# Notes

## A Defendant's Right to Inspect Pretrial Congressional Testimony of Government Witnesses

One of the most significant issues spawned by the My Lai incident has nothing to do with war crimes. It concerns instead the potential for congressional committees to influence criminal trials. Last year, the Investigating Subcommittee of the House Armed Services Committee conducted hearings on the My Lai incident.[1] While two soldiers, First Lieutenant William Calley and Staff Sergeant David Mitchell, awaited court-martial for allegedly taking part in the massacre, their respective defense lawyers requested transcripts of testimony given to the Subcommittee by probable government witnesses. The Subcommittee, even after receiving subpoenas, refused to turn over the testimony. This uncooperative attitude left the military tribunals no choice but to decide: (1) whether a criminal defendant has the right to inspect testimony given to Congress by prospective prosecution witnesses; (2) if he does, whether Congress has the power to refuse to produce it; and (3) what should be done when Congress withholds such testimony.

In answering these questions of first impression, the courts-martial disagreed. The *Calley* judge held that the defendant did not have a right to inspect the testimony and that there was no remedy for congressional refusal to produce it.[2] He therefore allowed the prosecution to call all its witnesses, regardless of any prior statements they had given to the Subcommittee. In *Mitchell*, the presiding judge, Colonel George Robinson, first held that the defendant had the right to inspect the

1. *See* STAFF OF ARMED FORCES INVESTIGATING SUBCOMM., HOUSE COMM. ON ARMED SERVICES, 91ST CONG., 2D SESS., INVESTIGATION OF THE MY LAI INCIDENT (Comm. Print 1970) [hereinafter cited as SUBCOMMITTEE INVESTIGATION].

2. The first time the issue was raised, the *Calley* judge did not decide whether discovery was required by the Jencks Act, 18 U.S.C. § 3500 (1964), *as amended*, 18 U.S.C.A. § 3500 (Supp. 1971), but simply said that production of the testimony would "promote the ends of justice." Although he issued a subpoena to Congress, he stated that he thought Congress could refuse to produce the testimony. United States v. Calley, 8 CRIM. L. REP. 2055 (Army GCM, 5th Jud. Cir. Oct. 13, 1970). After Congress did not respond to the subpoena, the motion was renewed. At that time, the court specifically held that neither the Jencks Act nor the Constitution gave the defendant the right to discover the testimony and that, therefore, he was not entitled to any relief because of the congressional refusal. Information as to the second decision, which was rendered orally, was supplied to the author by Captain Aubrey Daniel, prosecutor in the *Calley* case.

congressional testimony. When Congress refused to produce the statements, his remedy was to forbid the prosecution from calling any witnesses who had testified before the Subcommittee.[3]

The appellate process may never resolve the conflict between the two cases. Enough witnesses who never appeared before the Subcommittee testified against Calley so that the judge's ruling, even if wrong, might amount to only harmless error.[4] The *Mitchell* court-martial resulted in an acquittal. No doubt Colonel Robinson's ruling, which reduced the number of prosecution witnesses from eight to three, contributed to the verdict. Despite the possibility of seriously damaging the prosecution's case, however, the holding in *Mitchell* appears the better resolution of the conflict between the defendant's rights and the congressional committee's powers.

## I. The Right to Inspect Congressional Testimony

Criminal defendants in federal court have enjoyed the general right to examine relevant pretrial statements by prosecution witnesses since 1957, when the Supreme Court decided *Jencks v. United States*.[5] Two key prosecution witnesses in *Jencks* had given pretrial statements to the FBI about a labor union official's alleged communist activities. During cross-examination of these prosecution witnesses, the defense moved for production of their statements on the grounds that they were necessary for impeachment purposes. Reversing the trial court's ruling, the Supreme Court held that the defense was entitled to the earlier statements without a preliminary showing of conflict between the statements and the trial testimony of the witnesses. The right to inspect pretrial statements by prosecution witnesses, recognized in *Jencks*, is now protected by federal statute. Moreover, the right has strong constitutional and policy underpinnings. On balance, none of these sources —statute, Constitution, or policy—excepts congressional testimony from the defendant's general right to inspect.

3. United States v. Mitchell, Decision on the Jencks Act Motion (U.S. Army, Oct. 15, 1970). Colonel Robinson announced this decision at a public session of the trial. Only two of the other My Lai trials involved similar situations, and both followed the *Calley* ruling. In the court-martial of Captain Ernest Medina, the military judge denied a defense motion for production of such statements. Conversation with F. Lee Bailey, defense counsel, October 3, 1971. The military judge in the case against Colonel Oran Henderson also denied the same type of defense motion. Letter from Henry B. Rothblatt, defense counsel, to the author, September 7, 1971, on file with the *Yale Law Journal*.

4. *See* Rosenberg v. United States, 360 U.S. 367 (1959); Lewis v. United States, 340 F.2d 678 (8th Cir. 1965); People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961). *But see* Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964).

5. 353 U.S. 657 (1957).

## A. *The Jencks Act*

### 1. *Text*

Congress responded to the *Jencks* decision by quickly passing a law commonly called the Jencks Act.[6] The law provides, in relevant part:

> 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 . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.[7]

6. Jencks Act, 18 U.S.C. § 3500 (1964), *as amended*, 18 U.S.C.A. § 3500 (Supp. 1971). The statute clearly applies to military trials since it governs "any criminal prosecution brought by the United States." *Id.* at § 3500(a). *See* United States v. Augenblick, 393 U.S. 348 (1969); United States v. Wolbert, 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963); United States v. Combs, 28 C.M.R. 866 (AFCMR 1959). In fact, courts-martial have figured prominently in interpreting the Jencks Act. *See, e.g.*, Augenblick v. United States, 377 F.2d 586 (Ct. Cl., 1967), *rev'd on other grounds*, 393 U.S. 348 (1969); Levy v. Parker, 316 F. Supp. 473 (M.D. Pa. 1970).

7. 18 U.S.C. § 3500(b) (1964). As recently amended, the full text of the Jencks Act provides:

"(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 and use.

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

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

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

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

"(2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and

Although the Act does not explicitly refer to congressional testimony, its broad wording would seem to apply to such testimony. It requires production of "*any statement*" of the witness, without reference to the time, place, or nature of the statement. Indeed, subsection (e) defines a statement simply as "a written statement made by said witness" or a "recording, or a transcription . . . of an oral statement made by said witness."[8] Moreover the statement need not be made to or held by the prosecution;[9] any statement held by any part of the United States government is covered.[10] The extreme breadth of the statute would thus seem to justify the *Mitchell* ruling that transcripts of oral testimony before a congressional subcommittee fall within its scope—unless Congress intended to exempt itself.

2. *Legislative History*

But behind the all-encompassing text of the Jencks Act lies little hint of an implied exemption for congressional committee testimony. There is only one remark in the entire legislative history specifically considering the issue, and that remark supports the view that such testimony is within the statute's reach. While discussing a proposed amendment, Senator Hruska complained about the use of the term "records" in the definition of the statements to be made available by the statute:

> [T]he language now contained in the bill is much too broad. . . . The statements of the witness to investigators for congressional committees, for example, would be included in the definition of "records." Therefore, a witness in a case could come before one of the congressional committees, and testify on certain aspects of the case, and his testimony would be included in the records to which the defendant would be entitled, upon which to base impeachment of the witness. That right might even extend to an executive session of a congressional committee.[11]

The conference committee subsequently changed the wording from

recorded contemporaneously with the making of such oral statement; or

"(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury." 18 U.S.C. § 3500 (1964), *as amended*, 18 U.S.C.A. § 3500 (Supp. 1971).

8. 18 U.S.C.A. §§ 3500(e)(1), (2) (Supp. 1971). Since the Subcommittee transcribed witness testimony verbatim, the statutory loophole for summaries is irrelevant. Of course, Congress could avoid the entire Jencks Act problem by using summaries instead of verbatim transcripts.

9. *Compare* CONN. GEN. STAT. REV. § 54-86b (Supp. 1969) ("in the possession of the prosecution").

10. 18 U.S.C. § 3500(b) (1964); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).

11. 103 CONG. REC. 15931 (1957). The My Lai Subcommittee held its hearings in executive session.

"records" to "recordings," but the conference report does not mention the problem of congressional testimony.[12] Since the new term equally can be read to cover statements to Congress, no intention to exempt such statements can be properly inferred.[13]

There is no indication in the rest of the legislative history that Congress intended a contrary interpretation. Congress' original intent in passing the Jencks Act is itself unclear, since two seemingly competing purposes were involved. On the one hand, many congressmen were interested in "reaffirming" the *Jencks* decision.[14] On the other hand, some legislators approved the law because they hoped to correct the "extravagant" subsequent lower court interpretations of that decision.[15] Since no case had yet dealt with the production of congressional testimony, however, neither view of the purpose of the Act is inconsistent with a statutory construction providing for production of such information.

The only suggestion of a congressional committee exemption arises from the two limitations imposed in the original statute. First, the legislative history establishes that Congress plainly intended to except grand jury testimony from the statute's coverage.[16] The policies supporting nondisclosure of grand jury testimony arguably suggest a like exemption for congressional committee testimony given in secret ses-

12. H.R. REP. No. 1271, 85th Cong., 1st Sess. 3 (1957) (Conference Report).

13. The change was apparently a result of an extended congressional debate about the exactness of reproduction of a statement to be required. The new wording was intended to limit the staute to substantially verbatim reproductions, made at or close to the time of the statement and to exclude partial notes or 'records' made later. *See* Palermo v. United States, 360 U.S. 343, 358-60 (1959) (Appendix B), for a summary of the relevant legislative history and citations.

14. S. REP. No. 981, 85th Cong., 1st Sess. 3 (1957); H. R. REP. No. 700, 85th Cong., 1st Sess. 3-4 (1957). A major sponsor of the bill in the Senate said one of its purposes was "to preserve due process of law for defendants in criminal cases." 103 CONG. REC. 16487 (1957) (remarks of Senator O'Mahoney). *See generally* 103 CONG. REC. 15928, 15933, 16488-89, 16738 (1957). Justice Brennan, the author of the *Jencks* decision, reads the legislative history as reaffirming the rights implicit in his original opinion. Campbell v. United States, 373 U.S. 487, 496 n.12 (1963); Palermo v. United States, 360 U.S. 343, 361, 365 (1959) (concurring); Rosenberg v. United States, 360 U.S. 367, 375 (1959) (dissenting).

15. Palermo v. United States, 360 U.S. 343, 346-47 (1959). *See also* Note, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674, 676 (1958). As one court of appeals recently put it: "Despite frequent judicial reminders, counsel cannot seem to understand that rather than being the Magna Carta of the right to production, the Jencks Act is a restriction on it in some respects." United States v. Dioguardi, 428 F.2d 1033, 1038 (2d Cir. 1970).

16. S. REP. No. 981, 85th Cong., 1st Sess. 3 (1957); 103 CONG. REC. 15933 (1957) (remarks of Senator Clark). On the basis of this legislative history, the Supreme Court upheld the grand jury exemption in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398 (1959). Rule 6(e) of the Federal Rules of Criminal Procedure covers discovery of grand jury testimony while Rule 16(b) specifically excludes statements within the scope of the Jencks Act from its discovery provisions. FED. R. CRIM. P. 6(e), 16(b).

sion.[17] Second, the statute as first enacted reached only statements made to "an agent of the government,"[18] which meant a "Federal law officer."[19] This explicit restriction, coupled with the implied grand jury exemption, suggests that Congress originally intended the Jencks Act to apply only to statements made to the executive branch.[20]

But in the Organized Crime Control Act of 1970, Congress explicitly eliminated both these limitations; it made grand jury statements producible under the Jencks Act[21] and excised the words "to an agent of the government" from the Act.[22] Thus, whatever Congress may have originally intended, the amendments make the present purpose of the

17. For the traditional reasons justifying secrecy, see Pittsburgh Plate Glass Co. v. United States, 360 U.S. at 405 (Brennan, J., dissenting). For both grand juries and congressional committees, secrecy prevents an accused from escaping before he is indicted and arrested or from tampering with the witnesses against him. It prevents disclosure of derogatory information about an accused who has not been indicted. It encourages complainants and witnesses to come before the investigatory body and speak freely without fear that their testimony will be made public, thereby subjecting them to possible discomfort or retaliation. Finally, secrecy encourages legislators as well as grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.

18. This limiting language appeared twice in the original act, in subsections (a) and (e). Jencks Act, Pub. L. No. 85-269, 71 Stat. 595 (1957).

19. S. REP. No. 981, 85th Cong., 1st Sess. 1 (1957). *See also* United States v. Hilbrich, 232 F. Supp. 111, 126 (N.D. Ill. 1964), *aff'd*, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965).

20. Although the grand jury helps the executive decide whether to prosecute, it remains part of the judiciary. Brown v. United States, 359 U.S. 41 (1959); Cobbledick v. United States, 309 U.S. 323 (1940).

21. 18 U.S.C.A. § 3500(e)(3) (Supp. 1971). Even before the amendment, courts had eroded the grand jury exception. When first holding grand jury testimony outside the scope of the Jencks Act, the Supreme Court said judges should pierce the shroud of secrecy if a defendant showed "particularized need." Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). But courts had drained the "particularized need" standard so fully that to obtain grand jury testimony of a government witness a defendant had only to claim that he needed it for cross-examination purposes. *See, e.g.*, Dennis v. United States, 384 U.S. 855 (1966); Harris v. United States, 433 F.2d 1127 (D.C. Cir. 1970); United States v. Amabile, 395 F.2d 47, 53 (7th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); Cargill v. United States, 381 F.2d 849 (10th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968); Schlinsky v. United States, 379 F.2d 735 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967); United States v. Youngblood, 379 F.2d 365, 370 (2d Cir. 1967). Justice Brennan thought this development inevitable. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 403-10 (1959) (dissenting).

22. 18 U.S.C.A. § 3500(a) (Supp. 1971). With such clear implications, these legislative developments should have affected the *Mitchell* and *Calley* trials. But in *Mitchell*, Colonel Robinson held the Subcommittee testimony covered by the Jencks Act without even referring to the changes wrought by the new law. By sheer coincidence, he decided the Jencks Act motion on October 15, 1970, the very day that President Nixon signed the Organized Crime Control Act into law. The judge in the *Calley* case, Colonel Kennedy, had more time to ponder the amendments. But he must have thought them insubstantial, for he held the Jencks Act inapplicable. His view seems to have been shared by Rep. F. Edward Hebert, chairman of the My Lai Subcommittee, who stated in a letter to the prosecutor in the *Henderson* case, *see* note 3 *supra*, on November 24, 1970, more than a month after passage of the new Act, that "the Jencks Act was not intended to apply to records of the Legislative Branch." Letter on file with the *Yale Law Journal*.

Jencks Act clear: to provide the defense with all pretrial statements necessary for full and meaningful cross-examination.

3. *Case Law*

The relevant case law similarly provides no definitive interpretation. Before the My Lai trials, no court directly decided whether the Jencks Act reaches congressional testimony and only three cases touched on the issue at all. In 1958, the defendants in *United States v. Lev*[23] appealed a trial court ruling denying them inspection of a statement made by a government witness to agents of a Senate investigating committee. The court studied the alleged statement *in camera* but found it to be only a summary, not a verbatim transcript. Since summaries are not "statements" within the meaning of the Jencks Act,[24] the Second Circuit held that the trial court had no duty to order inspection.

Four years later, the First Circuit came to a similar conclusion in *Harney v. United States*,[25] where the issue was whether the trial court had erred in refusing to direct the government to produce a report of a subcommittee of the House Public Works Committee. Although representatives of the so-called Blatnik Committee had in fact interviewed a prosecution witness six or eight times, they had made no transcript of the interviews and had only prepared a three-page summary. The Court of Appeals agreed with the trial court in denying discovery because the item sought was not a "statement" under the Jencks Act.

Both of these courts avoided the more difficult question of whether statements to congressional investigators were covered by the Jencks Act by deciding the cases on the narrower ground of whether the document in question was a "statement." Although neither court mentioned the Jencks Act question, both decisions can be read to imply that their rulings would have gone the other way had the documents been "statements." The judge in *Mitchell* obviously read *Harney* this way since he explicitly relied on that case in holding the statements to the Subcommittee covered by the Jencks Act.[26]

In *United States v. Tane*,[27] the court made clear its assumption that the Jencks Act covers congressional testimony. In that case, a labor union official indicted for bribery moved before trial to examine testi-

23. 258 F.2d 9 (2d Cir. 1958), *aff'd by an equally divided Court*, 360 U.S. 470 (1959).
24. Palermo v. United States, 360 U.S. 343 (1959).
25. 306 F.2d 523 (1st Cir.), *cert. denied*, 371 U.S. 911 (1962).
26. United States v. Mitchell, Decision on the Jencks Act Motion (U.S. Army, Oct. 15, 1970).
27. 29 F.R.D. 131 (E.D.N.Y. 1962).

mony given by the sole complaining witness to the McClellan Committee of the Senate. The court refused to grant the motion because:

> The request for statements previously made by Pace and transcripts of his testimony before other grand juries and the said Senate Committee is premature.[28]

It then immediately added:

> When and if Pace shall have testified at the trial of the indictment herein demand may be made of the Government for production of any statements made by him, or any transcripts of his testimony which it may have in its possession or control. Section 3500(a) of Title 18, U.S. Code.[29]

Although the recitation of the Jencks Act right directly after mention of the Senate Committee testimony indicates that the court thought the Act applied to such testimony, that issue was never explicitly decided since the case did not reach trial.[30]

The case law, then, like the legislative history, is far from conclusive. But it tends to support the interpretation indicated by the broad wording of the Jencks Act: that congressional committee testimony falls within the statute's ambit.

B. *Constitutional Grounds*

The Jencks Act, however, is not the only source of a defendant's right to inspect government-held statements of prosecution witnesses. The Supreme Court first held in *Palermo v. United States*[31] that the Jencks Act provided the exclusive means for compelling such inspection.[32] It based its decision on the assumption that the Court's general power to prescribe procedures for the administration of justice in federal courts, which it had employed in the *Jencks* case, existed only in the absence of a relevant act of Congress.[33] Concurring in *Palermo*, four of the five Justices who subscribed to the majority opinion in *Jencks*—including its author—agreed that *Jencks* produced no explicit constitutional holding, but pointed out that "it would be idle to say that the commands of the Constitution were not close to the surface

28. *Id.* at 133.
29. *Id.*
30. The indictment was dismissed because Pace's testimony was the fruit of an unlawful wiretap. United States v. Tane, 329 F.2d 848 (2d Cir. 1964) (affirming unreported trial court decision dismissing the indictment).
31. 360 U.S. 343 (1959).
32. *Id.* at 351. *See also* Rosenberg v. United States, 360 U.S. 367, 369 (1959).
33. 360 U.S. 343, 353 n.11 (1959).

of the decision."[34] They further noted that the Jencks Act "cannot be said to be exclusive where the Constitution demands production."[35] Finally, in 1969, a unanimous Court agreed that denying production of Jencks Act-type statements might, in some circumstances, violate the Constitution.[36]

1. *Confrontation*

To deny production of inconsistent statements by prosecution witnesses would seem an invasion of the Sixth Amendment right to confront opposing witnesses.[37] Although the rights of confrontation and cross-examination may not be co-extensive,[38] the Confrontation Clause does guarantee the right to "full and effective" cross-examination of available witnesses.[39] For cross-examination to be "full and effective," a defendant must have an opportunity for "testing the recollection and sifting the conscience of the witness."[40] To insure this opportunity, courts generally allow great latitude for cross-examination regarding accuracy and credibility.[41] Cross-examination as to prior inconsistent statements provides an essential aid for the trier of fact to determine the truth of a witness' testimony.[42]

The Supreme Court has repeatedly emphasized the value and importance of placing prior inconsistent statements before the trier of fact. In 1970, the Court held in *California v. Green*[43] that use of prior inconsistent statements of a prosecution witness as part of the prosecution's case in chief does not violate the Confrontation Clause. The Court saw little constitutional difference between permitting prior inconsistent statements to be used for substantive purposes and permitting them to be used for impeachment purposes.[44] In either case:

34. *Id.* at 362-63 (Brennan, J. concurring). Chief Justice Warren and Justices Black and Douglas joined Justice Brennan.
35. *Id.* at 363.
36. Augenblick v. United States, 393 U.S. 348, 356 (1969). *Accord*, Levy v. Parker, 316 F. Supp. 473, 479 (M.D. Pa. 1970); United States v. Gleason, 265 F. Supp. 880, 887 (S.D.N.Y. 1967).
37. U.S. CONST. amend. VI.
38. Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970).
39. Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Smith v. Illinois, 390 U.S. 129 (1968); Pointer v. Texas, 380 U.S. 400 (1965); United States v. Norman, 402 F.2d 73, 76 (9th Cir. 1968), *cert. denied*, 397 U.S. 938 (1970).
40. Mattox v. United States, 156 U.S. 237, 242 (1895).
41. *Cf.* Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965).
42. 3 WHARTON, CRIMINAL EVIDENCE § 871 (11th ed. 1935). "Inasmuch as the jurors are the sole judges of the credibility of the witness, any matter that will properly assist the jurors in forming a correct judgment from all the facts ought to be shown in evidence." *Id.* (footnote omitted).
43. 399 U.S. 149 (1970).
44. *Id.* at 167-68.

> The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant believing either story.[45]

The Court again indicated the importance of prior inconsistent statements to effective confrontation of a witness when it recently held admissible, for purposes of impeachment, statements by a defendant that would be inadmissible as substantive evidence under the Fifth Amendment.[46] It would seem implied in this holding that there is a countervailing constitutional principle of confrontation that justifies the admission of otherwise defective evidence.

The right to introduce inconsistent statements is meaningless, of course, if no such statements are available. A defense attorney cannot confront prosecution witnesses with their inconsistencies unless he knows what they are. Since the right of confrontation is intended to guarantee defendants the opportunity for a "full and effective cross-examination" of government witnesses, production of the witnesses' prior inconsistent statements is necessary.[47] Without such inspection, the defendant might never be able to discover inconsistencies and attack a witness' credibility.[48] He would thus be deprived of the oppor-

45. *Id.* at 160.

46. Harris v. New York, 401 U.S. 222 (1971).

47. It should be noted, however, that the defendant's right to receive the prior *inconsistent* statements of prosecution witnesses can only be fully safeguarded by granting the defendant inspection of *all* the pretrial statements by such witnesses. Jencks v. United States, 353 U.S. 657 (1957); People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961). To leave to the prosecutor the determination of whether a statement is useful for impeachment would be to rely on the prosecutor's good faith, with judicial review limited to the few instances in which a defendant would later discover that an inconsistent statement had been withheld. Moreover, a prosecutor could not, even in good faith, decide *which* inconsistencies would be helpful to the defendant for impeachment without knowledge of the details of the defense case. Indeed, outright contradictions, which are most easily identifiable, are only one kind of useful inconsistency. Omissions, additions or changes in emphasis are also valuable for impeaching a government witness. Jencks v. United States, 353 U.S. at 667; People v. Rosario, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450. Prosecutors are unlikely to have this knowledge, at least until the defense has presented its case. But at that late stage, the prosecution witnesses will have been called and their testimony will have been presented, unimpeached, to the jury.

48. In most cases, the defendant will have some basis, without seeing the prior statements, for challenging the *accuracy* of the witness' statement of the facts. However, if the defendant was not present at the time of the events in question, if the witness has unique access to the information, or if the defendant had no relation whatsoever to the events (*i.e.*, is innocent), prior statements by the witness may provide the only aid by which to clarify and pinpoint the witness's testimony. In such cases—which obviously

tunity for full cross-examination and of his constitutional right to confront witnesses against him.[49]

2. *Compulsory Process*

A somewhat narrower right to examine the prior inconsistent statements of prosecution witnesses resides in the Sixth Amendment right to compulsory process. In contrast to the broadly worded confrontation right, compulsory process attaches only "for obtaining *witnesses* in [the defendant's] favor."[50] "Witness," however, does not usually connote "statement," and the presence of the witness in court makes it difficult for a defendant to claim he could not "obtain" the witness. Such a narrow interpretation, though, has two major weaknesses.

First, defense counsel needs prior inconsistent statements in order to turn a prosecution witness into a witness favorable to the defense. In *Washington v. Texas*,[51] the Supreme Court held that the right to compulsory process is, at its core, the right to tell the defendant's version of the events. In many cases, the prior statements of a government witness will contain exculpatory information or will relate the facts in a manner similar to the defendant's description of the events at issue. Use of these statements on cross-examination may force the witness to re-adopt his earlier statement and will in any case show the jury that at least at one time this witness was favorable to the defendant. Inspection of inconsistent statements is, therefore, necessary to determine whether the witness is favorable to the defense and to obtain his favorable testimony. Without the right of inspection, the right to produce favorable witnesses is a hollow promise.

Second, authorities going far back in American history extend a

cannot be readily identified by a judge—the inspection of a witness' prior inconsistent statements is also essential for a meaningful test of the witness' recollection.

49. *See* Palermo v. United States, 360 U.S. 343, 362 (1959) (Brennan, J. concurring); United States v. Missler, 414 F.2d 1293, 1303 (4th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970) (denial of Jencks Act statements may be violation of right of confrontation). *See also* People v. Neiman, 30 Ill. 2d 393, 197 N.E.2d 8 (1964). If taken to its extreme, the argument advanced in the text would require disclosure of all information known to the prosecution that might be useful to the defendant in cross-examining a witness as to the events in question or in impeaching his credibility, *i.e.*, full discovery of the prosecution's entire file. However, the emphasis of the Confrontation Clause is on the witness, not on the facts of the case. To cross-examine a particular witness effectively, it is *essential* to have the prior versions of the witness' testimony and any information that fundamentally undermines the witness' credibility (*e.g.*, a record of a criminal conviction or evidence of insanity). Although other information about the events in question would no doubt be *helpful* in challenging a witness' testimony, it is not *necessary* to the cross-examination of that particular witness. Some investigation of the facts of a case is still a responsibility of the defendant.

50. U.S. CONST. amend. VI (emphasis added).

51. 388 U.S. 14 (1967).

criminal accused's right to compulsory process to documentary as well as oral evidence. While on circuit, Chief Justice Marshall held that Aaron Burr had the right to examine certain letters that the government claimed were privileged.[52] More modern cases have continued in that tradition.[53] According to these authorities, "witness" includes not only a person but also all his statements *bearing witness* to the events. If they exculpate the accused or accord with his version of the events, the statements are evidence in the defendant's favor and thus subject to compulsory process.

Under either theory of compulsory process, a defendant has the right to inspect all prior statements of government witnesses that are favorable to him,[54] in that they either exonerate him or substantiate his story.[55]

3. *Due Process*

Wholly apart from the specific Sixth Amendment rights, due process imposes a duty on the government to disclose some statements by prosecution witnesses. Courts infer this duty primarily from the Supreme Court's 1963 decision in *Brady v. Maryland*.[56] In that case, the attorney representing one defendant against a murder charge asked the prosecution to disclose a co-defendant's pretrial statements. The lawyer saw all except one statement, but in that one the co-defendant admitted doing the actual shooting. Agreeing with the Maryland courts, the Supreme Court said:

> [S]uppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution.[57]

52. United States v. Burr, 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807).

53. Wilson v. United States, 221 U.S. 361, 372 (1911); United States v. Schneiderman, 106 F. Supp. 731, 735 (S.D. Cal. 1952). *See also* 8 WIGMORE, EVIDENCE §§ 2191, 2193, 2200 (3d ed. 1940); 3 WHARTON, CRIMINAL EVIDENCE §§ 1105, 1106 (11th ed. 1935).

54. Without specifying—or directly deciding the issue—the Supreme Court recently noted that a Jencks Act violation may sometimes trench upon the right to compulsory process. United States v. Augenblick, 393 U.S. 348, 356 (1969).

55. Statements that merely contradict a government witness' testimony are not discoverable because they are not affirmatively "favorable" to the defendant's case. In this respect, the right to inspection grounded in the right to compulsory process is narrower than that supported by the Confrontation Clause.

As a practical matter, however, effectuation of the compulsory process right, as of the confrontation right, would require production of *all* statements of government witnesses, since only the defense is able to judge whether a pretrial statement by a government witness contains material that corroborates the defendant's version of the facts and is therefore "favorable." *See* note 47 *supra*.

56. 373 U.S. 83 (1963).

57. *Id.* at 87.

Insofar as pretrial statements by prosecution witnesses form such evidence, due process requires them to be produced.[58]

In its narrowest sense, "evidence favorable to an accused" means evidence that is favorable on its face—*i.e.*, directly exculpatory or mitigating evidence. Prosecution witnesses may be the source of such statements more frequently than one initially might imagine.[59] A defendant's friend might well want to protect the defendant during the early stages of investigation. A witness-accomplice might seek to protect himself by providing an alibi for both the defendant and himself. Or, a witness might receive threats that would induce him to lie to the investigating authorities. In the ordinary case, subsequent questions, second thoughts, or promises of immunity or protection might persuade such witnesses to tell a story at trial that damns the defendant. In the My Lai cases, a soldier who witnessed or participated in a massacre might, at first, like other accomplices, have difficulty recalling the exact facts of the incident or might describe the defendant as a nonparticipant. But when he eventually finds out that the government cannot try him by court-martial or in federal district court,[60] a discharged soldier may take revenge on a former military superior by remembering the incident and the defendant's role in it more clearly. To satisfy personal animosity, the former soldier may even exaggerate the defendant's role.[61] For any of several motives, then, a prosecution

58. Although the text, like most courts that have considered the issue, approaches the due process claim in terms of the holding in *Brady*, the Supreme Court has recently indicated another, though less carefully articulated analysis of the issue. In United States v. Augenblick, 393 U.S. 348 (1969), the Court, in considering a due process challenge to a court-martial conviction based on the government's failure to produce certain tapes and the trial judge's refusal to order disclosure of certain notes, stated that:

> [A]part from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial [occurs] only where the barriers or safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest. *Id.* at 356.

Mooney v. Hoolohan, 294 U.S. 103 (1934), the forerunner of *Brady*, indicates that failure to disclose certain pretrial statements of prosecution witnesses may make a trial into such an impermissible "spectacle." There the Court said that when the government gets one story from a witness, then puts him on the stand and permits or leads him to tell a different story without revealing the first version, it has afforded the defendant only a "pretense of a trial." *Id.* at 112. Even if a prior statement would not make an outright lie of the courtroom testimony, its suppression makes the witness' testimony appear to be more credible than it is. Failure to disclose inconsistent pretrial statements would prevent a "disciplined contest" over the witness' testimony and the facts of the case and thus would appear to render the trial constitutionally unfair. *See* Giles v. Maryland, 386 U.S. 66, 98, 101 (1967) (Fortas, J., concurring); Virgin Islands v. Lovell, 410 F.2d 807, 812 (3d Cir.) (Freedman, J., dissenting), *cert. denied*, 396 U.S. 964 (1969).

59. United States v. Gleason, 265 F. Supp. 880, 887 (S.D.N.Y. 1967). *See also* United States *ex rel.* Meers v. Williams, 326 F.2d 135 (2d Cir. 1964).

60. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955). Discharged soldiers, however, could probably be tried by a military commission for violating the law of war. *Ex parte* Quirin, 317 U.S. 1 (1942).

61. "Should he harbor any ill will against the defendant for real or imagined wrongs,

witness might give an exculpatory pretrial statement producible under *Brady*.

But courts have realized that in order to satisfy fully the mandate of due process, the "favorable evidence" discoverable under *Brady* must be given a broader interpretation. Some have suggested that "favorable evidence" is any evidence that might be useful to the defendant.[62] This view, however, would require practically complete disclosure of the prosecution's file and has never been accepted by the Supreme Court that wrote *Brady*.[63]

Several courts, though, have recognized an intermediate position that can be said to require disclosure of any evidence favorable to the defendant *in the context of the other evidence*. Primarily this means evidence that is useful to impeach or discredit damaging witnesses and testimony, although it may not be exculpatory on its face.[64] In one case, a court of appeals found a denial of due process when the prosecutor refused to produce information bearing on the mental competence of a witness and repeatedly opposed defense efforts to put his mental condition in issue.[65] Indeed, in a case decided before *Brady*, the Supreme Court unanimously held a prosecutor's failure to correct testimony that he knew to be false to be a violation of due process, even though he had not solicited the testimony and it pertained only to the credibility of the witness.[66] This view, that due process demands disclosure of evidence possibly tending to alter the jury's impression of evidence or witnesses, is, indeed, suggested by the facts of *Brady*. The statement required to be produced in *Brady*, a pretrial statement of an accomplice, would not have cleared the defendant; he would still have been guilty of murder. But the Court remanded the case anyway, because the statement might have influenced the jury in assessing punishment.

Prior inconsistent statements of government witnesses clearly are

knowledge that he himself cannot be prosecuted might cause him to be more concerned with redress than with justice." SUBCOMMITTEE INVESTIGATION, *supra* note 1, at 48.

62. Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J. concurring) ("specific, concrete evidence . . . which may exonerate the defendant or be of material importance to the defense"); United States v. Gleason, 265 F. Supp. 880, 884 (S.D.N.Y. 1967) ("[f]or example, where the prosecutor knows of witnesses potentially useful to the defense"); People v. Preston, 13 Misc. 2d 802, 806, 176 N.Y.S.2d 542, 549 (Kings County Court 1958) ("material testimony which could cause a different verdict").

63. Giles v. Maryland, 386 U.S. 66 (1967).

64. United States v. Ball, 49 F.R.D. 153, 158 (E.D. Wis. 1969).

65. Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961), *subsequent appeal*, Wiman v. Powell, 293 F.2d 605 (5th Cir. 1961).

66. Napue v. Illinois, 360 U.S. 264 (1959). The evidence related to the witness' interest in testifying as he did. *Accord*, People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956).

"favorable evidence" in this sense, since they may serve to impeach the credibility of the witness in the jury's eyes or impress upon the jury the defendant's version of the facts. When placed in the context of a coherent, incriminating story told by the witness on the stand, inconsistent statements can be destructive to the prosecution's case and are therefore favorable to the defense. *Brady*, both on its facts and its underlying principle, requires the production of such statements.[67]

### C. *The Goals of a Criminal Trial*

Many of the considerations that underlie the constitutional right to production of prior statements of government witnesses also support a claim for such discovery addressed to a court's supervisory authority to implement the professed goals of a criminal trial and to insure the proper administration of justice.[68] Affording defendants the right to inspect statements given by prosecution witnesses to Congress follows from two major aims of our judicial system—ascertaining the truth and maintaining fair and balanced procedures.

#### 1. *The Pursuit of Truth at Trial*

Disclosure of congressional testimony furthers a criminal trial's quest

67. Although *Brady* itself involved a statement, the logic of its holding probably cannot be limited to pretrial statements of government witnesses. The due process vice is the prosecutorial suppression of any relevant material favorable to the defendant. Under the "favorable in the context of the other evidence" formulation, moreover, *Brady* would appear to lead to full criminal discovery, since only the defense would be in a position to evaluate the evidence in the context of the other evidence in its possession. *See* notes 47, 55 *supra*. Courts have not taken *Brady* this far—the normal treatment of *Brady* motions leaves production to the prosecutor's good faith. *See e.g.*, United States v. Ball, 49 F.R.D. 153, 158 (E.D. Wis. 1969); United States v. Cobb, 271 F. Supp. 159, 164 (S.D.N.Y. 1967). Yet this remedy seems inadequate. The facts of *Brady* were bound up in suppression by the prosecutor, not good faith. It would seem odd that effectuation of a right designed to circumvent the whim of the prosecutor is nonetheless entrusted to the prosecutor's good faith.

An intermediate position, suggested by one court, United States v. Gleason, 265 F. Supp. 880, 885 (S.D.N.Y. 1967), would be to order the prosecutor to produce for the court, *in camera*, all of its evidence. The court might then turn over to the defendant all evidence that it finds might arguably be favorable in the context of the other evidence. Although this solution would provide defendants with a more meaningful *Brady* right than does the present procedure, it has several serious shortcomings. Most significant is the fact that a court, with little or no knowledge of the defendant's case, would be unable to determine, as well as the defense attorney could, the value of the evidence to the defense. Yet any conscientious attempt to do so would require an enormous expenditure of judicial time. Moreover, the judicial involvement thereby demanded at the discovery stage might create the appearance of judicial prejudice and thus require a new judge at trial, with all the additional loss of time and effort attendant upon such a change.

Should a court find both the current practice and this "intermediate" procedure unsatisfactory, the due process right enunciated in *Brady* would have to be vindicated by full criminal discovery.

68. "Issues of the obligatory disclosure of information ultimately raise fundamental questions of the proper nature and characteristics of the criminal trial." Giles v. Maryland, 386 U.S. 66, 119 (1967) (Harlan, J., dissenting).

for truth by informing the parties and, in turn, the court and the jury of all relevant material.[69] The Supreme Court considers the discovery of truth at trial to be of such fundamental importance that it has applied new constitutional rules retroactively when they affected the integrity of the truth determining process.[70] Naturally, the typical imbalance in investigative resources will leave much of the relevant material in the hands of the government.[71] It should make no difference if some government employee other than the prosecutor has actual possession of the material. So long as the *government* possesses the material, it ought to be disclosed.[72] Likewise, restricting disclosure to only those instances in which the prosecution has the unfair advantage of having already examined the material may seriously hamper the search for truth.[73] Unless *all* relevant material is disclosed, regardless of which government employee now has it or has seen it, a court may never know what in fact happened.[74]

Although the disclosure of prior statements naturally softens somewhat the adversary aspect of a criminal trial,[75] it actually invigorates that process insofar as it serves as a means of arriving at the truth. Complicated cases, like those arising from the My Lai incident, depend,

69. Bryant v. United States, 439 F.2d 642 (D.C. Cir. 1971). In *Mitchell*, the military judge said the testimony given to the Subcommittee was "needed by both the defense and prosecution as well as this court." United States v. Mitchell, Court Order No. 5 (U.S. Army, Oct. 19, 1970), printed in 116 CONG. REC. H10357 (daily ed. Nov. 17, 1970). "[I]t is especially important that the defense, the judge, and the jury should have the assurance that the doors that may lead to truth have been unlocked." Dennis v. United States, 384 U.S. 855, 873 (1966).

70. *See generally* United States v. United States Coin and Currency, 401 U.S. 715 (1971); Williams v. United States, 401 U.S. 646 (1971); Desist v. United States, 394 U.S. 244 (1969); Stovall v. Denno, 388 U.S. 293, 298 (1967); Johnson v. New Jersey, 384 U.S. 719, 729 (1966).

71. United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); State v. Cook, 43 N.J. 560, 569, 206 A.2d 359, 364 (1965).

72. 18 U.S.C.A. § 3500(a) (Supp. 1971); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); Augenblick v. United States, 377 F.2d 586, 597 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969).

73. *See* Campbell v. United States, 364 U.S. 85, 96 (1961). "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." Dennis v. United States, 384 U.S. 855, 873 (1966).

74. The logic of this position would, of course, lead to full criminal discovery, on the theory that the adversary process is best geared to produce truth when both sides know as much as possible about the case. But the argument here is not that all relevant material must be disclosed to the defense as a matter of right, but simply that the broad interest in discovering the truth suggests substantial defense discovery. It is sufficient for present purposes to note that the fact-finding process will be enhanced by permitting production of pretrial statements of government witnesses made before congressional committees.

75. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. L.Q. 279, 291. The Supreme Court recently said that the adversary system must sometimes be subordinated to other aims: "The adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right to conceal their cards until played." Williams v. Florida, 399 U.S. 78, 82 (1970).

even more than the usual case, on the efforts of opposing parties to elicit the facts.[76] In some circumstances, even prior judicial screening of producible evidence is precluded, lest the decision as to what is material rest with a disinterested third party rather than with a personally involved defendant or his attorney.[77] Although allowing for such screening at the government's request,[78] the Jencks Act, by granting broad disclosure to the opposing party, heavily underscores the importance of cross-examination in the pursuit of truth. Indeed, cross-examination has been called the "greatest legal engine ever developed for the discovery of truth"[79] because of its unique potential for exploring the accuracy and credibility of witnesses.

Prior inconsistent statements are common tools for impeaching a witness' credibility on cross-examination. Obviously, the number of inconsistent statements—and not merely the inconsistencies themselves—may have an impact on those judging credibility. This possibility leaves no room for a rule denying disclosure where the statements sought would be only cumulative.[80] Prior inconsistent statements take on even more value when the trial occurs long after the alleged crime.[81] The Supreme Court so highly values cross-examination as a means of truth-testing that it recently permitted an illegally obtained confession to be used for impeachment purposes.[82] Such an aid to the accuracy of the fact-

76. *Alderman v. United States*, 394 U.S. 165, 183-84 (1969).

77. *Id.*; Rosenberg v. United States, 360 U.S. 367, 374-75 (1959) (Brennan, J., dissenting); Jencks v. United States, 353 U.S. 657, 669 (1957). "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." Dennis v. United States, 384 U.S. 855, 874-75 (1966).

78. 18 U.S.C. § 3500(c) (1964).

79. 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940), quoted in California v. Green, 399 U.S. 149, 158 (1969).

80. *Contra*, Virgin Islands v. Lovell, 410 F.2d 307 (3d Cir.), *cert. denied*, 396 U.S. 964 (1969). Former Justice Fortas has said that convictions ought not to be reversed "on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court" was not disclosed. Giles v. Maryland, 386 U.S. 66, 98 (1967) (concurring). But he himself pointed out the difference between grounds for reversal and grounds for disclosure. *Id.* at 101. Moreover, in neither case would the cumulative rule apply to prior inconsistent statements. The statements have value not only for their facts but for their impeaching value, their ability to make a liar out of the witness. Thus the fact that the statement was made, quite apart from information gleaned from the statement, makes it useful to the defendant.

81. Dennis v. United States, 384 U.S. 855, 872 (1966); Jencks v. United States, 353 U.S. 657, 667 (1957). The events at My Lai occurred on March 16, 1968. The Subcommittee held hearings two years later and the trials are still going on more than three years later.

82. Harris v. New York, 401 U.S. 222 (1971). "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." *Id.* at 225. The Court cited Dennis v. United States, 384 U.S. 855 (1966), a case in

finding process works, of course, as well for the defense as for the prosecution.[83] Thus, defense inspection of pretrial statements by government witnesses is necessary to insure both the disclosure of all material relevant to the discovery of truth[84] and the use of that material in the manner thought most likely to promote that discovery.

2. *Fair Trial Procedures*

In addition to the integrity of the fact-finding itself, our system has traditionally been concerned with the integrity of the procedures used to ascertain the truth. As the Supreme Court has noted, the Jencks Act reflects "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[85] Indeed, the impropriety of prosecutorial suppression was one of the concerns that prompted *Brady* and its two major predecessors, *Mooney v. Hoolohan*[86] and *Napue v. Illinois*.[87] Disclosure of contradictory evidence is essential to maintain the honesty and the appearance of honesty of the prosecutorial and judicial machinery.[88]

## II. Congress' Constitutional Power to Withhold Testimony

Notwithstanding a defendant's discovery rights, Congress may possess the constitutional power to withhold testimony. The military judges in both *Calley* and *Mitchell* certainly assumed so. Even though each subpoenaed the testimony, neither judge meant to challenge the Subcommittee's power; they only issued the subpoenas to comply with a House resolution outlining the means for officially requesting such testimony.[89] Although the principle of separation of powers would ap-

which the value of truth-testing was found to outweigh another competing value, grand jury secrecy.

83. "Obviously the impeachment of the Government's key witness on the basis of prior inconsistent or contradictory statements made under oath before a grand jury would have an important effect on a trial." Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 407 (1959) (Brennan, J., dissenting). *See also* Napue v. Illinois, 360 U.S. 264 (1959).

84. The *Calley* court stated as an independent reason for seeking disclosure of the congressional testimony of government witnesses, "its quest for the truth," United States v. Calley, 8 CRIM. L. REP. 2055 (Army GCM, 5th Jud. Cir. Oct. 13, 1970).

85. Dennis v. United States, 384 U.S. 855, 870 (1966).

86. 294 U.S. 103 (1934); *see* note 58 *supra*.

87. 360 U.S. 264 (1959); *see* p. 1401 and note 66 *supra*.

88. In *Mitchell*, the military judge noted that production of congressional testimony "will preserve the integrity of our judicial system." United States v. Mitchell, Court Order No. 5 (U.S. Army, Oct. 19, 1970), printed in 116 CONG. REC. H10357 (daily ed. Nov. 17, 1970).

89. H.R. Res. 15, 91st Cong., 1st Sess. (1969). United States v. Calley, 8 CRIM. L. REP.

pear to cast doubt on the power of Congress to refuse to produce testimony in a criminal case, the assumptions of the military judges find considerable constitutional support.

### A. *Journal of Proceedings*

The Constitution expressly gives Congress the right to withhold certain information. Article I provides that, "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, *excepting such Parts as may in their Judgment require Secrecy.*"[90] While a transcript of committee hearings differs from the *Congressional Record,* it could still arguably qualify as a "Journal of . . . Proceedings." Indeed, the *Calley* court assumed it did.[91] Moreover, it matters little whether the phrase "their Judgment" refers to the judgment of the Subcommittee alone or of the House as a whole. The Subcommittee clearly concluded that the testimony required secrecy, noting that the transcript of the testimony might contain matter prejudicial to the prosecution or the defense in upcoming criminal cases.[92] Once made, that decision could be changed only if a majority of the House decided otherwise.[93] But, after delegating to the Subcommittee the right to make the initial decision, the House failed to compel the Subcommittee to disclose the testimony.[94]

The constitutional authority to withhold information carries special weight when invoked to protect national security. Executive nondisclosure of information has long been accorded particular judicial deference when the secrecy of the information is essential to national

2055 (Army GCM, 5th Jud. Cir. Oct. 13, 1970); United States v. Mitchell, Court Order No. 5 (U.S. Army, Oct. 19, 1970), printed in 116 CONG. REC. H10357 (daily ed. Nov. 17, 1970).

90. U.S. CONST. art. I, § 5 (emphasis added).

91. United States v. Calley, 8 CRIM. L. REP. 2055 (Army GCM, 5th Jud. Cir. Oct. 13, 1970).

92. SUBCOMMITTEE INVESTIGATION, *supra* note 1, at 4. But excerpts of the supposedly confidential testimony appeared in the Subcommittee's report and in at least one national newspaper. These published excerpts led the military judge in *Mitchell* to doubt the sincerity of the Subcommittee's reasons for secrecy. United States v. Mitchell, Decision on the Jencks Act Motion (U.S. Army, Oct. 15, 1970). Yet publication of the excerpts does not necessarily indicate insincerity—the Subcommittee may have allowed only those excerpts to be printed that it judged did not require secrecy.

93. H.R. Res. 15, 91st Cong., 1st Sess. (1969).

94. Although the House was not in session when its Clerk received the *Mitchell* and *Calley* subpoenas, having adjourned on October 14th, 116 CONG. REC. H10216 (daily ed. Oct. 14, 1970), both subpoenas were read to the full House when it reconvened on November 17th, 116 CONG. REC. H10355, 10356 (daily ed. Nov. 17, 1970). The House as a whole never took any action with regard to either subpoena though the issue was far from moot—the last day of the *Mitchell* trial being November 20, 1970 and the *Calley* trial lasting until April 1971.

security.[95] Presumably courts would give at least the same consideration to a congressional claim of privilege on security grounds based as it is on a power explicitly delegated by the Constitution. The Subcommittee's hearings may well have turned up such information, as did the official Army investigation of the My Lai incident. The report of the full-scale investigation conducted by Lieutenant General Peers contains portions classified "secret" and "confidential."[96] Those labels apply, at least in theory, only to information in some sense dangerous or embarrassing to the national interest.[97] Since the Peers group and the Subcommittee investigated the same incident, Congress also may have had a justification for keeping some testimony secret. If the military can legally refuse to disclose state secrets of a military or diplomatic nature, so can Congress.

B. *The Power to Call Witnesses*

The Constitution grants Congress "[a]ll legislative Powers"[98] of the government, which have been held to include the power to call witnesses to aid in the formulation of legislation.[99] Congress further has the power to make such conditions or arrangements as are necessary to obtain the testimony of such witnesses. In *Adams v. Maryland*,[100] the Supreme Court held that Congress could, by virtue of the Necessary and Proper Clause, enact a statute that prevented testimony given to Congress from being used against the same witness as a defendant in a later trial. Like an immunity statute, a promise to keep testimony secret would aid Congress in eliciting candid testimony from witnesses who otherwise would be reluctant to testify. Of course, witnesses who feared self-incrimination could invoke their Fifth Amendment privilege and seek application of the immunity law upheld in *Adams*. But some witnesses might still feel inhibited. Thus, a congressional commitee could reasonably conclude, as did the My Lai Subcommittee, that a guarantee of secrecy would stimulate more responsive and com-

95. United States v. Reynolds, 345 U.S. 1 (1953); Totten v. United States, 92 U.S. 105 (1875); *see* REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES Rule 509 (March 1971), in 51 F.R.D. 315 (1971). [hereinafter cited as PROPOSED RULES].

96. REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATION INTO THE MY LAI INCIDENT (March 14, 1970).

97. Army Reg. No. 380-5 (March 26, 1969); New York Times Co. v. United States, 403 U.S. 713 (1971).

98. U.S. CONST. art. I, § 1.

99. McGrain v. Daugherty, 273 U.S. 135 (1927).

100. 347 U.S. 179 (1954).

prehensive testimony. Although the Constitution allows Congress to make only "[*l*]*aws* which shall be necessary and proper for carrying into Execution" the enumerated powers,[101] the spirit and purpose of the clause would seem to cover any legislative act.[102] Accordingly, a committee guarantee of secrecy falls within the constitutional power to make laws necessary to the full exercise of the legislative power to call witnesses.

C. *Separation of Powers*

Yet the congressional power to withhold information, when applied to material relevant to criminal proceedings, raises substantial separation of powers problems. Since congressional refusal to produce testimony of prospective prosecution witnesses may result in either the exclusion of those witnesses from testifying at trial or the dismissal of the charges,[103] the exercise of the constitutional power to withhold information might determine the outcome of particular criminal prosecutions.

Under our constitutional separation of powers, Congress ordinarily has the responsibility to form general rules, not to apply them to specific instances.[104] As early as *Fletcher v. Peck*,[105] Chief Justice John Marshall wrote:

> It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.[106]

In parcelling out the various responsibilities of goverment, the Constitution seems to withdraw from Congress all power to affect particular criminal cases. The Executive decides whether to prosecute and whether to pardon.[107] The Judiciary decides cases and controversies.[108] The Legislature, although it may pass general criminal laws, is prohibited

101. U.S. CONST. art. I, § 8 (emphasis added).

102. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). See also the application of the First Amendment, which says *"Congress* shall make no *laws,"* to other legislative acts, Bond v. Floyd, 385 U.S. 116 (1966), executive actions, *cf.* Oestereich v. Selective Service Board, 393 U.S. 233, 237 (1968), Kent v. Dulles, 357 U.S. 116, 129-30 (1958), and judicial orders, New York Times Co. v. United States, 403 U.S. 713 (1971).

103. *See* 1411-16 *infra*.

104. U.S. CONST. art. I, § 1. *Cf.* United States v. Brown, 381 U.S. 437, 445, 461 (1965).

105. 10 U.S. (6 Cranch) 87 (1810).

106. *Id.* at 136.

107. U.S. CONST. art. II, §§ 2, 3.

108. *Id.* at art. III, § 2.

from enacting any ex post facto law or bill of attainder.[109] According to the Supreme Court, the prohibition against bills of attainder reflects "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon blameworthiness of . . . specific persons."[110] A congressional refusal to disclose could either prevent or hamper prosecution, thereby infringing upon the executive and judicial functions of applying general rules to specific circumstances.

But this argument views the legislative process too narrowly.[111] Congress has always had some power to deal with specific instances. It may pass private bills.[112] It has the power to cite persons for contempt of Congress.[113] It can and indeed often must regulate with specificity.[114] Congressional action usurps the judicial function only when it *punishes* with specificity. Thus, bills of attainder are banned because they shortcut the judicial process by punishing particular individuals without trial.[115] Likewise a law violates the constitutional prohibition against ex post facto laws only when it retroactively declares conduct criminal, aggravates the penalties for criminal conduct, or lessens the standards of required proof.[116] On the other hand, the Constitution contains no prohibitions against an inverse bill of attainder that exempts particular individuals from punishment or a law that retroactively makes criminal conduct legal.

Moreover, congressional refusal to produce testimony will not necessarily effect a complete interference with the criminal process. Withholding testimony does not amount to a private bill of exemption or a retroactive exception to a criminal statute. Unlike a bill of attainder, the power to decline inspection does not eliminate the judicial process. The Executive still initiates and prosecutes the charges and the Judiciary still controls their processing. Congress, by exercising its legislative power to withhold testimony, is merely making the prosecution and the conduct of the trial more difficult.

Although it has been assumed that congressional withholding of testimony is an outgrowth of normal legislative activity, the My Lai

109. *Id.* at art. I, § 9.
110. United States v. Brown, 381 U.S. 437, 445 (1965).
111. *See generally id.* at 473-75 (White, J., dissenting).
112. *Id.* at 473. Paramino Co. v. Marshall, 309 U.S. 370 (1940).
113. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).
114. *See* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932); United States v. Chicago, Mil., St. P. & P.R.R., 282 U.S. 311, 324 (1931). *But see* K. DAVIS, ADMINISTRATIVE LAW § 200 (1970 Supp.).
115. United States v. Brown, 381 U.S. 437, 445, 461 (1965).
116. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

cases suggest that on occasion Congress might withhold testimony for the very purpose of interfering with the criminal process. Two days after the My Lai Subcommittee had scheduled hearings, the late L. Mendel Rivers, then Chairman of the House Armed Services Committee, said: "I had a little something to do with stopping the Green Beret business, and I'm going to have something to do with stopping this [the My Lai courts-martial]."[117] Of course, Congressman Rivers might have been alluding only to private talks with the President, other military leaders or the personnel involved in the prosecution. In light of the *Mitchell* court's insistence that Congressman Rivers knew that the charges might be dropped if the testimony was not made available,[118] however, the Subcommittee's subsequent refusal to release the testimony at least suggests a specific intent to interfere with the My Lai prosecutions.

Intentional congressional interference with a specific criminal prosecution may be subject to severe criticism on several policy grounds. It is, however, a well-settled constitutional principle that an exercise of a legitimate constitutional power, like the power to withhold testimony, is not invalid solely because of an illegitimate legislative motive.[119] Thus, whatever the reasons for its action, Congress may constitutionally refuse to divulge the testimony of witnesses required for a criminal prosecution.

117. Washington Post, April 12, 1970, at A6, col. 1.

118. In ruling on the Jencks Act motion, the military judge in the *Mitchell* case said he was "surprised" at the Committee's attitude, because the "Secretary of the Army informed the Committee most plainly that, unless certain testimony was made available to the Army to eventually turn over to the defense counsel, the charges against those involved in the My Lai incident may be dismissed." United States v. Mitchell, Decision on the Jencks Act Motion (U.S. Army, Oct. 15, 1970).

119. Palmer v. Thompson, 403 U.S. 217, 224-25 (1971); United States v. O'Brien, 391 U.S. 367, 383 (1968); Arizona v. California, 283 U.S. 423, 455 (1931); McCray v. United States, 195 U.S. 27, 56 (1904); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212-17, 1274-75, 1283-84 (1970). It could conceivably be argued that an intention to interfere with a criminal prosecution is not a constitutionally unacceptable motive and that Congress in fact has the power to pass a retroactive bill of exemption. Congress, after all, has the power to pass specific private bills bestowing benefits on individuals (*see* note 112 *supra*), and the Constitution, which explicitly prohibits only punitive retroactive laws (*see* notes 115, 116 *supra*), can be read to permit favorable retroactive statutes. Moreover, it could be argued that Congress, having enacted the original statute, would be in the best position to determine whether it intended to cover the particular conduct in question. Finally, congressional power to intervene in particular prosecutions might be said to have a justifiable role in the system of checks and balances that the separation of powers was designed to foster. Such a view, though, raises grave questions of potential abuse and flies in the face of the traditional understanding of congressional power. This entire, very complex issue need not, however, be dealt with here, since there exists an independent constitutional basis for the partial interference with the criminal process created by a congressional refusal to produce testimony.

## III. When Congress Refuses to Disclose

The law, however, will not allow governmental privileges to work against a criminal defendant, who has a substantial stake in the outcome of the trial. For the government to invoke a privilege as a means of depriving a defendant of anything material to his defense would be "unconscionable."[120] Over the years, a general rule has evolved to reconcile the discovery rights of a criminal defendant with the legitimate privileges of government. Lower federal courts, relying on their common law authority to devise remedies to insure justice, have ruled that when privileged material is relevant to the issues in a criminal case, the government must either waive its claim of privilege or terminate the prosecution.[121] The Supreme Court referred to this rule in *United States v. Reynolds*,[122] the leading civil case involving a claim of privilege, and in *Jencks* actually said, in dictum, that the prosecution must either comply with an order to produce or drop its case.[123] By 1969, most members of the Court assumed, as a necessary step for decision, that *some* sanction follows a governmental claim of privilege in a criminal case.[124] This assumption has now become so firmly embedded in American law that it is about to be codified. Culling from case law, the Proposed Rules of Evidence for Federal Courts give a trial judge a wide choice of remedies when the government invokes a privilege:

> If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.[125]

The Rules do not distinguish the congressional privilege from any other

120. United States v. Reynolds, 345 U.S. 1, 12 (1953).

121. United States v. O'Connor, 273 F.2d 358 (2d Cir. 1959); Coplon v. United States, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952); United States v. Beckman, 155 F.2d 580 (2d Cir. 1946); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944), *rev'd on other grounds*, 336 U.S. 440 (1949); Adolschek v. United States, 142 F.2d 503 (2d Cir. 1944); United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952), *aff'd sub nom.* Yates v. United States, 225 F.2d 146 (9th Cir. 1955). *See* Note, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674, 677 (1958).

122. 345 U.S. 1, 12 (1953).

123. 353 U.S. 657, 672 (1957).

124. Alderman v. United States, 394 U.S. 165 (1969).

125. PROPOSED RULES, *supra* note 95, Rule 509. *See also* ABA DISCOVERY AND PRETRIAL PROCEDURE STANDARDS § 4.7(a) (May 1969). *Cf.* FED. R. CRIM. P. 16(g).

governmental privilege. This approach seems unavoidable in light of the common rationale for all privileges and the constitutional basis for the congressional one. Accordingly, congressional refusal to disclose statements vital to criminal proceedings will require trial courts to formulate an appropriate remedy to protect the defendant.

### A. *Disclosure Based on the Jencks Act*

The Jencks Act explicitly provides two procedures for protecting a defendant's right to prevent government witnesses from testifying if their pretrial statements are not disclosed. If the government refuses to produce such statements when so ordered by a court, the statute directs the judge to strike the witness' testimony, or alternatively, if he believes it in the interests of justice, to declare a mistrial.[126] But these statutory remedies are inadequate. Striking testimony that the jury has already heard is a poor substitute for preventing the testimony in the first place, and a mistrial may waste large amounts of time and money.

To overcome these shortcomings and to safeguard the defendant's Jencks Act right, a court needs the flexibility, envisioned by the Proposed Rules of Evidence, to issue "any further orders which the interests of justice require."[127] Contrary to the unsupported assertion of one court,[128] the remedies specified by the Jencks Act need not be exclusive.[129] Indeed, Congress may lack the constitutional power to infringe on a court's traditional and inherent power to structure appropriate remedies for failure to obey a court order.[130] Questions presented by a Jencks Act motion deserve consideration on an individual basis, with remedies tailored for best results in the interests of justice.[131] The

126. 18 U.S.C. § 3500(d) (1964).

127. PROPOSED RULES, *supra* note 95, Rule 509.

128. United States v. Kelly, 269 F.2d 448 (10th Cir. 1959), *cert. denied*, 362 U.S. 904 (1960).

129. Although *Palermo* said that only the Jencks Act authorized discovery of these statements, *see* p. 1395 *supra*, the Court was referring to the *procedures* for inspection, not to the *sanctions* for refusal to comply with those procedures.

130. *Cf. Ex Parte* United States, 242 U.S. 27, 41-42 (1916); Latham v. Casey & King Corp. 23 Wis. 2d 311, 127 N.W.2d 225 (1964) (court has inherent power to dismiss a case in the interest of the orderly administration of justice).

131. United States v. Gardin, 382 F.2d 601, 605 (2d Cir. 1967); United States v. Westmoreland, 41 F.R.D. 419, 424 (S.D. Ind. 1967) ("Each case is sui generis when it comes to determining the time at which, the means by which, and the extent to which discovery is to be permitted.") Explaining the need for flexibility, the Advisory Committee on the Proposed Rules of Evidence noted "the variety of situations which may arise [involving a claim of privilege] and the impossibility of evolving a single formula to be applied automatically to all of them." PROPOSED RULES, *supra* note 95, Note to Rule 509 (d). In contrast to Rule 509, Rule 612 gives the trial judge only the Jencks Act remedies when the government refuses to disclose a writing used to refresh mem-

Supreme Court itself trusted to the "good sense and experience" of trial judges to administer the Jencks Act fairly.[132] Following the Supreme Court's guidance, judges have devised procedural methods not spelled out in the statute.[133]

The first step toward increasing the trial court's range of choice in this area, as some courts have found,[134] requires deciding Jencks Act questions *before* prosecution witnesses testify. While it may sometimes be difficult to determine the relevance of pretrial statements before the prosecution witness has testified, frequently, as in the My Lai cases, the pretrial statements will clearly pertain to the defendant's role in the alleged crime. Admittedly, subsection (a) of the Act declares that no statement will be examined by the defense until the prosecution witness has finished testifying on direct examination.[135] But where the statutory timetable has been unfair to the defendants or has caused an unnecessary delay in the trial, courts, acting directly contrary to the statute, have ordered actual *production* before the prosecution witness testifies.[136] By contrast, merely *deciding* that certain statements are producible under the Jencks Act comports with the letter and spirit of the statute. The statute is mute about when the motion can first be made or heard. Congress' only concern was that the statements be *given* to the defense at the latest possible moment, so they could be used only for impeachment purposes on cross-examination.[137]

If a court rules, before prosecution witnesses testify, that certain statements are producible under the Jencks Act, it is in a better position to forge a truly effective remedy. At that point, the court could insist that the governmental body possessing the statements deposit

ory. *Id.* Rule 612. The flexibility obviously needed in dealing with a general claim of privilege made such restrictions impossible in Rule 509.

132. Palermo v. United States, 360 U.S. 343, 353 (1959).

133. United States v. Wolfson, 322 F. Supp. 798, 817 (D. Del. 1971) (government must provide defense with Jencks Act statements at least one week before the witness is expected to testify); United States v. Hilbrich, 232 F. Supp. 111, 119 n.10 (N.D. Ill. 1964), *aff'd*, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965) (government must turn over statements at the end of last trial day before the day the witness is expected to testify).

134. *E.g.*, United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971); United States v. Ladd, 48 F.R.D. 266 (D. Alaska 1969); United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967); United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967).

135. 18 U.S.C.A. § 3500(a) (Supp. 1971). *Cf.* United States v. Marchioso, 344 F.2d 653 (2d Cir. 1965); Ogden v. United States, 303 F.2d 724 (9th Cir. 1962); Churder v. United States, 294 F. Supp. 207 (E.D. Mo. 1968), *aff'd*, 417 F.2d 633 (8th Cir. 1969); United States v. Kenner, 36 F.R.D. 391 (S.D.N.Y. 1965), *aff'd*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); United States v. Greathouse, 188 F. Supp. 765 (N.D. Ala. 1960).

136. United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971); United States v. Hilbrich, 232 F. Supp. 111 (N.D. Ill. 1964), *aff'd*, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965).

137. Palermo v. United States, 360 U.S. 343 (1959).

them with the court. Unless those statements are delivered to the court —not for inspection but to insure their availability—the court would do well to follow the example of *Mitchell* and prohibit the government witnesses who had made the statements in question from testifying.[138] In that way, the court would avoid any possible prejudice resulting from stricken testimony and save the time and expense caused by a mistrial. In return for these genuine gains to the judicial process, the prosecution would give up only the unfair advantage of calling witnesses, creating certain impressions in the minds of the fact-finders, and then compelling the court either to strike the testimony or to order a new trial. An order prohibiting those prosecution witnesses from testifying would both safeguard the defendant's Jencks Act right and further the interests of justice.[139]

### B. *Disclosure with Constitutional Underpinnings*

Statements by prospective government witnesses covered by the Jencks Act may also come within the scope of constitutional discovery doctrines.[140] Ordinarily, neither the court nor the defendant knows if constitutionally discoverable statements exist. The court thus normally relies on the prosecution's sense of duty to disclose upon penalty of mistrial or reversal,[141] even though such penalties depend on the happenstance of the discoverable evidence coming to light later.[142] But a court has a concrete reason for doubting the government's compliance with the duty to disclose when it knows the government possesses material statements by prosecution witnesses.[143]

In such a case, the court should order the prosecution to produce

138. *Cf.* FED. R. CRIM. P. 16(g), which allows a trial judge, *inter alia*, to "prohibit a party from introducing in evidence the material not disclosed."

139. The judge in *Calley* may have perceived a countervailing public interest in learning—via the court-martial—as much as possible about what happened at My Lai. Thus, Colonel Kennedy may have concluded that it was preferable for the court-martial panel and the American people to hear a few prosecution witnesses tell possibly inaccurate or misleading stories than not to hear them at all. In a trial setting, however, the public's right to know must surely yield before a defendant's right to prepare an adequate defense. *Cf.* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965). Whatever public education a trial provides is incidental to its main purpose. A trial is not supposed to be a teach-in but instead a "disciplined contest," United States v. Augenblick, 393 U.S. 348, 356 (1969), that determines, as accurately as possible, a man's guilt or innocence.

140. *See* pp. 1395-1402 *supra*.

141. United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967).

142. "The unfortunate defect in this course is that it leaves with one (the more powerful) of the adversaries a critical period of unilateral control that must at least sometimes exact an unacceptable toll of unfair convictions." United States v. Gleason, 265 F. Supp. 880, 885 (S.D.N.Y. 1967).

143. *See id.*

the statements *in camera* to see if they are constitutionally discoverable, as well as to insure their availability. Such an order should be made before trial, because, as several courts have held, some favorable evidence must be disclosed before trial,[144] possibly even if such evidence is part of a Jencks Act statement.[145] If the prosecutor refuses to turn over statements that he concedes are inconsistent but that he insists are not exculpatory,[146] a court must prevent the witnesses who made the statements from testifying, in order to protect the defendant's constitutional rights. Inasmuch as the Confrontation Clause guarantees a defendant the opportunity fully to cross-examine any opposing witness, a court would have to exclude a government witness from testifying when the defendant is denied the means of effectively confronting him. Similarly, to the extent that the Due Process Clause guarantees defendants the right to inspect evidence favorable in the context of the other evidence, it requires elimination of the context when the favorable evidence is withheld. With prior inconsistent statements, the context is obviously the witness' testimony on direct examination.

Cases involving refusal to disclose statements known to be favorable on their face, or those, like the My Lai trials, involving statements that neither the court nor the prosecutor has seen, require different treatment. Both situations arm the judge with important knowledge. In one situation, the judge knows that prospective prosecution witnesses have made statements that *are* exculpatory. In the other, the judge knows that witnesses have made material statements that *might* be exculpatory. All parties to the My Lai cases, for instance, knew that Congress possessed several material statements by prosecution witnesses. Some were even known to qualify as prior inconsistent statements, since the Subcommittee, in its final report, had specifically noted inconsistencies in the testimony of two prospective witnesses in the *Calley* and *Mitchell* cases.[147] A judge would have to assume that such statements,

144. United States v. Ball, 49 F.R.D. 153 (E.D. Wis. 1969); United States v. Ladd, 48 F.R.D. 266 (D. Alaska 1969); United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967). *Contra*, United States v. King, 49 F.R.D. 51 (S.D.N.Y. 1970); United States v. Wolfson, 289 F. Supp. 903 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); United States v. Leighton, 265 F. Supp. 27 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 822 (2d Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968); United States v. Westmoreland, 41 F.R.D. 419 (S.D. Ind. 1967).

145. United States v. Gleason, 265 F. Supp. 880, 887 (S.D.N.Y. 1967).

146. *Cf. In re* Evans, No. 71-1499 (D.C. Cir. July 27, 1971) (When the government denies wiretapping, courts are "predisposed to accepting as conclusive the government's answer."). But reliance on the prosecutor's good faith contains the defects described in note 67 *supra*.

147. SUBCOMMITTEE INVESTIGATION, *supra* note 1, at 16-23, 40, 42. Since the testimony before the Subcommittee was internally inconsistent, it could safely be assumed that at least one of the pretrial statements would conflict in some way with the witness' statement on the stand.

being inconsistent with the damaging testimony presented in court, might exculpate the defendant or mitigate his guilt. Given such knowledge, a court should not proceed with the case. Even if it were to strike the testimony of the relevant witnesses or prohibit them from testifying, the court would be unable to know whether exculpatory information in the undisclosed statements would put the case in a different light and lead to an acquittal. Surely the facts amount to suppression.[148] The court's only preventive remedy certain to avoid violating a defendant's compulsory process and *Brady* due process rights would be to dismiss the case without prejudice. Although dismissal seems a drastic remedy, it is the only procedure by which a court faced with the nondisclosure of definitely or potentially exculpatory statements can avoid the risk of an impermissibly tainted conviction.[149] Moreover, dismissal without prejudice permits the government to reconsider its decision not to disclose, allowing it to renew prosecution.

## IV. Conclusion

Dismissing a case or prohibiting certain prosecution witnesses from testifying may allow a criminal to go unpunished. But those remedies, although they clearly damage the prosecution, implement "a fundamental value determination of our society that it is far worse to convict an innocent man that to let a guilty man go free."[150] The right to inspect statements, grounded in the Jencks Act, the Constitution, and public policy, helps to prevent conviction of an innocent man by reducing the margin of error in fact-finding. Minimizing error in the guilt-determining process protects the defendant's liberty, which is the "interest of transcending value" in a criminal trial.[151] It is, ultimately, to protect that interest that our law imposes sanctions on the govern-

148. Suppression denotes control and exclusive possession by the government. United States v. Gleason, 265 F. Supp. 880, 884 (S.D.N.Y. 1967). *See also* Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J., concurring). The conduct of the Subcommittee is attributable to the prosecutor, who represents the government. United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).

149. The Supreme Court has said that it assumed that "the procedure set forth in the [Jencks] statute does not violate the Constitution and that the procedure required by the decision of this Court in *Jencks* was not required by the Constitution," Scales v. United States, 367 U.S. 203, 257-58 (1961). However, it made this statement in response to a challenge only to the Jencks Act procedure by which the trial judge, at the request of the government, examines the statements *in camera* and excises the portions he finds irrelevant. 18 U.S.C. § 3500(c)(1964); Scales v. United States, 260 F.2d 21, 40 (4th Cir. 1958). It thus did not rule on the constitutional sufficiency of the Jencks Act remedies when the government refuses to produce statements suspected of being subject to constitutional discovery mandates.

150. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

151. Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

ment for withholding material information from a criminal defendant on the ground of privilege. Even when the information concerns national security, itself an important interest, the government must decide which course of action jeopardizes a more important interest: disclosing the information or letting the conduct go unpunished.[152] In short, the suggested remedies, which apply to any case in which the government refuses to disclose, effectively and efficiently insure that innocent men will not be convicted solely because the government claims a privilege.

By prohibiting certain prosecution witnesses from testifying as the price of the government's nondisclosure of their previous testimony before the My Lai Subcommittee, the *Mitchell* court-martial fashioned an equitable and admirable remedy for the protection of Sergeant Mitchell's right to inspect the pretrial statements of government witnesses. But in creating a remedy that did justice to the defendant, the court recognized an indirect congressional power over the criminal process that magnifies the role of Congress in the scheme of government. Congressional committees conducting future investigations will undoubtedly keep the lesson of My Lai firmly in mind—although hopefully they will consider also the interests of justice from which their power derives.

152. Jencks v. United States, 353 U.S. 657, 672 (1957); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944); *cf.* Roviaro v. United States, 353 U.S. 53 (1957).