the court. Still it may respect a witness material in the case, and become important by bearing on his testimony. Different representations may have been made by that witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although before the case be opened its particular application cannot be perceived by the judge." Commenting on the *Burr* case, in the *Jencks* decision, Justice Brennan remarked at 353 U.S. 669, n. 14 (1957): "What is true before the case is opened is equally true as it unfolds. The trial judge cannot perceive or determine the relevancy and materiality of the documents to the defense without hearing defense argument, after inspection, as to its bearing upon the case."

<sup>37</sup> 8 WIGMORE, EVIDENCE, 3d ed., §2374, p. 755 (1940). See also comment, 11 STAN. L. REV. 297 at 306 (1959). For an excellent discussion of the use of informer testimony, see, generally, comment, 63 YALE L.J. 206 (1953).

<sup>38</sup> Ibid.

ought to be heightened notwithstanding their failure to conform to paragraph (e)'s definition of "statement." Moreover, to allow technical rules of rather dubious merit to prohibit impeachment through cross-examination may, in the absence of other means of attacking their credibility, allow convictions to be based on the untested and unsupported recollections of informers, a class of witnesses whose very livelihood, in many cases, depends on the acceptance of their testimony. As a very minimal requirement, the credibility of such witnesses ought to be subjected to the severest scrutiny.<sup>39</sup>

In *Riser v. Teets*,<sup>40</sup> although the error was held not to be prejudicial since the remainder of the evidence was overwhelming, the court nevertheless stated that it was error to refuse to furnish copies of prior inconsistent statements of witnesses to the defendant. However, the dissent deemed the error prejudicial in that there could be no compromise with a constitutional right, and stated, ". . . a right of an accused to have compulsory process for obtaining witnesses in his favor is also a right implicit in the concept of ordered liberty. . . . [It] extends to documentary as well as oral evidence. . . . [T]he vacating of the subpoena for the production of the statements of these witnesses was a plain denial of this due process."<sup>41</sup>

Congress, in addition to the courts in these three cases, recognized the use of either the compulsory process or right of confrontation clauses of the Sixth Amendment to justify providing the defendant with the statements of witnesses and other evidence relevant to his defense. The legislative history of the Jencks Act reveals the serious doubts of some of the legislators as to the constitutionality of exclusionary provisions which turn on form rather than substance. Senator Javits remarked that the constitutional mandates cannot be avoided so easily by a witness simply not signing a statement: if a report of a witness is sufficient to impeach that witness, the defendant is entitled to use it whether written or not.<sup>42</sup> And certainly it would seem that the senator's reasoning embodies a logical appreciation of the problems raised by the act.

<sup>39</sup> See comment, 31 So. CAL. L. REV. 78 at 82 (1957).

<sup>40</sup> 9th Cir. 1958) 253 F. (2d) 844.

<sup>41</sup> Id. at 847 (dissent).

<sup>42</sup> 103 CONG. REC. 15933-15934 (1957). Senator Javits also stated: "Certainly we cannot repeal or change the due process clause; nor do we wish to do so. Within the limits of the Constitution we are trying to protect the F.B.I. files. . . . The bill is designed to protect, and does protect, the F.B.I. files to the full extent they ought to be protected, consistent with the right of the individual to due process. . . ."

If the unsigned statement used to impeach the witness is not that of the witness, then it can be so explained. And if the unsigned statement is that of the witness, and the witness denies making it, then it would seem that its direct relevance to the issues of the case would permit the defendant to have the government agent verify its authenticity. But to prohibit altogether access to material of impeachment value would be to deny the constitutional right to cross-examine effectively. With respect to impeachment, the defendant would be in no better position, as a practical matter, than if the witness remained anonymous, or the entire proceeding was ex parte with the government submitting its arguments while the accused submitted none.<sup>43</sup> The denial of the available material and effective sources from which to cross-examine, seemingly possible under the Jencks Act, is practically tantamount to the denial of cross-examination itself.

### III. THE JENCKS ACT AND THE FIFTH AMENDMENT

Continuing, as in the above discussion, the assumption of the exclusiveness of the act, it is relevant also to question the act from the standpoint of the fair trial requirements of the Fifth Amendment due process clause. To appraise the act properly in this respect, it is first necessary to place it more specifically in a context of the *Jencks* case. The majority opinion in *Jencks* skillfully avoided any reference to the Constitution. But the conspicuous absence of the phrase "due process of law" in the opinion might well have been due to the exercise of judicial self-restraint, since the holding was necessarily based on other grounds.<sup>44</sup> Even though the Court was in many respects without precedent, the opinion seems sufficiently broad to indicate that constitutional mandates at least provided a guide.<sup>45</sup> Moreover, the conclusion is inescapable that the Court by-passed the narrow grounds of the appeal in order to deal with the more significant issue of the demands of

<sup>43</sup> See, generally, Mulvaney, "Government Secrecy and the Right of Confrontation," 31 NOTRE DAME LAWYER 602 (1956).

<sup>44</sup> The opinion is outwardly based upon error of the lower court in denying the motion for inspection. Considering the government's sole ground of objection, that a preliminary foundation of inconsistency was not laid between the contents of the reports and the testimony of the witness, and upon which ground the court of appeals affirmed, the Supreme Court holds this as error, since for production purposes it need appear only that the evidence is relevant, competent and outside the exclusionary rule. The Court held only that the trial court and the appellate court erred. No expression was made that this was error because the defendant, under the Fifth Amendment, had a right of inspection.

<sup>45</sup> See concurring opinion of Justice Clark in *Palermo v. United States*, 360 U.S. 343 at 363 (1959).

justice in affording access to government files.<sup>46</sup> What, then, compels the belief that due process of law was the basis of the Court's reasoning in *Jencks*?

First, and perhaps the strongest indication, is the language of Justice Brennan that, "Justice requires no less."<sup>47</sup> This language, coupled with the Court's approbation of language in *United States v. Reynolds*,<sup>48</sup> strongly suggests due process. Certainly the limits of "justice," although insusceptible of precise definition, must be moored to some basic structure. Justice in the abstract is almost meaningless unless attached to the basic rights which dictate it. And, it is indeed arguable that this basic right is that of due process of law afforded by the Fifth Amendment.

Second, it appears that the defendant in the *Jencks* case could not have invoked either rule 16 or 17 (c) of the Federal Rules of Criminal Procedure, for he sought the production of documents within the purview of neither. Rule 16 pertains to documents seized or otherwise obtained from the defendant by the government, while rule 17 (c) relates to an expeditious method of requiring production of documents before trial to be used during the trial. If, then, there is a right to obtain these documents, it is not unreasonable to assume that it arises as an integral part of the broader constitutional right to a fair trial. Although its outer limits are indefinite, the concept of a fair trial may be defined in terms of its recognized elements.<sup>49</sup> It would seem that one of these elements is the right to cross-examine effectively, for "it is unconscionable to allow . . . [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."<sup>50</sup>

<sup>46</sup> See Eagleton, "A State Prosecutor Looks at the *Jencks* Case," 4 ST. LOUIS UNIV. L.J. 405 (1957).

<sup>47</sup> 353 U.S. 657 at 669 (1957).

<sup>48</sup> 345 U.S. 1 at 12 (1952). Chief Justice Vinson stated, "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

<sup>49</sup> See, generally, Inbau, "The Concept of Fair Hearing in Anglo-American Law," 31 TULANE L. REV. 67 (1956).

<sup>50</sup> *United States v. Reynolds*, 345 U.S. 1 at 12 (1953) (dictum). See also *Roviaro v. United States*, 353 U.S. 53 at 60 (1957), where the Court said in response to the government's seeking to prevent disclosure of informer reports: "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." And in *United States v. Beekman*, (2d Cir. 1946) 155 F. (2d) 580 at 584, Judge Frank said: "We have recently held that when the Government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."

Third, to erect procedural barriers to obstruct the defendant's access to materials which might lead to his exculpation would be inconsistent with the basic philosophy of giving all possible protection to the innocent. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of *justice*. In order to declare a denial of it [the court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such a quality as necessarily prevent a fair trial."<sup>51</sup> It would seem that "fundamental fairness" would require making readily available material needed to impeach a witness and perhaps to exculpate a defendant. Moreover, a procedural form of suppression would be "fatally infectious" to the point of preventing a "fair trial." Although a witness' testimony need not necessarily be perjured, or known to be so, a procedural suppression of invaluable impeachment information would seem similar to the intentional suppression of evidence which would refute testimony known to be perjured, a practice which has been held to be a violation of due process.<sup>52</sup> In both instances, it would seem that neither the perjury or its possibility, nor the knowledge of the prosecution, is the greater wrong. Rather, the greater and more infectious wrong is the suppression, and therefore the same reasoning should be opposed to procedural suppression.

Assuming that the requirements of due process are the basis for the *Jencks* decision, an examination of the act reveals a definite delimitation of, if not an actual derogation from, the decision. Three specific examples point out the extent of the encroachment by the act into the principles enunciated by the *Jencks* case.

First, although the Court was without judicial precedent,<sup>53</sup> the in camera inspection provided for in paragraph (c) of the act is precisely the practice disapproved of in *Jencks*, for the Court reasoned that only the defendant was adequately equipped to determine the need for and the effective use of prior inconsistent statements for impeachment purposes, and thus production must be directly to the defendant.<sup>54</sup> Under the act, however, since the

<sup>51</sup> *Lisenba v. California*, 314 U.S. 219 at 236 (1941).

<sup>52</sup> *Mooney v. Holohan*, 294 U.S. 103 (1935). Factually the *Mooney* case can be distinguished from the *Jencks* case since in *Jencks* no perjury was known to exist, and there was no intentional suppression of evidence by the prosecution. However, the fact that perjury is not known to exist does not mean that it does not exist in fact. Further, there need be no intentional suppression by the prosecution if the procedural rules accomplish the same thing.

<sup>53</sup> See note 6 *supra*.

<sup>54</sup> 353 U.S. 657 at 669 (1957). See comment, 11 STAN. L. REV. 297 at 301-308 (1959).

accused or his attorney will not be present when the inspection is made and will not know the contents of the reports, it will be extremely difficult, if not impossible, to make a meaningful objection to the determination of the trial judge. A fortiori an appellate review will have the same defect, because the ability of the accused to make an effective argument is necessarily dependent on his knowledge of the contents of the reports. While it is true that the Jencks rule evolved from a balancing of the government's interests in secrecy against the interests of the defendant in material relevant to his defense,<sup>55</sup> the essentiality of the evidence raises a question of degree only, while reason should dictate that production should be to the defendant in the first instance.

Second, the Court in *Jencks* made no distinction as to the form of statements given by the witness to the government agent. Yet paragraph (e) of the act reveals a studious attempt to crystallize all possibilities into a rather inflexible definition. In practice, it is not only conceivable but it is probably to be expected that more and more interviewers will take advantage of the loopholes in the act by putting the interview into the words of the interviewer, as was done in *Palermo*. As a result, the ability to impeach the witness will be defeated by a requirement based on technicalities of form rather than on substance. Clearly this is contrary to the intent of the Court in the *Jencks* case, because the Court made no such distinctions and drew no such fine lines. Rather the Court dealt merely with the production of relevant information.<sup>56</sup> To reason, as did the appellate court in *Palermo*, that the memorandum was not intended to be substantially verbatim of anything recited by the witness<sup>57</sup> is to reason erroneously, for the intent of the recorder has little, if any, bearing on the issue of the substance of the report. The essential requirement for production ought not to be the form in which the witness's words are recorded or the intent of the recorder, but rather that the report contains the prior extrajudicial inconsistent statements sought by the defendant.<sup>58</sup> If the memorandum contains only one substantially-verbatim sentence out of hundreds, this does not mean that the value of that one sentence for impeachment would be lessened. In the *Palermo* case, the 600-word memorandum might have been a substantially-verbatim summary of all the statements needed for impeachment

<sup>55</sup> See note, 18 LA. L. REV. 345 (1958).

<sup>56</sup> 353 U.S. 657 at 672 (1957).

<sup>57</sup> *United States v. Palermo*, (2d Cir. 1958) 258 F. (2d) 397 at 399.

<sup>58</sup> See comment, 34 IND. L.J. 441 at 442, n. 11 (1959).

purposes and, further, it might have been a substantial recollection of all the material related to that matter testified to at the trial. However, since the 600 words were not a substantially-verbatim transcription of the entire interview, they would not come within the definition in paragraph (e) of the act. Yet no one could dispute the fact that their quality for impeachment purposes would be no greater if the whole interview had been recorded.

Thus, it would seem that if the *Jencks* case sets forth a rule of procedural due process, the Jencks Act has truly departed from the spirit of that decision<sup>59</sup> and would therefore be repugnant to the Fifth Amendment. Even if the Court in the *Jencks* case based its decision solely on its common-law power to administer procedural and evidentiary rules for the federal courts,<sup>60</sup> rather than on constitutional grounds, it is certainly arguable that through legislation, Congress, by according the defendant so much less than did the Court in *Jencks*, lessened his rights to such an extent that the act itself is a violation of due process. Since the requirements of due process of law serve as a restraint on congressional as well as judicial powers, Congress is not free to make whatever procedure it wishes "due process of law."<sup>61</sup> In striving to dispense justice in criminal proceedings, the means by which the justice is to be achieved must be considered as vital and significant as the justice itself. Procedural due process requires that the rules conform to a sound conception of the protective devices of the Constitution, not that the concept of due process be altered and molded to conform

<sup>59</sup> Another departure may perhaps be found in the fact that the procedure provided for in paragraph (d) of the act differs markedly from the procedure outlined in the *Jencks* case. The Court there adopted, without modification, the portions of the *Reynolds* opinion to the effect that in criminal cases the government can invoke its evidentiary privilege only at the expense of letting the defendant go free. 353 U.S. 657 at 671 (1957). And see notes 48 and 50 *supra*. See also Schwartz, "Jencks — An Unveiling Pattern of Expanding Federal Criminal Discovery," 3 So. Tex. L.J. 111 at 139 (1957).

<sup>60</sup> See *Scales v. United States*, (4th Cir. 1958) 260 F. (2d) 21, cert. granted 358 U.S. 917 (1958); *United States v. Spangelet*, (2d Cir. 1958) 258 F. (2d) 338; *United States v. Angelet*, (2d Cir. 1958) 255 F. (2d) 383. See also *McNabb v. United States*, 318 U.S. 332 at 341 (1943), where the Court said: "In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions."

<sup>61</sup> *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. (59 U.S.) 272 at 276-277 (1855): "The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."



to the rules.<sup>62</sup> To be sure, the history of the act indicates a congressional awareness of this, for the legislators continually referred to their duty to afford due process of law.<sup>63</sup> But awareness of a duty and the discharge of that duty are two different things. Undoubtedly many of the inconsistencies between the act and the *Jencks* case were generated by the desire to legislate in this area before the impending recess.<sup>64</sup> However, this explanation offers little solace to an accused.

#### IV. CONCLUSION

The general gravity and stigma of a criminal prosecution should not be treated so lightly as to withdraw access to possible exculpatory statements on so restrictive a definition as that found in the act. If the theories of the prosecution in any given case are correct, then certainly no prejudice will result from disclosure of the statements, since only the statements related to matters testified to will be involved. And if the theories of the prosecution are incorrect, then any prejudice to the government resulting from disclosure would be justified. The cases in which the *Jencks* rule was applied,<sup>65</sup> though not always satisfactorily or rationally, would still seem indicative of a general tendency to attach greater significance to the basic rights propounded in the *Jencks* case than Congress appears to have recognized in its enactment.

The constitutional questions raised by the application of the act are probably due more to the label of "exclusivity" attached by the Court in the *Palermo* case than to any one other single factor. Although the judiciary's duty to bridge the gaps in statutes in order to formulate purposes and policies is often unavoidable, the task is a dangerous one, to be approached with extreme caution.<sup>66</sup> It is questionable whether the admonitory dictum of the Court in *Palermo* resulted from the exercise of such caution. In view of the basic rights the Court endorsed in the *Jencks* case, the

<sup>62</sup> Ibid.

<sup>63</sup> See, e.g., 103 CONG. REC. 15915, 15916, 15932 (remarks of Senator O'Mahoney), 16489 (remarks of Senator Cooper) (1957).

<sup>64</sup> The principal discussion started in the Senate on Friday, August 23, 1957, 103 CONG. REC. 15781-15792 (1957); was resumed on Monday, August 26, 1957, id. at 15915-15942; then shifted to the House on Tuesday, August 27, 1957, id. at 16084, 16113-16130. On Thursday, August 29, 1957, the Senate passed the Conference bill, id. at 16486, and on Friday, August 30, 1957, the House passed it, id. at 16734.

<sup>65</sup> See cases discussed in the brief of Senator O'Mahoney, 103 CONG. REC. 15938-15941 (1957).

<sup>66</sup> See, generally, Horack, "Cooperative Action for Improved Statutory Interpretation," 3 VAND. L. REV. 382 (1950). See also Frankfurter, "Foreword" to "A Symposium on Statutory Construction," 3 VAND. L. REV. 365 (1950).

conclusion would seem even more compelling that the Court's interstitial exercise of a limited legislative function in *Palermo* was unwarranted. If "exclusivity" is to remain the only construction, then it appears that the need for an amendment to the act is an essential one — perhaps more essential than the need for the passage of the act in the first instance.

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#### APPENDIX

##### THE JENCKS ACT

[18 U. S. C. (1958) §3500]

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) 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.

"(c) 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. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (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.

"(e) 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; or

"(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 to an agent of the Government and recorded contemporaneously with the making of such oral statement."