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SECTION 3500:
JUSTICE ON A TIGHTROPE

Theodore A. Borillo*

INTRODUCTION

Exercising its power to prescribe rules of procedure and evidence for the administration of justice in the federal courts, the United States Supreme Court in Jencks v. United States held that a defendant in a criminal proceeding is entitled as a matter of right to statements made by a government witness to an agent of the government, and which relate to the events and activities about which that witness has testified at trial. This overruled a prior practice in many United States Courts of Appeal requiring, before production would be ordered, a showing of inconsistency between the contents of the statements demanded and the testimony of the witness. The Jencks Court stated, however, that it was not authorizing "any broad or blinding expedition among documents possessed by the Government," but that the demand must be for specific documents, i.e., those that relate to the testimony. In this regard, it attempted to strike a fair balance between according fair play and "justice" to the defend-

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1 Congress has the power to prescribe such rules for the federal courts, and has from the earliest days exercised that power. For a collection of such legislation see Frankfurter & Landis, Powers of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, app. I at 1074-1100 (1924). However, in the absence of a relevant act of Congress, the United States Supreme Court can exercise supervisory power over the administration of criminal justice in the federal courts and, in this regard, may prescribe rules of procedure and evidence to follow. Gordon v. United States, 344 U.S. 414, 418 (1953); McNabb v. United States, 318 U.S. 332, 340-42 (1943); Fed. R. Crim. P. 26. For a general discussion of this supervisory power see Comment, 9 Kan. L. Rev. 317 (1961).


3 Scanlon v. United States, 223 F. 2d 382 (1st Cir. 1955); Shelton v. United States, 205 F. 2d 806 (5th Cir. 1953); Christoffel v. United States, 200 F. 2d 734 (D.C. Cir. 1952), re/d on other grounds, 345 U.S. 947 (1953); Iva Ikuko Toguri D'Aquino v. United States, 192 F. 2d 338 (9th Cir. 1951); United States v. De Normand, 149 F. 2d 622 (2d Cir. 1945); United States v. Ebeling, 146 F. 2d 254 (2d Cir. 1944); Little v. United States, 93 F. 2d 401 (8th Cir. 1937); Arnstein v. United States, 296 Fed. 946 (D.C. Cir. 1924). In this regard, the Court in Jencks stated, "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining conflict cannot arise until after the witness has testified, and unless he admits conflict...the accused is helpless to know or discover conflict without inspecting the reports." Jencks v. United States, supra note 2 at 667-68. (Emphasis added.)


5 Id. at 667
ant, and the protection of national interests and security against compromise through possible overexposure of government files. Despite, however, the efforts of the Court to clearly state its position, the caveat of the dissent, that he ruling affords defense counsel a “Roman holiday for rummaging through confidential information,” had alarming effects, which were aggravated by a misapplication of the Jencks rule by lower federal courts into unrelated areas.

Misunderstandings of the intended scope of the Jencks ruling led to an almost immediate adoption of 18 U.S.C. §3500. While this statute was admittedly designed to “clarify” and “reaffirm” the Court’s position in Jencks, during its brief period of incubation it has already worked hardships to defendants alien to the rationale of that decision. Inroads have developed whereby section 3500 can be employed as a shield by the government against an assertion of rights originally meant to be accorded an accused.

PROCEDURE GOVERNING THE PRODUCTION OF STATEMENTS

The general statutory aim of section 3500 is to aid the defense in its attempt to impeach government witnesses, for no statement is required to be produced until the direct testimony of the government witness has been elicited.

After the witness has testified, the court shall, on motion of the defendant, order the production of any statements related to the subject matter of the testimony. A motion for production is premature if the government witness has not yet testified, and must be renewed if the benefits of the statute are to be availed of by the defense. Also, a

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6 Id. at 681-82.
8 The full text of the statute is set out in the appendix infra.
10 A discussion of the meaning of the word “statement” as used in 18 U.S.C. §3500 (1958), and its attendant problems, appears at pp. 13-16 infra.
12 18 U.S.C. §3500(b) (1958). In Johnston v. United States, 260 F. 2d 345 (10th Cir. 1958), a witness testified that he had signed a statement for the F.B.I. However, since no request or motion was made by the defense for production of the statement, the court held that no rights had been denied under 3500. In Howard v. United States, 278 F. 2d 872 (D.C. Cir. 1960), the witness admitted to having made a statement and to having a copy in his possession. The defense then asked the witness, “May I see it?” The court held this to have been a sufficient demand for production, stating at page 874, “. . . no ritual words could have made it any plainer that the defense wanted to see the officer’s report.”
14 Rich v. United States, 261 F. 2d 536 (4th Cir. 1958); Johnston v. United States, supra note 12.
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Foundation must be laid for the motion, usually by asking the witness on cross-examination whether he has made any statements or reports to a government agent regarding the subject matter of his direct testimony. 15

Upon motion by the defendant, the court shall order the government to produce and deliver directly to the defendant for his examination and use all statements which in their entirety relate to the testimony. 16 If the government claims that a statement containing relevant matter, also contains unrelated matter, the statement is to be delivered to the court for an in camera inspection by the trial judge. 17 The court is then to exercise its discretion by excising that portion of the statement which does not relate to the testimony, and delivering the unexcised portion directly to the defendant for his use. 18

Once it is determined that the documents in the possession of the governments are “statements” within the terms of 3500, they must be turned over to the defense without regard to national interests and security, 19 their “consistency” with the testimony, 20 or their admissibility as statements into evidence. 21

With regard to that procedure dealing with in camera inspections, section 3500 provides that if “any portion of such statement is withheld

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15 United States v. Kelly, 269 F. 2d 536 (10th Cir. 1959) (no foundation established). There the court stated, at page 452, that the witness “. . . was not asked whether he had made any statement or report. . . . In other words, there was a complete absence of any evidence which tended to show directly or indirectly that the secret files of the Government contained any statement or report made by the witness relating to the matter.”


17 Ibid.

18 Ibid. The procedure outlined in section 3500 for excising unrelated portions of statements has been upheld against attacks alleging a violation of the due process provision of the Fifth Amendment. West v. United States, 274 F. 2d 885 (6th Cir. 1960); Sells v. United States, 262 F. 2d 815 (10th Cir. 1958), cert. denied, 360 U.S. 913 (1959); Scales v. United States, 260 F. 2d 21 (4th Cir. 1958), cert. granted, 358 U.S. 917 (1958). For a general discussion of the constitutional questions raised by the Jencks Act see Note, Jencks Act and Constitutional Questions Raised By It, 58 Mich. L. Rev. 888 (1960); Comment, 38 Tex. L. Rev. 595, 608-12 (1960). The mechanics used in the federal courts in complying with 3500 are to photostat the original document with the excised parts covered, and then deliver the photostated copy to the defendant for his use.

19 West v. United States, supra note 18.

20 United States v. McKeever, 271 F. 2d 669, 674 (2d Cir. 1959). Also, the Jencks Court recognized that “Flat contradictions between the witness’ 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 contrast 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.” Jencks v. United States, supra note 2, at 667.

21 Palermo v. United States, supra note 9, at 353 n.10, 354. See also 18 U.S.C. §3500(c) (1958) which states that whenever any statement is delivered to a defendant pursuant to 3500 “. . . 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.”
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.” 22

One of the weaknesses of section 3500 is that documents in the pos-
session of the government that are not “statements” within the meaning
of the statute, or that are “statements” but which do not relate to the
testimony, need not be turned over to the trial judge, nor need they be
preserved as part of the record on appeal for the appellate court to re-
view. This leads to the somewhat anomalous position that an appellate
review is available “if only part of a document is withheld from the
defense; none, if the entire document is withheld.” 23

Clearly, a narrow construction by an overzealous prosecutor of what
constitute “statements,” and what “statements” are “relevant,” presents
a danger to the interests of the defense not easily remediable. The effect
of the vice of permitting the government to be the sole arbiter as to
what should be produced to the court is that no judicial tribunal will
ever have the opportunity to test the validity of government counsel’s
determinations. Documents not surrendered remain sealed in the pos-
session of the Department of Justice—not subject to review. It is ap-
parent that compliance with the mandates of the statute can be danger-
ously frustrated when its operation is made to depend upon the caprice,
or lack thereof, of government counsel. 24

The severity of the problem has not escaped the attention of the
courts, for some relief has been provided against its consequences. In
Palermo v. United States, 25 the United States Supreme Court stated:

When it is doubtful whether the production of a particular state-
ment is compelled by the statute, we approve the practice of hav-
ing the Government submit the statement to the trial judge for
an in camera inspection. Indeed, any other procedure would be
destructive of the statutory purpose. 26

In Campbell v. United States27 the Court moved against the prose-
cut” who is “without doubt” that the documents in his possession do
not meet the statutory requirements. There, a government witness who

22 Supra note 16. Many cases have been decided which have upheld trial judge
determinations of relevancy, e.g., Short v. United States, 271 F. 2d 73 (9th
Cir. 1959).
23 This issue was raised but not decided by the court in Travis v. United States,
269 F. 2d 928, 944 (10th Cir. 1959), rev’d on other grounds, 364 U.S. 310 (1961).
24 And the problem should not be brushed aside by employing the handy pre-
sumption that government officials pursue their responsibilities in good faith,
for injustices may result under the present practice from “honest” differences
of opinion.
26 Id. at 354. [Emphasis added.]
was an eye witness to a bank robbery on direct examination identified the defendant as one of the robbers. On cross-examination he admitted having talked to F.B.I. agents about the robbery, a report was prepared by them and read back to him, which he approved as being essentially what he had told them. Later, the witness qualified his testimony by expressing some doubt as to whether he read the document over and whether he had signed it. The defense moved pursuant to section 3500 for the production of this document but the government denied having any documents which were "statements" within its possession. It did, however, produce to the court an Interview Report of an interview by F.B.I. agent Toomey with said witness and which related to his testimony and rendered suspect his identification of the defendant. The government contended, however, that the Report was not a "statement."

The Court, speaking generally, stated that when a defendant makes a prima facie showing that the government might have in its possession a document producible under section 3500, it becomes the duty of the trial judge to take extrinsic evidence, or to require the government to produce evidence, to assist him in reaching a determination as to whether the document should be produced to the defense.28

Directing itself specifically to the Interview Report, the Court held that a sufficient showing had been made to cast doubt on the determination by the government that it was not a "statement." And since it was not possible to determine by a mere inspection and reading of the Report whether it was a "statement," extrinsic evidence was required.29 The

28 The trial judge, in fulfilling his responsibility under such circumstances, should first order government counsel to produce the document in question to the court for an in camera inspection. See Bary v. United States, 292 F. 2d 53 (10th Cir. 1961). In Campbell v. United States, supra note 27, such an order was not necessary since the government had voluntarily surrendered the Interview Report to the Court, but accompanied by a concurrent assertion that it was not a "statement."

29 Accord, United States v. McKeever, supra note 20; Bary v. United States, supra note 28. In the McKeever case, supra at 674, it was held that where the court has doubts as to their being "statements" which cannot be resolved from a mere inspection and reading of the documents, "The proper course would have been for the trial court to conduct voir dire examination to obtain further evidence bearing on the issues raised by the statutory requirements. . . . The exclusion of these reports without voir dire was error." In the Bary case, supra, the government admitted having 739 documents in its possession "in connection with [a government witness'] . . . services," yet only 39 of these documents were produced to the defense as "statements." The wide disparity between the number of documents in the possession of the government, and the number produced, coupled with the language and conduct of the government at trial (see Brief for Appellants, Bary v. United States, pp. 104-09, supra) raised the doubt required for judicial intervention and supervision. The court held that a controverted question had been raised with regard to the propriety of the government's determinations as to "statements" and "relevancy," and that the trial judge should have made an in camera inspection of the 700 documents left in the possession of the government. The court added, "And in discharge of the responsibility resting upon the judge, an inquiry should be made as an aid to the court in making the judicial determination," citing Campbell v. United States, supra note 27.
Court held that the trial judge or government should have called F.B.I. agent Toomey, who had prepared the Report, to testify in order to clarify the doubts, i.e., was the witness given the Report to read, did he in some way approve it? The Court held it to be "further error" for the trial judge to have permitted the witness himself to have been asked about the document since this would require showing him the Report, thereby undermining its effective use in cross-examination if it was a "statement" or running the obvious risk that the witness' self-interest might defeat the purpose of the statute. Nor would it have been proper to have required the defendants to call and question Toomey since this would have made him "their witness," thereby limiting their rights to examining him and being possibly bound by his answers.

While these judicial inroads to some extent offer protection to defendants against the "withholding" of documents, the progress has not been of sufficient magnitude to alleviate the need for amending legislation. And the pitfall of the statute can be avoided without compromising any interests of the government, by requiring all documents to be turned over to the trial judge for an in camera inspection and for preservation for review by the appellate courts. While this may cast an onerous burden on the court in some cases, there are few who would contend that a criminal defendant's rights should be subordinated because it would be inconvenient for the court to honor those rights.

**The Meaning of "Statements"**

The so-called "Jencks" statute concerns documents in the possession of the government that are "statements," which have been defined to include a document in the handwriting of the witness and signed or otherwise adopted or approved by him, and a "stenographic, mechanical, electrical, or other recording . . . 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." The expression "other recording" includes manual, such as a longhand report of an agent, as well as other automatic recordings.

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30 "For example, the Interview Report states that Staula [the witness] was unable to give any description of one of the robbers. This is in sharp contrast to his positive identification of Lester made on direct examination." The defendants were "... deprived of the opportunity to make use of the report by the obviously self-serving declarations of the witness that it did not accurately record what he told the agent." Campbell v. United States, supra note 27, at 428.

31 As a witness called by the government or the court, the defendants would have been entitled to subject the witness to cross-examination, a right which offers greater latitude in questioning than does direct examination. Id. at 427.


The efforts of Congress in so defining "statements" was to restrict the production of documents to those which as nearly as possible reflect the witness' own words, thereby minimizing the danger of distortion. As stated by the United States Supreme Court in *United States v. Palermo*, it is important that the document "fairly be deemed to reflect and without distortion what had been said to the government agent. Distortion can be the product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions."

Therefore, in determining whether a document is "substantially verbatim" one should consider the extent to which it conforms to the language of the interview, and the length of the document in comparison to the length of the interview.

The statute also requires that the interview results be "contemporaneously recorded," and a summary report of an interview with a witness made "ten or fifteen days" thereafter was held not to have been a "statement." Obviously, Congress did not want to trust the results of an interview to the fallibility of memory. However, if "contemporaneously recorded," the document is nevertheless a "statement" though *transcribed* at a later time.

Clearly, a significant hazard present in section 3500 is the opportunity it affords the government to efficaciously insulate itself against disclosure, thereby negating the promise of *Jencks*. A selective summary of the witness' remarks, or an insertion by the agent making the report of his subjective impressions, interpretations, and conclusions would effectively place the document beyond production.

In view of the position taken by the Court in *Palermo v. United States* that section 3500 is the exclusive procedure for the production of documents in the possession of the government, a more liberal inter-

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36 Supra note 9, at 352.
38 Palermo v. United States, supra note 9, at 355 n.12.
39 In United States v. McKeever, supra note 20, at 675, the court indicated that *contemporaneously* made does not mean simultaneously made.
41 "[T]he statute requires not that the transcription shall be contemporaneous, but that its recording shall be. . ." United States v. Waldman, supra note 35.
42 "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*." Palermo v. United States, supra note 9, at 353. [Emphasis added.] United States v. Grunewald, 162 F. Supp. 621, 624 (S.D. N.Y. 1958) ; United States v. Anderson, 154 F. Supp. 374, 375 (E.D. Miss. 1957).
43 See generally pp. 29-32 *infra* for a discussion of the *Palermo* position of "exclusivity" with regard to section 3500.
interpretation of "statement" is required if homage is to be paid to the Jencks decision.

Surely, the insertion of notes and impressions by the agent making the report should not prevent the document from being a "statement" since these can be easily excised by the trial judge. And as so ably pointed out by Justice Brennan in Palermo:

[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.44

A commendable strike forward was taken in United States v. Campbell45 toward freeing "statement" from its confining definition. There the Court held that a summary report of an interview prepared by an F.B.I. agent is a "statement" if the witness has read and in some way approved of the report, though the report is not substantially verbatim and was not contemporaneously recorded.

**STATEMENTS MADE "TO AN AGENT OF THE GOVERNMENT"**

A "statement" must have been made "by a Government witness . . . to an agent of the Government" for it to be producible under section 3500.46 Hence, where a government witness had prepared notes in his own handwriting to use simply to refresh his memory regarding his prospective testimony prior to coming to court, the notes were not made subject to production since his comments were not made to a government agent.47

Also, it has been held that the words "to an agent of the Government" do not circumscribe the operation of the statute to government informant witnesses.48 It is equally operative against an agent of the government who is a witness and who has made a report to another agent of the government.49 This leads to the following seemingly anomo-

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44 Supra note 9, at 365 (concurring opinion). For a case applying the evidentiary rule of testimonial completeness to 3500 statements see Short v. United States, supra note 22.
47 See McGill v. United States, 270 F. 2d 329 (D.C. Cir. 1959). However, if the witness refers to the notes while on the witness stand for the purpose of refreshing his recollection, a rule of evidence entitles counsel, upon request, to look at the notes. McGill v. United States, supra at 331 (dictum); see generally McCormick, Evidence 14-18 (1954).
48 United States v. Berry, 277 F. 2d 826 (7th Cir. 1960).
49 Clancy v. United States, 365 U.S. 312 (1961); Karp v. United States, 277 F. 2d 843, 847-48 (8th Cir. 1960); United States v. Sheer, 278 F. 2d 65, 67-68 (7th Cir. 1960); Holmes v. United States, 271 F. 2d 635 (4th Cir. 1959); United States v. O'Connor, 273 F. 2d 358, 360-61 (2d Cir. 1959); United States v. Prince, 264 F. 2d 850 (3rd Cir. 1959); United States v. De Lucia, 262 F. 2d 610 (7th Cir. 1958).
ous situation. Assume government agent X interviews W and then files with his superior in the F.B.I. a summary report of the interview prepared in X's handwriting and signed by him. The report, however, is not substantially verbatim, nor did W ever read and approve the report. If W were to testify as a government witness, the summary report would not be producible under section 3500. However, if X were to testify for the government, the report would be a "statement" by X and producible if related to X's testimony.

A question that has not yet arisen is whether "statements" made by a government witness to a state investigative official should be made available to a defendant in cases where the "statements" have been turned over to the federal government to aid it in its prosecution of the case. Although such "statements" are not made to an agent of the United States government, and therefore technically not within section 3500, it seems justice would require that they be produced since they are in the possession and control of the United States.

**Statements "In the Possession of the United States"**

The scope and meaning of "possession" as used in section 3500 merits comment. The statute requires the production of "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."\(^{50}\)

In *United States v. West*\(^{51}\) the government relied upon the testimony of an F.B.I. agent named Gardner. Three investigative reports which allegedly related to his testimony and been prepared by Gardner and filed with the F.B.I. These reports were in the possession of the U.S. Attorney in Colorado who was, at the time of the *West* trial, prosecuting *United States v. Travis*,\(^{52}\) which involved an almost identical offense.\(^{53}\) Gardner was also called as a witness in the *Travis* case and one of the three reports was there produced to the defense. The U.S. Attorney in the *West* case\(^{54}\) had not been furnished copies by the F.B.I. of these reports and so none were produced at trial. On appeal the defendant urged that his rights under section 3500 had been denied. In this regard the court stated, "The District Attorney could not very well be guilty of suppressing F.B.I. investigative reports of which he had no knowledge and which he did not possess."\(^{55}\)

Clearly, the restrictive attitude of the *West* court is not called for by section 3500, which does not condition the production of statements

\(^{50}\) 18 U.S.C. §3500(b) (1958). [Emphasis added.]


\(^{52}\) *Supra* note 23.

\(^{53}\) Travis was charged as a union official with filing a false noncommunist affidavit with the National Labor Relations Board in violation of 18 U.S.C. §1001. West was charged with a conspiracy to do the same.

\(^{54}\) *United States v. West*, *supra* note 51, at 209.

on any knowledge, or actual possession, by the local prosecuting attorney but refers to statements "in the possession of the United States."

In view of the language employed in section 3500, the government should be held accountable for the production of all "statements" which it, as an entity, has in its possession at the time of trial. This view has support from the United States Supreme Court in United States v. National Exchange Bank, an analogous decision involving a rule of bills and notes. There a check on the U.S. Treasurer (drawee) was drawn by a disbursing clerk in the Veterans Bureau (drawer) in favor of one Beck for $47.50. Beck altered the check to read $4750 and it was ultimately negotiated to the defendant bank, a bona fide purchaser, and finally presented to the U.S. Treasurer and the raised amount collected. The United States sought to recover the overpayment because made under "a mistake of fact." A rule of negotiable instruments states that "if the drawer and the drawee are the same the drawer cannot recover for an overpayment to an innocent payee because he is bound to know his own checks." The Government argued the rule to be inapplicable in that "the hand that drew and the hand that was to pay were not the same." The Court viewed the Government as an entity and denied recovery, holding that in spite of its bigness and geographical scope of its dealings, one arm of the Government was responsible for what another arm of the Government was doing.

An adherence to the West court's view of "possession" must be avoided lest the danger that a defendant's rights under section 3500 be frustrated and lost in the labyrinth of bureaucracy. Surely, "justice" under section 3500 was not intended to mean one thing in Ohio and yet another in Colorado.

SECTION 3500 AND GRAND JURY MINUTES

Although grand jury minutes are without doubt "substantially verbatim" and "contemporaneously recorded," the United States Supreme Court in Pittsburgh Plate Glass Co. v. United States held section 3500 to be inapplicable to such prior "statements." In so ruling, the Court upheld the long-established policy of secrecy which has guarded grand

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56 Cert. No. 527 (1926).
59 To the same effect, United States v. Killian, 275 F. 2d 561, 571-72 (7th Cir. 1960); Parr v. United States, 265 F. 2d 894 (5th Cir. 1959), rev'd on other grounds, 363 U.S. 370 (1960); United States v. Spangerlet, 258 F. 2d 338 (2d Cir. 1958); United States v. Consolidated Laundries Corporation, 159 F. Supp. 860 (S.D.N.Y. 1958).
jury minutes against disclosure\textsuperscript{61} in the absence of showing "a particularized need" that outweighs the need for secrecy.\textsuperscript{62}

The \textit{Pittsburgh Plate Glass} decision was severely criticized in the persuasively written dissenting opinion by Justice Brennan,\textsuperscript{63} the author of \textit{Jencks}. There he stated that:

The considerations that moved us to lay down [the \textit{Jencks} principle] . . . as to prior statements of government witnesses made to government agents obviously apply with equal force to the grand jury testimony of a government witness.\textsuperscript{64}

For example, the "particularized need" standard is met in cases where some inconsistency exists between the grand jury testimony and the trial testimony of a government witness.\textsuperscript{65} Clearly, as has been noted, this was the pre-\textit{Jencks} rule with regard to statements in the possession of the government,\textsuperscript{66} and the difficulty to a defendant of establishing such inconsistency was what motivated the \textit{Jencks} Court.\textsuperscript{67}

Also, the traditional reasons underlying the secrecy of grand jury minutes become moot once the trial has begun and the government witness has testified. Essentially, these reasons are:

\begin{itemize}
  \item The rule of secrecy was zealously enforced in early English law. Blackstone reports that "antiently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offense, if felony; and in treason a principal. And at this day it is agreed, that he is guilty of a high misprison, and liable to be fined and imprisoned." 4 \textit{B. Comm.} *126 (citations omitted). See also \textit{In re Summerhayes}, 70 Fed. 769 (N.D. Cal. 1895) (grand juror punished for contempt for revealing proceedings of grand jury).
  \item \textit{United States v. Procter & Gamble}, 356 U.S. 677, 683 (1958). Rule 6(e) of the Federal Rules of Criminal Procedure which governs disclosure of grand jury minutes is but declaratory of case law. \textit{Pittsburgh Plate Glass Co. v. United States}, 360 U.S. 395, 399 (1959). It has been held that a defendant charged with having perjured himself before the grand jury is entitled to the minutes of his own testimony before the grand jury, to afford him a fair opportunity to prepare his defense. \textit{United States v. Rose}, 215 F. 2d 617 (3d Cir. 1955); \textit{United States v. Remington}, 191 F. 2d 246 (2d Cir. 1951).
  \item Id. at 408.
  \item This principle is recognized in \textit{Parr v. United States}, supra note 60, at 901-04 (harmless error); \textit{Travis v. United States}, supra note 23, at 945-47; \textit{United States v. Spangelet}, supra note 60, at 341-42; \textit{United States v. H.J.K. Theater Corporation}, 236 F. 2d 502, 508-09 (2d Cir. 1956) (harmless error); \textit{Herzog v. United States}, 226 F. 2d 561, 566-67 (9th Cir. 1955). In cases where the defendant has shown that there \textit{may be a variance} between the grand jury and trial testimony of a government witness, the proper procedure is for the trial court judge, upon motion by the defendant, to read the grand jury record related to the testimony in question, to determine whether there are any inconsistencies, and if there are, to permit the defendant to use the pertinent grand jury testimony for impeachment purposes. \textit{United States v. H.J.K. Theater Corporation}, supra at 507. \textit{But see United States v. Spangelet}, supra (court \textit{required} to inspect minutes without necessity of evidentiary foundation). A court is permitted, in the exercise of sound discretion, to limit the use of grand jury minutes to prevent merely cumulative impeachment. \textit{United States v. H.J.K. Theater Corporation}, supra at 508-09.
  \item See text supra at 205.
(1) To prevent the accused from escaping before he is indicted and arrested or from tampering with the witness against him. (2) To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted. (3) To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation. (4) To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings. In this regard, it must be remembered that disclosure under section 3500 does not call for a complete abandonment of secrecy but only with regard to those minutes which relate to the testimony given at trial.

Grand jury testimony is available to the government for assistance in preparing for trial, refreshing the recollection of witnesses at the trial, and for impeachment. It seems that “justice requires no less” than that grand jury testimony which relates to the testimony of a government witness be made available to the defendant, if not under section 3500, then by extending the application of the “particularized need” rule to this situation.

**Consequences of Non-Compliance with Section 3500**

If during the trial the government elects not to comply with an order of the court for the production of documents, “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.”

On appeal, in instances where the record is vague on whether a defendant has been denied a “statement” producible under section 3500, the matter will be remanded to the trial court for a hearing solely to determine that issue.
If it appears that rights under section 3500 have been denied, the court will order a new trial unless the error is considered harmless. The application of the harmless error rule must necessarily depend upon a careful analysis of the facts and circumstances of each case. It has been applied in cases where the information contained in the withheld "statement" was otherwise in the possession of the defendant. For example, it was harmless error for the government to have withheld a typewritten copy of a "statement," the original of which was in the possession of the defense counsel. Similarly, where the government witness had testified as to the contents of the unproduced "statement."

Generally, in cases where the defendant was not in possession of the "withheld" information, appellate courts have been reluctant to substitute their judgment for that of defense counsel regarding the utility of the unproduced "statements." As the Jencks Court stated, "only the defense is adequately equipped to determine [their] ... effective use for the purpose of discrediting the Government's witness. ..." Indeed, while it is an easy task to second guess a lawyer, there are too many imponderables outside the record for an appellate court to proceed to the trial forum, and there perform, out of context, the duties of trial defense counsel. For example, the manner in which the


Ibid. Cf. United States v. Killian, supra note 60, at 570-71. The dissent in Rosenberg, supra note 76 at 373-77, emphasizes the need, in applying the harmless error rule, to consider the importance of the testimony of the witness to which the denial under section 3500 relates.

Supra note 75. In Holmes v. United States, supra note 49, at 638-39, the court, in distinguishing the Rosenberg case, supra note 76, stated, "[There] a failure to deliver certain documents was held to be harmless error, but there it appeared affirmatively that the defense had in its possession the original of one of the unproduced documents and the witness had affirmatively testified on the stand to the contents of the other unproduced documents containing related matter. Here it is not contended that the defense had the information contained in the portion of the file which was not produced." In Clancy v. United States, supra note 49, 29 U.S.L.W. 4241, 4242 (U.S. Feb. 27, 1961), the Court stated, "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively." In Karp v. United States, 277 F. 2d 843 (8th Cir. 1960), however, where the government failed to comply with section 3500, it was held harmless error for the trial judge to have failed to strike the testimony from the record where the defendant's testimony did not materially vary from the testimony which should have been stricken.

Jencks v. United States, supra note 67, at 668-69.

The court in United States v. Castillo-Acevedo, CM 360555, 12 C.M.R. 318, 324 (1952), in discussing whether an accused had been denied effective assistance of counsel, stated that the considerations that form the basis for a tactical decision on the trial level "... are of such subtle nature that their application
government witness has testified,\textsuperscript{82} and the zeal and ability of trial defense counsel, will bear upon the utility of a withheld "statement," and the record is usually barren in this regard. Any quick condonation of error must therefore be avoided. Furthermore, some merit must be given to the position that any omission under the statute is substantial, since its mandate is not made to depend upon the utility of the "statement," but only upon its being related to the subject matter of the testimony of a government witness.\textsuperscript{83}

**The Exclusive Effect of Section 3500**

The United States Supreme Court in *Palermo v. United States*, faced with its initial interpretation of section 3500, stated that a memorandum prepared by an agent of the government summarizing an interview with a government witness "which cannot be produced under the terms of... 3500 cannot be produced at all."\textsuperscript{84} The Court stated that "the statute does not, in so many words, state that it is... exclusive... But some things too clearly evince a legislative enactment to call for a redundancy of utterance."\textsuperscript{85}
Assume the following hypothetical. The government is in possession of a summary report prepared by an agent of the government which states that W was interviewed for several hours and denied any knowledge of the offense in question. Later, W testifies at trial as a key government witness and relates at length his "knowledge" of the defendant's alleged criminal conduct. If the summary report is not a "statement" within section 3500, under the Palermo rule of "exclusivity" it cannot be produced at all.86

The Jencks Court, in reaching its conclusion, stated that "the interest of the United States in a criminal prosecution '. . . is not that it shall win a case, but that justice shall be done. . . ."87 It seems inconceivable that Congress intended by section 3500 to so diminish this fastidious regard for the untainted administration of criminal justice demonstrated by the Jencks decision.

Indeed, the "exclusive attitude of the Palermo Court has not interfered with the production of grand jury testimony where "a particularized need" can be shown, though production of such testimony is not possible under section 3500.88 Similarly, the interests of justice require

States which was made by a Government witness or prospective Government witness . . . to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Cf. United States v. Rothman, 179 F. Supp. 935, 937 (W.D. Penn. 1959). It seems, however, that this conclusion is not required by Palermo since the Court was there confronted with a report concerning a witness who had testified.86

In the Palermo case, "government counsel suggested that the primary remedy of the defendant was to call the interviewer. Of course this would only be adequate if the defense had some reason to believe that an interview of such character had taken place and if the witness recalled the interviewer's name." Palermo v. United States, supra note 84, at 362 n.l. See also Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 294 U.S. 103 (1935); Curren v. Delaware, 259 F. 2d 707 (3d Cir. 1958); Wild v. Oklahoma, 187 F. 2d 409 (10th Cir. 1951).


See generally pp. 21-25 supra. Also, in enacting section 3500 Congress in no way intended to supplant or in any way modify discovery under rules 16 and 17(c) of the Federal Rules of Criminal Procedure. See Comment, 58 Mich. L. Rev. 888, 890-93 (1960). Neither rule, however, is a boon to the defendant seeking the kind of inspection sought in Jencks.

Rule 16 states, "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. . . ." [Emphasis added.] This rule is of no benefit to an accused when the documents sought are the reports of government agents in the hands of the prosecution. United States v. Rothman, supra note 85, at 938. Furthermore, a clear showing must be made of the specific documents sought and their materiality to the preparation of the defense. "Naked motions [that] . . . have the complexion of a general fishing expedition" will not be acknowledged. United States v. Rothman, supra note 85, at 939.
the doors be open for the production of documents falling without the "barriers" of section 3500, particularly since the scope of the Jencks ruling with regard to production is broader than that of section 3500, and its judicial interpretations.89

Also, one must be mindful of the fact that many government witnesses are paid informers whose very livelihood depends upon their performance in a courtroom.90 In such instances, the motive for "distortion" is great;91 hence, the search to determine credibility must be even greater. In fairness to an accused, the United States Supreme Court must either regress from its present position of "exclusivity," or expand the area of producible documents by liberalizing the interpretation that has been given "statements," if the spirit of the Jencks decision is to be fostered.

**CONCLUSION**

Section 3500 is one of the few arrows a criminal defendant holds in his quiver to effectively strike against memory that has been treacherously dulled or distorted by time. Unfortunately, however, the path of its flight has been beset with obstacles that has prevented it from striking with the full impact of the promise of Jencks. The "uncontrolled" discretion of government counsel, the confining interpretation of "statements," and the role of "exclusivity" have already been discussed. Other problems will undoubtedly present themselves as more cases unfold. For example, the boundary lines of "relevancy" have not been clearly

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Rule 17(c) states that, "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein ... The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys." In Mesarosh v. United States, 13 F.R.D. 180, 183 (W.D. Penn. 1952), the court stated that "Rule 17(c) is not a discovery rule, its purpose is to shorten trials and to make it possible to require production before the trial of documents subpoenaed for use at trial." In Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951) (dictum), the Court read into the rule the requirement that the materials designated in the subpoena be evidentiary, i.e., admissible in evidence. See also United States v. Garrison, 168 F. Supp. 622, 625 (E.D. Wis. 1958).

For an involved discussion of the operation of rules 16 and 17(c), see Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. Va. L. Rev. 221, 312 (1957).

89 The Jencks Court did not circumscribe the right of a defendant to inspect documents in the possession of the government by the criteria which governed the Palermo Court, namely, 3500's definition of "statements." See generally pp. 13-16 supra. To accord section 3500 a narrower construction than that intended by the Jencks decision has serious constitutional implications. See Comment, 58 Mich. L. Rev. 888 (1960); Comment, 31 So. Calif. L. Rev. 78 (1957).

90 Mesarosh v. United States, 352 U.S. 1 (1956); Fisher v. United States, 231 F. 2d 99 (9th Cir. 1956) (government witness paid $10,530 for his services as informer).

91 See supra note 90.
Also, some measure must be taken at trial to control the accountability of documents, to avoid the confusion that presently attends any reference to documents on both the trial and appellate levels of a proceeding.

The Jencks rule represents a development in the administration of criminal justice far more worthwhile than many previous attempts to maintain a trial above the "plimsoll line" of fair play. The statute, however, has retreated somewhat from the initial liberality of the Jencks decision. The doors which the Jencks Court sought to shut against unfairness are being slowly pushed ajar. A concerted and determined effort must be made to keep them shut, no matter how loud the hinges may squeak.

For example, should a statement which may be of aid to cross-examination and even admissible in evidence to impeach a witness, be ordered to be produced to a defendant although not directly relevant to the subject matter of the testimony? 'One prime example may be found in statements showing strong bias, another in reports indicating a propensity to lie in fact situations analogous to that immediately involved. The latter statements are evidence of 'mythomania'—psychic unbalance resulting in delusions—the chronic prosicutrix in rape cases being particularly illustrative. Both types of material have long been acknowledged as important sources of impeaching information. In situations comparable to Jencks, involving alleged subversive activities, an acute need for such information exists. The accusing witnesses in this area of especially strong prejudices have on occasion been recognized to tend to delusions, and are commonly informers, spies and agent provocateurs, a class of witnesses whose testimony has traditionally been suspect and only reluctantly admitted in evidence.' Comment, 67 Yale L. J. 674, 694 (1958) (citations omitted). Surprisingly, to date, there has been no authoritative pronouncement as to the meaning of "relates to the subject matter to which the witness has testified," 18 U.S.C. §3500(b) (1958). In Rosenberg v. United States, supra note 76, at 370, the Court stated that "A statement by a witness that she fears her memory as to the events at issue was poor certainly 'relates to the subject matter as to which the witness had testified' and should have been given to defendant." It is suggested that "relates," as used in section 3500, be interpreted to include all statements that in any way affect the subject matter of the given testimony.

In this regard, it is suggested that a subsection be added to section 3500 to this effect: Each document in the possession of the United States, shall be identified by letter or number distinctive from the trial exhibit identification, and when the United States makes disposition of any such documents, it shall take appropriate receipts therefor. If the documents are delivered directly to the defendant, and are not offered in evidence, they shall be returned by the defendant to the United States, who shall give receipts therefor. If the documents are delivered to the judge for an in camera inspection, a similar procedure shall be followed. All receipts shall be incorporated into the record in each case.
APPENDIX
The Jencks Act
[18 U.S.C. §3500 (1958)]

"(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 subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

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

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

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

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

1. a written statement made by said witness and signed or otherwise adopted or approved by him; or
2. a stenographic mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."