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.

error requiring a remand of this case to the examiner with instructions to reopen the hearing and to reconsider this issue in the light of this opinion.

In view of our disposition of this ground of respondents' appeal, we do not address ourselves to the remaining issues raised by respondents on this appeal.

I

The Jencks Decision and Act

On June 3, 1957, the Supreme Court handed down its landmark decision in *Jencks* v. *United States,* 353 U.S. 657, in which the Court held that the defendant was entitled to inspect all prior reports made to the F.B.I. by two witnesses, Ford and Matusow, whom the Government called during the trial concerning meetings about which they had testified at the trial. Ford had testified that his reports had been made "immediately following each meeting, while the events were still fresh in his memory. He could not recall, however, which reports were oral and which in writing" (p. 665). Matusow testified that he had made both oral and written reports to the F.B.I. The Supreme Court stated:

> We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold further that the petitioner 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 the 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 (pp. 668–669).

Thus, the rule laid down in the *Jencks* case by the Supreme Court was that for purposes of cross-examination, a defendant is entitled to the production of any statements made to the Government by the witness in writing or, when orally made, as "recorded" by the Government agent.

Shortly after the *Jencks* decision the rule laid down by that decision was codified in statutory form in what is known as the Jencks Act, 18 U.S.C. 3500. In a case decided after the *Jencks* case, but prior to the statute, *United States* v. *Anderson,* 154 F. Supp. 374, 375 (E.D. No. 1957), the Court held that a witness' statement under the *Jencks* case

> * * * includes only continuous, narrative statements made by the witness recorded verbatim, or nearly so, by persons acting for the United States, and does not include notes made during the course of an investigation (or

reports compiled therefrom) which contain the subjective impressions, opinions or conclusions of the person or persons making such notes.

The report of the House Managers of the Jencks bill, signed by all of the House Conferees, stated that the provisions of the bill were "in line with the standard enunciated" in the *Anderson* case. H. R. Rep. No. 1271, 85th Cong., 1st Sess. 3, quoted in *Palermo* v. *United States,* 360 U.S. 343, App. B, p. 359 (1959).

The Jencks Act provides as follows:

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

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

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

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

(e) The term statement, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. (Added Pub. L. 85–269 Sept. 2, 1957, 71 Stat. 595.)

One of the reasons motivating Congress to codify the Supreme Court's decision in *Jencks* was its concern to reaffirm the basic *Jencks* principle but to protect Government files from unreasonable and unwarranted demands and to make certain that the rule laid down in the *Jencks* decision would not be indiscriminately extended to require production of agents' summaries of interviews regardless of their character or completeness. *Palermo* v. *United States,* 360 U.S. 343, 350, 365 (1959); *Campbell* v. *United States I,* 365 U.S. 85, 92 (1961); *Johnson* v. *United States,* 269 F. 2d 72, 74 (10th Cir. 1959); *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d 314, 325 (D.C. Cir. 1958). Congress in enacting the Jencks Act, was concerned lest the Courts give an "overly expansive" reading to the *Jencks* case. The Supreme Court pointed out in *Palermo* that:

Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations (p. 350).

In general, the Courts in applying the Jencks rule as codified in the Act have sought to adopt a common sense approach to the definition of what constitutes a Jencks "statement" so as to require production of what is clearly the witness' words and to keep out of evidence anything which is merely an agent's summary of a witness' words.

In *Palermo* v. *United States,* 360 U.S. *supra* at 352, the Supreme Court stated that the touchstone of the statutory definition of a "statement" was Congress's clear intent "that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." The Court went on to point out that:

It was important that the statements could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear

from the continuous congressional emphasis on "substantially verbatim recital," and "continuous, narrative statements made by the witness recorded verbatim, or nearly so * * *," see Appendix B, post 79 S. Ct. page 1228, that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions (pp. 352–53).

The Courts have held that the Jencks Act requirement that transcriptions of oral statements shall be made "contemporaneously" does not mean "simultaneously" (*United States* v. *McKeever,* 271 F. 2d 669, 675 (2nd Cir. 1959) and *United States* v. *Waldman,* 159 F. Supp. 747, 749 (D.N.J. 1958)). Thus, in the *Waldman* case, it was held that the transcription which was made while the agent's "memory was fresh" from notes taken while the agent was talking to the witness constituted a contemporaneous transcription.

The Courts have further held that a "substantially verbatim recital" of an oral statement does not mean "precisely verbatim" (*United States* v. *McKeever, supra,* and *Williams* v. *United States,* 338 F. 2d 286, 288 (D.C. Cir. 1964)) and that a statement may be "substantially verbatim" even though it is made in the third person. *Williams* v. *United States, supra.* Furthermore, variances such as "grammatical and syntactical changes, rearrangement into chronological order, [or] omissions [or] additions of information immaterial for impeachment purposes" will not prevent a transcription from being "substantially verbatim." *Campbell* v. *United States II,* 373 U.S. 487, 495, fn. 10 (1963); *United States* v. *Aviles,* 337 F. 2d 552, 558 (2nd Cir. 1964). A summary of an oral statement, however, is not considered to be a substantially verbatim transcription. In *Palermo* v. *United States,* 360 U.S. 343 (1959), the Court held that a 600-word summary of a 3-½ hour conference was not an oral statement within the meaning of the Act.

In *United States* v. *McKeever, supra,* the Court suggested that certain factors be considered in determining whether or not a statement is substantially verbatim. These were: (a) the length of the report in comparison to the length of the interview, (b) the lapse of time between the interview and its transcription

and (c) the extent to which the report conforms to the language of the witness. In *Williams* v. *United States, supra,* the following additional guidelines were proposed by the Government: (d) the appearance of the substance of the witness' remarks, (e) the use of quotation marks and (f) the presence of comments or ideas of the interviewer.

With respect to written statements, the Supreme Court has held that an interview report prepared from notes which have been read back to and approved by a witness constitutes a "written statement" within the meaning of Subsection (e)(1) of the Jencks Act even though the report was made seven hours after an interview. *Campbell* v. *United States,* 373 U.S. 487 (1963).

II

Applicability of the Jencks Decision And Act to Administrative Proceedings

Prior to the *Jencks* decision, defendants in civil or administrative actions were generally denied witnesses' statements made to attorneys or investigators acting on behalf of plaintiffs in the course of their pretrial investigation and preparation of the case either on the ground that they constituted the attorney's work product or, when the plaintiff was a Government agency, on the additional grounds of privilege or confidentiality of Government files. See *N.L.R.B.* v. *Quest-Shon Mark Brassiere Co.,* 185 F. 2d 285, 289 (2nd Cir. 1950); *United States* v. *Deere,* 9 F.R.D. 523, 527–28 (D. Minn. 1949); *Alltmont* v. *United States,* 177 F. 2d 971 (3rd Cir. 1949), *cert. denied,* 339 U.S. 967; *United States* v. *Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461, 462 (E. D. Mich. 1954); *United States* v. *Shubert,* 11 F.R.D. 528, 539 (S.D.N.Y. 1951).

The basis for the denial of production insofar as it was grounded on privilege or confidentiality rested mainly on the Court's concern not to reveal unduly the identity of informants and on its general concern with maintaining confidentiality of Government files. See *United States* v. *Deere, supra* at pp. 525–527 and *United States* v. *Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461, 463–64 (E.D. Mich. 1954). As the court in *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 945–46 (Ct. Cl. 1958) noted, an important public policy consideration underlying the doctrine of executive privilege is to encourage the frank and open exchange of views and disagreements between government employees and their superiors which might be dis-

couraged if government files were indiscriminately open to inspection by litigants. See also *N.L.R.B.* v. *Botany Worsted Mills*, 106 F. 2d 263, 267 (3rd Cir. 1939) and *Machin* v. *Zuckert*, 316 F. 2d 336, 339 (D.C. Cir. 1963).

The bases for the denial of production of such statements on the ground that they represented the attorneys work product are elaborated in great detail in the Supreme Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In that case, involving a private civil action for damages, plaintiff sought production of both signed and unsigned statements of certain witnesses taken by defendants' attorney in the course of preparing his case for trial.

The Supreme Court stated that the basic question at stake was whether any of the discovery devices "may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation" (page 505). The Court pointed out:

> Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task (p. 497).

After weighing the purported need for the documents in question against the importance of preserving the freedom of the attorney to develop his case, the Supreme Court concluded that plaintiff had failed to make any showing which would justify the court in ordering the production of either the signed or the unsigned statements which had been gathered by defendants' attorney. In reaching this conclusion, the Court discussed at some length the importance of maintaining intact the work product rule and pointed out:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though

roughly termed by the Circuit Court of Appeals in this case as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served (pp. 510–511).

The Court refused to entertain plaintiff's argument that due process required that he be given full discovery into all relevant material which in this case included signed statements of eye witnesses to the accident which was the subject of the lawsuit regardless of whether the statements had been gathered by the attorney.

Recognizing that the work product rule must bend where substantial prejudice or injustice would result, the Supreme Court discussed the circumstances under which some discovery of an attorney's files might be permitted:

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted (p. 394).

However, with respect to oral statements the Court felt that they should *never* be produced:

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks.

Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer (pp. 512–513).

The Court concluded that:

* * * [U]ntil some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result (p. 514).

It is against this background that the applicability of the Jencks rule to civil and administrative proceedings must be viewed.

The courts which have considered the question of the applicability of the principles announced in the *Jencks* decision to administrative proceedings have uniformly held that the Jencks rule is applicable to these proceedings because as the Supreme Court stated in *Jencks,* "justice requires no less." Thus, in *N.L.R.B.* v. *Adhesive Products Corporation,* 258 F. 2d 403, 408 (2nd Cir. 1958), the Court stated that "logic compels the conclusion that [the rules set forth in the *Jencks* decision] are applicable to an administrative hearing." In *Great Lakes Airlines, Inc.* v. *C.A.B.,* 291 F. 2d 354, 364 (9th Cir. 1961), the Court declared that it has been "judicially recognized" that "the underlying principle of the Jencks case and statute * * * is generally applicable in administrative proceedings * * *." In *Harvey Aluminum Co.* v. *N.L.R.B.,* 335 F. 2d 749, 753 notes 9 and 10 (9th Cir. 1964), the Court refused to decide "whether the compulsion of the rule is constitutional or statutory," but held nevertheless that the "underlying principle of Jencks must be followed" by an administrative agency (p. 753, n. 10). This same principle was enunciated by the Court in *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d 314, 327–328 (D.C. Cir. 1958), where the applicability of the Jencks Act to administrative proceedings was again affirmed, the Court pointing out that it reached this result because:

"the laws under which these agencies operate prescribe the fundamentals of fair play." Their proceedings must "satisfy the pertinent demands of due process."

See also *Basic Books, Inc.* v. *F.T.C.,* 276 F. 2d 718 (7th Cir. 1960); *N.L.R.B.* v. *American Federation of Television and Radio*

Artists, 285 F. 2d 902, 903 (6th Cir. 1961); *Schere* v. *Christenberry,* 179 F. Supp. 900, 905–906 (S.D.N.Y. 1959), *Carlisle* v. *Rogers,* 262 F. 2d 19 (D.C. Cir. 1958).

Thus, the courts in applying the Jencks rule to administrative proceedings have followed the principles of the Supreme Court's decision in the *Jencks* case. Recognizing that the Jencks Act merely represents a codification of those principles and is expressly applicable only to criminal cases, the courts have nevertheless followed substantially the same tests laid down by the Jencks Act as applied by the courts to criminal cases since the *Jencks* decision did not define the types of oral statements to be produced beyond describing them as those which were "recorded" by the Government agent. As the Court in the *Harvey Aluminum* case stated in applying the Jencks principle to N.L.R.B. proceedings: just as "Congress did in enacting the Jencks Act" an administrative agency may adopt reasonable rules implementing this principle "so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest" (335 F. 2d 749, 753, n. 10). No court has suggested that a more expansive test should be applicable to civil or administrative proceedings than is now applicable to criminal cases. Indeed, the Court of Appeals for the District of Columbia made it quite clear in its opinion in *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d *supra* at 325, that it would be improper to go beyond the confines of the *Jencks* case in considering the production of witnesses' statements to administrative proceedings:

> The new act of Congress requires the production of "statements" but defines statements as those written, signed or approved by the witness himself, or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital * * * recorded contemporaneously." *Surely the executive files of the Government are not to be invaded more easily and with less basis in a regulatory administrative proceeding of this sort than they would be in a criminal prosecution* (p. 325). (Emphasis added.)

In appeals from administrative decisions, as in criminal cases, the courts have sought to distinguish carefully between those witnesses' words and those which represent merely attorneys' summaries of such statements and have confined production of witnesses' oral statements solely to written statements which reflect substantially the witnesses' own words. *Harvey Aluminum Co.* v. *N.L.R.B., supra* at 753; *Communist Party of the United States* v. *Subversive Activities Control Board, supra* at 325, and *Basic Books, Inc.* v. *F. T. C., supra* at 722.

The Commission has already recognized in general the applicability of the Jencks rule to its proceedings.[1]

Applying these considerations and legal principles to the instant case, we hold that respondents were correct in their contention that the Jencks rule is applicable to administrative proceedings and that under this rule any written statements in the possession of the Commission prepared or approved by the witness relating to the subject matter of such witness' testimony must be produced for inspection by respondents' counsel for possible use in cross-examination. We hold further that any written statement in the Commission's possession which represents a substantially verbatim transcription of any oral statements given to a Commission investigator by such witness must also be made available to respondents' counsel under the same circumstances.

In determining whether a statement represents a substantially verbatim transcription of the witness' oral words as recorded by the Government investigator, it is clear that the hearing examiner must be careful to apply the criteria laid down by the Supreme Court in the *Palermo, Campbell* and other related cases 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.

As the Supreme Court's decisions in the *Jencks, Hickman* v. *Taylor* and *Palermo* cases make clear, the problems raised in determining the discovery rights of defendants in this area of witness' statements are exceedingly complex.

On the one hand, there is the basic consideration of fairness to administrative respondents. While the problem is of course more acute in criminal proceedings, where defendants have more limited discovery rights than are available in civil or administra-

[1] *Ernest Mark High*, 56 F.T.C. 625 (Dkt. 6940, 1959). However, in the cases in which the Commission has adverted to the Jencks rule it has denied production of interview reports to respondents on a variety of grounds which have been sustained by the Court where appeals on the issue were taken. *Pure Oil Co.*, 54 F.T.C. 1892, 1894–95 (Dkt. 6640, 1958) (production of interview report refused on the grounds that it was "privileged"; it was not "used in any way during the course of the hearings" and it was hearsay since it was "prepared not by the witness but by an outside party"); *Basic Books, Inc.*, 56 F.T.C. 69, 85–86 (Dkt. 7016, 1959), aff'd. 276 F. 2d 718 (7th Cir. 1960) (production of witnesses' statements denied because "there was no evidence in the record of the existence of any written statements of any of the witnesses" and because an oral report by an attorney-examiner cannot be successfully used to impeach the testimony of a witness); *Bakers Franchise Corp.*, 56 F.T.C. 1636 (Dkt. 7472, 1959) (production of reports and questionnaires denied because interview reports by Commission attorneys are privileged as "work product"; each witness was subjected to cross-examination; and the investigating attorney fully described the substance of his interviews during the hearing); *Western Radio Corp.* (Dkt. 7468, 1963), aff'd. 339 F. 2d 937 (7th Cir. 1964) (reversal of hearing examiner's denial of request for examination of test report refused because report was skeletal and thus of no value for impeachment purposes and because no reliance was placed by the Commission on the testimony to which it related).

tive proceedings and where the defendants' rights in jeopardy in such cases may go to the essence of an individual's liberty, nevertheless, as the courts and the Commission have asserted many times, questions of fairness to civil defendants or respondents are basic to the administration of justice. The need for steadfast and zealous protection of defendants' or respondents' rights is not only the concern of the courts, but, where the Government is the moving party, it also becomes of equal concern to the administrative agency.

On the other hand, there are equally important policy considerations involved in ensuring that the fact-finding process will be advanced and not impeded in its fundamental objective of ascertaining truth and that attorneys, whose proper performance of their duties is also of fundamental concern to the proper functioning of our judicial system, be protected from any undue interference in the discharge of their duty to advance and protect the interests of their clients, *e.g., Hickman* v. *Taylor, supra.*

In applying these general policy considerations to the issue at hand, we believe that the distinction drawn by the courts in prior cases, criminal and administrative, between requiring production of written or oral statements given by witnesses and refusing production of attorney's summaries of such statements is essential and that the same distinctions must be drawn in Commission hearings as well. The vital importance of preserving inviolate the work product of attorneys so eloquently detailed by the Supreme Court in its opinion in *Hickman* v. *Taylor* applies with even greater force to the investigatory work of Government attorneys who are engaged not only in the representation of their client, but in the protection of the public interest.[2]

It is obvious that the Supreme Court's concern that an attorney not be inhibited in the proper performance of his duties is of particular relevance and significance in the case of Government attorneys whose proper discharge of duties is essential not only to a single client, but to the general public whose interests are served by the efficient and effective administration of the Commission statutes. 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

[2] See *United States* v. *Deere & Co.*, 9 F.R.D., *supra* at 527–528, and *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D., *supra* at 462.

superiors, and ultimately by the Commission. The considerations noted by the Supreme Court for not in any way hampering the attorney in his work are thus of vital importance with respect to the work of the Commission attorney whose work represents the basis for the Commission's decision as to whether a law violation has taken place or not, and if so, what enforcement steps should be taken. The Supreme Court's expressed fears as to the effect on the caliber of an attorney's work of undue liberality in permitting access of opposing counsel into the attorney's files are, therefore, of even greater concern in the case of Government attorneys, where the potential effects of unreasonable rules in this area may be to hamper the proper investigation and evaluation of alleged law violations.

The Supreme Court's concern in *Palermo* with the unfairness and distortions of the fact-finding processes of trial which use of attorneys' summaries of a witness' statements could generate applies with equal force to Commission hearings before trial examiners. In *Palermo,* the Court emphasized Congress' concern in enacting the Jencks statute that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." 360 U.S. *supra* at 350. The unfairness inherent in the use of summaries is as present in Commission hearings before an examiner as it is in a criminal case which may or may not be conducted before a jury.

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. Summaries prepared earlier in the case may be less representative of the witnesses' state of knowledge than those prepared at a later stage in the case. If respondents were given access to all these summaries for use in cross-examination, witnesses might well be far more confused and misled as to what they had thought or known at the time of the interview than their present recollection at the time of trial and their testimony as a result far less accurate than if counsel on

both sides were required to probe the witnesses' memory without confronting the witness with what in many instances might be inaccurate and misleading summaries. Confronted with an attorney's summary purporting to reflect his remarks, the witness might be caused to retract or change his statement because of what he feels may have been a prior inconsistent statement by him. If the prior statement was in fact made by him no unfairness could result; but if the prior statement was an incorrect interpretation of his remarks, he might well be influenced to defer to the views of the examining attorney and modify his remarks to the obvious detriment of truth rather than to its advancement, which is the purpose of all fact-finding and discovery.

Moreover, use of attorney's summaries of witnesses' statements 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. Such a result would not only demean the professional status of the attorney but it would disrupt and confuse the hearing by injecting into it irrelevant side issues.

For all of the foregoing reasons, we conclude that the Jencks rule should be applied to Commission proceedings but that the principles of that case should not be extended beyond the rule laid down in that case and subsequently codified in the Jencks Act. We should make clear that in reaching this conclusion we are in no way suggesting that we are laying down here in this case any absolute rule respecting all materials which may be contained in Government files or in attorneys' interview reports. In some situations a litigant's need for data in Government files may be so compelling and the adverse effects of disclosure so minimal, or at least relatively so, that disclosure would be appropriate. We do not pass on this question since it is not involved in this case. We hold only that with respect to Jencks statements, respondents shall be entitled to inspect any written statement made by a witness to a Commission attorney or investigator or any written report or portions thereof which reflect in substantially verbatim form any oral statement given by the witness to such attorney or investigator but that any summaries of such statements made by the attorney or investigator should not be produced.

With respect to the timing of the production of Jencks statements, subsection (a) of the Jencks Act expressly provides that no statement or report made by a prospective Government witness to an agent of the Government shall be the subject of inspection "until said witness has testified on direct examination in the

trial of the case." Cases applying the principles of this statute to administrative proceedings have held that "Jencks statements" need not and should not be produced until after a witness has testified on direct examination. See *N.L.R.B.* v. *Vapor Blast Company,* 287 F. 2d 402, 407 (7th Cir. 1961); *N.L.R.B.* v. *Chambers Manufacturing Corporation,* 278 F. 2d 715, 716 (5th Cir. 1960); *Raser Tanning Company* v. *N.L.R.B.,* 276 F. 2d 80, 83 (6th Cir. 1960), *cert. denied,* 363 U.S. 830; *Local No. 320 International Union of Operating Engineers, AFL-CIO,* 150 N.L.R.B. No. 47 (1964); *Walsh Lumpkin Wholesale Drug Co.,* 129 N.L.R.B. No. 31 (1960).

We believe that this procedure which has been followed in criminal cases and in administrative proceedings as well without any undue delay or unfairness resulting to defendants should be applicable to Commission hearings. It is clear that the Jencks rule was designed solely as a rule to ensure that defendants would be fully protected in their rights of cross-examination. The rule was never envisaged as a general rule of discovery. Viewing the rule in this manner it is clear that demands for production of Jencks statements in advance of a witness' testimony would be premature. In some instances the witness might not ultimately be called upon to testify. In other instances a witness' testimony might be unrelated to prior statements which he made to the Government. It is obvious, therefore, that the rules laid down by the Supreme Court and Congress for the production of Jencks statements apply with equal force to Commission hearings.

There is an additional consideration of particular pertinence to Commission hearings which underlies our conclusion that production of these statements should not be made until after the witness has in fact testified. Persons interviewed by Government attorneys in Commission investigations are frequently customers, suppliers, or even competitors of the proposed respondent with interests which might be adverse to respondent and which could be injuriously affected if respondent was totally free at any time to discover what they have told Commission counsel. Indeed, if any general access to statements of such interviewees was unnecessarily granted they might choose to remain silent rather than risk any adverse reaction on the part of the respondent to their having talked to Commission investigators. This could have serious and lasting effects on the Commission's ability to conduct effective investigations of its cases. Since the Commission depends on investigations to discharge its statutory

obligations of law enforcement, and since the persons to whom it must go for information may be subject to economic coercion or intimidation, we must strike a balance between those needs and the respondent's legitimate interest in perparing for trial. Respondent is at all times free to interview any and all industry members who in its judgment have facts which bear on the issues in the complaint and on its defense. Thus, respondent has no need to preparing its case for trial to have access to any statements which Commission counsel has procured in the course of his investigation. By the time pretrial under Commission rules has advanced to the point of exchanging witnesses' names, respondent will have in most cases substantially completed his own trial preparation, formulated his defenses and probably even planned his trial strategy. Moreover, he is entirely free to conduct such interviews with or about such designated witnesses as in his judgment are necessary. What the witness may have told Commission counsel is still not necessary for respondent's trial preparation even at this point. Moreover, the witness, though listed by counsel, may never even be called to testify. It would not appear, therefore, that even at this point in pretrial does respondent have any need for Jencks statements. Indeed, respondents themselves in their brief recognized that the use of Jencks statements "is for impeachment only *after* a witness has testified" and need not be produced in pretrial discovery (Respondents' Reply Brief, p. 6). (Emphasis in original.)

For all of these reasons, we conclude that Jencks statements may not be demanded until after the witness in question has in fact testified on direct examination.

III

Application of the Jencks Rule to Respondents' Demand

At the hearing, which took place in Cincinnati between October 13 and October 16, 1964, complaint counsel called 19 witnesses, consisting of the individual respondent, Milton S. Gottesman, and 18 consumers who had purchased respondents' products. Subsequent to the testimony on direct examination of the first witness, Mr. Gottesman, the following discussion appears in the transcript (Tr. 100–102):

> Mr. Ostrander [respondents' counsel] . . . I was going to, if I could, before recess, move that any statements which the examination of this witness was based now that the testimony is completed be made available to me, prior statements of Mr. Gottesman that were made to other Government attorneys that conducted this investigation which we don't have.

Mr. Whitehead: The only thing that I have that I am reading from is the interviewer's report. Of course, that's privileged.

Hearing Examiner Poindexter: Counsel says he has none.

Mr. Ostrander: Well, as I understand the rule, your Honor, I think perhaps I am entitled to look over what he has.

Hearing Examiner Poindexter: You mean you are entitled to look over the investigating—Commission's investigator's report to the Federal Trade Commission of his interview with the respondent?

Mr. Ostrander: I think there was some direct quotes here taken and I think we have a right to have this made available to us to examine.

Mr. Whitehead: I object.

Hearing Examiner Poindexter: Just a minute, one at a time, please. Counsel supporting the complaint says he has no written statement by the witness, is that correct?

Mr. Whitehead: I have none.

Hearing Examiner Poindexter: All right. Now, he says he does have a statement by the Commission's investigator who interviewed Mr. Gottesman. Now, is that the statement that you are asking to be produced?

Mr. Ostrander: Yes, if there is a narrative statement of their conversation which I presume that's what he is talking about I think that I should be entitled to look at that narrative statement.

Hearing Examiner Poindexter: Well, you are not entitled to see that, Mr. Ostrander, and the request will be denied.

Mr. Ostrander: Well, your Honor, I don't think that I am asking for the work product here and I know that we are not. . . .

Hearing Examiner Poindexter: Counsel states that it is a report by the Commission investigator of his interview with Mr. Gottesman. Now, if that's not a work product I don't know what you would call it and that is privileged and not subject to examination by Respondent's counsel.

It's not a written statement by the witness.

Mr. Ostrander: Note my exception.

Respondents' counsel made no attempt to examine any pretrial statements with respect to the three witnesses who immediately followed Mr. Gottesman or even to establish that these witnesses had made statements to any agent of the Commission.

The fifth witness was another consumer, Mrs. William D. Ross. At the conclusion of her testimony on direct, the following colloquy took place (Tr. 168–171):

Mr. Whitehead: All right, I have no further questions.

Hearing Examiner Poindexter: You wish to cross-examine, Mr. Ostrander?

Mr. Ostrander: Yes. First I would like to know if the Government has a statement taken from this witness during the examination and if so I would like to see it.

Mr. Whitehead: I have nothing. The field report of the investigating attorney is all I have.

Mr. Ostrander: Which I presume does not include any statements by the witness?

Mr. Whitehead: No written statement by the witness. The interviewer's report in the terminology of the investigating attorney.

Mr. Ostrander: Well, again, your Honor—

Hearing Examiner Poindexter: Do I interpret your statement, Mr. Whitehead, the witness, Mrs. Ross, has given no written statement to the Federal Trade Commission?

Mr. Whitehead: That's right, your Honor.

Hearing Examiner Poindexter: And you have none in your possession?

Mr. Whitehead: That's right, your Honor.

Mr. Ostrander: Well, I would like to ask one additional question. Did Mrs. Ross give a statement that the agent of the Federal Trade Commission then wrote down?

Hearing Examiner Poindexter: I didn't understand your question.

Mr. Ostrander: Well, I want to be sure that we aren't just concerning ourselves with something that might be in her handwriting that she personally wrote out. It might be that she dictated a statement to an agent of the Federal Trade Commission.

Hearing Examiner Poindexter: If she did, so what? You have spent time and found that she gave no written statement to the Commission. The Commission has no written statement according to counsel.

Mr. Ostrander: I am not questioning counsel, I just want to be sure that it isn't her statement written by someone else.

Hearing Examiner Poindexter: Well, counsel, the investigator I presume that he wrote—he questioned her and wrote down what she said or tried to, but you are not entitled to see that.

Mr. Ostrander: I think we are if it's in her language, if it's something that she dictated.

Hearing Examiner Poindexter: Well, I presume that he did his best to state what she said in her language. I assume that he did that.

Mr. Ostrander: If so I think we are entitled to that:

Hearing Examiner Poindexter: Well, I ruled yesterday and you are not entitled to see that. That's the work of the Commission investigator, Mr. Ostrander.

Mr. Ostrander: I am sure the Court will bear with me if I prepare my record as I think it has to be prepared.

Hearing Examiner Poindexter: Well, let's not go through this on every witness. You are not entitled to see it. There is no need to spend all this time on something that I previously ruled on and I thought we had it clear.

Mr. Ostrander: Well, as it relates to different witnesses I want to be sure the situation was the same, but I won't come back to it again.

Subsequently, complaint counsel called 14 additional consumer witnesses. No further attempts were made by respondents' counsel to obtain prehearing statements.

Respondents urge that the examiner erred in refusing to inspect the reports made by the Commission's investigators of interviews with Mrs. Ross, as well as with the other consumer witnesses called by complaint counsel at the hearing. Respondents in this appeal have not pressed their demand with respect to the pretrial statements made by respondent Milton S. Gottesman but have limited their request to the consumer witnesses called by complaint counsel.

Complaint counsel argues that the hearing examiner's ruling was not in error since respondents' counsel did not present his demand in accordance with the requirements of the Commission's rules as reflected in Rule 1.134 in that respondents' request should have been directed to the Commission and should have set forth good cause; second, that the reports demanded by respondents were attorney's work product and hence not producible; third, that in view of the exhaustive cross-examination of the witnesses in question by respondents' counsel, production of the reports would be of no conceivable value to him; and finally that no proper foundation had been laid for the documents demanded and hence that the demand was invalid.

We find no merit in any of these contentions put forward by complaint counsel.

Complaint counsel argues that since interview reports constitute confidential information within the meaning of Rule 1.133 (see *Bakers Franchise Corporation,* 56 F.T.C. 1636 [1959]), respondents were required under Rule 1.134 to make a request to the Commission for the interview reports.

There is no support either in the express language of the Commission's rules or in considerations of practicality for complaint counsel's interpretation of these two rules.

The procedure provided for in Rule 1.134 respecting applications for confidential data to be addressed to the Commission is not applicable to "Jencks statements" since these statements are clearly within the exception provided in Rule 1.133(a) which excepts from confidential status documents "whose use may become necessary in connection with adjudicative proceedings." There is little doubt that possible Jencks statements are "necessary" to respondent for use in cross-examination and thus come within this exception clause. This would appear to have been the conclusion of the Commission in *Ernest Mark High,* 56 F.T.C. 625, 633 (1959), where the Commission stated "that where there is doubt as to the nature of the report, the examiner should inspect it and make a determination."

This conclusion as to the applicability of the exception clause to Rule 1.133 to "Jencks statements" is reinforced by the possible invalidity of the Rule 1.134 procedure if it were to be applied to such statements and by the impracticability and unfeasibility of using this procedure to secure copies of such statements for cross-examination purposes in the middle of a hearing.

The Ninth Circuit has held that an administrative agency "may not avoid [the Jencks rule] by adopting regulations incon-

sistent with its requirements." *Harvey Aluminum* v. *N.L.R.B.*, 335 F. 2d 749, 753 (9th Cir. 1964). One of the basic ingredients of the Jencks rule is that the statement is "to be turned over at the time of cross-examination" (*Palermo* v. *United States*, 360 U.S. 343, 345 (1959)) to "facilitate proper cross-examination," *United States* v. *Rosenberg*, 257 F. 2d 760, 763 (2nd Cir. 1958), *aff'd.* 360 U.S. 367 (1959); *Basic Books* v. *F.T.C.*, 276 F. 2d 718, 722 (7th Cir. 1960). A court might rule that delaying cross-examination pending submission of an application for production to the Commission and a ruling by the Commission does not constitute production at the time of cross-examination. However, of even greater importance is the delay in the hearing and the unfairness to complaint counsel which would result from such a procedure. Requiring such application to be addressed to the Commission would interrupt the hearings contrary to the intent of the Commission Rules 3.1 and 3.16(d), would inconvenience the witness, would present respondents from conducting an immediate cross-examination and might severely prejudice complaint counsel in that the delay would give respondent additional time to study and prepare for cross-examination and might therefore encourage him to make demands for production which he might not otherwise make. For all of these reasons, we hold that respondents' counsel was correct in directing his demand for Jencks statements to the hearing examiner and that the examiner should have called for the reports in question, examined them and should have held whatever hearings were necessary in order to establish whether any statements contained therein had been approved or adopted by the witness and the circumstance of the recording by the attorney in order to determine whether they are summaries or substantially verbatim transcriptions.

Complaint counsel's argument that respondents' demand must fail because the interview reports in question are privileged as attorney's work product was rejected implicitly by the Supreme Court in its *Jencks* decision and directly by all other courts in cases under the Jencks Act in which the issue has been raised. *United States* v. *Hilbrich*, 341 F. 2d 555, 557 (7th Cir. 1965); *United States* v. *Aviles*, 315 F. 2d 186 (2nd Cir. 1963), vacated and remanded *sub nomine Evola* v. *United States*, 375 U.S. 32 (1963), *aff'd. on remand*, 337 F. 2d 552 (1964), *cert. den.*, 380 U.S. 906 (1965); and *Saunders* v. *United States*, 316 F. 2d 346 (D.C. Cir. 1963), *cert. den.*, 377 U.S. 935.

In the *Saunders* case, the Court explained its reasoning in refusing to read the "work product" rule in the Jencks Act:

> The work product rule * * * protects the mental processes of the attorney * * * [I]t is possible to produce "statements" taken down by an attorney, and still preserve the sanctity of the attorney's work product. If a government attorney has recorded only his own thoughts in his interview notes, the notes would seem both to come within the work product immunity and to fall without the statutory definition of a "statement." But if the attorney has made only a substantially verbatim record of his interview, then, quite the contrary, his notes constitute a "statement" and include no protected material flowing from the attorney's mental processes. * * * If the notes contain both verbatim remarks of the witness and personal observations of the attorney, then paragraph (c) of the act requires that the district judge inspect the statement and excise the protected material if this is possible (pp. 349–350).

Thus, the Court in *Saunders* made very clear its view that Jencks constituted a limitation on the work product rule and not vice versa. In view of the limited nature of the Jencks rule, it is clear that the policy considerations underlying the work product rule which were so emphatically stressed by the Supreme Court in *Hickman* v. *Taylor* are still operative whenever Jencks statements are not involved. We hold that the same considerations are present in administrative hearings and that the work product rule must give way to the principles enunciated in the *Jencks* decision to the extent of statements which reflect in substantially verbatim form the words of the witness.

Complaint counsel's further contention in his brief that "nothing could be gained from further cross-examination with the aid of Commission interview reports," is equally without merit as a ground for sustaining the examiner's refusal to consider respondents' request for the production of statements. The Supreme Court in its decision in *Palermo* v. *United States,* 360 U.S. 343, 346 (1959) made it clear that its *Jencks* decision related solely to the production for impeachment purposes of specific statements relating to the subject matter of a witness' testimony after proper demand and not to their admissibility and that the trial court's duty was to determine whether Jencks statements existed and not to determine whether such statements were of "value" for impeachment purposes. Thus, any questions of "value" are irrelevant where in fact a Jencks statement exists.

Complaint counsel's final objection that respondents' counsel failed to make a proper demand or to lay an adequate foundation for his demand seems to us in the context of what transpired at this hearing to be without substance.

The courts have never imposed rigid requirements with respect to the form of demand which must be made. No "ritual of words" is stated to be required for the demand of Jencks statements.

Howard v. *United States,* 278 F. 2d 872, 874 (D.C. Cir. 1960). The reason for this flexibility was explained by the Court in *United States* v. *Aviles,* 315 F. 2d 186 (2nd Cir. 1963); vacated and remanded *sub nomine Evola* v. *United States,* 375 U.S. 32 (1963); aff'd. on remand, 337 F. 2d 552 (1964); *cert. denied,* 380 U.S. 906 (1965):

> Ours is an adversary system of criminal justice. It is not, however, a "game of verbal jackstraws," the object of which is to see whether the actions of either the Government or the defense can be pulled out from under the language of the applicable statutes, the demands of opposing counsel, or the orders of the court, without disturbing any of the latter. * * * Of course the Act does not require that demands for statements must be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language" (pp. 190, 191).

Nevertheless, the courts have generally insisted that regardless of the form in which a demand for a "Jencks statement" is made, counsel must make some showing that a statement has been made to the Government or that a report of an interview with the witness has been prepared by a Government agent. *Ogden* v. *United States,* 303 F. 2d 724 (9th Cir. 1962); *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d 314 (D.C. Cir. 1958). Whether or not counsel must go further and introduce facts indicating that a statement fits within one of the definitions set forth in the Jencks Act would appear to depend on the type of statement requested. To form the basis for a written statement as defined in Section (e) (1) of the Jencks Act counsel must normally make some showing on cross-examination that the statement or report was prepared by or shown to and approved by the witness. *Ogden* v. *United States,* 303 F. 2d *supra* at 737; *United States* v. *Lamma,* 349 F. 2d 338 (2nd Cir. 1965). However, with respect to an oral statement within the meaning of Section (e) (2) of the Jencks Act, defendant is not usually required by the courts to attempt to establish that a substantially verbatim transcription was made of the statement. *Saunders* v. *United States,* 316 F. 2d 346, 349 (D.C. Cir. 1963), cert. denied, 377 U.S. 935. Thus, in the *Ogden* case, *supra,* one of the witnesses testified on cross-examination that he had been interviewed by F.B.I. agents and had observed them taking notes. The Court held that this testimony was sufficient to indicate the creation of an oral statement within the meaning of Section (e) (2) of the Jencks Act but that the defendant had not properly raised the issue under Section (e) (1) since he could have and did not explore the matter on cross-examination. The reason why different standards have

been applied with respect to oral and written statements was set forth in the *Lamma* decision at page 341:

> * * * [I]n the (e) (2) situation * * * defense counsel, unlike the court, has not seen the reports or notes, and is not in a position to formulate intelligent questions as to the circumstances surrounding the recording of the oral statement in order to determine whether a substantially verbatim recital exists. On the other hand, in the (e) (1) situation, when the issue is adoption or approval, the defense labors under no such disadvantage, for its lack of access to the document does not prevent defense counsel from asking the witness appropriate questions.

In the instant case, as noted above, respondents have limited their demand for prehearing statements to the 18 consumer witnesses. The only consumer witness with respect to whom a prehearing statement was directly requested by respondents during the hearing was Mrs. Ross, the fourth consumer witness. Respondents' counsel had made such a demand previously with respect to complaint counsel's first witness Milton Gottesman. On both occasions he was told flatly by the hearing examiner that he was not entitled to any interview reports and that he should not raise the issue again.

Complaint counsel had admitted at the hearing that an interview report was in existence with respect to the witness Ross, but did not disclose whether similar reports were available with respect to later consumer witnesses because of the hearing examiner's denial of counsel's request for Mrs. Ross' report and his admonition to counsel not to come back to the issue. Respondents' counsel did not make or attempt to make any showing that the report respecting Mrs. Ross was a substantially verbatim transcription of the witness' remarks or that she had adopted or approved it. Nor did he make any demands for possible Jencks statements of any of the other consumer witnesses called by complaint counsel.

The case at bar is in sharp contrast to *United States* v. *Lamma, supra,* where the Court, in holding that the trial judge had not erred in failing to conduct a hearing to determine adoption or approval, noted that the defense counsel had had "every opportunity" to explore the issue but had failed to do so.

In the instant case the examiner made his ruling denying counsel access to this report with such finality that respondents' counsel had no choice but to declare, as he did: "I won't come back to it again." As the Court declared in *Howard* v. *United States,* 278 F. 2d 872, 874 (D.C. Cir. 1960):

> Moreover, the court's hostility toward this entire line of questioning emphasizes the futility of efforts to further pursue the matter.

In view of the hearing examiner's attitude, we cannot now speculate as to what counsel might have done or inquired about had he not been so abruptly cut off. Nor can we hold that respondents have waived their right to statements with respect to the witnesses who were called after Mrs. Ross. The issue is less clear with respect to the three witnesses who preceded Mrs. Ross. Although the examiner had refused to order the production of reports with respect to the first witness, Milton S. Gottesman, he did not at that point permanently close the door to further requests as he later did at the conclusion of Mrs. Ross' testimony. Thus, there might be some basis for concluding that respondents were not concerned with gaining access to any previous statements which may exist with respect to these witnesses. Nevertheless, the point is not free from doubt on the record in this case.

In the light of the record in this case and the hearing examiner's erroneous conception as to the nature and scope of the Jencks rule, we hold that he erred in refusing to consider counsel's request for production of possible Jencks statements with respect to Mrs. Ross and the consumer witnesses who followed her. Since this case will have to be remanded to enable the examiner to consider this request in the light of this opinion, it would seem to be the preferable course for the examiner to consider the issue with respect to each of the consumer witnesses who preceded Mrs. Ross as well.

The final point to be considered is the procedure to be followed by the hearing examiner in making a determination as to whether or not a statement or report is a "Jencks statement." The initial step is for him to inspect the document *in camera*. He may be able to determine from its face whether it is a mere summary or has been approved by the witness. If it is unclear whether the document qualifies as a Jencks statement the examiner should on his own motion conduct a voir dire examination into the circumstances surrounding its making. At this hearing extrinsic evidence, including, where appropriate, testimony by the witness as well as by the person who transcribed the statement or made the report, may be introduced. *Palermo* v. *United States,* 360 U.S. 343 (1959) ; *Campbell* v. *United States,* 365 U.S. 85 (1961) ; *Campbell* v. *United States,* 373 U.S. 487 (1963). Thereafter the hearing examiner should prepare findings embodying the factual bases for his conclusions on this point so that the point can be examined on appeal.

IV

The hearing examiner's initial decision is vacated, and the case is remanded to the examiner to examine the interview reports made with respect to each of the consumer witnesses called by complaint counsel to determine, by appropriate procedures, whether or not such reports contain "Jencks statements" The examiner should deliver to respondents' counsel any reports or portions thereof which are found by him to be "Jencks statements" and to relate to the witness' testimony on direct examination. If requested by respondents' counsel, the examiner should reconvene the hearing-in-chief to permit respondents' counsel to utilize such reports or portions thereof for the purpose of cross-examining those consumer witnesses whom respondents' counsel requests be recalled for such purpose. Finally, the examiner should issue a new initial decision which should include specific findings with respect to the issues presented on this remand. An appropriate order will issue.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred and has filed a separate concurring statement.

ORDER DIRECTING REMAND

This matter having been heard by the Commission upon the the appeal of respondents from the initial decision of the hearing examiner and upon the briefs and oral argument in support thereof and in opposition thereto, and

The Commission having rendered its opinion, determining that the initial decision should be vacated and that the matter should be remanded to the hearing examiner for further proceedings as outlined in said opinion, and having considered only the procedural issues referred to in said opinion, and having made no determination with respect to any of the substantive issues raised by respondents in their appeal:

It is ordered, That the initial decision be, and it hereby is, vacated and the proceeding be, and it hereby is, remanded to the hearing examiner to:

(1) examine the interview reports made with respect to each of the witnesses (other than Milton S. Gottesman) called by counsel supporting the complaint to determine by appropriate procedures, including a hearing if necessary, whether or not such reports contain pre-hearing statements which should be made available to respondents' counsel under

the "Jencks rule" as described in the Commission's opinion of this date;

(2) deliver to respondents' counsel any of such reports or portions thereof found by him to be statements within the meaning of the "Jencks rule" and to be relevant for the purposes of cross-examination;

(3) if requested by respondents' counsel, reconvene the hearing-in-chief to permit respondents' counsel to utilize such reports or portions thereof for the purpose of cross-examining any of such witnesses whom respondents' counsel requests be recalled for such purpose; and

(4) issue a new initial decision which should include specific findings with respect to the issues presented on this remand.

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

DEAN FOODS COMPANY ET AL.