



Department of Justice

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STATEMENT

BY

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The House bills, companion to S. 2377, to amend the procedures for production of statements and reports in federal criminal cases are intended to correct a grave emergency in federal law enforcement which has resulted from the decision of the Supreme Court in Jencks v. United States.

The issue in the Jencks case involved the procedure under which a defendant may inspect a statement of a government witness, in order to impeach the credibility of such witness. The argument of the case centered on whether it was necessary for the defendant to establish a foundation of inconsistency between the testimony of the witness and the statement before the statement was made available to the defense. The Court held that numerous lower court cases holding such a foundation was necessary were wrong, and that statements which relate to the testimony of the witness must be made available to the defense without requiring the defense first to establish some inconsistency. We accept this principle.

However, there is an immediate need for legislation to clarify the procedure to be followed in applying such a principle. Otherwise, serious harm will be done to federal law enforcement. Three principal problems have arisen:

The most serious problem which has arisen as the result of interpretations of the Jencks decision is the insistence by some courts that entire reports of the F.B.I. or other federal investigative agency be handed over to defense counsel, even though but a small part of the report relates to the testimony of a government witness. To understand the seriousness of such a ruling, let me briefly explain what such reports contain.

Reports of the F.B.I. are all inclusive and cover the full investigation of every phase of the case, frequently by F.B.I. officers in different parts of the country. They include not only interviews with possible

witnesses, but information received from confidential sources, volunteered statements, and all the action that has been taken from the start of the investigation through the preparation of the case for trial.

The reading of an F.B.I. report by a defendant would often enable him to learn the identity of confidential informants. Frequently the information such informants furnish is of such a nature that its very disclosure will identify its source.

The uncovering of confidential informants, particularly in the internal security field, would cut off intelligence sources, and in some instances endanger the lives of the informants.

F.B.I. reports may contain information gathered by other intelligence investigative agencies, including those of friendly allied countries exchanging information on a cooperative basis under this Government's commitment that their identities will not be disclosed without prior consultation.

Investigative reports necessarily include the raw material of unverified complaints, allegations, and information which is checked out only if it bears upon the investigation. In some investigations it is necessary to secure the most intimate details of the personal life of a victim of a crime to aid in the identification of the wrongdoer. Thus in the early stages of any big extortion or kidnaping case, the enemies, both real and imaginary, of a family are frequently identified to the F.B.I. This personal information may subsequently prove to be wholly irrelevant in the ultimate outcome of the investigation. Nevertheless, it is in the reports, and properly so, because the F.B.I. investigation must record all information received, whether relevant or not and whether verified or not. The reports will also contain the names of suspects or unverified accusations

against innocent persons. Disclosing the names of such persons might seriously damage the reputations of innocent persons. _____

Reports of other federal investigative agencies are prepared in the same way. In a criminal income tax or narcotics case the reports contain the complete story of the investigation. They include all the investigation, including much raw material which may have to do with leads to investigation of wholly unrelated crimes, or statements which, as I have indicated, could damage the reputation of innocent persons.

Study of one of these reports by defendants would necessarily make them familiar with the techniques of investigation, and could give them an instructive course in how to evade the federal law enforcement officers in the future.

It is obvious that because of the nature of these reports, the handing over of them to the defense would be completely unacceptable. The protection of law enforcement techniques, sources of intelligence, and protection of confidential informants is vital.

Yet it is these very reports that have become jeopardized as a result of interpretation of the Jencks decision by the courts. _____

In a narcotics case tried in Pittsburgh shortly after the Jencks decision, defense counsel sought the production and inspection of the entire Narcotics Bureau report after the Government agent had testified. The report covered all of the investigation of the case. The judge ordered the production of the entire report. When the United States Attorney declined to produce the entire report for inspection by the defense, the Court summarily dismissed the case. We have since been advised that this court has indicated its intention to follow this procedure in all future narcotics prosecutions.

In an antitrust case, also tried in the Western District of Pennsylvania, the government was required to dispense with material testimony of F.B.I. agents because of the court's ruling that if the agents testified their entire reports would have to be given the defense.

In a narcotics case in Georgia, trial of which was actually in progress on the day of the decision, the defense attorney immediately asked for the production of "any statements that the government witness was testifying from and any intelligence reports submitted to the government in the investigation carried on in connection with this case." The report by the investigator consisted of summarizations of the numerous interviews with police, drug company employees, and others. The investigator was on the stand and had testified that he had prepared the report. Two other witnesses, whose oral statements to the agent were paraphrased and summarized in his report, had already testified. The Court ordered that the government produce for inspection by the defense any of the reports relating to the events and activities about which either of the witnesses had testified or is expected to testify. The United States Attorney assured the Court there were no written statements by the witnesses but declined to produce the entire report or the summarizations of the oral statements of the witnesses to the agent which had not been read to or by the witness nor did they in any way adopt or approve these statements as correct. The agent had dictated his report after his interviews and, at best, his report was a summary of the interview-- obviously hearsay evidence. The Court, without further discussion, dismissed the case.

In a criminal income tax case, likewise tried in Georgia, the court dismissed the case because the government declined to produce unauthenticated summaries of interviews with witnesses. At the time of dismissal the court indicated its opinion that a pending defense motion for production of the entire investigative report was well taken.

This interpretation of the Jencks case also threatens to upset convictions already obtained. On June 21st a defendant who had already been convicted in a criminal tax evasion case in Rhode Island moved the court to order production and handing over to the defense of the complete reports of the Special Agent and the Revenue Agent who had investigated and prepared the case. Although the defendant had not requested these reports during the trial, the court immediately entered an order granting the motion. The court stated: "In the light of the pronouncements of the majority of the Supreme Court in the Jencks case I think there is a clear mandate to permit the defendant to examine these reports. It may well be that the result of the examination of these reports will produce material of an evidentiary value to be used in support of a motion for a new trial." No final disposition of the case has yet been made.

On June 27th we received notice that four defendants who were convicted of kidnapping on May 29th in Rhode Island have filed with the same court a motion to have turned over to them all reports of the F.B.I., relating to the "alleged kidnapping" as well as any statements "oral or written" made to the F.B.I. agents by the parents of the victim. That motion will be heard on July 8th.

In these two cases the direct result of one court's action under its interpretation of the Jencks case could be the freeing of a convicted tax evader and four convicted kidnappers.

In some instances since the Jencks case the courts have agreed to limit production of reports to the statements of the witness which relates to the matters on which he has testified. Needless to say, counsel for defendants are urging the courts to go to the extreme of requiring all reports to be produced. In a mail fraud case in Texas, which had been in progress for weeks prior to the Jencks decision, the defense used the Jencks decision to bring the trial to a virtual standstill and inject collateral issues of no import to the real issue of guilt or innocence. After some 60 witnesses had testified and while one of the government's key witnesses was testifying, the defense demanded and obtained the statements of that witness to the F.B.I. on an unrelated issue. They also demanded and obtained some 14 statements made by the witness to various government agencies over a period of several years. These included statements made to state agencies. Now the defense is demanding the statements of the some 60 witnesses who had previously testified and has indicated an intention to reopen their testimony. The principal witness was on the stand for nine days, eight of which were used for cross-examination based on the totally unrelated statements as well as the 14 apparently relevant statements. As a result, the vital issues have been thoroughly hidden in the mess of collateral issues raised as a result of the utilization of the Jencks decision for delay and confusion.

The second problem arises from the fact that in the Jencks case the Court ordered the government to produce reports orally made by the witness. This raises a grave problem and the general language of the opinion must be given a reasonable interpretation to prevent serious unfairness. The Department takes the position that unless the witness has been in some way informed

of the statements attributed to him, and has indicated his approval of their accuracy, that such reports should not be turned over to the defense. Such reports are mere hearsay as far as the witness is concerned and cannot and should not be used to attack the credibility of a witness. Obviously the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else.

A third problem arises from an interpretation of the decision which would require pre-trial production of statements and reports.

In many cases, the defense has attempted to use the Jencks decision to rummage through government files prior to trial. In a case involving a charge of fraud against the government, prior to trial, the defense served a subpoena duces tecum on the F.B.I. requiring the production of "all relevant statements and reports in (the government's) possession of government witnesses (written and when orally made, as recorded (by the F.B.I.)) at the forthcoming trial of the . . . case." After a hearing on the government's motion to quash, the judge wisely granted the motion and quashed the subpoena. In his opinion filed June 17, 1957, Judge Edmond L. Palmieri of the Southern District of New York pointed out that such a disclosure would force the government to furnish in advance a complete roster of its witnesses, a right reserved to capital cases, a burden which he said would cause the government both vexation and delay.

On the other hand, in the District of Puerto Rico the court is considering, a motion for the pre-trial production and inspection of the complete investigative reports. In that district there are 16 criminal cases which will be affected by this ruling. To illustrate the character of other demands made by defense attorneys for pre-trial production influenced by the Jencks decision: In one case a motion requested the production of "all

reports" made by the F.B.I. agents which the government will use in the prosecution of the case. A pre-trial motion in an Alcohol Tax case sought the inspection of all documents including all reports, data, documents and papers in possession of the United States Attorneys pertaining to the case, and specifically demanded the transcripts of witnesses before the grand jury, the complete reports of the Alcohol and Tobacco Tax Division, including laboratory and investigative reports.

The legislation now under consideration is designed to provide solutions for the problems I have discussed by setting definite guide lines for the trial courts.

The effect of the legislation we support would be to establish the following procedures:

1. It provides that only reports or statements which relate to the subject matter as to which the witness has testified are subject to production.
2. It gives to the Court the power to excise from any such statement or report matter which does not relate to the subject matter of the testimony of the witness who made it. Thus reports about other persons or transactions, information disclosing the techniques of investigation, and all other extraneous matter would be safeguarded by the Court.
3. The bill makes it clear that the government need produce only reports or statements of a witness which are signed by him or otherwise adopted or approved by him as correct.
4. It provides that statements and reports to be used for impeachment of a government witness are not subject to production until the witness has been called and has testified for the government.
5. It provides that if the government declines to produce such a statement or report the Court shall either strike out the testimony affected or order a mistrial. Since the Jencks decision courts have dismissed the prosecution completely where the government has found compliance with a production order unacceptable.

The Department of Justice believes that these procedures must be followed to avoid serious miscarriage of justice in federal criminal cases where the production of statements or reports comes into issue.