Catholic University Law Review

Volume 7 | Issue 2 Article 3

1958

Jinks and Jencks - A Study of Jencks versus United States in Depth

Arthur John Keeffe

JINKS AND JENCKS

A STUDY OF JENCKS VERSUS UNITED STATES IN DEPTH

by

ARTHUR JOHN KEEFFE*

A hurricane blew over Capitol Hill during the hot summer of 1957. At least it seemed like a hurricane when the Congress worked on *Jencks v. United States.*[1] On its facts alone the case was a sleeper.

In a Texas federal court Jencks was convicted of perjury. Witnesses testified that Jencks was a Communist after he swore that he was not a Party member in an affidavit he filed with the National Labor Relations Board. Two paid informers (Matusow and Ford), one of whom subsequently recanted (Matusow),[2] were the principal witnesses against Jencks. On cross examination, they admitted making regular reports about him to the Federal Bureau of Investigation, whereupon counsel for the defense asked to see such portions of the reports as, after inspection, the court found relevant. The trial court refused the request and gave no reason. The Court of Appeals in the Fifth Circuit approved, stating that the defense had not established any inconsistency between the reports and their testimony.[3]

The Supreme Court reversed. Its ruling was right. If a government witness, paid or unpaid, testifies that an accused person is a criminal and admits that he has made oral and written reports about the accused, the latter's counsel should be entitled to inspect the reports to discover inconsistencies in the witness' stories. As the Supreme Court unanimously agreed, the trial court's ruling deprived Jencks of due process of law under the Fifth Amendment in that without seeing the confidential reports the two informers made, it would have been impossible for the defense to offer any evidence of inconsistency. How clearly contrary to procedural due process under the Fifth Amendment was the ruling of the trial court and the court of appeals.

The division in the Supreme Court did not relate to the duty of the Department of Justice to produce the oral and written reports of the two informers. Nor indeed, in presenting its bill to the Congress to over-

* Professor of Law, The Catholic University.

[1] 353 U.S. 657 (1957).

[2] *Id.* footnote 9 of the Court's opinion.

[3] 226 F. 2d 540, 553. See also comment in Brennan opinion, supra footnote 1 as to action of Trial and Appellate courts.

rule *Jencks*, did the Department of Justice dispute the right of the defense to have these reports produced *even though it had fought against it all the way to the Supreme Court.* All sides, the Department of Justice included, *now* concede there was a duty to produce without any showing by the defense that the unseen statements were in any way inconsistent. The difference of opinion in the Supreme Court was confined to whether the statements on production should be first inspected by the court and such, as the court thought relevant, delivered to the defense or whether due process demanded that the statements be given in the first instance to defense counsel.

Speaking for the majority consisting of the Chief Justice, Black, Frankfurter, Douglas and himself, Mr. Justice Brennan declared that production had to be to defense counsel directly. His point was simply that defense counsel could better judge the relevancy of the statements and thus the better defend Jencks. To quote his words: "Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."[4]

From this the meaning of Mr. Justice Brennan is clear—procedural due process requires production in the first instance to defense counsel. In saying this, however, one must assume that the statements thus ordered to be given by the Government to Jencks' counsel were the verbatim reports the two informers made to the F.B.I. relating to Jencks. Any other reading of the Brennan opinion is careless and unfair.

In making his ruling, Mr. Justice Brennan was careful to emphasize that: "the Government did not assert that the reports were privileged against disclosure on grounds of national security, confidential character of the reports, public interest or otherwise." Acknowledging that in *civil* cases, the Court has recognized that "the protection of vital national interests may militate against public disclosure of documents in the Government's possession," he said: "the *criminal* action must be dismissed, when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of govern-

[4] Footnote 1, supra. In footnote 14 to his opinion for the Court in *Jencks*, supra footnote 1, Mr. Justice Brennan quotes what Marshall said on the trial of Aaron Burr, to wit, that "before the case be opened" the "particular application" of a "paper may bear upon the case" simply "cannot be perceived by the judge." To this, Justice Brennan adds: "What is true before the case is opened is equally true as the case unfolds. The trial judge cannot perceive or determine the relevancy and materiality of the documents to the defense without hearing defense argument, after inspection as to its bearing upon the case."

ment witnesses touching the subject matter of their testimony at the trial."[5] (Emphasis supplied).

To this judgment three Justices dissented: Mr. Justice Burton in an opinion that Justice Harlan joined; Mr. Justice Clark in an opinion of his own. The position of all three was that before delivery to the defense, the statements should be handed by the Department of Justice to the court for inspection *in camera.* Mr. Justice Burton stated that the trial court should seal "as part of the record" the irrelevant matter, so that if the defendant be convicted, the appellate court on review may "correct any abuse of discretion."[6]

In the course of his dissent, Mr. Justice Clark said: "Unless Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop for the Court has opened their files to the criminal and thus afforded him a Roman Holiday for rummaging through confidential information as well as vital national secrets."[7]

In the light of the carefully worded Brennan opinion, the unanimous agreement of all members of the Supreme Court, except Whittaker who did not sit, that the Government was obligated in criminal cases to produce the reports, and the absence of any claim by the Government that national security would in any way be imperiled by the production, this passage in the Clark opinion seems exaggerated. But warranted or not, the Clark opinion did the trick on Capitol Hill. And the name Clinton Jencks coupled with this inflammatory dissent reacted on an otherwise normal Congress in much the same way as the lyrics of the song "Captain Jinks" was said to have reacted on the actors who sang it.[8]

The more one thinks about the manner in which the *Jencks* bill was passed, the more disturbed he becomes. It is but another example of Congressional hysteria and irresponsibility of which in our generation

---

[5] *Id.*

[6] Footnote 5 in the Burton dissent.

[7] Footnote 1, supra.

[8] "Captain Jinks" was invented by William Horace Lingard, America's first female impersonator. He wrote the lyrics and T. MacLagen wrote the music in 1868. The first verse went:

"I'm Captain Jinks of the Horse Marines
I feed my horse on corn and beans
Of course, it's quite beyond my means—
Though a Captain in the Army."

In 1900, Ethel Barrymore starred in a show named "Captain Jinks." Commenting on the song in his history of American music, Sigmund Spaeth attributes its great success to the fact that the lyrics so admirably lent themselves to the performer's making an ass of himself.

there have been too many.[9] Reading the House debate gives one the same pause that a reading of the McCarthy hearings on the Voice of America did. Many remarks definitely indicate that certain Congressmen did not know what the *Jencks* case decided and what the bill was all about. You want to sing a parody of that famous song of Lord Mountararat in Iolanthe: "Noble Congressman should not itch to interfere with matters which they do not understand."[10]

It is true that in the Senate there was an intelligent discussion of the bill and many of its more obvious faults were corrected. But discussion by the most intelligent and best informed of us does not equal study and reflection. Hearings serve this purpose. "Wisdom, like good wine requires maturing."[11]

The Department of Justice was ill-advised to push the *Jencks* bill during the tag end of the first session of the 85th Congress and in one of Washington's hottest summers. It was taking an unfair advantage of the Court that is on the spot so much with many Southern Congressmen and Senators. By pressing the *Jencks* bill as it did, the Department called the wolves of Capitol Hill to bay at the Court, not half so much for the Jencks decision as for *Brown v. the Board of Education.*[12] As Catholics

[9] The principal discussion started in the Senate on Friday, August 23, 1957, 103 Cong. Record No. 154 at pp. 14,398-14,410, 14,415-14,417; continued Monday, August 26, 1957, 103 Cong. Record No. 155 at pp. 14,525, 14,527-14,554, then shifted to the House, Tuesday, August 27, 1957, 103 Cong. Record No. 156 at pp. 14,714-14,731. On Thursday, August 29, 1957, the Senate passed the Conference bill, 103 Cong. Record No. 158 at pp. 15,052-15,056 and on Friday, August 30, 1957, the House passed it, 103 Cong. Record No. 159 at pp. 15,248-15,253. Congressman Willis of the House Judiciary Committee filed a Report (No. 700) urging the passage of H.R. 7915. This was originally introduced by Congressman Walter but the Committee amended it to substitute in that bill the provisions of the Administration bill (H.R. 8341) originally introduced in the House by Congressman Keating and in the Senate by Senator O'Mahoney as S. 2377. The House passed H.R. 7915 as reported but the Senate passed a considerably revised version of S. 2377. As above noted in Conference, the two Houses agreed on the Conference bill that was passed.

[10] Second Act "Iolanthe" by Gilbert and Sullivan. In the debate of one hour allowed in the House on August 27, 1957, 103 Cong. Record No. 156 at p. 14,715, Congressman Smith of Virginia said that in *Jencks* there was "the requirement of the Court that F.B.I. reports should be produced for the scrutiny of the accused person" and it was embarrassing the F.B.I. to disclose confidential communications "given to them both by their own agents and by volunteers." He adds: "I am not too familiar with the effect of the bill itself . . ." This is an understatement. Congressman Willis told the House that in *Jencks,* the Supreme Court had ruled that "the defendant was entitled to inspect the reports of the Federal Bureau of Investigation." Mr. Willis said:

"As a member of the House Committee on Un-American Activities, I say to you that in my opinion nothing would please a hard-core member of the Communist Party more than to become a so-called martyr of the Communist cause, in exchange for an opportunity to lay hands on and to raid secret F.B.I. reports." Continued Mr. Willis: "Our entire counterintelligence system is jeopardized by this situation. That is the reason why both the Department of Justice and the Post Office Department, as well as the Treasury Department, welcome this legislation." (103 Cong. Rec. 14,717).

[11] Frankfurter, J. in Reid v. Covert, 351 U.S. 487 (1956).

[12] Brown v. Board of Education, 347 U.S. 483 (1954).

have reason to know from the sermon Father William J. Kenealy of the Society of Jesus preached to the lawyers of New Orleans at the Red Mass in 1956, school integration is demanded not only by the Constitution but by the natural law.[13] In its dealings with the Congress, the Department of Justice should resolve every doubt today in favor of the Court and insist that none of its decisions be reversed by the Congress without fullest consideration.

Not only did consideration for the Court's unpopularity on Capitol Hill demand that the Justice Department proceed cautiously but also legislation designed to overrule Jencks posed such difficult constitutional problems that time for study was essential. Its most ardent supporter cannot excuse the manner in which the Department of Justice presented its *Jencks* bill to the Congress. Senator Clark of Pennsylvania thus describes it: "There were no public hearings on the bill. The Attorney-General came before the committee in what I consider to be a scare approach and said the country would not survive if Congress failed to pass the bill on the subject. The representative of the Treasury Department made the same emotional appeal. No civic agency or any other persons were given an opportunity to testify."[14] And Congressman Yates of Illinois had this to say about the Administration bill that the House passed after a debate limited to one hour: "It was far worse than no bill at all. It was hasty and far reaching, distorting the Federal Rules of Criminal Procedure without hearings, without the recommendation of the Judicial Conference, without due regard to the possible impact the bill might have on orderly court procedure."[15]

What Senator Clark and Congressman Yates said was confirmed by many another harassed, hot, tired legislator.[16]

---

[13] Kenealy, *Legal Profession and Segregation,* 6 SOCIAL ORDER 483 (December, 1956).

[14] August 26, 1957, 103 Cong. Record No. 155, at p. 14,531; see also 14,525 and 14,527-14,554. Senator Clark was not the only one who deplored the refusal of the House or Senate to hold hearings. Senator McNamara said: "I think it is confusing to the degree, in such an important matter as this, that the bill should be recommitted to the committee and hearings should be held, so that everyone with an interest in the matter would have an opportunity to be heard." August 23, 1957, 103 Cong. Rec. 14,400. Senator McNamara's point was that the Senate should "not act hastily when we are dealing with a decision of the Supreme Court." p. 14,401.

[15] August 30, 1957, 103 Cong. Record No. 159, p. 15,250; see also pp. 15,248-15,262.

[16] Said Chairman Celler of the House Judiciary Committee: "This hullabaloo about opening up the F.B.I. records so that spies, traitors and saboteurs could have those records in defense of trial, and therefore by that ruse they could go scot free, is ridiculous." August 27, 1957, 103 Cong. Record. 14,715. Said Congressman Becker: "Since the *Jencks* case was decided, J. Edgar Hoover and the Justice Department officials have been pressing for legislation to change the *Jencks* ruling. It is extremely unfortunate, Mr. Chairman, that this pressure through press, radio and other mediums—has resulted in eleventh-hour consideration of the bill before us. . . . the legislative skis have been greased, the adjournment flag has been readied, and word has gone out that the bill isn't really too bad after all." August 27, 1957, 103 Cong. Rec. 14,725.

As each session of the Congress draws to a close, bills are frequently rushed to passage that otherwise would never receive consideration. The name of the F.B.I. on Capitol Hill is magic. A Congressman or a Senator would rather vote against Mother than the Federal Bureau of Investigation. Both the Attorney General, Herbert Brownell, and his Deputy, William P. Rogers, demanded legislation in the name of J. Edgar Hoover and Clark's dissent was freely quoted."[17] Normally, as Congressman Yates said, a bill that affects federal court procedure stands little chance of passage in either House of Congress unless endorsed by the Judicial Conference. The Jencks bill was different. It received a warm welcome.

Fuel was added to the fire by the Department of Justice. Lower federal courts in all parts of the country were ordering whole raw F.B.I. and Treasury files turned over to defense counsel. Quite rightly, the Department of Justice was upset about this. One Treasury agent who refused to produce a file was fined $1,000. All these apparent misinterpretations and unwarranted applications of the Jencks case were detailed to the Congress.[18]

Congressional debate *assumed* these lower court rulings were not in the public interest accepting the *ex parte* judgment of the Department of Justice without hearing the Judges who decided the cases, reading the trial records or hearing the lawyers who defended the cases. The temper of the House was for immediate passage. It was in no mood to listen to Congressman Coffin of Maine who said:

> "We are being naive if we believe that the next 4 or 5 months will see the wholesale acquittal of subversives or other desperadoes. At most there will be delay in bringing cases to trial. That delay, if used—as it certainly should and could be used—to invoke the Judicial Council (sic) and the advice of bench and bar throughout the country is indeed a small price to pay for the sane and orderly improvement of our system of Justice. The legislative cure is likely to prove a wonder drug leaving after effects worse than the ailment it seeks to remedy."[19]

[17] Before coming to the bench, Justice Clark had been Attorney-General. President Truman appointed Clark to that office when he became President and accepted the resignation of Attorney-General Biddle. Clark at that time was the Assistant Attorney-General in charge of the Criminal Division of the Department of Justice. In the brief House debate, Congressman Chelf asked: "Does not the gentleman (Congressman Willis) think it is rather significant that the Justice who delivered the minority opinion was the Justice who had the most reason to know the most about the F.B.I., having served as a former Attorney-General, and if he does not know his business, then none of them know their business?" 103 Cong. Rec. 14,718. In the Senate debate, Senator Ervin expressed the view that "much of the misconception" of the Jencks decision "in the country at large" was due to the dissent of Justice Clark. August 23, 1957, 103 Cong. Rec. 14,400.

[18] See brief submitted by the Justice Department printed in the August 26, 1957 Congressional Record, supra footnote 14 at pages 14,550-14,554. Note especially the statement at p. 14,552 of the case of United States v. Anderson, a decision of Judge George E. Moore in the Eastern District of New York. The Conference Report approves what Judge Moore did. See August 30, 1957 Cong. Record supra, footnote 15 at p. 15,249.

[19] August 27, 1957, 103 Cong. Rec. No. 156, p. 14,725.

Nor with all the good lawyers in the House and Senate was there one to inquire whether there was not some remedy open to the Department of Justice, other than dropping a prosecution when at trial a judge makes an unwarranted order forcing production of raw and irrelevant F.B.I. and Treasury files. Is not the writ of prohibition or mandamus available to the Government? If not, should not a satisfactory appeal procedure be provided on criminal trials to prevent dismissal because of such unwarranted rulings?

As the ill-starred *Icardi* case[20] demonstrated, there is need to provide the Government with a right to appeal when judges make rulings that dismiss an indictment as a matter of law during the trial after the jury is empaneled. It does not seem fair to the Government to force it to dismiss a case during trial on a ruling of law that could have been made before trial. Likewise, it is unfair to force the Government to dismiss its case when a flagrantly wrong ruling is made on the trial. By application to a court of appeal or to the Supreme Court, the Government should be able constitutionally to obtain an immediate correction of a grossly improper ruling and thus avoid a dismissal.

There was no showing before the Congress that the Government thus attempted by writ of prohibition, mandamus, injunction or otherwise to correct what, as the Department represented them to the Congress, were flagrant misinterpretations and applications of the *Jencks* case.[21]

[20] United States v. Icardi, 140 F. Supp. 383 (D.Ct. D.C. 1956). Icardi was accused of the murder of Major William V. Holohan at the Villa Castelnovo in northern Italy on December 6, 1944, then enemy territory. Icardi and Lo Dolce, another American soldier, were accused of participation in the murder. Neither could be courtmartialled as each had been discharged. Nor could either be extradited to Italy as we have no extradition treaty with that country. Icardi denied his guilt and sought admission to the Pennsylvania bar. On March 11, 1953, a subcommittee of the House Armed Services Committee, consisting of Congressmen Cole and Kilday, after studying the statement Icardi had given the Pennsylvania bar examiners, to complete an investigation they had been making as to the death of Major Holohan, invited Icardi to testify. He accepted and testified denying his guilt. He was not subpoenaed. On July 24, 1953, the subcommittee reported to the full committee and concluded Icardi had testified falsely. The committee sent the transcript to the Justice Department which presented the case to the Grand Jury in the District of Columbia. Icardi was indicted for perjury and tried before Judge Keech in the United States District Court for the District of Columbia. After the jury had been impaneled and when the Government was then powerless to appeal, Judge Keech granted a motion by the distinguished counsel for Icardi, Edward Bennett Williams, Esq. to dismiss the indictment. Judge Keech held that the Cole subcommittee was not investigating to legislate, and that suspecting Icardi would testify to his innocence, the subcommittee had no business to invite him to testify.

[21] The All Writs Statute provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (Section 1651 of Title 28, U.S. Code). At the October, 1956 Term, the Supreme Court in LaBuy v. Howes Leather Co., 352 U.S. 249, 1 L. ed. 2d 290, 77 S. Ct. 309, upheld the authority of the Seventh Circuit to mandamus United States District Judge LaBuy from referring certain antitrust treble damage cases to a special master for trial. In effect, this is an appeal from an intermediate order before trial in a civil case. But it would appear to be within the reason of *LaBuy*

Moreover, as both Senator Clark and Congressman Yates said, the greatest protection the country has against crackpot legislation is the reference of a bill by each House to an appropriate committee for hearings and report. This normally precedes every enactment. So warm a defender of civil liberty as Senator Wayne Morse voted in the First Session of the 85th Congress to refer the Civil Rights Bill as it came from the House to the Senate Judiciary Committee under the Chairmanship of Senator James Eastland of Mississippi. His point was that if laws could be enacted without Committee study and report, there was a great danger that unwise legislation would result.

Though referred nominally to subcommittees of the House and Senate Judiciary Committees, both of which heard witnesses from the Department of Justice in support of their own bill, neither House heard anyone else, nor held its usual public hearings or wrote its usual careful report as to the Jencks bill. The bill reported and passed by the House and the first bill reported by the Senate was the Administration version and very dangerous. Fortunately, the management of the Senate bill was under the direction of Senator Joseph O'Mahoney of Wyoming and he accepted a series of amendments from Senators Cooper, Clark, Javits and Hruska that in the end converted what at the start had been a very dangerous Administration bill into a fairly good Senate bill.

In conference many of the provisions of the Senate bill were incorporated into the conference bill that was passed by both Houses of Congress in the dying minutes of the First Session of the 85th Congress. It has now become law as section 3500 of Title 18, United States Code. As a result of an intelligent and constructive Senate debate, the bill finally passed was much improved.[22]

Its principal provisions are these:

1. Until a witness testifies on direct examination, a defendant "in

to extend it to intermediate appeals in cases such as *Icardi* and the alleged orders that abused and misapplied *Jencks*. Permitting intermediate appeals *before* trial in civil or criminal cases ought not to present any constitutional problem but *after* trial commences the statute must be drawn to avoid the double jeopardy clause of the Fifth Amendment with respect to criminal appeals. It may be that reports by government witnesses should be inspected by defense counsel in advance of trial to avoid any Fifth Amendment problem on the trial of a criminal case. The *Jencks* bill proposed by the Justice Department and passed by the Congress would prevent any inspection even by the Court until the witnesses have taken the stand. The Government may rue the day it asked for such a statute as it may not be possible to entertain an application for either a writ of prohibition or mandamus during the course of a criminal trial in view of the Double Jeopardy clause in the Fifth Amendment. See authorities discussed in "The Writ of Mandamus—Obtaining Judicial Review of the 'Non-Appealable' Interlocutory Order" by Robert L. Howard, Esq. in 6 Kansas Law Review 78, October, 1957.

[22] §3500. Demands for production of statements and reports of witnesses.

For Conference report and this statute see August 30, 1957, 103 Cong. Rec. 15,248-15,249.

any criminal prosecution" cannot call for the production of any "statement or report in the possession of the United States" (paragraph (a));

2. After a witness called by the United States testifies on direct examination and the defendant so moves, the Court shall order the United States to produce any statement of the witness in its possession that "relates to the subject-matter" of his testimony (paragraph (b));

3. If the entire statement relates to the testimony of the witness, then it is to be "delivered directly to the defendant for his examination and use" (paragraph (b));

4. However, if the United States claims that any statement contains matter which does not relate to the subject matter of the testimony of the witness, then the court shall order the United States to deliver it "for the inspection of court *in camera*" (paragraph (c));

5. If the court on inspection finds that the statement does contain portions that do not relate to the subject matter of the testimony of the witness then it shall "excise" them and deliver the statement, "with such material excised" to "the defendant for his use" (paragraph (c));

6. If, pursuant to such procedure, any portion of the statement is "withheld" and if "the defendant objects to such withholding" and the defendant is convicted, "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" (paragraph (c));

7. Whenever any such statement is delivered to the defendant, the court, in its discretion, on application by the defendant may "recess proceedings in the trial" for such time as the defendant needs to examine the statement and make "preparation for its use in the trial" (paragraph (c));

8. Unless the court believes "the interests of justice require a mistrial be declared," if the United States elects not to comply with the Court's order, "the court shall strike from the record the testimony of the witness and the trial shall proceed" (Paragraph (d)); and

9. "Statement" is defined as a writing "made by said witness and signed or otherwise adopted or approved by him" or "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" (Paragraph (e)).

In directing the production (Paragraph (b), item 2, supra) and the delivery of the statements to the defense (Paragraph (b), item 3 supra), entirely relating to the testimony of Government witnesses, the new

statute would seem to codify the *Jencks* decision. Likewise, in permitting defendant to recess the trial to study the documents (Paragraph c, item 7 supra) and the trial to proceed where the Government elects not to comply with an order or production by the court's striking out the testimony of the Government's witnesses if justice does not require a mistrial (Paragraph (d), item 8, supra), the new statute cannot be said to be contrary to *Jencks.* Under the *Jencks* decision both these procedures might well have ultimately obtained.

Where the new statute conflicts with *Jencks* is in permitting only the trial and appellate courts to inspect statements of witnesses in the Government's possession which it contends do not relate in part to their direct testimony (Paragraph c, items 4, 5 and 6 supra). Presumably an *entirely* nonrelated statement would not be subject to production by the Government to either the court or the defense under the *Jencks* case. The purpose of the statute, therefore, is to permit the court to excise nonrelated parts of an otherwise relevant statement. As we have seen, it was the view of the Court in the *Jencks* case, that the defense attorneys were best qualified to determine relevancy, and due process in a criminal prosecution demands that the *defense,* not the Court do the inspection.

The new statute cannot be said to be contrary to *Jencks* in prohibiting the defense from demanding the production of a statement of a witness in the possession of the Government, until the witness be called for direct examination. In this respect, however, the statute limits production to the facts of the *Jencks* case and overrules Rule 17(c) of the Federal Rules of Criminal Procedure under which the United States Court of Appeals for the District of Columbia Circuit has permitted inspection in advance of trial.[23]

This point arose during the Senate debate and Senator Clark of Pennsylvania argued that the statute was in this respect unconstitutional in that without seeing the excluded matter, defense counsel could not intelligently argue on appeal that the excision was prejudicial.[24] His point

[23] *Fryer v. United States,* 207 F. 2d 134, decided July 7, 1953 by the District of Columbia Circuit. Bazelon, C.J. writing for the Court in whose opinion Chief Judge Edgerton joined and Circuit Judge Wilbur K. Miller dissented.

[24] "if the evidence forwarded to the court (on appeal) is never made available * * * counsel for the defendant will never be able to argue to the appellate court that the ruling of the lower court was erroneous. * * * I say in all candor to the Senator from Wyoming (O'Mahoney) that this point did not occur to me until this afternoon, * * * what is done, in effect, is to change the rule in the *Jencks* case * * * We should have caught the defect long before this. I have committed myself to support the amendment of the Senator from Wyoming. I intend to keep my commitment, but I hope when the bill passes—and I hope it does * * * the House will give serious thought to this provision, which does not assure due process of law." Senator Clark of Pennsylvania, Senate Debate, Friday, August 23, 1957, 103 Cong. Record, pp. 14,406-14,407.

would seem to be valid not only on the appeal but even more so when at the trial defense counsel attempts to make the objection that the statute requires. In offering the Conference Report in the House, Chairman Celler of the House Judiciary Committee frankly acknowledged that in this respect the *Jencks* statute might well be declared unconstitutional.[25] Congressman Celler never was more right.

If the Supreme Court meant what it said in the *Jencks* case, certainly in the absence of danger to national security and, indeed, perhaps even in the presence of it, due process requires that the inspection of the reports for relevancy be by defense counsel, not by the trial judge. More especially, is this so when the Court cannot under the statute order the production of any but relevant, verbatim statements. Collateral or irrelevant material is highly unlikely to be found in such reports. The judge of the relevancy of portions of such otherwise competent statements should be defense counsel. He alone is best equipped to judge. Further, can the Congress by statute repeal a Court Rule?

The requirement of the new statute that "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* witness" shall be subject to inspection "until said witness has testified on direct examination in the trial of the case" conflicts with Rule 17c of the Federal Criminal Rules of Procedure which was interpreted by the United States Court of Appeals for the District of Columbia Circuit in *Fryer v. United States*[26] to permit a defendant in a murder case to inspect three days before trial statements made by prospective government witnesses. Since Rule 17c is a rule of court promulgated by the Supreme Court pursuant to a Congressional enabling act, the question at once arises whether the Congress has the constitutional power to repeal it. In these two respects, therefore, the constitutionality of the new statute is questionable.

The Right of the Defense to Inspect

As indicated above, the application of the new statute is limited to statements which relate to the testimony of a Government witness containing material the Government alleges to be irrelevant. While broadly

[25] "I realize, Mr. Speaker, that there may be a constitutional block to this legislation." And referring to the holding in *Jencks* that 'justice required no less' than that defense counsel see statements of Government witnessses relating to their testimony to judge whether they be relevant, Congressman Celler said: "This, of course might be construed to mean 'due process requires no less.'" August 30, 1957, 103 Cong. Rec. 15,249.

[26] Footnote 20, supra.

defined to include not only written statements "signed or otherwise adopted or approved by him" but also "a stenographic, mechanical, electrical or other recording, or a transcription thereof" nevertheless the statement must be one "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." (Paragraph (e), item 9, supra.) What the new statute does is to permit the court to inspect *in camera* any *such* statement and excise therefrom any portion the Government contends is not relevant. Its constitutionality depends, therefore, upon whether due process of law in the trial of a criminal defendant demands that the defense, rather than the court do the inspection.

Conceivably a trial court could direct the production of an entirely non-related statement but this seems highly improbable. What does seem likely is that the Government may seek to have the trial court excise material it believes unrelated contained in otherwise relevant statements. To prevent this, the statute permits the defendant to object in the trial court to the excision and, if he does the United States must preserve the excised portions for inspection by the appellate courts. (Paragraph (c), item 6, supra.)

The difficulty under the statute is obvious. How can defense counsel intelligently object either at the trial or on the appeal to matter he does not see? Was it not the ruling in *Jencks* that production had to be directly to defense counsel, rather than to the trial judge for the very reason that defense counsel and he, alone, can best judge what portion of the statement is relevant? If in *Jencks,* it was a deprivation of procedural due process under the Fifth Amendment to deliver the requested statements to the court for inspection, rather than to defense counsel in the first instance, then is it not equally so under the statute?

The Administration bill to correct alleged abuses by lower federal courts in the application of the *Jencks* case was proposed in the House by Congressman Keating, a Republican, as H.R. 8341. A similar bill, H.R. 7915, had been introduced in the House by Congressman Walter. The House Judiciary Committee amended H.R. 7915 to incorporate H.R. 8341 and this was the bill that the House passed on August 27, 1957.

In the Senate the Administration bill was introduced by Senator O'Mahoney, a Democrat, as S. 2377 and it was his bill that, as amended, the Senate passed and sent to conference. There is not a better constitutional lawyer in the Senate or perhaps in the country than Senator O'Mahoney. After he had consented to introduce the Administration bill (S. 2377), his sharp, keen eyes studied Paragraph (a) which read:

"(a) In any criminal prosecution brought by the United States, *any rule of court or procedure to the contrary notwithstanding,* no statement or report of any prospective witness or person other than a defendant which is in the possession of the United States shall be the subject of subpena, discovery, or inspection, except as provided in paragraph (b) of this section." Immediately at the brief hearing and at informal conferences thereafter, the Senator inquired of then Deputy Attorney General William P. Rogers as to the purpose of the underscored phrase: *"any rule of court or procedure to the contrary notwithstanding."*

Senator O'Mahoney was told that the underscored language had been inserted by the Department of Justice to reverse the decision of the District of Columbia Circuit, above-mentioned in *Fryer v. United States.* That decision was made on July 7, 1953 *almost four years* before the decision in *Jencks.* It was a murder case. In such capital cases, the Government has to furnish the defense three days in advance of trial a list of its witnesses. Defense counsel, acting under Rule 17c of the Federal Rules of Criminal Procedure sought to subpoena three days in advance of trial statements not only of the defendant but also of government witnesses who were to testify against him. In ruling that the defendant was within his rights in thus demanding such statements, the court remanded the case to the trial court for production of the requested statements for defense inspection.

Having discovered that the above italicized language was designed to reverse the *Fryer* case, and not *Jencks,* Senator O'Mahoney removed it from the bill, making paragraph (a) read as follows: "In any criminal prosecution brought by the United States, no statement or report of a Government witness or prospective Government witness (other than the defendant) made to an agent of the Government which is in the possession of the United States shall be the subject of subpena, or inspection, except, if provided in the Federal rules of criminal procedure or as provided in paragraph (b) of this section."[27] Naturally, Senator O'Mahoney informed Deputy Attorney General Rogers what he had done and received from him a letter[28] which led him to believe that the amendment was satisfactory to the Department of Justice.

[27] August 23, 1957, 103 Cong. Rec. 14,405.

[28] The letter of Mr. Rogers to Senator O'Mahoney read: "On August 12, 1957, you introduced an amendment in the nature of a substitute for S. 2317, a bill which had originally been sponsored by the Department of Justice with the purpose of conforming chapter 223 of title 18, United States Code, to the opinion of the United States Supreme Court in *Jencks v. United States of America.* That particular amendment, by way of a substitute to which I have reference, is reported at page 13,169 of the *Congressional Record* for August 12, 1957.

Thereafter, however, Mr. Rogers addressed a letter[29] under date of August 22, 1957 to Senator Eastland, Chairman of the Senate Judiciary Committee, with a copy to Senator O'Mahoney. In this letter, Mr. Rogers stated that the proposed change in paragraph (a) was "completely unacceptable to the Department of Justice" for this reason: "The proposed change in the language of section (a) implies that prior statements of Government witnesses can be secured by the defendant in a criminal case through discovery proceedings under the present Federal Rules of Criminal Procedure. The implication in the suggested language would be bound to cause confusion and might result in a broad and highly undesirable extension of the right of discovery in criminal cases which is not at all intended by the subcommittee or the Congress." As a result of this letter of August 22, 1957, Senator Dirksen on August 26, 1957 moved[30] in the Senate to strike out the language that Senator O'Mahoney had inserted into S. 2377, namely, "if provided in the Federal Rules of Criminal Procedure."

In the course of the debate that followed, Senator Clark described how the Senate had detected that the Administration bill was designed not only to reverse the *Jencks* case but the *Fryer* case as well. Senator Clark said:

> "I have made the charge that the position of the Department of Justice in this regard is, to put it mildly, disingenuous. I say that because when the Attorney General testified before the committee, and engaged in the conference when we were putting the bill in shape to do what the Senator from Wyoming wants it to do—which is merely to protect the Government files to the extent they should be protected and yet give a defendant his appropriate right to proceed in due process—at that point the Department of Justice made clear what it is trying to do—to repeal rule 17 (c), and perhaps rule 15 and rule 16.
>
> "They were trying to erase the case of *Fryer v. United States*, 207 Fed. (2d) 134, without telling anybody that is what they had in mind to do. We would never have known it if it had not been for the painstaking work of the Senator from Wyoming, the Senator from Kentucky, the Senator from New York, and other Senators, which showed that was the intent. If we had not explored the matter to its ultimate conclusion, we would not have found what they wanted to do was to give the Government a free and clear right in this bill to repeal by implication rules of criminal procedure, to overrule cases in the appellate courts, and not even tell the Senate that is what they had in mind. I suggest that we do not want that kind of legislation enacted

"As you are aware from the views which I expressed at our recent meeting with you and other Senators of the Committee, the Department of Justice would have preferred the language of the original S. 2377, but it is felt that this substitute, which is in the nature of a compromise, should substantially achieve the purposes sought by S. 2377. Therefore, the Department of Justice not only has no objection to this amended bill but earnestly recommends its passage in order to accomplish the remedial purposes sought by this legislation."

(Read by Senator O'Mahoney in the course of the Senate debate, August 26, 1957, 103 Cong. Rec. 14,532.)

[29] Senator O'Mahoney read this letter also during the Senate debate, August 26, 1957, 103 Cong. Rec. 14,408.

[30] August 26, 1957, 103 Cong. Rec. 14,532.

> in that way by the Senate of the United States. I suggest again, for the reasons so ably stated by my friend from Wyoming, these words should remain in the bill, and I hope the pending amendment will be defeated."[31]

In the same debate, Senator O'Mahoney defended his amendment. He pointed out that the *Fryer* case had been decided by but three of the nine Judges on the District of Columbia Circuit, that one had dissented and "later on in the District Court of the District of Columbia, a District Judge himself declined to follow the rule of the Court of Appeals."[32] Senator O'Mahoney called attention to his use of the word "if" rather than "as." It was to leave the question "utterly open."[33] And Senator Clark pointed out that the language in the Administration bill, S. 2377, *"any rule of court or procedure to the contrary notwithstanding,"* would purport to repeal Rule 17c of Federal Rules of Criminal Procedure, which are court created and not "the product of the Congress." Said the Senator: "It is for that reason, I say, we ought to be pretty careful about 'monkeying' with that buzz saw. We ought to be pretty careful about maintaining rules which were drawn up by the Supreme Court of the United States and approved by a previous Congress. Before we undertake to change them, we ought to have full hearings, and not very brief hearings, in which only two Government witnesses testified in respect to the bill, and in which the Rules of Criminal Procedure were not even mentioned."[34]

On his part, Senator O'Mahoney said "with the utmost emphasis and sincerity" that if his amended language were not included in the bill, "we shall give to every defendant a constitutional right to appeal from a conviction."[35] After an extensive debate, the Senate voted on August 26, 1957 to keep the O'Mahoney amendment, 45 to 30.[36]

The following day, August 27, 1957, the Administration bill was presented to the House of Representatives. Debate was limited to one hour and it was passed by a vote of 351 to 17.[37] As previously stated, the House debate was most inadequate. However, brief and inadequate as it was, certain aspects must be mentioned. Shortly after it opened, Congressman Keating read a letter written to him under date of August 27,

---

[31] *Id.* at p. 14,538.
[32] *Id.* at pp. 14,534 and 14,538.
[33] *Id.* 14,535.
[34] *Id.* 14,537.
[35] *Id.* 14,536-14,537.
[36] *Id.* 14,542.
[37] August 27, 1957, 103 Cong. Rec. 14,714-14,731. After passage the Senate bill, S. 2377, was amended by incorporating into it H.R. 7915 as passed by the House (14,731) so that it was the O'Mahoney Senate bill as thus amended that the House sent to Conference. The vote appears at page 14,730.

1957 by Deputy Attorney General Rogers.[38] With respect to the O'Mahoney amendment to paragraph (a) of the Administration bill, Mr. Rogers in this letter stated:

> "In subdivision (a) of the Senate version the words 'except, if provided in the Federal Rules of Criminal Procedure' are inserted, and this insertion will only cause confusion in the courts. The purpose of the legislation is to spell out the precise circumstances and procedures which entitle a defendant to demand and receive pretrial statements made by a Government witness to an agent of the Government. The legislation will fail of its purpose of producing certainty and uniformity of practice if it fails to provide that the procedures outlined are exclusive. *The fact is that the Federal Rules of Criminal Procedure do not require the Government to surrender pretrial statements made by a Govenment witness to agents of the Government. Consequently, there is no need for the insertion in the statute of the above quoted language and its inclusion can only cause unnecessary doubt and confusion as to whether the procedures of the statute are intended to be exclusive.*"[39]

In his letter, Mr. Rogers, of course, urged passage of the Administration bill, H.R. 7915, and rejection of the Senate bill as amended by Senator O'Mahoney. As the Senate debate developed, the phrase in paragraph (a) *"any rule of court or procedure to the contrary notwithstanding"* had been specifically inserted to overrule *Fryer's* interpretation of Rule 17c of the Federal Rules of Criminal Procedure. The Attorney General had so stated. When Mr. Rogers in this letter stated that the Federal Rules of Criminal Procedure "do not require the Government to surrender pretrial statements made by a Government witness to agents of the Government," he doubtless meant that the Department of Justice does not recognize that the *Fryer* case is a valid interpretation of Rule 17c. In this, as Senator O'Mahoney so honestly and graciously stated, the Department may be correct. When the Supreme Court of the United States gets the point, it may not agree with *Fryer.*

This statement in the Rogers letter of August 27, 1957 is not clear. But he follows it by saying, "there is no need for the insertion in the statute," H.R. 7915, of the O'Mahoney phrase *"except, if provided in the Federal Rules of Criminal Procedure."* This statement seems impossible to explain or defend. And worse it doubtless led Congressman Keating in the House debate to say: "It has been contended that paragraph (a) of H.R. 7915 would change the rules of criminal procedure with respect to pretrial discovery and inspection in criminal cases. There is no foundation for such a suggestion."

Whatever else H.R. 7915 did when it provides that it is to take effect "any rule of court or procedure to the contrary notwithstanding," it must have been intended thereby to overrule *Fryer's* interpretation of

[38] *Id.* 14,720.
[39] *Id.* 14,729.

Rule 17c. Both the statement of Mr. Rogers in his letter of August 27, 1957 and this statement of Mr. Keating were incorrect.

Some good lawyers who sit in the House were aware of this and warned against the passage of the *Jencks* bill without the O'Mahoney amendment. Particularly eloquent was Congressman Coffin who said: "Mr. Chairman, in deciding to vote with the small minority against H.R. 7915 (the Administration bill) which was devised to correct misunderstanding in the wake of the *Jencks* case, I was reminded of and influenced by the example set by Maine's great son, William Pitt Fesendon, who, notwithstanding popular clamor to impeach President Andrew Johnson, cast the first Republican vote of not guilty."[40] Stating that as a lawyer in Maine, he had become familiar with the Federal Rules of Civil and Criminal Procedure, Congressman Coffin pointed out that these Rules: "have proved eminently successful because they were adopted only after an exhaustive consideration by both bar and bench. Each successive change in these rules has been made only after thorough exploration and discussion by the Judicial Council and the bench and bar generally. In no instance, so it was revealed in the debate, since the inauguration of these rules, has Congress attempted to work its will on the body of rules so carefully wrought."[41]

The Congressman showed that this seemingly simple legislation changes both Rules 16 and 17 of the Federal Criminal Code when corporations are defendants in antitrust suits and when any proprietor is sued in a wages and hours case. Under the new bill, defendants in these instances could not before trial inspect documents in the Government's possession. And Congressman Coffin was not the only one who warned against changing court rules by Congressional act. Congressmen Celler,[42] Fascell,[43] and Rogers,[44] to mention but three, did so, too.

Despite the warning that it was thereby repealing a Federal Rule of Criminal Procedure, as above stated, the House passed the Administration bill, H.R. 7915, in the form requested by the Attorney General and the bill went to conference. Thereafter, a conference bill was passed. As changed in conference, paragraph (a) reads: "(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

[40] August 27, 1957, 103 Cong. Rec. 14,724.
[41] *Idem.*
[42] *Id.* 14,716 and 14,721.
[43] *Id.* 14,721.
[44] *Id.* 14,726.

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."[45] Calling attention to the fact that the Senate bill permitted the production of statements of "prospective" witnesses "if provided in the Federal Rules of Criminal Procedure," the Conference Report states that one change agreed upon is to: "eliminate specific reference to the Federal Rules of Criminal Procedure."[46]

Presenting the Conference Report, Congressman Celler said: "In doing this we are not seeking to nullify or curb the Federal Rules of Criminal Procedure . . . Mr. Speaker, I am happy to state that the amendment which the House now has before it, is for all practical purposes the language and substance of the Senate bill . . ."[47]

Immediately thereafter, Congressman Keating, ranking minority member of the House Judiciary Committee, replied: "Mr. Speaker, I think the House should know that I differ markedly and emphatically with the last statement of the chairman of the committee, that this bill represents in any way the position of the 55 members of the House who voted for the substitution of the weak Senate bill. It rather confirms and fortifies the position of the 161 members who voted for the stronger House bill."[48] Speaking of the effect of the *Jencks* bill on Rule 17c of the Federal Rules of Criminal Procedure, Mr. Keating said: "There was fear that there was language in section (a) of the Senate bill which would imply the right of defendants to get such evidence before they ever got into the courtroom. The wording here not only does not recognize that they might have such a right but positively and definitely says that they shall not have that right. Section (a) of the bill is even stronger than the House bill which we considered and for which an overwhelming majority of this body voted."[49]

The language of the bill as set forth above, although it does not refer to the Federal Rules of Criminal Procedure, specifically forbids the production of "any statement or report in the possession of the United States which was made by a Government witness or *prospective* Government witness until said witness has testified on direct examination in the trial of the case." The language of the statute supports the statements of Congressman Keating to the House. The *Jencks* bill as modified in conference and passed overrules the *Fryer* case. Granted therefore, that under Rule 17c of the Federal Rules of Criminal Procedure, a defendant

[45] August 30, 1957, 103 Cong. Rec. 15,248-15,249 and see footnote 19, supra.
[46] August 30, 1957, 103 Cong. Rec. 15,249.
[47] August 30, 1957, 103 Cong. Rec. 15,249.
[48] August 30, 1957, 103 Cong. Rec. 15,249.
[49] August 30, 1957, 103 Cong. Rec. 15,249.

may inspect three or more days in advance of trial the statements or reports of a prospective Government witness, the *Jencks* statute purports to repeal Rule 17c in this respect. But Rule 17c is not a statute. It is a court rule, promulgated by the Supreme Court of the United States with the consent of the Congress under the terms of an enabling act. This act reads:

> "Procedure to and including verdict.
>
> "The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the Territory of Alaska, the district of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. *Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.* All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> "Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."[50]

Note the italicized language. It merely provides that rules promulgated by the Supreme Court be *"reported"* to the Congress at a regular session "at or after" its beginning in January and "not later" than May 1 and that they "not take effect" until "the expiration of ninety days after they have been thus reported." There is no Congressional veto reserved by this enabling act. Rule 17c was duly "reported" and ninety days elapsed without Congressional objection. In one sense, therefore, the *Jencks* bill can be said to be criminal *ex post facto* legislation.[51] And probably it was drawn to supply such a reservation *nunc pro tunc.*

Granted that the Congress meant by requiring the Court to "report" its rules to reserve a veto, can the Congress constitutionally veto a court rule? Does the Supreme Court make its procedural rules by the grace of

---

[50] 18 U. S. CODE §3771.

[51] In one sense the *Jencks* bill, therefore, is *ex post facto* legislation. Having agreed that the Court has rule making power and requested only that (1) it report its rules and (2) delay their effect for 90 days, the Congress now welches on its bargain and long after the 90 day period without consultation with the Court purports to repeal the authority of the Court to have promulgated Rule 17c under the enabling act. Section 9 of Article I of the Constitution prohibits it from passing *ex post facto* laws. Calder v. Bull, 3 Dall. 386 (1798), improperly construed the clause to apply to criminal actions only. "Politics and the Constitution," Crosskey, Chapter X, pp. 295-323, University of Chicago Press, 1953. But there has been a difference of opinion in the Court as to the construction and recently as to what is "criminal." See Lehmann v. U.S. ex rel. Bruno Carson or Carasanti, 353 U.S. 685, (1957). But the Jencks bill affecting a criminal rule is a criminal law, is it not? And thus subject to the *ex post facto* clause?

the Congress? Or is the enabling act but a Congressional recognition of the facts of life—that under Article III of the United States Constitution judicial power is vested in the Supreme Court and it includes power to make procedural rules in both civil and criminal causes? If, under Article III of the United States Constitution judicial power has been vested in the Supreme Court of the United States and that power thus vested includes the power to make rules of procedure and evidence, then the provision of the *Jencks* bill that purports to overrule the *Fryer* case and repeal 17c of the Federal Rules of Criminal Procedure is unconstitutional.

The point was met by Mr. Justice Story long ago in *Martin v. Hunter's Lessee* where considering the powers of the Congress with respect to Article III, speaking for the "Marshall Court," he said: "The judicial power must, therefore, be vested in some court by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution they might defeat the Constitution itself; a construction that would lead to such a result cannot be sound. . . ." Speaking more directly to the point at issue here, Story said: "If, then, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the *whole* judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that the Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others."[52]

The classic view of Story does not permit the Congress to interfere with Article III of the Constitution. Under it there can be no other conclusion but that if judicial power includes the right to make a rule of evidence, it is vested by the Constitution in the Supreme Court and no act of the Congress can affect it. Moreover, under the doctrine of separa-

[52] Martin v. Hunter's Lesseee, 1 Wheat. 304 (1816). During the course of the Senate debate, Senator O'Mahoney said: "Of course, we have the constitutional right, given to us in Article III of the Constitution, to authorize the Supreme Court to make rules. So there is no question about our power." August 23, 1957, 103 Cong. Rec. 14,400. Examination of Article III will demonstrate that the distinguished Senator is in error. Under Article III, the only power the Congress has is to establish inferior Courts. "The judicial Power of the United States is vested in one Supreme Court" and in the inferior Courts that "the Congress shall from time to time ordain and establish." There is no provision in Article III for the Congress to make rules. And in Martin v. Hunter's Lessee supra, observe that Justice Story said that under Article III it was "a question of some difficulty" whether the Congress was not *obligated* to establish inferior courts. Otherwise "the judicial power (in some cases) might nowhere exist."

tion of powers the Congress cannot constitutionally delegate legislative power to the Supreme Court.[53] The right to make a rule of evidence such as the *Jencks* bill purports to establish is either a legislative or judicial power. If Rule 17c of the Federal Rules of Criminal Procedure was a legislative power, it was unconstitutionally delegated by the Congress to the Court. Since, however, the Court accepted the delegation, we must assume it regarded the power as judicial, not subject to delegation at all but vested by Article III of the Constitution in the Court. And the so-called "enabling" act was in fact a "disenabling" one.

Apart from whether the judicial power vested by the Constitution in the Supreme Court includes, as a matter of law, the power to make rules of procedure and evidence, is the desirability that such power be so vested in the public interest. The making of rules of evidence and procedure is the business of the courts not the Congress. The great contribution of Roscoe Pound to American jurisprudence was to point out at the start of this century that it was a national tragedy for the courts to surrender to legislatures their inherent rule-making powers. This surrender, as we know, began about the middle of the nineteenth century when the New York State legislature passed the Code of Procedure drafted by David Dudley Field. Thereafter, legislative codes came to replace court rules.[54]

The vice of the legislative code is that it is rigid and to change an unjust provision lawyers must endure the agony of convincing the busy legislature to pass a law. Many court decisions were made by state courts calling attention to needed changes in state legislative codes of procedure. Since the state courts did not create the code provision, they felt no obligation other than to call attention to the need for change. State legislatures have not made the changes. It is not only that the job belongs more to courts than to legislatures but there is no political appeal to induce busy legislators to make needed changes.

From grim experience with state legislatures, the country and the Congress concluded that the public interest is best served by the passage of enabling acts under which the legislatures *surrender* to courts the power to make rules of procedure in civil and criminal causes. For this reason, the Congress passed the above-quoted enabling act surrendering

[53] Keller v. Potomac Electric Power Co., 261 U.S. 428 (1923); O'Donoghue v. United States, 289 U.S. 516 (1933); National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

[54] See *"86 or 1100"* in volume 32 of the Cornell Law Quarterly by the author in collaboration with his then students, Brooks and Greer, where Pound's contribution is detailed and the effect of the Field Code evaluated in the light of Pound's trenchant criticism.

to the Supreme Court of the United States the right to make rules of procedure in criminal causes. In this way the mistakes of the states were to be avoided in the nation and the responsibility for keeping court procedures up to date was to be placed where it belongs, with the interested and informed.

Conclusion

To the extent that the Jencks statute, Section 3500 of Title 18, denies to counsel for defendants the right to inspect verbatim reports of Government witnesses that contain alleged irrelevant matter, it is unconstitutional. Under *Jencks,* it denies a defendant due process of law in violation of the due process clause of the Fifth Amendment. As held by the majority in *Jencks,* justice requires that defense counsel judge whether the objected portions in the report of a Government witness are irrelevant. Only defense counsel is qualified to do so.

To the extent also that the Jencks statute, 3500 of Title 18, overrules Rules 15, 16, or 17, particularly Rule 17c, of the Federal Rules of Criminal Procedure, it is clearly unconstitutional. Under the Constitution, the Supreme Court is vested with the nation's judicial power. That power includes power to make rules of procedure and evidence. If Congress had *legislative* power to make such rules, it could not delegate it to the Court. The enabling act under which the Congress purported to give the Supreme Court power to promulgate rules was in fact a *disenabling* act. It recognized that under the judicial power vested in the Supreme Court by Article III, the Court alone has power to make court rules. It may well be that the Supreme Court will not approve the interpretation of Rule 17c by the District of Columbia Circuit in the *Fryer* case under which a criminal defendant was said to have the right to inspect a statement of a government witness before trial. If so, the Jencks statute will not be in conflict with Rule 17c. But granted *Fryer* is right and wins Supreme Court approval, the provision in the Jencks statute that purports to overrule 17c is also unconstitutional.

Under the enabling act the Congress seems not to have reserved a veto of a criminal rule promulgated by the Supreme Court. All the Act requires, is that the Supreme Court report when Congress is in session between January and May 1 and that the Criminal Rule promulgated not become effective until ninety days after report. This report as to 17c the Supreme Court made and the Congress did not object during the ninety day period. To the extent, therefore, that the new statute, 3500 of Title 18, conflicts with 17c, it would seem unconstitutional as *ex post facto* legislation under section 9 of Article I of the Constitution.

Whether the Jencks statute, 3500 of Title 18, conflicts with the Federal Criminal Rules, its manner of passage was a national disgrace. As Congressman Coffin said it was a bill to pack the Federal Criminal Rules and reminiscent of the attack of President Franklin D. Roosevelt on the Court and of the attacks of Mr. Jefferson on the Marshall Court. To pass at the tag end of the session in the torrid heat of a Washington August, so complicated a bill in such haste and without public hearings was inexcusable. Let's hope the Congress never repeats the fiasco of *Jencks.*