L. G. BALFOUR COMPANY

Docket 8435. Order and Opinions, April 22, 1966

Order vacating hearing examiner's order of Sept. 29, 1965, and remanding the case for further consideration of whether certain parts of the witness interview reports should be made available to respondent's counsel pursuant to the Jencks Act.

OPINION OF THE COMMISSION

This matter is before the Commission on the interlocutory appeal of complaint counsel from a ruling of the hearing examiner on September 29, 1965, allowing respondents access to certain interview reports from the Commission's files. The appeal and respondents' answer raise important issues concerning the requirements of the Jencks Act [1] insofar as Commission proceed-

[1] 18 U.S.C. § 3500 (1958).

ings are concerned and the hearing examiner's role in determining whether confidential reports from the Commission's files should be produced for impeachment purposes.

The events leading up to the appeal may briefly be summarized as follows: The complaint issued on June 16, 1961. In the ensuing period the case-in-chief was presented and the defense rested its case on August 17, 1965. Rebuttal hearings were held the following September. Subsequently, on September 14, 1965, the respondents moved for an order striking from the record the testimony of five Commission witnesses, namely, Messrs. Tanner, Pollock, Buchroeder, Pennington, and Murray, on the ground that complaint counsel had failed to produce written statements, letters, or other writings by these witnesses covering the subject matter of their testimony in the case-in-chief.

On September 29, 1965, complaint counsel produced for the hearing examiner's *in camera* inspection correspondence signed by the witnesses in question as well as reports of interview with four of the witnesses, namely, Tanner, Pollock, Buchroeder, and Pennington. Complaint counsel requested the hearing examiner to examine the interview reports and certain of the Buchroeder correspondence for relevancy and to determine whether these documents should be produced for purposes of cross-examination. Complaint counsel further suggested that respondents be permitted to recall at Government expense any of the five witnesses for additional cross-examination on the basis of such documents as the hearing examiner might decide should be made available to the respondents for the purpose of impeachment.

The examiner, after inspecting the documents in question, turned all of the records over to respondents despite complaint counsel's objections. After respondents' counsel had briefly inspected these records in the hearing room, the documents were returned to complaint counsel for the purpose of having copies made for respondents. Complaint counsel, on October 6, 1965, filed a request for permission to file an interlocutory appeal from the hearing examiner's ruling ordering the field reports turned over to respondents. On October 22, 1965, the Commission granted permission to file the interlocutory appeal. Copies of the correspondence signed by the five witnesses were apparently turned over to respondents on October 26, 1965.

The Commission has ruled that it will follow the substance of the Jencks statute in those instances involving a request for production of documents in the Commission's files for the purpose of impeaching witnesses who have testified. (See *Ernest Mark*

High, Docket 6940 (1959) [56 F.T.C. 625].) Accordingly, it is this statute and the decisions construing its requirements which will govern our disposition of this appeal.

In essence complaint counsel's appeal charges that the examiner erred in failing to make a proper determination as to whether the field reports in question were statements of the witnesses within the scope of the Act as defined by subsection (e) of the statute. Complaint counsel further charges that the hearing examiner erred in failing to excise those portions of the interview reports which do not relate to the testimony of the witnesses or which on their face are not properly producible for purposes of impeachment. Complaint counsel also contends that with respect to Commission witnesses Tanner, Pollock and Murray, respondents had failed to make timely motion for the production of the interview reports with those witnesses.

Ordinarily, the question of whether a proper foundation has been laid and whether a timely motion for the production of documents has been made for impeachment purposes under the Jencks Act is a crucial consideration. Under the circumstances presented by this appeal, however, we will not explore that issue. In effect, complaint counsel waived that objection in the hearing of September 29, 1965.[2] As a result, the examiner did not have before him the question of whether respondents had made timely motion for the production of the field reports in question. Accordingly, our ruling on the interlocutory appeal is limited to the question of whether all or any part of the interview reports should have been produced for impeachment purposes and whether the hearing examiner made proper findings of fact on that issue.

Basic to any discussion of the application of the Jencks Act is a recognition that the purpose of the statute is restricted to facilitating impeachment. *Palermo* v. *United States,* 360 U.S. 343, 349 (1959); *United States* v. *Berry,* 277 F. 2d 826 (7th Cir. 1960), and that it is not to be used as a vehicle for general discovery. It is for that reason that the statute is limited to statements of the witnesses which are precisely defined by this legislation for the purposes of the application of the Act.

Section (e) of the statute limits production of documents to statements coming within the following categories:

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 transcription thereof, which is a substantially verbatim recital of an oral state-

[2] Tr. 5794–95.

ment made by said witness to an agent of the Government and recorded contemporaneously, with the making of such oral statement.

In those instances where there is a question of whether a document comes within the terms of Section (e) of the Act the Supreme Court has specifically ruled: "we approve the practice of having the Government submit the statement to the trial judge for an in camera determination. Indeed, any other procedure would be destructive of the statutory purpose." *Palermo* v. *United States, supra,* at 354. The reasons for an *in camera* inspection by the trier of fact when there is a dispute as to the nature of the document are obvious, for "[i]t would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Id.* In other words, in the federal court system the trial judge has the fact finding function of determining in disputed cases whether a document comes within the terms of Section (e) of the Act. In our procedures the hearing examiner is in the position of the trial judge and has the same function. This is a function which the trial judge must perform thoroughly and with care in order to ensure fairness to the respondent and to ensure at the same time that "[t]he Act's major concern . . . with limiting and regulating defense access to government papers, and to deny access to those statements which do not satisfy the requirements of Section (e)" is effectuated. *Id.*

In this case, the hearing examiner has failed to fulfill that function. He made no findings of fact as far as we can determine from the transcript of the hearing of September 29 as to whether the interview reports in question fell within the ambit of Section (e) of the Act and therefore should be produced. Rather, he orderd the documents produced on a generalized finding of relevancy to the proceeding. It is evident that the hearing examiner finally examined the documents only with the greatest reluctance. At the outset of the hearing, he declared categorically: "I have no intention of reviewing the documents at all." (Tr. 5796.) In effect, the examiner strongly indicated that he did not intend to go into the question.[3] Although repeatedly asked to make a determination as to whether or not the field reports in question were verbatim

[3] Illustrative of his approach to the problem is the following statement:

". . . I have no intention—I don't know what court it was that filed the procedure of being an advocate in questioning the witness with respect to the documents and so on, but I have no intention of following that, nor at the moment as I told Mr. Barnes, without your comments, do I have any intention of examining these documents, and making a judgment before counsel for the respondent has an opportunity to examine them, that his case can be helped or hindered by the use of the documents and therefore deny him the right to put in his case as he sees fit to do." (Tr. 5806.)

recitals of the witnesses within the scope of Section (e) (2) of that Act, the Examiner evidently held to his position that he did not intend to explore this issue. For example, subsequently, in the hearing, the examiner stated that with respect to the four field reports the purpose of his examination, to which he finally consented, was:

> . . . solely for the purpose of determining whether or not the material contained in the documents is relevant to the issues in the proceeding or relevant to the proceeding, that he [the examiner] then make a judgment and if he finds so he should turn them over to [respondents]. . . . (Tr. 5851-52.)

In short, the examiner failed to make adequate findings of fact on the threshold issue, namely, were the interview reports in question statements of the witnesses producible under the terms of the Jencks Act.

The need for careful findings of fact on this point in order to protect a Government witness from unfair attack has been stated numerous times by the courts. Ordinarily it would not be necessary to elaborate on this point. Under the circumstances presented by this appeal, however, a reference to one of the more recent statements on this issue should be helpful to all concerned. In this connection the Second Circuit held:

> . . . Congress intended to restrict defense access to statements of government witnesses, for purposes of impeachment, to those statements for which the witness and not the government agent is responsible, so as to avoid the unfairness that results from the use of distorted and inaccurate material. Palermo v. United States, supra, at 350. . . . Where a claimed past contradictory, written or recorded statement of a witness is to be used to impeach and discredit him, it should be his own statement and not someone else's interpretation of what the witness said or what he thought the witness said. *United States* v. *Lamma*, 349 F. 2d 338, 340 (2d Cir. 1965).

Since the hearing examiner failed to make adequate findings on this crucial issue, the findings he did make as to relevancy are based on an erroneous interpretation of the law. His findings, as a result, are not binding. *United States* v. *Aviles*, 337 F. 2d 552, 557 (2d Cir. 1964), *cert. denied*, 380 U.S. 906, 918 (1965), and the case will be remanded for proper findings on this issue.

It may be helpful to outline for the examiner's guidance, as well as for the benefit of counsel, the considerations pertinent to such a determination. In most cases the answer as to whether the document is within the scope of Section (e) of the Act is plain from the statement itself without the aid of extrinsic evidence. *Palermo* v. *United States, supra*, at 355; *United States* v. *Lamma, supra*, at 340. Whether there is a need for evidence extrinsic to

the statement to make such a determination should be decided by the trial judge in the light of the circumstances of the particular case. *Palermo* v. *United States, supra,* at 354, 355. As the Second Circuit has held, the procedure to be employed for determining whether or not a "statement" is involved, rests within the sound discretion of the trial judge. *United States* v. *Lamma, supra,* at 340.

The crucial determination here seems to be the question of whether the reports are within the scope of Section (e) (2).[4] The question has been before the courts numerous times and there are a number of cases affording guidance. One of the more recent decisions in point is *Dennis* v. *United States,* 346 F. 2d 10, 20 (10th Cir. 1965), *cert. granted,* 34 U.S.L. Week 3171 (1965). The court found in that case that "The withheld documents were couched in the vernacular of 'Informant stated', 'Informant advised' or 'Informant related', but none we have examined can be said to be a verbatim recital within the meaning of § 3500(e) (2). We think they were properly withheld." Or, as the Second Circuit ruled, "a very restrictive standard is to govern —only continuous, narrative statements made by the witness, recorded verbatim or nearly so qualify." *United States* v. *Lamma, supra,* at 340. It should be noted that the interview reports in the Commission's files ordinarily are agents' summarizations. *Ernest Mark High, supra.* In such cases, the examiner, if he orders an interview report produced, has the obligation of making concrete findings that the prerequisites of Section (e) of the Jencks Act have been met.

In this case, we note that the reports in question are to a considerable extent distinguished by phrases such as "informant stated." There were also included a few isolated direct quotations in these reports, set apart from the remainder of the reports by quotation marks. These should be produced as coming within the scope of Section (e) (2) unless the examiner finds that such quotations have been cited out of context or that they do not accurately reflect the witness's statement for other reasons. As the Supreme Court has ruled, "Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." *Palermo* v. *United States, supra,* at 352. The citation of such isolated quotations suggests another question to which the examiner should address himself, namely, do they indicate an intention to distinguish between what

[4] There seems to be no serious contention that the reports are within the scope of Section (e) (1). The cross-examination of the witnesses gives no indication that they had adopted or affirmed the interview reports in issue or the notes underlying such reports.

the interviewee said and summarizations of the results of the interviews and interpretative comment by the individual preparing the report?

Should the hearing examiner decide that he needs evidence extrinsic to the documents to determine whether they are statements within the meaning of Section (e) (2), he may then make such further inquiry as he feels appropriate to get information on that point. For example, he may interrogate the witness or the attorney who prepared the report. See *Saunders* v. *United States,* 316 F. 2d 346, 350 (D.C. Cir. 1963).

In this connection, respondents, during the course of the hearing of September 29, requested that the notes from which the interview reports were prepared be also produced for inspection by the hearing examiner.[5] Complaint counsel, during the course of the hearing, advised that the interview notes were either not in existence or not in the Commission's files. In view of respondents' motion, the hearing examiner is authorized to make further inquiry as to the disposition of such notes, if necessary, by examining the Commission attorneys who interviewed the witnesses in question. Assuming the notes are in existence and there is a dispute as to whether or not they are statements of the witnesses within the scope of Section (e) (2), then the examiner should, as in the case of the interview reports, examine these documents *in camera.* If he deems extrinsic evidence necessary for a proper determination, the examiner may question the Commission attorneys preparing the notes as to whether or not they were verbatim recordings of the witnesses' statements or whether they were a mere summarization of the results of the interviews.

Should the examiner examine the interview notes underlying the reports in question to determine whether or not they are within the category of Section (e) (2) statements, a number of court decisions will afford him guidance. For example, when notes are fragmentary and do not indicate that they conform to the language of the interviewee rather than of the Government attorney, where they contain interpolations of the interviewer and do not record a continuous narrative, there is no need to conduct a hearing to determine whether they are producible under Section (e) (2). *United States* v. *Lamma, supra,* at 341. The District of Columbia Circuit, in *Saunders* v. *United States, supra,* at 350, held if the Government attorney has recorded his own

[5] Tr. 5814, 5845, 5854. Respondents made these motions apparently on the theory that the hearing examiner had to compare the notes underlying the report with the report to determine whether it came within Section (e) (2) and that primary evidence of the nature of the interview reports were necessarily the interview notes.

thoughts in his interview notes, then the notes are within the work product immunity doctrine and not the statutory definition of a statement. Similarly, where notes contain omissions from the interview or additions from other sources, it would be unfair to confront the witness with the notes as if they were his own statements. *Aviles* v. *United States, supra,* at 558–559. If the examiner, however, finds that the notes constitute a substantially verbatim recital of the respondents' statements within the meaning of Section (e) (2), then they should be produced. See *Ogden* v. *United States,* 303 F. 2d 724, 737 (9th Cir. 1962); *Saunders* v. *United States, supra,* at 350. "If the notes contain both verbatim remarks of the witness and personal observations of the attorney [making the notes] then paragraph (c) of the act requires that the district judge inspect the statement and excise the protected material, if this is possible." *Saunders* v. *United States, supra,* at 350.

If the notes are not available, then the trier of fact must make a determination whether the notes were destroyed in good faith in the course of normal procedure. Furthermore, if the examiner finds that portions of the notes or the entire notes were producible statements within Section (e) (2), then the requirements of the Act are satisfied if a subsequent report accurately records the producible statements originally set forth in the notes. See *Ogden* v. *United States,* 323 F. 2d 818, 821 (9th Cir. 1963), *cert. denied,* 376 U.S. 973 (1964).

Finally, depending on the circumstances, the examiner may be in a position to determine from the face of the interview reports whether the underlying notes come within the scope of Section (e) (2). For example, the Tenth Circuit, in one case, inferred from the nature of the interview reports that the underlying notes were not verbatim recitals of oral statements of the witness but rather that the reports indicated quite clearly that the notes were not producible. As a result, the court held their destruction would not give rise to sanctions under subsection (d) of the Act. *Dennis* v. *United States, supra,* at 21.

Respondents, to rebut complaint counsel's argument that the interview reports were not producible because on their face they are mere summarizations, seem to rely on the holding of the Supreme Court in its second *Campbell* decision [6] (*Campbell II*). There the Court held that the district judge was entitled to infer that an agent of the FBI with considerable experience would

[6] *Campbell* v. *United States,* 373 U.S. 487 (1963).

record a potential witness's statement with sufficient accuracy so as to obviate any need for the court to consider whether it would be grossly unfair to allow the defense to use the statements to impeach the witness, which could not be fairly said to be the witness's own. That holding, however, must be confined to the facts of that case. First, it must be noted that *Campbell II* involved a witness's statement under Section (e) (1) of the Act. In short, the interview notes became the witness's statements because he approved their content after they were read back to him. The Court did not rule that without such approval the notes would have been producible as a statement of the witness merely because the interview was summarized accurately. The Court, in *Campbell II,* on the facts of that case, merely held that once there is evidence that a witness has approved or adopted an agent's notes or report within the meaning of Section (e) (1) so as to make it a statement of the witness as that term is contemplated by the Jencks Act, then the courts may infer that the notes or other (e) (1) statement of the witness will be accurately transcribed in the subsequent interview report. In short, the Court held merely that a transcription of a summary of a witness's statement is producible, assuming that the witness has adopted the summary of his statement in accordance with the terms of Section (e) (1). The Court did not hold that any and all summarizations of a witness's statements or records of such summarizations are producible merely because it is reasonable to infer the Government agent was competent to record the gist of an interview with accuracy.

In this connection, of course, it is important to note as far as interview notes are concerned, that determination of whether or not they are within the scope of Section (e) (2) depends not only on the accuracy of the interviewing Government agent but also upon his intent in making the notes, namely, was it his purpose to provide a complete record of the witness's story or, on the other hand, was it merely the purpose of the notes and the subsequent report to serve as a future guide for interrogating the witness. See *United States* v. *Aviles, supra,* at 559. In the latter case, neither the notes nor the subsequent report would come within the scope of Section (e) (2) nor would either the notes or the report come within the scope of Section (e) (1) unless the witness had adopted or approved them.

In this case, as far as we can determine, the record thus far does not indicate that the witnesses in question either adopted or affirmed the interview notes underlying the reports in issue here or the reports themselves. Respondents' counsel did not raise

that issue in his answer to complaint counsel's interlocutory appeal. That testimony on cross-examination bearing on the point apparently indicated to the contrary. Under Section (e) (1) it is generally incumbent on the defendant to explore the issue of whether there has been an approval or adoption, within the meaning of Section (e) (1). Absent other indications that approval or adoption has taken place,[7] it is not incumbent on the court or trier of fact to make such a determination on his own motion. *United States* v. *Lamma, supra,* at 341. The examiner, of course, is not foreclosed from going into that question should it prove desirable in the light of further facts developed on remand.

In their appeal, complaint counsel also urge that the hearing examiner erred in failing to excise passages in the interview reports which on their face did not relate to summarizations or characterizations of what the witness said during the interview. The question will assume importance if the examiner subsequently finds that the interview reports contain statements producible under the Jencks Act. Upon our examination of the interview reports we have determined that the hearing examiner erred in refusing to excise those portions of the reports under consideration which on their face cannot be construed as a summary or characterization of what the witness said, let alone as a statement of the witness. For example, those passages in the reports which are clearly comments of the Commission attorney concerning the administrative detail of the investigation are not producible under any circumstances. By no stretch of the imagination could these passages be considered statements of the witness within Section (e). Further, we agree with complaint counsel's argument that those passages in the reports on their face reflecting the Commission attorney's own comments and observations on documents obtained during the interview, as well as the related exhibit lists themselves should not be produced. Such passages obviously cannot be used for the purpose of impeaching the witness nor do they have even the most tenuous relationship with a statement of the witness as contemplated by Section (e) of the Act. Further, we agree that those portions of the interview reports relating to the alleged statements of persons who did not testify in this proceeding should not be made available for impeachment purposes. Where the interview report is a record of an interview with a number of persons, only one of whom testified, then the statements of the nonwitness cannot be used as a basis for impeaching the individual who took the stand.

Material of this nature can, and should, be excised. As the

[7] *E.g.,* on the documents under consideration.

Ninth Circuit has stated, if an interview report includes the statement of a witness within the scope of the Jencks Act but also includes other nonproducible material, this neither precludes production of the "statement" of the witness nor requires delivery of the entire report to the defendant. *Ogden* v. *United States, supra,* 303 F. 2d, at 735. See also *West* v. *United States,* 274 F. 2d 885, 890 (6th Cir. 1960), *cert. denied,* 365 U.S. 811, 819 (1961).

Excision of such clearly extraneous matters from documents purporting to contain a Jencks Act statement of the witness is necessary for the protection of the witness and to achieve the other purpose of the Act, namely, to preclude " 'the broad or blind fishing expedition' [into the Government's files] which the Supreme Court has condemned." *Sells* v. *United States,* 262 F. 2d 815, 823 (10th Cir. 1959), *cert. denied,* 360 U.S. 913 (1959).

In short, if, on remand, the examiner finds that any part of the interview reports should be produced as a statement within the scope of the Jencks Act, he is then directed to excise those passages in the reports referred to above and described with more particularity in complaint counsel's appeal which are clearly extraneous to any comments the witness may have made to the attorney interviewing him.

The proceeding will be remanded to the examiner for further appropriate action in accordance with the views expressed in this opinion.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred and has filed a separate concurring statement.

DISSENTING OPINION*

APRIL 22, 1966

BY ELMAN, *Commissioner:*

I

While insisting that it fully accepts the rule established by the Supreme Court in *Jencks* v. *United States,* 353 U.S. 657, the Commission has largely made that rule a dead letter as applied to F.T.C. proceedings.

In its actual application to F.T.C. proceedings, the *Jencks* rule will henceforth extend only to:

*Consolidated dissenting opinion *In the Matter of L. G. Balfour Co.*, Docket No. 8435 and *In the Matter of Inter-State Builders, Inc., et al.*, Docket No. 8624, p. 1152 herein.

(1) Prior written statements of witnesses to Commission attorney-investigators, where such statements have been prepared, signed, adopted, or approved by the witness. Such written statements by witnesses are rarely submitted by them to the Commission.

(2) Prior oral statements made by witnesses to Commission attorney investigators, where such statements have been recorded "substantially verbatim" in reports which constitute "contemporaneously recorded" transcriptions of the witness' "own words." The Commission holds that it will not "extend" the *Jencks* rule to include interview reports which *summarize* the witness' statements.

The Commission's decision means, in practical terms, that F.T.C. interview reports will no longer qualify for production under the *Jencks* rule. As the Commission recognizes in the *Balfour* opinion, pp. 1118, 1123 herein, "the interview reports in the Commission's files ordinarily are agent's summarizations." They are not usually cast in the form of "substantially verbatim," "contemporaneously recorded" transcriptions of witnesses' oral statements. And it is safe to presume that, after today's rulings by the Commission, interview reports are not likely to be cast in that form in the future.

The Commission emphasizes its concern that the *Jencks* rule "not be indiscriminately extended to require production of agents' summaries of interviews regardless of their character or completeness." (*Inter-State Builders,* pp. 1152, 1155 herein.) Accordingly, the Commission will exclude "anything which is merely an agent's summary of a witness' words." (*Id.,* p. 1155.) The Commission instructs its hearing examiners that, in applying the *Jencks* rule, they "must be careful * * * so as to require production of what can fairly be said to reflect a witness' own words and to avoid production of what is in fact an attorney's summary of a witness' remarks." (*Id.,* p. 1162.) Statements of the witness "couched in the vernacular of 'Informant stated,' 'Informant advised' or 'Informant related' " will be withheld, because "a very restrictive standard is to govern—only continuous, narrative statements made by the witness, recorded verbatim or nearly so qualify." (*Balfour,* p. 1123 herein.) Even "direct quotations in these reports, set apart from the remainder of the reports by quotation marks" should not be produced if "the examiner finds that such quotations have been cited out of context or that they do not accurately reflect the witness' statement for other reasons." (*Id.,* p. 1123.)

In justification of its exclusion of "summary" interview reports from the *Jencks* rule, the Commission states that "There is little doubt that any attorney's summaries of interviews which he conducts will inevitably, by the very fact of selection, omission and emphasis, reflect the attorney's own state of knowledge at the time of the interview and also his own thoughts and subjective impressions of what he is being told influenced as well by the type and form of the questions which he posed during the interview. To this extent, his summary may more accurately reflect his own views of the case and state of knowledge of the issues at the time of the interview than it will of the witnesses' state of knowledge." (*Inter-State Builders,* p. 1164 herein.)

While interview reports, as "agent's summarizations," will not be made available to respondents under the *Jencks* rule, they will undoubtedly continue, for every other purpose, to be treated by the Commission and its staff as accurate and reliable documents used in our day-to-day work. To those of us who work within the Commission, an interview report is a familiar document. It is the basic raw material of F.T.C. investigations. As the Commission points out, "Commission attorneys almost always interview industry members, customers, suppliers and the like in the course of their investigations of whether violations of law have taken place. The attorney's investigating reports based on these interviews and on documents and other pertinent data are basic to the evaluation of the case which must be made, first by his superiors, and ultimately by the Commission." (*Inter-State Builders,* p. 1163 herein.)

If agents' interview reports are not accurate and dependable, the work of the Commission breaks down. For that fundamental reason, the methods and procedures followed by Commission attorney-investigators in preparing interview reports, as well as the format and style of the reports, are standard and routine. While the reports are not expected to be anything other than "mere summaries," it is expected that they be entirely factual, objective, and accurate. Attorney-investigators are specifically instructed that the function of an interview report is to record the *witness'* statements, not the agent's subjective impressions or reactions. I do not know where the Commission finds any basis in fact for its assertion that interview reports "inevitably" contain, or are infused by, the agent's "opinions," "views," or "interpretations." On the contrary, our attorney-investigators are specifically discouraged from expressing in the interview report any judgment or evaluation of the witness' statements. They are in-

structed that the appropriate place for stating their opinions, comments, and recommendations is in the final report prepared when the investigation is completed.

As a general rule, therefore, F.T.C. interview reports faithfully and objectively report statements of witnesses. They are regarded by the members and the staff of the Commission as sufficiently accurate and reliable reports of witnesses' statements to be used for determining whether a complaint should issue, or the case be closed, or an assurance of voluntary compliance be accepted, etc. But the Commission today holds that, because they are mere "summaries," they are not sufficiently accurate and reliable reports of witnesses' statements to be used by respondent's counsel for purposes of impeaching or discrediting the witnesses. Under the *Jencks* rule as now interpreted by the Commission, such reports will no longer be available to respondents in Commission proceedings for use in cross-examination.

The result is a paradox: Despite the Commission's insistence that it accepts the rule of the *Jencks* case, that rule will no longer play any significant role in F.T.C. proceedings or afford any real protection to respondents in adversary proceedings where they are charged by the Commission with having violated the law.

II

"The history of liberty," as Mr. Justice Frankfurter stated in *McNabb* v. *United States,* 318 U.S. 332, 347, "has largely been the history of observance of procedural safeguards." Elsewhere he pointed out that "the standards of what is fair and just set by courts * * * are perhaps the single most powerful influence in promoting the spirit of law throughout government. These standards also help shape the dominant civic habits and attitudes which ultimately determine the ethos of a society." (*Of Law and Men,* p. 29.) In the history of liberty, and of judicial evolution of standards of fairness and justice, a place of honor is held by the Supreme Court's decision of June 3, 1957, in *Jencks* v. *United States.*

The issue presented for decision in *Jencks* went to the heart of the right of cross-examination in an accusatory proceeding initiated by the United States. The question is this: Where a witness is called by the prosecution to testify against the defendant, and the Government has in its possession reports containing prior statements made by the witness which relate to

the subject-matter of his testimony, must these reports be made available to defense counsel so that he may decide whether and how to use them in cross-examination for purposes of impeaching or discrediting the witness? The answer given by the Court was an unqualified and unequivocal Yes.

It could have been argued in opposition to *Jencks,* and indeed it was, that such reports, being hearsay and inadmissible in evidence, should not be made available to the defense; that papers in the Government's possession should be treated as strictly "confidential" and privileged against disclosure; and that Government attorneys, like their brothers in private practice, should be entitled to work in privacy, free from intrusion by opposing parties and their counsel. The Supreme Court recognized the force of these arguments and concerns; but it held that they must yield to even more persuasive arguments based upon more weighty concerns.

Two overriding considerations coalesced in, and formed the basis and rationale of, the rule established by the Supreme Court in the *Jencks* case: (1) the crucial importance of the right of cross-examination in an accusatory proceeding; and (2) the special status of the Government as a litigant, and the particular obligation of fair and honorable treatment which rests upon the Government when it brings a proceeding charging a citizen with violation of one of its laws.

The right of cross-examination is, of course, a fundamental protection to accused persons. In another landmark case, *Greene* v. *McElroy,* 360 U.S. 474, the Supreme Court, in an opinion by the Chief Justice, quoted with approval Wigmore's "incisive summary statement" of the critical importance of cross-examination in an adversary proceeding: "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." (360 U.S. at 497.)

The Chief Justice pointedly added that the Court "has been zealous to protect these rights [confrontation and cross-examination] from erosion * * * not only in criminal cases, * * * but also in all types of cases where administrative and regulatory actions were under scrutiny." (*Ibid.*)

In *Jencks* the Supreme Court recognized that to deny a defendant access to Government reports of prior statements of an adverse witness which may be useful in impeaching or discrediting his testimony has the practical effect of limiting and impairing the value of the right of cross-examination. The Court pointed out that these documents may be of crucial importance to the defendant:

> 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. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contract in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony. * * * Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. (353 U.S. at 667, 668–69.)

The second basic principle reflected in *Jencks* is found in the standards of fairness and decency applicable to the Government in relation to its citizens whenever it seeks to impose upon them the penalties, sanctions, or restraints of the law. The principle is simple and straightforward. It is proudly inscribed on the entrance to the office of the Attorney General of the United States: "The United States wins its point whenever justice is done its citizens in the courts."

A Government lawyer is not a private litigant; he is a public officer, for whom public office is as much a public trust as it is for any other official. Standards fashioned for private litigants are not the measure of the standards of honor and decency appropriate for those who represent the United States in its courts. A Government lawyer is an advocate for a client whose interest is not so much to win a case as to do justice.[1] And it is not just and not fair for the Government to withhold a document in its possession which, if made available to the accused, could exculpate him or assist him in making his defense.[2]

Thus, in *Jencks* the Court quoted with approval the statements in *United States* v. *Reynolds,* 345 U.S. 1, 12, and *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944), that "since the Government which prosecutes an accused also has the duty

[1] *Brady* v. *Maryland,* 373 U.S. 83, 86–88; *Berger* v. *United States,* 295 U. S. 78, 88.

[2] *Brady* v. *Maryland, supra; Mooney* v. *Holohan,* 294 U.S. 103; *Roviaro* v. *United States,* 353 U.S. 53, 60–61; *Reynolds* v. *United States,* 345 U.S. 1; *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944).

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. * * * [T]he prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." (353 U.S. at 671.)

The liberating principles which converged in the *Jencks* rule are fundamental. They should be construed and applied, not in a niggling, grudging fashion, but in harmony with the basic values involved.

The *Jencks* rule, as established by the Supreme Court, is forthright and free of fuzzy ambiguities. With no "ifs" or "buts," the Court directed the Government to produce "all reports" in its possession containing the prior oral statements of the witnesses. (353 U.S. at 668.) Does it make any difference under *Jencks* that the report sought to be produced is "confidential"? No. Does it make any difference that it is "hearsay" and inadmissible in evidence? No. Does it make any difference that it is the "work product" of Government attorneys? No. Does it make any difference whether the report is a "summary," "substantially verbatim recital," "continuous narrative statement," or "contemporaneous transcription"? No. One searches the Court's opinion in vain for any such distinctions or refinements. Does it make any difference that, in the opinion of the Government or the court, the report is not "relevant" in the sense of being useful or helpful to the defense? No. Whether and how the report is to be used in cross-examination, and whether or not it will help the defense, is for the accused and his counsel to determine, not the prosecutor or the judge.

The essence of the *Jencks* rule is that, whatever the form or style of the report, if it contains or reports statements of the witness relating to the subject-matter of his testimony, the *defendant* "is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less.*" (353 U.S. at 668–69; emphasis added.)

The use of an interview report for purpose of cross-examination

is, as the Court recognized, a matter wholly separate from and broader than that of its admissibility in evidence. An interview report summarizing a witness' oral statements, or reporting them only in part, may be as useful to the defense in impeaching or discrediting his testimony as a signed affidavit or "substantially verbatim" recording. As Mr. Justice Brennan has pointed out (*Palermo* v. *United States,* 360 U.S. 343, 365 (concurring opinion)), "a statement can be most useful for impeachment even though it does not exhaust all that was said upon the occasion. We must not forget that when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation."

The purpose of the *Jencks* rule is not to shield a Government witness from embarrassment, discomfiture, or even the inconvenience of having to explain or justify alleged inconsistencies between his testimony and prior statements contained in an interview report. If it transpires that there are in fact no inconsistencies, because the report is incomplete or inaccurate or for some other reason, the net result will be to bolster his testimony. In any event, whether in the end his testimony is strengthened or weakened thereby, the *Jencks* rule is designed to subject it to the rigorous test of cross-examination—and by this the Court meant effective cross-examination conducted not in the dark but in the light of prior statements of the witness contained in reports in the Government's possession.

This, then, is the *Jencks* rule as declared by the Supreme Court on June 3, 1957. If there be any question as to the scope or limits of that rule, it will ultimately be determined by the Supreme Court, not this Commission. The question, going as it does to the fundamental nature and protection of the right of cross-examiation in accusatory proceedings brought by the Government, does not involve the exercise of agency "expertise" to which deference is owed the Federal Trade Commission, either by the Supreme Court or any other reviewing authority.

III

As I read its opinions in these cases, the Commission agrees that the rule established by the Supreme Court in the *Jencks* case is a rule of fundamental fairness and justice whose application cannot be confined to criminal prosecutions. The Commission recognizes that the rationale of the *Jencks* rule, and the considerations of policy underlying it, are no less applicable to administrative proceedings, accusatory and adversary in nature,

where an agency of the United States charges a person with having committed a violation of law and seeks to impose a legal sanction or restraint upon him.[3]

The Commission does not suggest that the rule laid down by the Supreme Court in the *Jencks* case can, or should, be abridged or modified by action of this Commission. It does not assert that our views should prevail over the Court's as to how the various competing interests here should be balanced. The Commission seems to recognize that, like it or not, the *Jencks* rule is the "law of the land" which we are not free to restrict or change, and which it is our duty to apply to Commission proceedings fairly and conscientiously, neither nullifying nor diluting its fundamental protections.

Thus, the Commission proceeds here on a premise which appears to be neither challenged nor disputed: the full and unqualified applicability to these proceedings of the rule of *Jencks* v. *United States*. What is challenged and disputed—and this is the crux of my disagreement with the majority—is whether the restrictive provisions of 18 U.S.C. 3500, the so-called "Jencks Act," limiting the production of interview reports in criminal cases to witnesses' statements which are recorded "contemporaneously" and "substantially verbatim," are a part of the Supreme Court's *Jencks* rule. It is the Commission's view that the Act "codifies" the *Jencks* rule, merely making explicit what was already implicit in the Court's opinion. I disagree.

However, one thing should be wholly clear: The difference between the *Jencks* rule, as I understand its formulation by the Supreme Court, and the *Jencks* rule, as now "restated" by the Commission, is the difference between day and night. It is not a difference in semantics. It is a difference of a fundamental character, vitally affecting the rights of respondents in Commission proceedings. In Commission proceedings, it is the difference between whether a respondent will, or will not, have access to

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[3] There can be no question as to the accusatory character of Commission proceedings such as these. When the Federal Trade Commission issues a formal complaint charging a person with a violation of law, the adjudicative proceeding that follows is wholly adversary in nature. Evidence is presented, and testimony is adduced, before the hearing examiner in much the same manner as in a trial before a judge. The burden of proving the alleged violation of law rest upon the charging party (*i.e.*, Commission complaint counsel). The decision must be based upon the record. Findings of fact must be supported by reliable, probative, and substantial evidence. And, most pertinent here, the respondent has the full and unqualified right of cross-examination. In Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c), Congress expressly provided that a party "shall have the right * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts." To the same effect, Section 3.16(b) of the Commission's Rules of Practice provides that a respondent "shall have the right of * * * cross-examination * * * and all other rights essential to a fair hearing."

F.T.C. interview reports, for use in cross-examining adverse witnesses, where such reports—as they customarily do—summarize the witness' oral statements and do not quote them verbatim and in full.

Let us take a simple example. Suppose that an interview report in the possession of the Commission reads in toto as follows: "I interviewed the witness for two hours. Without going into details, the sum and substance of what he said was that respondent *never* made any representations to him of any kind." Suppose further that the Commission brings a proceeding charging the respondent with having made false and misleading representations, in violation of the F.T.C. Act. The witness is called by Commission counsel, and testifies that respondent made various fraudulent representations to him.

Under the rule of the *Jencks* case as expressed by the Supreme Court, it is clear that withholding the report from respondent's counsel would impair his right of cross-examination and be inconsistent with the basic standards of fairness and decency applicable to the Government. Although it is a summary, and not signed or adopted by the witness or a "substantially verbatim" recital, the report could be of great value in impeaching or discrediting his testimony. Indeed, in the view of Mr. Justice Brennan, who wrote the Court's opinion in *Jencks*, a refusal to produce such a report would present a "constitutional question close to the surface of our holding in *Jencks*." (*Palermo* v. *United States*, 360 U.S. 343, 361–62, 364–65.)

This does not seem to give the Commission any concern. It holds today that the *Jencks* rule "should not be extended" so as to require production of "any summaries of such [oral] statements" made by the witness to a Commission attorney or investigator. (*Inter-State Builders, Inc.*, p. 1165 herein.)

IV

At the root of the Commission's error in these cases is its misunderstanding of what the *Jencks* rule is. To me, the *Jencks* rule is the rule declared by the Supreme Court in *Jencks* v. *United States*, decided June 3, 1957, and reported in Volume 353 of the U.S. Reports at page 657. To the other members of the Commission, however, the *Jencks* rule is to be found in a criminal statute enacted by Congress on September 2, 1957, as an amendment of Title 18 U.S.C., the Penal Code, captioned "Crimes and Criminal Procedure": the so-called "Jencks Act." According to the Commission, the Act is merely a codification or restatement,

in statutory form, of the rule declared by the Supreme Court in the *Jencks* case. This may come as a surprise to the Department of Justice, which moved so quickly after the *Jencks* case to obtain legislative delimitation of its impact on criminal cases; to the members of Congress, who enacted the law to avoid what they feared would be the calamitous effects of the *Jencks* decision in the prosecution of criminal cases; and to the Supreme Court and other federal courts, which have been endeavoring since September 2, 1957, to reconcile the restrictive provisions of the Jencks Act with the requirements of due process in criminal cases. Indeed, in the first case arising under the Jencks Act, the Supreme Court accepted as a working premise that the Act "restrictively" defined producible statements; the Court recognized that prior to the Act "other statements, *e.g.*, non-verbatim, non-contemporaneous records of oral statements" were producible "under pre-existing rules of procedure." (*Palermo* v. *United States, supra,* at 349.)

It does not denigrate the Jencks Act to observe what its legislative history and provisions make indisputable: that while accepting the "basic principle" of the *Jencks* case that the interest in maintaining "confidentiality" of Government files must yield to the requirements of fundamental fairness and justice, Congress decided that some restriction of the *Jencks* rule was appropriate in its application to criminal cases tried in the federal courts. But the Jencks Act is a criminal statute, and only a criminal statute.

One need not consider here the extent of the constitutional power of Congress in regard to the trial of criminal cases in federal courts. It remains to be seen whether, as a result of the need for construing the statute so as to avoid constitutional doubts, the area of divergence, in criminal cases, between the Jencks Act and the *Jencks* rule will eventually be reduced or even eliminated. *Cf. Campbell* v. *United States,* 373 U.S. 487. That is for the Supreme Court to determine, not this Commission. What does concern us here is whether, in applying the Supreme Court's *Jencks* rule to administrative proceedings, the Commission may substitute the restrictive definition of "statements" contained in the Jencks Act, a criminal statute.

To me, the short of the matter is that Congress, in the Jencks Act, was *explicit* in limiting its application to criminal cases tried in the federal courts. The Jencks Act bears that name only because its enactment was triggered by the Supreme Court's decision in the *Jencks* case. To a layman, it might seem that, be-

cause the Court's decision and the Act of Congress both bear the name of "Jencks," the two are identical. But to lawyers it would certainly be a novel approach to statutory construction to have the scope of an Act of Congress determined by its popular name. Nothing in this Commission's "expertise" authorizes us to convert the Jencks Act into a statute of general application whose provisions apply not only to criminal cases, as specified in the Act, but to every other kind of non-criminal proceeding. If we follow here the usual process of statutory construction, we cannot escape the conclusion that 18 U.S.C. 3500 does not apply, and was not intended to apply, to any proceedings other than criminal cases tried in the federal courts. Nothing in the language or legislative history of the Jencks Act indicates that Congress thereby directed or authorized agencies like the Federal Trade Commission to apply to their own distinctive proceedings the specific provisions of the Jencks Act. In its application to such agency proceedings, the *Jencks* rule established by the Supreme Court was left intact by Congress. One may speculate whether, and how, Congress might have extended the provisions of the Jencks Act to proceedings other than criminal cases, had it chosen to legislate in the matter. But—to me at least—it is decisive here that Congress did not so legislate, and that the Jencks Act is expressly limited to criminal cases.

Restrictions on fundamental rights and fair procedures are not lightly implied. As the Supreme Court has held, courts and agencies of government must be careful that "traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." (*Greene* v. *McElroy,* 360 U.S. 474, 508; see also *Kent* v. *Dulles,* 357 U.S. 116, 130.) The Court has emphasized that even in criminal cases it will not enlarge the specific restrictions contained in the Jencks Act. As Mr. Justice Brennan stated in his concurring opinion (joined by the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas) in *Palermo* v. *United States,* 360 U.S. 343, 365: "Although it is plain that some restrictions on production have been introduced [by the Jencks Act], it would do violence to the understanding on which Congress, working at high speed under the pressures of the end of a session, passed the statute, if we were to sanction applications of it exalting and exaggerating its restrictions, in disregard of the congressional aim of reaffirming the basic *Jencks* principle of assuring the defendant a fair opportunity to make his defense."

If the Supreme Court will not "sanction applications of [the Jencks Act] exalting and exaggerating its restrictions," where is there authority for the Federal Trade Commission to do so? If the *Jencks* rule is applicable to agency proceedings, as the Commission concedes it is, we should not be reluctant to give the rule full force and effect. Our duty is not to nullify its protections, "exalting and exaggerating" the restrictions of the Jencks Act by extending them into an area far outside the expressed scope of the law.

V

Thus, the short answer to the Commission's use of the Jencks Act as justification for excluding F.T.C. interview reports from the *Jencks* rule is that the Act simply does not apply here; and that it would require "the most explicit action by the Nation's lawmakers," which is wholly absent here, to permit such a restriction of the rule. However, some further comments should be made regarding the Commission's erroneous assumption that the considerations that persuaded Congress to restrict the *Jencks* rule as applied to criminal cases are also applicable to F.T.C. proceedings.

One must recall the circumstances which led to the Jencks Act. The *Jencks* case was decided on June 3, 1957, and the Jencks Act became law on September 2, 1957 (71 Stat. 595). In that three-month period, as the Supreme Court later noted in *Palermo* v. *United States,* 360 U.S. 343, 346, there was considerable agitation over the scope and feared consequences of the *Jencks* decision: "Defendants' counsel began to invoke the *Jencks* decision to justify demands for production far more sweeping than that involved in *Jencks,* and under circumstances far removed from those of that case, and some federal trial judges acceded to those excessive demands." There was widespread "controversy and concern" that, particularly in criminal cases involving treason, espionage, and other offenses against national security, defense counsel might obtain unwarranted access to secret F.B.I. files. There was fear that the decision might unduly broaden the scope of pretrial discovery in criminal cases, again to the detriment of the Government. Pointing to the broad protections afforded defendants in criminal cases (*e.g.,* the presumption of innocence, the requirement that guilt be proved beyond a reasonable doubt, the privilege against self-incrimination, etc.), many persons contended that the *Jencks* decision unduly

tipped the scales against the Government in criminal prosecutions, especially in cases involving national security.[4]

The Jencks Act's most important restriction is in its definition of the "statements" required to be produced. The legislative history reveals that Congress' concern was that summaries might be inaccurate or distorted, and hence that their use for impeachment purposes could be unfair to the witness and the prosecution.[5] To be sure, "when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation." [6] However, Congress seemed to be concerned that, whatever explanation or disclaimer the witness might offer, the effect of the statement would not easily be expunged from a juror's mind and the damage to the prosecution could thus be irreparable.[7]

Let us consider the applicability of the above factors to F.T.C. proceedings.

First, it is absurd to suggest that a threat to the "national security," which was so much in the minds of those responsible for the enactment of the Jencks Act and which its provisions so surely reflect, is in any way involved when a respondent requests an interview report in a Federal Trade Commission proceeding.

Second, the Commission's suggestion that requiring production of interview reports which are not "substantially verbatim" would "hamper" or create "undue interference" with the work of Commission attorneys is rather strange. It is difficult to see how a rule requiring production of interview reports "not substantially verbatim" would hamper the work of our attorneys any more than a rule requiring production of "substantially verbatim" reports. The Commission's view appears to be that the purpose of the distinction between "substantially verbatim" reports and summaries is to afford a Government attorney some

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[4] See generally H.R. Rep. No. 700, 85th Cong., 1st Sess. (1957); S. Rep. No. 981, 85th Cong., 1st Sess. (1957); S. Rep. No. 569, 85th Cong., 1st Sess. (1957); Note, *The Jencks Legislation: Problems in Prospect*, 67 Yale L. J. 674 (1958); Note, *The Aftermath of the Jencks Case*, 11 Stan. L. Rev. 297 (1959).

[5] *Palermo* v. *United States*, *supra*, at 350, 352; *Campbell* v. *United States*, 373 U.S. 487, 496–97; see especially *id.* at 502 (Clark J., dissenting).

[6] *Palermo* v. *United States*, *supra*, at 365 (Brennan, J., concurring).

[7] It is clear that Congress in defining "statements" did not intend to draw a distinction based upon the admissibility of the documents. Under the Jencks Act, admissibility is wholly irrelevant in determining a request for production. *Palermo* v. *United States*, *supra*, at 353, n. 10. Indeed, "substantially verbatim" written reports of an interview made by an investigator are no less hearsay than summaries. The original House bill did in fact limit "statements" to those signed or adopted by the witness, for the reason that any other reports would be hearsay. H.R. Rep. No. 700, 85th Cong., 1st Sess. (1950), p. 6. Congress specifically rejected this view by allowing "substantially verbatim" reports.

area in which his "work product" is protected. This would mean that the primary function of the distinction is simply to give Commission attorneys the option, and indeed the incentive, "to take statements in a fashion calculated to insulate them from production." [8]

At all events, the members of Congress certainly had no such thoughts in mind in drawing the Act's distinction between "substantially verbatim" reports and summaries. In the legislative history, neither *Hickman* v. *Taylor* nor the work product rule is mentioned in this connection. Rather, as I have already pointed out, Congress' main reason for defining "statements" as it did was its fear that in a criminal case the danger of undue prejudice to the prosecution from the use of an inaccurate or distorted summary for impeachment purposes would outweigh any unfairness to the defendant. There may be some danger in a criminal case that the jury will be influenced, to the detriment of the prosecution, by cross-examination based on an inaccurate report, regardless of how well the witness explains away the report. But this danger does not exist in agency proceedings tried before a hearing examiner. Even under the rule now fashioned by the Commission, upon request that an interview report be produced, it must be turned over to the hearing examiner so that he may determine whether it is *prima facie* "substantially verbatim." Thus, the trier of fact, the hearing examiner, will see the report even if it is in fact "inaccurate" or not "substantially verbatim." What further "prejudice" or "unfairness" to complaint counsel's case could result if the report were turned over to respondent?

But there is a more fundamental reason for rejecting the Commission's conclusion that we are justified in restricting access to interview reports because they may be inaccurate or distorted. The Commission has a duty to deal with this problem in the light of realities, and not on the basis of hypothetical, unreal and unsubstantiated dangers. I do not think it serves the public interest, or increases the public's respect for the integrity of the Commission's processes, for us here to impugn the accuracy and trustworthiness of interview reports prepared by Commission attorney-investigators. It is a fact, and one that the members of the Commission surely should not seek to obscure or deny, that these reports, while "summaries," are generally characterized by objectivity, accuracy, and reliability. The Commission expects,

[8] *Palermo* v. *United States*, *supra*, at 366 (Brennan, J., concurring.)

and receives, such reports from its attorney-investigators. Were it otherwise, we could not do our work properly.

It is incongruous and wrong for the Commission—in order to justify its restriction of the *Jencks* rule so as to make it inapplicable to F.T.C. interview reports summarizing oral statements of witnesses—to brand such reports as "inaccurate and misleading" in many instances.[9]

Nor does it accord with reality to suggest that allowing respondents access to interview reports could "easily convert the fact-finding process from a trial of the issues into a trial of the competency and accuracy of the work of the attorney" or that "it would disrupt and confuse the hearing by injecting into it irrelevant side issues." [10] Under the *Jencks* rule, the presiding officer, whether he be a judge or hearing examiner, is well able to prevent cross-examination from degenerating into a trial of such collateral issues. If the respondent's attorney formulates a question based upon his examination of the summary, he must accept the witness' response. If the witness explains that the summary is inaccurate, that is the end of the matter. There is neither "disruption" nor a trial of "irrelevant side issues." [11]

A basic premise of the rule announced by the Supreme Court in the *Jencks* case is that the standards of conduct for Government attorneys are high, and far more exacting than those applicable to attorneys in private litigation. We must do all we can to impress upon our attorneys that the Commission is primarily concerned with doing justice, not winning cases, and that no case is "won" if justice is denied.

Rather than instructing Commission counsel that high standards of fairness and justice require that they not withhold interview reports which may be vital to a respondent in making his defense, the Commission delivers an extraordinary paean to the interests of "confidentiality" and "executive privilege." Its opinions in these cases establish an elaborate and complex set of distinctions which in practical effect will serve as a manual on how to write interview reports so as to guarantee not having to produce them. In *R. H. Macy & Co.*, Docket No. 8650, issued March 10, 1966 [p. 1108 herein], the Commission goes even further. It tells our attorneys that even where the hearing examiner has de-

[9] If the other members of the Commission feel that the interview reports submitted to us every day are in many instances inaccurate, distorted, and unreliable, the remedy is not to restrict the *Jencks* rule. Instead, we should proceed without delay to correct the situation by making certain that all interview reports will be as accurate, complete, and trustworthy as I, at least, believe they are now.

[10] *Inter-State Builders, Inc.*, p. 1152 herein.

[11] 3 Wigmore, *Evidence* § 1023 (1940).

termined that an interview report falls within the Jencks Act definition of "statement," complaint counsel has the option of acquiescing in the striking of the testimony of a witness who has already testified, rather than having to produce the interview report. Such evasive tactics have no place in Commission proceedings.[12] In the long run, they can have only a corrupting effect on agency processes.

VI

Consideration of the procedural delays, confusion, and opportunities for error engendered by the Jencks Act standards and procedures demonstrates that their extension, by implication, to Commission proceedings is not only unfair but imprudent. The Jencks Act restrictions have already been recognized as a principal source of delay in criminal trials.[13] As the present cases demonstrate, they will surely have that effect in Commission proceedings.

Even assuming that interview reports will in some instances

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[12] The Jencks Act provides for the striking of testimony rather than dismissal of a prosecution where the Government refuses to comply with a district judge's direction to produce a witness' statement. Whatever the merits of that provision in criminal proceedings, it is wholly inappropriate in Commission proceedings where complaint counsel can file an interlocutory appeal to the Commission—which in the last analysis is responsible for maintaining confidentiality of agency files.

See also Note, *The Jencks Rule's Application to Adversary Adjudications of Administrative Agencies*, 68 Yale L. J. 1409, 1422–23 (1959):

"The sanctions imposed by the [Jencks Act] . . . should not be incorporated into an administrative law Jencks Rule . . . . A statement by a witness which the prosecution conceals may well be of extreme importance. This likelihood is increased when the prosecutor prefers to have the witness' testimony at trial expunged rather than permit the statement to be used on cross-examination."

[13] Judge Herlands of the United States District Court for the Southern District of New York thus describes the experience in criminal trials:

"[T]he Jencks Act, Title 18 United States Code, Section 3500, requires the United States Attorney to furnish defense counsel, upon request, with all pre-trial statements of a prosecution witness after the particular witness has completed his direct testimony at the trial.

"What constitutes a 'statement' within the meaning of this Act has been the subject of a multitude of decisions.

"To determine whether the particular documents constitute 'statements' within the meaning of the statute, the trial judge must frequently devote considerable time to a close reading of voluminous papers. Often he must conduct extensive hearings to determine, for example, whether the particular paper correctly reflects the witness' statement; whether it has been revised; or whether it consists of selected excerpts.

"The Supreme Court has held that, in certain circumstances, the trial judge has the duty to hold a non-adversary hearing on his own motion and to have extrinsic evidence adduced on this issue.

"These *voir dire* proceedings stall the main trial.

"Any trial judge who attempts to cut corners in order to save time may easily run afoul of the controlling appellate rulings.

"Then there is the provision of the Jencks Act that the statement must be turned over to the defendant if it 'relates to the subject matter as to which the witness has testified,' and that the trial judge must excise such portions of the statement that do 'not relate to the subject matter of the testimony of the witness.' What is the scope and thrust of the words 'relate to' and the words 'subject matter'? Dictionary definitions will not do.

qualify as "Jencks-type" statements under the criteria now established, the examiner would usually have to conduct a *voir dire* hearing, at which it may even be necessary to call the interviewing Commission attorney away from some other task, perhaps in another city, to testify at such a hearing. Meanwhile the continuity of the hearing has been disrupted, and, as in the cases before us, for considerable periods of time. This process may be repeated for each succeeding witness. Moreover, in such cases the distinction between "substantially verbatim" and "summary" reports may be hard to apply. Reference to hundreds of federal court decisions may be required. Some of these precedents are in conflict with one another. Indeed, in the cases before us, the issues may not have been finally disposed of. We have, for example, no guarantee that after remand we will not have another appeal by respondent, if the examiner applies the Jencks Act provisions too narrowly, or by complaint counsel, if he applies them too broadly.[14]

These delays are wholly unnecessary and can easily be avoided without sacrifice of any demonstrable interest. First, the simple rule of the *Jencks* case—which eschews the esoteric distinction between "substantially verbatim" and "summary" reports—will be easier to apply, will be unlikely to create a source of error, and, most important, will never require the holding of a *voir dire* hearing.

Second, it is essential, if inexcusable delays and disruptions of Commission proceedings are to be eliminated, that requests for production of interview reports be handled during prehearing proceedings, and not be deferred until after the witness testifies at the hearing. Although we hardly need look beyond these cases for illustration of the disruptive effects of the Jencks Act's post-direct requirement, it is significant that this procedure has been

"Nice questions are presented with respect to the factual and linguistic relevance of the witness' pre-trial statements to his trial testimony.

"Furthermore, assuming there is a relationship to such subject matter, how much should be turned over to the defendant? How much can be excised without eliminating qualifying or otherwise significant contextual material?

"To answer these and related questions, the judge must take the time to read all of the transcripts analytically.

"Every word of the witness' trial testimony and every word of the witness' pre-trial statement must be searchingly studied in relationship to each other.

"Where the trial testimony and pre-trial statements are voluminous, days must be required to complete the examinations, to designate and impound the excised excerpts, and to give defense counsel reasonable time to study the portions turned over to him prior to cross-examination. As a result, the main trial is adjourned; and the jurors are recessed.

"This procedure and this delay can take place with each trial witness as to whom the Government possesses a pre-trial statement."

Judicial Conference of the Second Judicial Circuit, *The Problems of Long Criminal Trials*, 34 F.R.D. 155, 168–69 (1963).

[14] Compare *Inter-State Builders, Inc.*, with *L. G. Balfour Co.*

cause for considerable concern and dissatisfaction in criminal trials. In addition to its disruptive effects, defense counsel have found that examination of interview reports while the trial is in process does not afford them sufficient opportunity to assess the reports' utility for impeachment purposes.[15] Accordingly, despite the Jencks Act's formal requirement that production be allowed only after the testimony of the witness on direct, in many cases there has been informal agreement for production of all witness reports before trial or at an early stage.[16] And one court of appeals has recommended this as a desirable procedure.[17]

Surely, in view of this, requests for production of witnesses' statements should not be deferred until after witnesses have testified on direct. That requirement in the Jencks Act reflects the variety of unique policy considerations in criminal cases which have traditionally been used to deny or limit pretrial discovery of the identity of prosecution witnesses.[18] But no such policy considerations are involved in Commission proceedings. Our Rules of Practice specifically provide for prehearing disclosure of the names of witnesses to be called at the hearing.[19] This, of course, also renders groundless the Commission's fears that production at a pre-hearing stage would permit "general access" to all interview reports in the Commission's files. The only reports required

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[15] Note, *The Jencks Act: After Six Years*, 38 N.Y.U.L. Rev. 1133, 1139–40 (1963) ; Junior Bar Section of the Bar Association of the District of Columbia, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 118 (1963).

[16] Committee on Pretrial Procedure, Judicial Conference of the United States, *Report on Recommended Procedures in Criminal Pretrials*, 37 F.R.D. 95, 102 (1965). Note, *The Jencks Act: After Six Years*, 38 N.Y.U.L. Rev. 1133, 1139–40 (1963).

[17] *Ogden* v. *United States*, 303 F. 2d 724, 734 (9th Cir. 1962) :

"[I]t was not error to deny defendant's pretrial Jencks Act demands for statements of this and other witnesses. This is not to suggest that it is always, or even normally, inappropriate for the government to produce such statements before trial. Where the identity of the government's witnesses and the probable nature of their testimony is known, speedy resoultion of Jencks Act problems by early and full disclosure may serve the interests of all concerned."

See also Junior Bar Section of the Bar Association of the District of Columbia, *supra*, n. 15, at 122.

[18] The reluctance to permit pretrial production of witness lists and witness statements in criminal cases reflects a belief that there are dangers, peculiar to criminal proceedings, of perjury and manufactured evidence, and bribery and intimidation of prospective witnesses, as well as an assumption that the Government is entitled to the strategic advantages of surprise in enforcing the criminal laws. See Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964) ; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149 (1960) ; Comment, *Federal Rules of Criminal Procedure—Rule 16, Second Preliminary Draft of Proposed Amendments*, 113 U. Pa. L. Rev. 1295, 1296 (1965).

[19] Rule 3.8 provides in relevant part:

"(a) The hearing examiner in any case may, and upon motion of any party or where it appears probable that the hearing will extend for more than five (5) days he shall, direct counsel for all parties to meet with him for a conference to consider any or all of the following: * * *

"(6) Such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses and of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding."

to be produced would be those reporting interviews with specific witnesses whom complaint counsel intends to call at the hearing. As the Ninth Circuit has pointed out (*Ogden* v. *United States*, 303 F. 2d at 734), "Where the identity of the government's witnesses and the probable nature of their testimony is known, * * * early and full disclosure may serve the interests of all concerned." The feasibility of this practice is demonstrated not only by the fact that it is a common and recommended procedure in federal criminal cases, but that, as the Commission observed in *Viviano Macaroni Co.*, Docket No. 8666, issued March 9, 1966 [p. 1104 herein], it is already an established practice in Commission proceedings.

Nor, finally, should there be any undue concern that production at a prehearing stage might result in the production of interview reports unrelated to the witness' testimony at the hearing. In the first place, it is most unlikely that the substance of the witness' statements in the interview reports will be broader than the subject-matter of his testimony at the hearing. Second, even under the Jencks Act, the court's role in determining whether a statement is related to the witness' testimony is a very narrow one. The standard of relevancy is necessarily broad and must be loosely applied to be consistent with the principle, which the Jencks Act reflects, that only the defense attorney can surely assess the document's usefulness for impeachment purposes. Accordingly, there is little likelihood that under a rule allowing pre-hearing production, the respondent will get substantially more than he would get under the wait-and-see rule of the Jencks Act. At all events, if respondent does get a little more—so what? Is it worth the costs in delay and disruption of adjudicative proceedings which the Commission's present approach entails?

Unlike the Federal Rules of Criminal Procedure, the purpose of the Commission's Rules is to encourage maximum prehearing discovery which will expedite hearings and assure that they are "not conducted under the 'sporting theory' of litigation where the goal is to surprise and confound your opponent." [20] To allow the kinds of delay and interruptions which now prevail is inconsistent with the Commission's policy that adjudication be expeditious and continuous.[21]

[20] *L. G. Balfour Co.*, Docket No. 8435 (Order Directing Disclosure of Documents, issued May 10, 1963, pp. 3–4 [62 F.T.C. 1541, 1543]).

[21] Rule 3.16(d) of the Commission's Rules of Practice provides:

"Hearings shall proceed with all reasonable expedition. Unless the Commission otherwise orders upon a certificate of necessity therefor by the hearing examiner, all hearings shall be held at one place and shall continue without suspension until concluded. (This does not bar overnight, week end, or holiday recesses, or other brief intervals of the sort normally involved in judicial proceedings.)"

VII

Finally, I think a word is in order with respect to the Commission's decision in *Viviano Macaroni Co.* That decision illustrates the Commission's misconception of its role in assessing the "relevance" of an interview report for purposes of discrediting a witness.[22] In *Viviano,* respondent requested inspection of interview reports of conversations with prospective witnesses. Respondent's counsel urged that a "number of the prospective witnesses are hostile to the respondent and that, if he can obtain the documents called for and if they demonstrate this hostility, he will be able, if not to attack the credibility of the witnesses, at least diminish the weight that should be given to their testimony." (*Viviano,* pp. 1104, 1106 herein.) The Commission held that respondent had failed to show good cause for the release of these documents under Section 1.134 of the Commission's Rules. It held that "what [respondent] seeks are the summary reports by agents as contained in interview reports. These reports would be the impressions of a third party as to what was said in a particular conversation. This, of course, would be inappropriate for impeachment purposes since such a report is not necessarily the statement of the prospective witness." (*Id.,* p. 1106.) The Commission also held that the claim "that there might be hostile witnesses in the group of prospective witnesses to be called by complaint counsel is clearly insufficient to justify production of documents within the category of an attorney's work product as defined in *Hickman* v. *Taylor.*" (*Id.,* p. 1107.)

Suppose an interview report reads as follows: "I talked to the witness for over an hour. He was very frank and outspoken in telling me that he hates the respondent and would like to send him to jail if he can, even if he has to lie under oath to do it." Under the Commission's decision in *Viviano,* such an interview report would not be producible since it would be merely an "agent's summarization" conveying "the impressions of a third party" and "inappropriate for impeachment purposes since such a report is not necessarily the statement of the prospective witness." I disagree. For purposes of impeaching the witness, such an interview report would be invaluable to the defense, and in my view is clearly producible under the *Jencks* rule.[23]

[22] The Commission in *Viviano* also concludes—erroneously in my view—that a prehearing request for intreview reports is subject to Rule 1.134 governing requests for confidential information. As the Commission holds in *Inter-State,* that rule is not applicable to such requests made during the hearing. I can conceive of no reason for making it applicable to an identical prehearing request. At whatever stage the request is made, a report whose use is "necessary in connection with adjudicative proceedings" is not "confidential information," as defined in Rule 1.133.

[23] *Cf. Rosenberg* v. *United States,* 360 U.S. 367, 370.

SEPARATE CONCURRING STATEMENT*

BY MACINTYRE, *Commissioner:*

Here the avalanche of words and arguments have come close to overwhelming the Commission. Resolution of a simple issue has been made difficult because it has become obscured in the mire of conflicting arguments.

The issue before the Commission is quite simple: Are respondents in Commission proceedings entitled, as a matter of right, to general access to Commission investigational files containing reports on work done in the field by Commission agents relating to persons who may be called as witnesses? I do not believe they are.

There is, of course, no question concerning the availability to respondents of Commission records necessary for their proper cross-examination of witnesses called by complaint counsel, such as the prior statements of persons who take the stand. The Commission, under its rulings in these cases, has made it clear that such documents are, or will be made, available to respondents upon a proper showing under its established procedures. It has refused to indiscriminately turn over to respondents the reports of work performed by its attorneys merely because the reports relate to a witness called to testify. To do so would, in effect, grant general access to the Commission's investigational files. Specifically, the Commission's position, as I view it, is that a work report relating to a witness, containing no more than a summary of what the witness said or may have said and which is not the witness' own statement, is not producible. Its rulings are consistent both with the Jencks rule contained in the Supreme Court's decision in *Jencks* v. *United States,* 353 U.S. 657 (1957), and the requirements of that rule as they have been codified by the Congress in the so-called Jencks Act (18 U.S.C. § 3500). This the Commission made clear in its opinion in *Inter-State Builders, Inc.,* Docket No. 8624 [p. 1152 herein].

The dissent apparently misconstrues the *Jencks* decision and consistently confuses the issue by equating the report of an interview with a witness with a statement of that witness. Neither the facts nor language of the *Jencks* decision afford a ground for a contention that the Court considered the two as necessarily one and the same thing. In fact, it seems clear that in referring to statements orally made to, and recorded by, an agent, the Court was not considering mere summarizations but rather the witness'

*Consolidated concurring statement *In the Matter of L. G. Balfour Co.,* Docket No. 8435 and *In the Matter of Inter-State Builders, Inc., et al.,* Docket No. 8624, p. 1152 herein.

own statements. It is also apparent from the Supreme Court's subsequent review of the *Jencks* decision in *Palermo* v. *United States,* 360 U.S. 343 (1959), that the Court was satisfied that the statute was framed to preclude an "expansive reading" going beyond the holding of that decision.

Further, the dissent unmistakably implies that by applying the Jencks Act standards for determining whether a document is producible the Commission deprived respondents of the full right to cross-examination and of due process. This astonishing statement I suspect will surprise the courts and the Congress. It deserves a reply. I think it goes without saying that in the light of the possible penalties in criminal proceedings the attendant procedures must comport to the highest Constitutional requirements of fairness and due process. As a result, the insinuation that the application of the Jencks Act to the administrative proceedings is somehow unfair is startling if not ludicrous. If application of the Jencks Act standard in administrative proceedings deprives a respondent of the right to a full cross-examination, the same must be true in criminal proceedings. After some eight years of interpretation I have yet to see a judicial decision questioning the fundamental fairness of the guidelines spelled out in the Jencks Act by Congress. If the Jencks Act standard meets the requirements of fairness for criminal proceedings *a fortiori,* it must meet the requirements for due process in a civil administrative proceeding which is nonpunitive.

Finally, cross-examination on the basis of a summary, which may or may not be complete, or a report of what a witness said, or may have said, would not necessarily bring the proceeding closer to ascertaining the truth but might well result in the converse, namely, the confusion of the testimony and the record. For example, the Court in *Palermo* noted the legislative concern with the danger of misinterpretation [1] inherent in a report merely relating portions, although accurately, from a lengthy oral recital. Cross-examination on this basis would be far more apt to contribute to a sporting type of trial than application of the carefully thought-out guidelines spelled out by Congress under the Jencks Act. The courts do not permit such procedure and there is no reason why an administrative agency should not show a similar concern for the witnesses appearing before it.

There are one or two additional points which should be touched upon in passing. No one seriously disputes the accuracy of our

[1] The dissents insistence that such a danger is not inherent in administrative proceedings because no jury is involved ignores the fact that the Jencks Act applies equally to jury and nonjury criminal trials.

attorneys' field reports for the purposes for which they are written, namely, to give the Commission information on which it may act. The same is also true of the reports of the agents of the Federal Bureau of Investigation whose reports must also, of course, meet the highest standards of probity and accuracy. Nor would anyone question that the Internal Revenue Service relies on the reports of its agents. Yet, the Court in *Palermo*, in connection with an Internal Revenue agent's memorandum of a conference with a witness, expressly recognized the Congressional preoccupation with the unfairness of allowing the defense to use statements to impeach the witness which could not fairly be said to be the witness' own, rather than the product of the investigator's selections, interpretations and interpolations.[2] Why, on this issue, should a differentiation be made between the attorneys of the Federal Trade Commission, agents of the Federal Bureau of Investigation or agents of Internal Revenue?

No respondent in these cases has been, nor should be, deprived of access to prior statements of witnesses necessary for its defense, and such access each will have. Neither the law nor fairness demands more.

I concur in the decisions of the majority in *Inter-State Builders, Inc.*, Docket No. 8624 [p. 1152 herein], and *L. G. Balfour*, Docket No. 8435, decided today [p. 1118 herein].

ORDER RULING ON INTERLOCUTORY APPEAL

This matter is before the Commission upon complaint counsel's interlocutory appeal from the hearing examiner's order of September 29, 1965, directing that certain interview reports be turned over to respondents. The Commission, upon consideration of the appeal and respondents' answer in opposition thereto, has determined that the order should be vacated and the proceeding remanded to the examiner for action consistent with the views expressed in the accompanying opinion. Accordingly,

It is ordered, That the hearing examiner's order of September 29, 1965, be, and it hereby is, vacated.

It is further ordered, That the proceeding be, and it hereby is, remanded to the hearing examiner for further action consistent with the views expressed in the accompanying opinion.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioner MacIntyre concurred and has filed a separate concurring statement.

[2] In the Commission's own proceedings, take, as an example, the case where one of our attorneys interviews a number of witnesses at once. The resulting report would probably consist primarily of the attorney's impressions and evaluations of what went on at the session, and be more in the nature of reporting on an event rather than a recording of the persons' statements.

INTER-STATE BUILDERS, INC., ET AL.

Docket 8624. Order and Opinions, April 22, 1966

Order vacating initial decision and remanding proceeding to the hearing examiner for him to review the interview reports of witnesses and determine whether or not portions of the reports should be made available to respondent's counsel under the Jencks rule.

OPINION OF THE COMMISSION*

BY JONES, *Commissioner:*

The complaint charges that Inter-State Builders, Inc., a corporation, and Milton S. Gottesman, who controls and directs the acts and practices of said corporation, violated Section 5 of the Federal Trade Commission Act by making certain misrepresentations in connection with the sale and distribution of aluminum and insulated siding products.

In his initial decision, the hearing examiner sustained the allegations of the complaint and found that respondents had violated Section 5 as charged.

Respondents have appealed from the initial decision, urging among other things that the hearing examiner erred in refusing at the hearing to inspect certain Commission interview reports prepared by Commission investigators recounting interviews with the consumer witnesses who testified at the hearing on behalf of the Commission to determine whether or not such reports were required to be made available to the respondents for the purpose of cross-examining and impeaching such witnesses. Respondents maintain that the examiner should have ordered that the reports be made available if they were "written by the witness or, if written by another, [were] approved or adopted by the witness" or were "verbatim transcriptions of witnesses' statements" and specifically urge that the Commission apply "the criteria of the Jencks statute" (Respondents Brief on Appeal, pp. 11, 12).

It is our view that the hearing examiner misconceived the proper rule to be followed in considering respondents' counsel's request for production of prior statements made by the witnesses called by complaint counsel and that his refusal to inspect the interview reports in order to determine whether they came within the Jencks rule requiring production of certain types of pretrial statements given by witnesses to the Government constituted

*For dissenting opinion of Commissioner Elman and concurring statement of Commissioner MacIntyre in this case, see consolidated opinion and statement *In the Matter of L. G. Balfour Co.*, Docket No. 8435, pp. 1128, 1149 herein.