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EXPANDING DEFENDANT'S DISCOVERY: THE JENCKS ACT AT PRETRIAL HEARINGS

INTRODUCTION

In federal criminal prosecutions, the Jencks Act\(^1\) provides exclusive procedures for defense access to any prior statements or reports

\(^1\) 18 U.S.C. § 3500 (1970) provides:

Demands for production of statements and reports of witnesses.

(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) 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.

(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 subsection (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;

2. a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an
of witnesses or potential witnesses for the government. This statute was adopted in response to fears aroused by the decision of the Supreme Court in Jencks v. United States. In Jencks, the court held that, in the case of witnesses who had testified at trial, the defendant was entitled to inspect all reports of the witnesses which referred to events about which they had testified. The defendant was not required to show any inconsistency with the testimony, and the reports were to be produced without regard to their admissibility into evidence. Mr. Justice Clark, dissenting in Jencks, expressed the fear that the majority approach would afford defendants a "Roman holiday for rummaging through confidential information" in the possession of the government.

It was apparently this language which sparked intense public reaction against the Jencks decision. In response to public pressure and to modify lower court decisions which were perceived to interpret Jencks too broadly the Jencks Act was passed. The statute was designed to prevent excessive and untimely production of statements and to restrict the use of such statements to purposes of impeachment. It is the purpose of this Comment to examine the operation of the Jencks Act in the context of pretrial hearings in order to ascertain whether the Act fulfills its purpose to "further the fair and just administration of criminal justice" in that context. Additionally, an alternative to present procedures will be proposed which might better fulfill that purpose.

I. GOVERNMENT INTERESTS RELATING TO DISCLOSURE OF STATEMENTS

The passage of the Jencks Act represented a congressional decision to enter into the field of criminal discovery, an area which tradi-
tionally has been the province of the judiciary.\textsuperscript{10} It was feared that extensive discovery of government files under the guise of obtaining statements would hamper effective law enforcement and could potentially endanger national security.\textsuperscript{11} While it has been argued that these concerns were out of proportion to the actual scope of \textit{Jencks}, and that the Act is unnecessarily restrictive in its approach to the problem,\textsuperscript{12} the fact remains that the intent of Congress was to protect legitimate governmental interests in restricting access to government files in the face of a perceived threat to those interests. It is therefore necessary to identify any interests the government may have in restricting or delaying defense access to statements made by government witnesses.

In some cases, the statement may contain information relevant to national security. The government's interest in restricting access to such material is obvious. The material may be so important that the prosecution will elect to resist disclosure altogether, thereby creating the possibility of losing the case through having the testimony of the witness excluded or a mistrial declared.\textsuperscript{13} However, it may be assumed that cases in which national security interests are at stake will be relatively rare in proportion to the total number of federal criminal prosecutions. In the majority of cases, a different justification must be found.

In cases where national security is not a factor, the interests of the government are basically the same as those which traditionally have been advanced in opposition to liberal discovery by defendants in criminal cases.\textsuperscript{14} The identity of witnesses must be concealed to prevent any improper interference by unscrupulous defendants and defense counsel.\textsuperscript{15} Secondly, the government has an interest in concealing the nature of its case to prevent the defendant from fabricating defenses to fit the evidence which the government possesses and

\textsuperscript{10} Note, supr\textsuperscript{a} note 5, at 674.
\textsuperscript{12} Note, \textit{The Jencks Act}, 73 HARV. L. REV. 179 (1959); Note, supr\textsuperscript{a} note 5.
\textsuperscript{15} Such interference could include subornation to perjury, bribery, and intimidation, as well as direct threats to the safety of the witness or other persons.
from improperly altering evidence. Finally, the government has an interest in protecting its investigative files to prevent information therein from falling into the hands of those who have not been formally charged or who may be charged at a later date. Thus, in addition to the interest in concealing the identity of witnesses before they testify, there is an interest in concealing the substance of their testimony until the testimony is presented in open court. It is primarily for these and similar reasons that production of statements is restricted by the Jencks Act.

Proponents of more liberalized criminal discovery argue that these interests are not sufficiently strong in every criminal case to justify restriction of access to relevant materials by blanket prohibitive rules. The prosecution may have interests which would support early disclosure rather than delay. The prosecution has a duty to prevent wrongful convictions which is as strong as the duty to secure proper ones. To the extent that discovery operates as a device to ascertain the truth, this interest will be promoted by liberalized discovery. On the other hand, discovery could reveal the hopelessness of the defense’s case, which would tend to induce the defendant to enter plea bargaining negotiations at an early stage of the proceedings. Such a result would be in the prosecution’s interest, and would tend to reduce the burden on the entire criminal justice system. Liberal discovery also would aid the government in protecting against postconviction charges of prejudicial surprise and failure to produce material and exculpatory evidence. Finally, in regard to statements which would ultimately be available at trial, early disclosure may prevent delay at trial, where the inconvenience is greatest for all parties.

The government has a variety of interests relating to disclosure of statements, and these interests will in some cases be in conflict. The need for suppression may be strongest where organized crime or vio-

16. The nature and scope of all these interests is more fully developed in the literature cited in note 14 supra.
21. See 18 U.S.C. § 3500(c) (1970), which allows for continuance at trial to allow the defense adequate time to inspect any statement produced.
lence-prone defendants are involved, and suppression of statements may be fully justified in such cases. In other cases, the governmental interests might better be fulfilled by disclosure. It follows, then, that blanket rules against discovery are unnecessary to protect governmental interests. Such rules are particularly ill-advised when they interfere with the legitimate interest of defendants in obtaining pretrial discovery. In spite of this fact, the Jencks Act has had the effect of totally excluding the defendant from access to statements of government witnesses who testify at pretrial hearings. It is appropriate at this point to examine the nature and scope of this rule.

II. THE OPERATION OF THE JENCKS ACT AT PRETRIAL HEARINGS

The term "pretrial hearing" is used for the purposes of this Comment to mean any formal proceedings where the accused and the prosecution confront each other before an official in a judicial capacity at any time subsequent to the inception of the criminal proceedings, but before trial on the merits. The term thus embraces the preliminary hearing, hearings to suppress evidence such as the Wade hearing, and other hearings which may be held to rule on defense or prosecution motions. The term does not include grand jury proceedings, interrogation of witnesses by either side, in camera inspections of evidence, or other events which are not public or adversarial.

The Jencks Act, by its terms, appears to be an absolute bar to the compulsory production of witness' prior statements at any pretrial hearings. The first paragraph of the Act provides that such statements are not subject to inspection until the witness "has testified on direct examination in the trial of the case." Generally, the type of

22. For the proposition that advocates on each side of the discovery issue are arguing about different factual situations, see J. Moore, Federal Practice \( \S \) 16.02 (1965). The basic idea is that opponents of liberal discovery are concerned with organized crime, while proponents are thinking of the indigent defendant. The implication is that the justification for suppression may be stronger in situations involving organized crime.


27. 18 U.S.C. \( \S \) 3500(a) (1970) (emphasis added).
proceeding which will fall into the definition of "pretrial hearing" will not be considered part of the "trial of the case." This construction follows not only from the designation of the proceedings as "pretrial," but also from other provisions relating to the conduct of criminal proceedings. For example, the Federal Rules of Criminal Procedure provide that: "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial." Similarly, the prohibition of double jeopardy found in the Constitution has been construed to cover only those situations where jeopardy attaches through the empaneling of a jury, and retrial has been permitted even after this event in some circumstances.

This construction of the statutory language finds support in the case law. The Jencks Act has been held to prohibit compulsory production of statements at pretrial hearings, after guilt has been ascertained, at parole revocation hearings and even at draft classification proceedings. While not all of the cited cases have dealt expressly with the language of the first paragraph, the results are entirely consistent with the strict construction normally afforded the term "trial" in criminal prosecutions. In the Second Circuit, the United States Court of Appeals has dealt directly with the "trial" terminology in applying the Act to pretrial hearings to suppress illegally seized evidence. In United States v. Covello, the court went beyond the face of the statute to inquire into congressional intent. Despite the seemingly clear statutory language, the court found that:

29. U.S. Const. amend. V.
34. United States v. Hodges, 489 F.2d 212 (5th Cir. 1973).
Suppression hearings are nowhere alluded to in the legislative history and the statute does not supply any direct guidance for conduct at such hearings. In all probability Congress did not consider the question whether a suppression hearing is itself a “trial” or whether such a hearing is so much an integral part of the criminal trial that determines a defendant’s innocence or guilt so as to intend either that the Act apply to such a hearing or that it not do so.37

However, from this conclusion that the statute did not provide direct guidance for the conduct of suppression hearings, the court went on to conclude that the production of statements at such hearings could not be compelled by the defendant as a matter of right. This result was based upon the normal strict construction of the term “trial” in criminal proceedings. The Covello decision seemed to leave open the question of whether the district court judge could exercise discretion in ordering the production of statements. This was due in large part to Covello’s characterization of the case of United States v. Foley38 as “holding no more than that we left it to the discretion of the trial judge whether to order a production of documents . . . .”39 When this language was read in connection with the finding that the Jencks Act did not supply direct guidance for suppression hearings, it appeared that district court judges would be allowed to compel disclosure in some cases.

The defendant in United States v. Sebastian40 relied upon these cases in an attempt to have the Second Circuit uphold a lower court order suppressing certain evidence because of the refusal of the government to turn over Jencks material at the suppression hearing. The Court of Appeals reversed the order after stating that it might prefer, as a matter of policy, to uphold.41 The opinion stated that the court did “not feel that [it could] ignore the weight of authority, including [its] own, or the language of the Act in the absence of contrary legislative history or specific direction from Congress.”42 The “authority” of which the court spoke consisted in part of cases relating to discovery motions.43 Only two cases were cited relating directly to sup-

37. Id. at 543-44.
38. 283 F.2d 582 (2d Cir. 1960).
39. 410 F.2d at 544-45.
40. 497 F.2d 1267 (2d Cir. 1974).
41. Id. at 1270.
42. Id.
43. United States v. Percevault, 490 F.2d 126 (2d Cir. 1974), United States v. McMillen, 489 F.2d 229 (7th Cir. 1972), and United States v. Lyles, 471 F.2d 1167 (5th Cir. 1972), were the discovery cases relied upon in Sebastian.
pression hearings, Covello and United States v. Montos. In Montos, production of Jencks Act materials was denied without any discussion of the intent of Congress to apply the Act to suppression hearings; the decision rested on the statutory language alone.

The production of statements at preliminary hearings was at issue in Robbins v. United States. The court found that the statutory language was clear, and denied compulsory disclosure on the grounds that the hearing was not a "trial" within the meaning of that language. The further argument was made that the committing magistrate is not a "court" and therefore was not allowed to order production of statements within the provisions of the Act. Substantially the same reasoning was applied by the court in Gibson v. Halleck, with the same result.

It is apparent, both from the statutory language and the case law, that the Jencks Act creates a complete bar to the production of statements at pretrial hearings whenever the government resists production. This result occurs regardless of the legitimacy of prosecutorial reasons for resisting disclosure for the government is not required to reveal its reasons. The Act thus creates the very type of blanket rule which legitimate governmental interests do not require. It remains to be seen whether this rule substantially interferes with interests of the defendant. Such interests at pretrial hearings can best be seen by examining the nature of such hearings, with particular emphasis on the need of the defendant to impeach witnesses who testify at them.

III. THE NATURE OF PRETRIAL HEARINGS

A. General Considerations

In addition to the fact that governmental interests in criminal prosecutions do not require blanket rules against discovery of state-

45. 476 F.2d 26 (10th Cir. 1973).
47. By way of example, in Sebastian the government relied merely upon the Jencks Act and related case law. No showing was made that disclosure in that case would interfere with any legitimate government interests. Under the terms of the Act no such showing is required.
48. The clear intent of Congress to restrict use of statements to purposes of impeachment would apply even if production could be compelled at pretrial hearings. For an analysis of the congressional intent behind the Act, see Palermo v. United States, 360 U.S. 343, 352 (1959).
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ments, the defendant has a variety of legitimate interests in obtaining statements of witnesses who testify at pretrial hearings. By prohibiting disclosure, the Act interferes with these interests. It is difficult to generalize about "pretrial hearings" because their scope is as broad as the potential motions in a criminal case are numerous. The search for connecting threads is prompted by the distinction embodied in the Jencks Act between such hearings and a trial. This distinction can be justified only if there are no interests of the defendant which require disclosure prior to trial. In other words, if the defendant has no need to impeach government witnesses at pretrial hearings, the present rule may be sufficient. Otherwise, the rule could be justified by showing that production at trial would fully protect the interests of the defendant in impeaching government witnesses. This latter position would have greater appeal if it could be shown that production at trial would have further benefits, such as speeding up the criminal justice process and thereby relieving court congestion. It is submitted that none of these potential justifications will withstand scrutiny. In order to examine this proposition more fully, it will be helpful to look at some examples of pretrial hearings. For these purposes, an examination of the preliminary hearing and the hearing on a motion to suppress illegally obtained evidence hopefully will suffice to reveal the problems with such justifications of the Jencks Act provisions.

B. The Suppression Hearing

The first hearing to be scrutinized is the hearing on a motion to suppress illegally obtained evidence, for "the case for pre-trial disclosure is strongest in the framework of a suppression hearing." Whether one perceives the interest in excluding illegally obtained evidence from criminal prosecutions as protecting the rights of the defendant or simply as an application of the doctrine of judicial integrity, there can be little doubt that, in practice, the stakes for the defendant in the outcome of the hearing are of great significance. This is particularly true in the case where the only meaningful defense available to the offense charged is that the evidence which the govern-

50. Mapp v. Ohio, 367 U.S. 643 (1961), dealt with both of these factors as basic justifications for the ruling that the exclusionary rule is required by the Constitution in state as well as federal prosecutions.
ment seeks to introduce was illegally obtained. Despite the importance to the defendant of the outcome of such a hearing, the Jencks Act operates to deny him the opportunity to examine prior statements of any witness who may testify at the hearing.

It is difficult to perceive how release of information which falls within the provisions of the Jencks Act in such a setting would have adverse consequences for effective law enforcement. There would be little need to worry about the disclosure of the identity of the witness for he will be present before the court at the time the motion to produce is made. To the extent that any prior statement might contain references to other witnesses whose identity the prosecution may wish to conceal, the statement could be submitted to the court for in camera inspection and the information could be removed. Since any statement to be obtained by the defense must relate "to the subject matter as to which the witness has testified," there is likewise little to fear in regard to untimely disclosure of the substance of the witness' testimony. Again, the statement may be submitted to the court for in camera inspection. The in camera inspection would allow the court to remove any information about which the witness would not testify until trial, as well as information of an investigatory nature about persons not involved in the proceedings. In sum, the provisions which operate to restrict the use of statements to purposes of impeachment when the statements are released at trial would operate in the same fashion at a suppression hearing. The discovery value of the statement would be no greater than that afforded by the testimony of the witness except for the discovery of matters relevant to the impeachment of the witness.

On the other hand, if the defendant is not allowed to have access to the statements, he is effectively denied the opportunity to fully impeach and cross-examine the witness. It is no answer to this problem to say that the statements will be available after the witness testifies at trial. In most instances the issues of the suppression hearing will

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51. It is beyond the scope of this Comment to examine the merit of the provisions of the Jencks Act except insofar as they affect compulsory disclosure of statements at pretrial hearings. It is assumed that the scope of materials which may be ordered produced and the procedural requirements of the Act would remain unchanged if statements were to be available at pretrial hearings.
53. Id. § 3500(b).
not be relitigated at trial. Even in the instance where relitigation is permitted, both the defense and the prosecution will have been put to the expense and inconvenience of preparing for trial when a fuller impeachment of the witness at the hearing might have revealed the problem with the evidence.

A closely related problem arises when the witness does not testify at the trial. Because relitigation of suppression issues is infrequent, the witness at the suppression hearing may not testify at trial unless he has further testimony which bears upon the issues at trial. The problem is complicated even more by the fact that portions of the statement which relate only to the issues at the hearing might be excised when and if the statement is produced at trial. In either event, the defendant is deprived of the opportunity to fully impeach the witness' testimony relating to the issues of the hearing.

Finally, in many cases trial may never be held. There is little doubt that in many cases the outcome of the hearing will determine the outcome of the entire proceedings. The defendant might be induced to enter a plea after it is determined that the evidence which is offered against him is admissible. In such situations, the government will have secured a conviction on the basis of testimony which the defendant is unable to fully challenge because he has been denied access to materials relevant, or potentially relevant, to the impeachment of the witness.

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55. This was a concern of the trial court in Sebastian. 497 F.2d at 1270; see Record of Hearing on Motion to Suppress Evidence at 34.

56. In 1971, 26.9 percent of all defendants convicted in federal district courts changed an initial plea of not guilty to one of guilty or nolo contendere. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 6, 42 (1971).

57. Fed. R. Crim. P. 12(b)(5) provides in part: "If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded."

58. "Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, [the government] has no interest ... in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits." Jones v. Superior Court, 58 Cal. 2d 56, 59, 372 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (1962) (citation omitted in original).
C. The Preliminary Hearing

Any person accused of committing a crime is entitled to an early determination of the issue of whether or not there is probable cause to bind the person over for trial. While it has been held that there is no right to have this determination made at a preliminary hearing, when such a hearing is held the defendant should be entitled to fully examine government witnesses who appear. The need for effective cross-examination of government witnesses was one of the factors which lead the Supreme Court to conclude that the accused is entitled to the presence of counsel at such hearings. While there are those who might argue that the credibility of government witnesses should not be a consideration at the hearing, recent court decisions serve to point out the interests of the accused in impeachment of witnesses at the time of the hearing. Perhaps the most significant such case is California v. Green in which it was held that testimony of a witness at a preliminary hearing could be admitted at trial when the same witness was evasive and uncooperative at the trial. For many years, such testimony has been admissible where the witness was unavailable at trial. In deciding Green, the Court placed great emphasis on the fact that the witness in that case had been cross-examined at the preliminary hearing. While Green dealt with a state prosecution and therefore did not involve any Jencks Act questions, there is little reason to suppose that in a federal prosecution the courts would find that failure to turn over statements of the witness at the preliminary hearing would require a result different than that reached in Green.

Precedents do not reveal any constitutional requirements that effective cross-examination requires the production of Jencks materials. The Supreme Court decision in Jencks was not based on constitutional grounds, but rather was an exercise of that Court’s supervisory power in the absence of congressional action. In United States v. Moceri the district court indicated by way of dictum that complete

63. See Mattox v. United States, 156 U.S. 237 (1895).
deprivation of access to statements or a showing of prejudice might raise issues of constitutional dimensions. The courts may well be reluctant to rule that good faith compliance with the terms of the Jencks Act by the magistrate and the prosecution in the context of the preliminary hearing would render the testimony of the witness at the hearing inadmissible at trial where counsel had otherwise been granted an opportunity to cross-examine the witness.

Production of statements at trial will not protect the interests of the defendant. In terms of the defendant's interest in a full hearing on the probable cause issue to prevent unjustified and burdensome prosecutions, simple logic dictates that occurrences at trial cannot protect the defendant. If the testimony from the preliminary hearing is later admitted at trial because the witness becomes unavailable, effective impeachment will be impossible. If a Green analysis were applied to federal prosecutions, the very same uncooperativeness which would justify admission of the testimony will prevent effective cross-examination.

The degree of discovery permitted by disclosure at the preliminary hearing will be limited by those provisions of the Jencks Act which serve to limit the use of statements to purposes of impeachment. The witness' identity will be revealed by his presence at the hearing. The provision which requires the statement to relate only to matters as to which the witness has testified will prevent discovery beyond that afforded by the hearing itself. While the witness will perhaps appear at trial more frequently than in the case of suppression hearings because of the greater relation of the hearing to issues of guilt and innocence, nonappearance at trial is still a possibility. This is particularly true if hearsay testimony is admissible at the preliminary hearing. The witness' testimony at trial may differ from that at the hearing, raising the possibility that statements which relate only to the testimony at the hearing will not be producible at trial. The interests of the defendant will be served by production, while in the majority of cases no governmental interests will require suppression.

It is generally recognized that the discovery value of the preliminary hearing for the defendant is merely incidental, and does not of

66. See Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922).
itself serve as a justification for holding the hearing. This does not mean that when such a hearing is held the defense should be denied access to statements of witnesses who appear, for the discovery which the defendant seeks is not the sort which goes to the nature of the government's case against the accused. Rather, it is sought for (and will only be useful for) purposes of impeachment. In a sense, providing the statements at the preliminary hearing will serve as a partial substitute for the protection inherent in the nature of the grand jury. A full and complete hearing on all the evidence offered against the defendant will tend to provide "security to the innocent against hasty, malicious and oppressive persecution" when the accused is charged without an indictment.

D. Some Conclusions About Pretrial Hearings

This examination of the suppression hearing and the preliminary hearing obviously does not encompass the full range of proceedings which could fall within the definition of "pretrial hearings." However, other hearings would be subject to the same type of analysis since they presumably deal with issues of substantial importance to the defendant. The issue of disclosure will be of less importance at some hearings. If the hearing deals only with questions of law and not of fact, the government may not offer any witnesses, and the issue will not arise at all. In any proceeding where witnesses are offered, considerations analogous to those offered in regard to suppression or preliminary hearings will apply. The narrow scope of the information which could be ordered to be produced at any hearing under the Jencks Act would be sufficient to protect legitimate government interests in the majority of cases, while the interests of the accused will be better served by allowing compulsory disclosure of statements. Because the current provisions of the Jencks Act tend to prevent this result, the Act fails to fulfill its purpose to promote the fair and just administration of criminal justice. The problem becomes one of searching for possible avenues of relief from the current rules governing production of statements at pretrial hearings.

70. Id.
IV. Prospects for Judicial Reform

The issue of production of statements at pretrial hearings has not been fully litigated on the appellate level.\textsuperscript{72} Despite this fact, it is submitted that the judiciary will provide a poor vehicle for the institution of reform in this area, primarily because Congress has chosen to act in the area thereby limiting the power of the courts to act. The lack of appellate level litigation may be more indicative of the problems with judicial reform than that of the potential for judicial activism. The statutory language and existing case law could arguably be exerting a chilling effect on the willingness of counsel to extensively litigate the issue,\textsuperscript{73} particularly where funding is a problem. However, the willingness of counsel to expend time and money to litigate is not the sole barrier to judicial reform.

In any attempt to seek relief from present standards, it will be necessary first to convince the court that the Jencks Act does not absolutely prohibit disclosure.\textsuperscript{74} This could be accomplished, following the Second Circuit's approach in \textit{Covello}, through reliance on the lack of evidence of congressional intent to apply the Act to pretrial hearings. If this obstacle can be cleared, defense counsel would be free to raise the policy arguments relating to the balance of interests between the defendant and the government.\textsuperscript{75} Even if courts other than the Second Circuit show a willingness to examine these issues, the potential for success is limited, for the courts have shown a strong disinclination to order pretrial production of statements. To illustrate this fact, a number of cases relating to pretrial discovery motions will be reviewed. Such cases are more numerous than those dealing with pretrial hearings, and will serve to cast further light on prevailing judicial attitudes toward modification of the Jencks Act through judicial interpretation.\textsuperscript{76}

\textsuperscript{72} A survey of the cases indicates that most circuits have not dealt with the problem at all. No Supreme Court decisions have directly considered the issue.

\textsuperscript{73} The same statutory language and case law which has led courts to conclude that the Act prohibits compulsory disclosure at pretrial hearings may convince counsel of the futility of such litigation. \textit{See} text accompanying note 24-48 supra.

\textsuperscript{74} "Statements of a government witness... which cannot be produced under the terms of 18 U.S.C. § 3500 cannot be produced at all." Palermo v. United States, 360 U.S. 343, 351 (1959).

\textsuperscript{75} Such arguments will necessarily vary with the nature of the particular hearing and the facts of the case, but would probably be analogous to the arguments with which this Comment has dealt at length.

\textsuperscript{76} It should be remembered that congressional intent to limit the use of state-
The Supreme Court set the tone for judicial review of the Act the first time it was called upon to decide a case arising thereunder:

In almost every enactment there are gaps to be filled and ambiguities to be resolved by judicial construction. This statute is not free from them. Here, however, the detailed particularity with which Congress has spoken has narrowed the scope for needful interpretation to an unusual degree. The statute clearly defines procedures and plainly indicates the circumstances for their application.77

The lower federal courts have consistently followed this theme by routinely denying discovery motions aimed at statements of potential government witnesses. Usually, little or no regard is paid to any policy considerations.78 Of potentially greater significance is the fact that there has been strong resistance to permitting discovery even where the court has been willing to entertain policy considerations which argue for disclosure. As an example, in United States v. Wilkerson,70 the court refused to rule that the defendant could compel disclosure of his own confession where the confession was made to a witness who subsequently reported it to government agents. The defendant sought discovery of an F.B.I. agent's report which embodied the substance of an interview with the witness. The court reviewed several policy factors relating to the desirability of allowing discovery of a defendant's own confession, but concluded that these factors were not as persuasive where the confession was made to a person other than a government agent. It held that the Jencks Act prohibited pretrial disclosure. The result of this decision was to deny defense access to materials, which are normally discoverable under different circumstances,80 on the grounds that the material sought fell within the provisions of the Jencks Act.

In United States v. Harris,81 the court rejected arguments based on the doctrine of Brady v. Maryland,82 which requires the prosecu-
tion to turn over to the defense any material or exculpatory evidence in its possession. The *Harris* court concluded that the *Brady* doctrine could not automatically override the Jencks Act absent a showing of prejudice. The court did not address the problem of how such a showing could be made when the statement is unavailable to the defense. This problem was a major factor in the original *Jencks* decision. The potential conflict between the *Brady* doctrine and the Jencks Act was resolved in favor of the statute in *United States v. Trainor* as well.

Judicial reluctance to contradict the terms of the Jencks Act is best illustrated by cases where the court expressly states that it would prefer to order production because of policy factors, but rules that the Act prohibits such a result. In one such case, the court held that the lower court had properly denied the defendant’s motion for discovery, but went on to say that: “[w]here the identity of the government’s witnesses and the probable nature of their testimony is known, speedy resolution of Jencks Act problems by early and full disclosure may serve the interests of all concerned.” In *United States v. Percevault*, the court ruled that the Jencks Act prohibited compulsory disclosure prior to trial, but suggested that the pretrial conference was an appropriate forum for working out Jencks Act problems through voluntary cooperation. The court in *United States v. Moceri* strongly criticised the Jencks Act.

While sustaining the validity of the Jencks Act on its face, some comment upon the wisdom of the Act does not seem inappropriate. ... Disclosure, and not secrecy, is more likely to promote swift and effective justice. The public interest in speedy criminal trials ... is evident ... The Jencks Act would appear to be contrary to the current objectives of many members of Congress. Hopefully that body will exercise its powers to re-examine the wisdom of the statute.

The result in all of these cases is consistent with the language of the statute. They are used here to indicate the degree of judicial

83. 423 F.2d 263 (1st Cir. 1970).
84. Ogden v. United States, 303 F.2d 724, 734 (9th Cir. 1962).
85. 490 F.2d 126 (2d Cir. 1974).
87. *Id.* at 439.
88. The clarity of the Act’s language may have narrowed the scope for judicial review, but the uniformity of reported decisions has virtually eliminated all interpretation. The result of rigidity in judicial attitudes is a lack of meaningful precedent for those seeking to have the Act interpreted in a more liberal fashion.
reluctance to contradict the terms of the Act which those who attempt to assert policy arguments are likely to encounter. The statute refers directly to discovery, rather than pretrial hearings, but the approach of the Second Circuit in Covello and Sebastian indicates that this difference will have small effect upon judicial attitudes.

It is because of these attitudes that the best chance for meaningful reform of the Jencks Act lies with congressional action and not with the courts. The language of Moceri and Sebastian indicates that this is the belief of the federal judiciary as well. Unlike the case-by-case approach which the courts may pursue in formulating new rules, Congress must search for a standard which has wider application. It is necessary to examine certain potential standards in order to find a rule which would effectively protect all interests involved.

V. A Proposal for Congressional Reform

A blanket rule such as that provided by the Jencks Act for production at trial after the witness has testified seems as unwise as the current rule which prohibits production in all cases. A rule making production mandatory upon the conclusion of the witness' testimony on direct examination at the pretrial hearing would be based on the assumption that the government could never have a legitimate interest in suppression of the witness' statement. While it has been demonstrated that in many cases there is no governmental interest sufficient to justify interference with the defendant's need to fully impeach, it does not follow that there could be no such cases. It appears that some situations would require the defendant's interest to give way to the larger interests of the government in preserving effective law enforcement or national security.

A rule leaving the question to the discretion of the presiding judicial officer also seems unwise. Such an approach would be time-consuming, as the official would be required to examine the issues at every hearing which might be held in the course of a criminal prosecution.

90. See text accompanying notes 40-42 supra.
91. Requiring the government to choose at the pretrial stage in every case between the production of the statement or the loss of the testimony of the witness who made it seems unnecessarily harsh if an alternative can be found. The rule proposed in this Comment will hopefully provide an alternative which will still protect the interests of the defendant. See note 93 infra & accompanying text.
In the majority of cases, there would be little need for such delay as the real issues would be insubstantial. In light of congested court calendars and the need to expedite the criminal justice process, such delay cannot be tolerated unless there is no alternative which would fully protect the potentially competing interests.

A second consideration argues against a rule which would rely exclusively upon the discretion of the presiding official. It has been asserted that such rules governing criminal discovery are merely a means of avoiding issues, and that such rules usually lead to restricted discovery rather than liberalism. To the extent that this is true, the result would be at odds with the desired objective of making the statements available to defendants whenever possible without undue interference with governmental interests.

The more desirable alternative would be to allow compulsory production in all cases unless the prosecution establishes that some legitimate interests would be unduly hampered by disclosure prior to trial, even if the statement were to be carefully edited prior to production. This rule would afford due recognition to the defendant's interest in impeachment of government witnesses, while protecting in some degree the interests which the government may have in suppression of statements. The burden would be placed on the government to establish its position, rather than leaving it to the sole discretion of the prosecution. The scope of the showing which would be required would vary with the circumstances of the particular case. Finally, this rule would have the virtue of avoiding delay in the majority of cases by the application of a uniform rule in the absence of special circumstances.

The proposed rule might be effectuated by substituting in the first paragraph of the statute a phrase such as "in any formal proceeding in the case" for the current "in the trial of the case." An additional sentence could then be added to the effect that: "If the United States claims that production of any statement ordered to be produced prior to trial on the merits would unduly hamper effective law en-

93. This proposal should be read in light of note 51 supra.
94. It could be argued that the production of statements at pretrial hearings will itself lead to delay when the defense requires time to review the statements, but mere expediency will not justify substantial interference with the interests of the defendant in fully impeaching the witness. It is relevant only to problems of choice between alternatives which will protect all interests involved in substantially similar fashion.
forcement, or would endanger the safety of any person, or would threaten the national security the court or committing magistrate may, upon a sufficient showing, rescind the order." If Congress felt that such a decision were beyond the proper powers of a committing magistrate, a provision could be drafted whereby application could be made to a district court judge to pass upon the motion of the government. Such a provision is not recommended here because it would lead to delays in preliminary hearings. A fuller examination of the qualifications and proper powers of the magistrate might reveal the need for such a rule. If it were determined that the committing magistrate should be allowed to pass on these issues, the phrase "or committing magistrate" could be inserted after the word "court" throughout the statute\textsuperscript{95} in the interest of clarity. For similar reasons, the phrase "or formal proceedings" could be added after the word "trial" wherever appropriate. Otherwise, the statute could stand as written.\textsuperscript{96}

**CONCLUSION**

The Jencks Act in its present form has had and apparently will continue to have the seemingly unintended effect of uniformly denying defense access to statements of government witnesses who testify at pretrial hearings. At least in the context of preliminary hearings and suppression hearings, there is little justification for this rule while there are a variety of factors which would indicate that a more liberal approach is desirable. While case-by-case adjudication might provide a forum for the development of new procedures, trends in the judicial interpretation of the Act indicate that the potential for meaningful judicial reform is limited at best. Therefore, it is suggested that Congress should reconsider the Act with an eye toward establishing a standard whereby the defendant would be allowed to examine statements of witnesses who testify at pretrial hearings except where the prosecution is able to establish that effective law enforcement, public safety or national security would be threatened by such disclosure.

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\textsuperscript{95} This language would not be inserted in paragraph (d) after the final comma. The committing magistrate is obviously powerless to declare a mistrial.

\textsuperscript{96} It is doubtful that the provisions for declaring mistrials would have any application at the pretrial stage. Therefore, the more typical remedy of striking the testimony of the witness would be followed if the government were to persist in refusing to produce statements.