

## Jencks Act Construed - Palermo v. United States

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## Jencks Act Construed

### *Palermo v. United States*<sup>1</sup>

The defendant was tried on a charge of wilfully attempting to evade payment of federal income taxes. Prior to the trial in the District Court, the government interrogated a witness for approximately three and one-half hours, and a short memorandum of approximately six hundred words had been made by a federal agent as a summary of what had been revealed during the interrogation. At the trial defendant demanded and was given transcripts of the entire testimony of the witness during this interrogation, as well as a later affidavit. Defendant's request for a copy of the six hundred word memorandum was refused by the trial judge on the ground that the document requested was not within the scope of Section (e) of the Jencks Act.<sup>2</sup> Defendant was convicted and the conviction was affirmed by the Circuit Court of Appeals for the Second Circuit.<sup>3</sup> Certiorari was granted to determine the scope of the statute.<sup>4</sup> The Supreme Court, speaking through Mr. Justice Frankfurter, held that the refusal to require production of the six hundred word summary was justified under the Jencks Act and affirmed the decisions in the courts below. Justices Brennan, Black, Douglas, and the Chief Justice joined in a concurring opinion that acknowledged the propriety of the result but criticized the majority for their full examination of the scope of the statute that was not, in their opinion, required by the case at bar.<sup>5</sup>

The decision in *Palermo* indicates that the Court does not intend to require the complete revelation of government investigative dossiers upon the defendant's motion in a federal criminal proceeding. Instead, the Court has adopted the rather narrow limitations of the Jencks Act as the only applicable rule to be used in determining whether or not to require the production of statements made by government witnesses. What is of considerable interest is the fact that the majority have put their holding on purely procedural grounds, thereby denying that the constitu-

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<sup>1</sup> 360 U.S. 343 (1959).

<sup>2</sup> 18 U.S.C.A. (1960 Supp.) § 3500.

<sup>3</sup> 258 F. 2d 397 (2nd Cir. 1958).

<sup>4</sup> 358 U.S. 905 (1958).

<sup>5</sup> *Supra*, n. 1, 360.

tionally guaranteed rights of defendants have been impinged upon by the adoption of this rule.<sup>6</sup>

By upholding the restrictive Jencks Act provisions, the Court tempers the effect of their liberal decision in *Jencks v. United States*<sup>7</sup> and allays the fears of those who saw in that decision a broad and dangerous precedent under which the secrecy surrounding government investigative files would be eroded with a resultant decrease in the effectiveness of the law enforcement agencies.

In the *Jencks* case, the Court ordered a new trial for the officer of a union who had been convicted for filing a false non-Communist affidavit. The grounds were that it was error for the trial court to deny the defendant access to reports filed by a government witness solely because the defendant had not laid a preliminary foundation of inconsistency between the contents of the report and the witness's testimony. The Court held that reports previously filed with the F.B.I. by witnesses which touched upon activities or events about which these witnesses testified were required to be produced for the defendant's scrutiny, without their first being submitted to the trial judge for his decision as to their relevancy, regardless of the detrimental effect of the revelation of secret material concerning the national security program. The *Palermo* decision makes it clear that the more liberal procedures prescribed in *Jencks* were not based upon due process or other constitutional grounds, but were the Court's interpretation of what the then applicable procedural rules required.

Congressional reaction to the *Jencks* decision had been swift and severe, taking the form of outspoken criticism coupled with the introduction of hastily drawn bills in both the House and the Senate designed to ameliorate or entirely nullify the effect of the Court's pronouncement, by erecting barriers against too broad incursions into government files.<sup>8</sup> In a flurry of activity marking the closing weeks of the first session of the Eighty-Fifth Congress, the slightly different versions of the House and

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<sup>6</sup> *Supra*, n. 1, 373.

<sup>7</sup> 353 U.S. 657 (1957). For a discussion of the Jencks case and the resulting Jencks Act, see *The Aftermath of the Jencks Case*, 11 Stanford L. Rev. 297 (1959); and Comment, *The Impact of Jencks v. United States And Subsequent Legislation On The Secrecy Of Grand Jury Minutes*, 27 Fordham L. Rev. 244 (1958).

<sup>8</sup> Eleven Bills were introduced in the House alone, 103 Cong. Rec. 8327 (1957), while the Senate concerned itself with debating and amending a bill drawn by the Justice Department and introduced in the Senate by Senator O'Mahoney, 103 Cong. Rec. 10057 (1957).

Senate were sent to a conference committee, where a compromise measure was drawn, reported out, and promptly passed by both houses. That due process considerations were a topic of congressional concern pending the enactment of the Jencks Act, as Mr. Justice Brennan indicates, may be ascertained from the report of the conference committee<sup>9</sup> and the Congressional Record.<sup>10</sup> The same sources will also reflect, as Mr. Justice Frankfurter, speaking for the majority, contends, the determination of the framers of the statute to sharply limit access to government files and to make the statute the only rule under which statements of government witnesses are to be obtained.<sup>11</sup>

The Jencks Act provides that no statements are required to be produced by the government until after the witness who made them has testified on direct examination. The trial judge must then decide on the relevancy of disputed documents; and if it is found that they are relevant, the defendant is allowed access only to the relevant portions of them.<sup>12</sup> The heart of the Jencks Act is Section (e), wherein the material producible under it is defined. That Section limits production to written statements signed or approved by the witness and "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 statement."<sup>13</sup>

In two other cases decided the same day as the *Palermo* case, *Rosenberg v. United States*<sup>13</sup> and *Pittsburgh Plate Glass Co. v. United States*,<sup>14</sup> the Court announced further interpretations of the Jencks Act. In *Rosenberg* the Court held that a letter from a government witness to the federal agent in charge of the case, in which the witness requested a chance to read over her testimony in a previous trial prior to testifying again, was producible under the statute; but that failure to require its production was not reversible error due to the fact that the

<sup>9</sup> U.S. Code Cong. & Ad. News, 85th Congress, 1st Session, 1861, 1862 (1957).

<sup>10</sup> 103 Cong. Rec. 15928, 15933, 16489 (1957).

<sup>11</sup> Justice Frankfurter, in two appendices to *Palermo*, *supra*, n. 1, 356, 358, outlines the legislative history of the Jencks Act to illustrate the intent of Congress in passing it.

<sup>12</sup> 18 U.S.C.A. (1960 Supp.) § 3500.

<sup>13</sup> 360 U.S. 367 (1959).

<sup>14</sup> 360 U.S. 395 (1959).

substance of the letter was revealed by the witness during her testimony.

In *Pittsburgh Plate Glass*, the Court held that grand jury minutes were not producible under the Jencks Act, but were to be produced only where the trial judge might, at his discretion, find that in fairness to the parties the veil of secrecy surrounding grand jury proceedings should be lifted. In each of these cases, the four justices who concurred specially in *Palermo*, joined in a dissenting opinion.

As an examination of past decisions of the Supreme Court will show, some of the provisions of the Jencks Act are not without precedent while others are in direct conflict with previous holdings. In *Goldman v. United States*,<sup>15</sup> the Court established the rule that memoranda made by government agents or a witness were producible at the trial judge's discretion when the witness did not use notes when testifying during the trial. *Gordon v. United States*,<sup>16</sup> and later *Jencks*, broadened the *Goldman* decision. The *Gordon* case held that it need only appear that the evidence sought was relevant, competent, and outside any exclusionary rule, to require its production,<sup>17</sup> and *Jencks* held that the document need only touch upon or relate to the events and activities at the trial, the defendant not being required to show inconsistencies prior to obtaining it.<sup>18</sup> The Court in *Jencks* also ruled against the practice of submitting documents to the trial judge for his decision as to their relevancy before giving access to the defendant.<sup>19</sup>

The requirement that all government documents bearing any relation to the testimony of a witness be produced

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<sup>15</sup> 316 U.S. 129, 132 (1942). Justice Roberts, speaking for the majority, denied that the defendant should have access prior to the trial to the memoranda, consisting mostly of a digest of overheard conversations.

<sup>16</sup> 344 U.S. 414 (1953).

<sup>17</sup> *Ibid.* A Government witness had made several statements to the authorities which did not implicate the defendants and a later one which did. When the witness testified at the trial only the last incriminating statement was used and the trial judge refused to require production of the exculpatory statements. The Supreme Court reversed, holding that any relevant statements should be produced for examination by the trial judge as to their admissibility, and that failure to require such production was prejudicial error.

<sup>18</sup> *Jencks v. United States*, 353 U.S. 657, 666 (1957). *Cf.* *Gordon v. United States*, *supra*, n. 16, where the prior foundation had been laid by the defendant. The *Jencks* opinion distinguishes the cases by stating that the holding in *Gordon* was not based on the fact that foundation had been laid.

<sup>19</sup> *Jencks v. United States*, *supra*, n. 18, 669. The Court required the documents be first examined by defendant before the trial judge passed on their admissibility.

for the defendant's examination has very obvious shortcomings. The danger of revealing complete dossiers of classified materials before a ruling is made on their materiality would preclude prosecution of all but the most important defendants. The government would, in effect, be required to balance the importance of the connected materials in its investigative files from a security aspect as against the desirability of obtaining a conviction against the defendant at hand. This balancing of interests, however, is precisely what Justice Brennan prescribed in *Jencks*.<sup>20</sup>

The *Palermo* decision, then, is a conservative retrogression from *Jencks*, not denying that relevant statements of witnesses may be produced but endorsing the *Jencks* Act safeguards against what Mr. Justice Jackson in *Gordon v. United States* described as a "broad or blind fishing expedition among documents possessed by the government on the chance that something impeaching might turn up."<sup>21</sup> Under the *Palermo* decision, statements not producible under the *Jencks* Act are not producible at all.

No one can gainsay that there is a valid and worthwhile interest to be served by the erection of adequate safeguards around the investigative process. How far this can be carried without eroding personal rights of defendants in criminal prosecutions based upon such investigations is the crux of the *Jencks* Act conflict. In certain areas, security interests and personal rights are simply incompatible. Legislative enactments can never wholly satisfy both requirements. There is no panacea that will itself resolve problems by simple cataloguing of what is and what is not producible. The *Jencks* Act provisions, if strictly applied under the *Palermo* holding, could lead to the forced exclusion of valid, relevant material solely on the basis of its form where digesting of testimony had been practiced. On the other hand, the *Jencks* decision, liberally construed in the lower federal courts, brought materials under the scrutiny of defense counsel without regard to relevancy or competency, often with deleterious effects on the investigative program.<sup>22</sup>

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<sup>20</sup> *Supra*, n. 18, 672.

<sup>21</sup> *Supra*, n. 16, 419.

<sup>22</sup> This problem and others arising from *Palermo*, are discussed in a Recent Case, *Production of Statements — Statute Governing Production Ruled Exclusive Vehicle For Production By The Government*, 108 U. of Pa. L. Rev. 141 (1959).

The federal courts, under the *Palermo* decision, will be required to employ the highest level of judicial prudence in passing upon materials for production purposes without doing violence to either of the conflicting considerations. The underlying purpose of the Jencks Act must be given weight in arriving at such a decision. Simply defined, the statute is intended to limit production to relevant materials for use only in cross-examination of government witnesses. Statements or other materials not suitable for cross-examination use because they touch neither the matter at issue nor the character or veracity of the witness should, therefore, not be ordered produced. The Jencks Act requirement that the statements only be produced after the witness has testified on direct examination is firm basis for the exclusion of fragmentary or extensively digested materials.

The liberal justices, Warren, Black, Douglas, and Brennan, who dissented as a group in *Rosenberg* and *Pittsburgh* and who concurred specially in *Palermo*, seem to feel that the Jencks Act, as construed by the majority, does reach a substantial constitutional barrier when it is allowed to limit so severely the types of government held materials available to a defendant. Mr. Justice Brennan, concurring in *Palermo*, argues that the serious limitations imposed by the majority's interpretation of the statute conflict with the right of a defendant to be confronted with his accusers and obtain witnesses in his behalf as guaranteed by the Sixth Amendment.<sup>23</sup> He concedes that the decision in *Jencks* "was not put on constitutional grounds," but points out that the overriding considerations of constitutional guarantees were "close to the surface" in that decision and that Congress recognized their import during the debate over the enactment of the *Jencks* statute.<sup>24</sup> The stand of the liberals might be stated as acknowledging the power of Congress to prescribe rules for the administration of justice in the federal courts *within constitutional limits*, but that the construction placed on the Jencks Act by the majority, making documents not producible under it not producible at all, puts it beyond the bounds of constitutionality. The concurring justices, then, would not

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<sup>23</sup> *Palermo v. United States*, 360 U.S. 343, 362 (1959) ("Less substantial restrictions than this of the common-law rights of confrontation of one's accusers have been struck down by this Court under the Sixth Amendment. *Kirby v. United States*, 174 U.S. 47. And in such circumstances, there becomes pertinent the command of that Amendment that criminal defendants have compulsory process to obtain witnesses for their defense. See *United States v. Schneiderman*, 106 F. Supp. 731, 738.").

<sup>24</sup> *Palermo v. United States*, *supra*, n. 23, 362-3.

have attempted to define the limits of the statute as the majority did, but would have only decided that the Jencks Act precludes the trial court from requiring the production of the specific summarization as demanded by the defendant in the instant case.

The instant case, adopting as it does the restrictive provisions of the Jencks Act and complying with the expression of conservative congressional feeling that it embodies, marks a victory for those who fear the liberal tendencies of judicial law-making and who feel more secure with the rules of procedure explicitly defined by legislative enactment. Others, who see in such restrictive laws the strangulation of personal rights and liberties, align themselves with the concurring justices against the interpretation placed on the statute by the majority. Perhaps, as the concurring justices propose, it would be better to allow the lower federal courts time to apply the Act's provisions in a variety of situations and let the Supreme Court restrict itself to interpreting only so much of it as the cases before it demand, rather than essay a complete definition on first impression especially when personal rights are involved. It will be of interest to follow subsequent decisions to determine whether the all-embracing scope the Court ascribes to the Jencks Act in *Palermo* will continue to meet the needs of security in government files while protecting the constitutionally guaranteed rights of defendants as well.

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