Fordham Law Review

Volume 27 | Issue 2 Article 6

1958

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and, therefore, the law cannot be said to require more than the *Edwards* case required.

Conclusion

It seems, therefore, that a clarification of just what the "law requires" a testator to provide in order to bar an election is needed. It is submitted that the *Edwards* holding is neither a sufficient nor satisfactory answer to that question. If the legislature actually intended to prevent the spouse's share from being whittled down by ingenious draftsmanship and to assure the spouse the enjoyment of that portion which would have been received in intestacy, such intention should be reaffirmed by a clarification of sections 18 and 124.

THE IMPACT OF JENCKS V. UNITED STATES AND SUBSEQUENT LEGISLATION ON THE SECRECY OF GRAND JURY MINUTES

The Traditional Rule

In the absence of a statute providing otherwise, an accused has had traditionally no right to inspect the minutes of the grand jury which indicted him.[1] The rule was the same whether the accused's request to inspect came before,[2] during,[3] or after[4] the trial. This common-law rule of absolute secrecy[5] has been defended on many grounds but they all derive from four paramount considerations: (1) it insures the utmost freedom of action in the grand jury room; (2) witnesses appearing before the jury should be free of apprehension that their testimony may subsequently be disclosed lest the state find itself unable to secure willing witnesses; (3) a guilty accused is not to be provided with a temptation to flee arrest or suborn false testimony; (4) the reputation of an innocent accused who is not indicted is to be protected from those who would use a mere investigation of his conduct as a springboard for slander.

Do these considerations justify a rule of absolute secrecy? No one will quarrel with the soundness of the first reason, the purpose of which is to secure for grand jurors absolute freedom of deliberation, and freedom from fear that their votes or opinions will later be revealed. The grand juror's privilege rests upon the same footing as the privilege of petit jurors or of husband and wife,[6] and on principle this privilege like all others may be waived by the person entitled to it. But this protection properly extends only to opinions, deliberations, and votes of the grand jurors and therefore the privilege is of little importance since the utterance protected by it can seldom be relevant to any issue at a later trial. For this reason the present comment will consider the problem of grand jury secrecy apart from the particular privilege of the grand juror.

1. Goodman v. United States, 108 F.2d 516 (9th Cir. 1939).

2. United States v. Procter & Gamble Co., 47 F. Supp. 676 (D. Mass. 1942).

3. Commonwealth v. Gettigan, 252 Mass. 450, 148 N.E. 113 (1925).

4. Commonwealth v. Gedzium, 261 Mass. 299, 159 N.E. 51 (1927).

5. At common law a grand juror was an accessory to the offense if he disclosed the evidence to a person accused of a felony. He was a principal if the person was accused of treason. 4 Blackstone, Commentaries *126.

6. 8 Wigmore, Evidence § 2361 (3d ed. 1940).

The second reason for secrecy is designed to afford witnesses a privilege analogous to the privilege of informers in general. It is the state's principal inducement for obtaining testimony. The privilege is personal to the witness, and obviously is but a temporary one that cannot survive the sitting of the grand jury. If the witness has testified before the grand jury and the accused is then indicted, the witness can be compelled to testify at the trial and all reason for secrecy disappears. If the accused is not indicted, the question is usually academic for there can rarely be a justified demand for the minutes of a grand jury that did not hand down an indictment. If there is a later trial of some other issue, and the accused can prove that the minutes show the bias or prejudice of the witness, that witness "is in no way a person who ought to have any privilege."[7]

The last two reasons suggested can never be the basis for absolute refusal to reveal the testimony of witnesses. The argument that an accused who inspects the minutes might be tempted thereby to flee arrest disappears as soon as the accused escapes or is arrested; and under modern practice where the indictment bears the names of the witnesses against the accused, there can be little reason for keeping secret the proceedings of the grand jury to prevent the accused from discovering his enemies. The final reason, protection of the reputation of an innocent accused, is a sound gesture but since the fact that no indictment was found is made a matter of public record in any event, this argument loses much of its weight. It should also be borne in mind that it is usually the accused himself who seeks to use the minutes.

There remain, therefore, on principle, no cases in which, after the grand jury's functions are at an end, the privilege of witnesses to have their testimony blanketed in secrecy should be deemed to continue.[8] This is, in effect, the law as it is generally accepted today, but it is not usually stated so sweepingly. By statute or decision the rule of absolute secrecy has been abolished, and the common expression of the rule now is that disclosure may be required "whenever it becomes necessary in the course of justice."[9] Rule 6(e) of the Federal Rules of Criminal Procedure is the statutory basis for disclosure in the federal courts and it provides for inspection of grand jury minutes both by the prosecution and defense within the discretion of the court.[10] Similar provisions are in effect throughout most of the states.[11]

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7. 8 id. § 2362.

8. Ibid.

9. Ibid.

10. Fed. R. Crim. P. 6(e) reads, "disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court . . . at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. . . . "

11. N.Y. Code Crim. Proc. § 952-t. For other statutes, see 8 Wigmore, op. cit. supra note 6, § 2360 n.4.

The federal courts in applying rule 6(e) have recognized that absolute secrecy is untenable, and after an indictment has been found and the accused apprehended, the veil of secrecy may be lifted where justice so requires.[12] Just when justice requires it is a determination that lies within the sole discretion of the trial judge,[13] but it is clear that it is extremely rare[14] and a motion to inspect the minutes will be allowed only in the most compelling circumstances.[15] A large and well settled body of law has evolved from this rule, and the instances where disclosure has been permitted lend themselves well to specific rules.

Inspection of grand jury minutes will be allowed where it appears that the indictment was found solely upon incompetent or illegal evidence or obtained in violation of the constitutional rights of the accused.[16] Or again, if the indictment was the result of fraud, corruption or caprice.[17] But a mere request to inspect without any statement of facts indicating insufficiency of competent evidence is not enough[18] to rebut the presumption of the regularity of grand jury proceedings[19] and the presumption that an indictment is founded on competent evidence.[20] The statement of facts sufficient to justify disclosure must be contained in a sworn affidavit or sworn testimony,[21] and must be cogent enough to raise a reasonable doubt in the mind of the trial court.[22] No reasonable doubt will be raised if there is enough competent evidence to sustain an indictment,[23] and some courts have hinted that if there is any competent evidence at all the request will be denied.[24] The statement offered to show irregularity must contain compelling proof and cannot be based upon information and belief.[25] Under no circumstance will the defendant be given the grand jury minutes just to enable him to ascertain the sufficiency of the evidence on which the indictment is based.[26]

Another common and, for purposes of this comment, the most important use of grand jury minutes is to impeach a witness in any subsequent trial by contradictory testimony given by him before the grand jury.[27] In the same way, a party to the action not taking the stand as a witness may be impeached by his admissions made before the grand jury.[28] As in other cases, there must be

12. United States v. Texeira, 162 F.2d 169 (2d Cir. 1947).
13. United States v. Byoir, 147 F.2d 336 (5th Cir. 1945).
14. United States v. Brothman, 93 F. Supp. 368 (S.D.N.Y. 1950).
15. United States v. Papaioanu, 10 F.R.D. 517 (D. Del. 1950).
16. United States v. White, 104 F. Supp. 120 (D.N.J. 1952).
17. United States v. Gouled, 253 Fed. 242 (S.D.N.Y. 1918).
18. United States v. Weber, 197 F.2d 237 (2d Cir.), cert. denied, 344 U.S. 834 (1952).
19. See note 16 supra.
20. United States v. Costello, 119 F. Supp. 159 (S.D.N.Y. 1954).
21. United States v. Aman, 13 F.R.D. 430 (N.D. Ill. 1953).
22. United States v. Foster, 80 F. Supp. 479 (S.D.N.Y. 1948).
23. United States v. Perlman, 247 Fed. 158 (S.D.N.Y. 1917).
24. United States v. Bridges, 86 F. Supp. 922 (N.D. Cal. 1949).
25. United States v. Skurla, 126 F. Supp. 711 (W.D. Pa. 1954).
26. United States v. Smyth, 104 F. Supp. 279 (N.D. Cal. 1952).
27. In re Bullock, 103 F. Supp. 639 (D.D.C. 1952).
28. Metzler v. United States, 64 F.2d 203 (9th Cir. 1933).

a clear showing of contradiction, and the accused is not entitled to rummage through the minutes in the hope that he can find a contradictory statement.[29]

The statement of a witness before the grand jury may always be used in a prosecution for perjury therein,[30] and the accused is entitled to the minutes of his own testimony to prepare his defense.[31] But the defendant in such a case has no right to the testimony of other witnesses.[32] These are the principal uses of grand jury minutes[33] and the most casual reading reveals the reluctance of the courts to lift the veil of secrecy that protects the grand jury. It should be noted that such disclosure has been limited to criminal actions, and there is but one civil action where it has been allowed.[34]

Once the prosecution witness has testified and the defense desires to impeach, the burden is on the accused to raise sufficient doubt in the court's mind concerning the truth of the testimony given in court vis à vis the testimony before the grand jury. If the defense moves the court to lift the veil of secrecy the next question is the procedure to be followed. A common and heretofore generally approved practice was that used by the Second Circuit. The trial judge directs that the pertinent grand jury testimony be turned over to the court. Then, *in camera* the judge decides what is contradictory and of impeachment value to the defense, and surrenders this material to the defendant. If the defense objects to this expunging, the entire grand jury testimony of the witness is sealed and attached to the record on appeal.[35] It can be readily seen that this is one workable compromise between the defendant's substantive right to prepare his case and the traditional rule of secrecy that surrounds the grand jury.

The Jencks Case

Against this well settled backdrop the United States Supreme Court decided *Jencks v. United States*.[36] Jencks was indicted for falsely swearing that he was not a member of the Communist Party. To prove its case the Government relied on the testimony of two witnesses who had acted as undercover agents for the Federal Bureau of Investigation. They admitted at the trial that they were assigned to affiliate themselves with the Communist Party, and to make oral and written reports to the FBI concerning communist activity. The defendant demanded that these reports as to which they testified be produced for the judge's inspection, and if any inconsistency appeared between the documents and the testimony of their authors that they be given to the defendant

29. Havenor v. State, 125 Wis. 444, 104 N.W. 116 (1905).

30. United States v. Remington, 191 F.2d 246 (2d Cir. 1951).

31. See note 16 supra.

32. See note 30 supra.

33. For other common uses see 8 Wigmore, Evidence § 2363.

34. United States v. Ben Grunstein & Sons Co., 137 F. Supp. 197 (D.N.J. 1956). In United States v. Procter & Gamble Co., 19 F.R.D. 122 (D.N.J. 1956) disclosure was allowed in a civil action. This decision was recently reversed by the Supreme Court. 356 U.S. 677 (1958). See p. 253 infra.

35. United States v. H. J. K. Theatre Corp., 236 F.2d 502 (2d Cir. 1956), cert. denied sub nom. Rosenblum v. United States, 352 U.S. 969 (1957).

36. 353 U.S. 657 (1957).

for use in cross-examination. Thus, Jencks was asking that the procedure followed in the Second Circuit be followed by the trial court. The court denied the motion on the ground that no inconsistency between the reports and the testimony had been shown. It should be carefully noted that no grand jury minutes were involved.

The case was appealed to the United States Supreme Court where it was reversed. The Court held that the rule requiring the showing of inconsistency before a witness's prior statement to the FBI could be produced resulted from a "misplaced" reliance on *Gordon v. United States*.[37] Though in the *Gordon* case the facts showed a clear inconsistency the Court in the *Jencks* case said, "[A] sufficient foundation was established by the testimony of [the witnesses] that their reports were of the events and activities related in their testimony."[38] Then, to leave no doubt as to its meaning the Court said, "[A] requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected."[39] Thus, the only foundation that need be laid is one of relevancy. To forestall any "blind fishing expeditions" defendant's request must be for specific documents, and it seems clear that the Court meant the rule to apply only after the witness had testified.

Addressing itself to the procedure to be followed, the Court went further than the defense had requested. It emphatically "disapproved" the Second Circuit practice providing for *in camera* inspection by the judge and stated that the defense was entitled to the documents in the first instance. Condemning five Second Circuit cases[40] the Court said:

> [T]he petitioner is entitled to inspect the reports to decide whether to use them in his defense. . . . Only after inspection of the reports by the accused, must the trial judge determine admissibility — e.g., evidentiary questions of inconsistency, materiality and relevancy — of the contents and the method to be employed for the elimination of parts immaterial or irrelevant.[41]

The language of the *Jencks* case was sweeping and it was not long before the rule was being applied to different fact situations in a different manner.[42]

37. 344 U.S. 414 (1953).

38. 353 U.S. at 666. This foundation is necessary to the application of the Jencks rule. Thus, nothing in Jencks bears upon pretrial disclosure; and problems of challenging the validity of an indictment and the like continue to be governed by other rules. See text at notes 16-26.

39. Id. at 668.

40. United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Ebeling, 146 F.2d 254, 256 (2d Cir. 1944); United States v. Cohen, 145 F.2d 82 (2d Cir. 1944); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944).

41. 353 U.S. at 668-69.

42. Entire investigative reports were turned over in United States v. Clark, — F. Supp. — (E.D. Pa. 1957). State grand jury testimony was obtained in United States v. Parr, — F. Supp. — (S.D. Tex. 1957), while federal grand jury minutes went to the defense in United States v. Rosenberg, 245 F.2d 870 (3d Cir. 1957). Pretrial disclosure was allowed in United States v. Hall, 153 F. Supp. 661 (W.D. Ky. 1957) but denied in United States v. Benson, 20 F.R.D. 602 (S.D.N.Y. 1957).

Within three weeks of the decision grand jury minutes were swept within its ambit in the Third Circuit. *United States v. Rosenberg*[43] involved a prosecution for the transportation in interstate commerce of a check obtained by fraud. The trial judge denied a motion by the defendant for the production of the grand jury testimony given by the principal witness for the Government. However, he did obtain the grand jury minutes and after an *in camera* examination indicated to the defense counsel wherein the witness' testimony in court differed. The court of appeals reversed the conviction stating that, "the failure of the trial judge to permit counsel for the defendant to inspect at the trial the witness' grand jury testimony . . . as required by the rule announced in the *Jencks* case, compels us to grant a new trial."[44]

THE JENCKS STATUTE

Congressional reaction to *Jencks* was generally adverse,[45] and when the legislators saw the extensions given it by lower courts they were quick to enact a statute designed to codify and restrict the *Jencks* rule.[46] The first section makes it essential that the government witness testify in the trial of the case before the question of obtaining prior statements can be raised. The next section provides:

> (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.

The third section provides that if the Government feels that some of the material ordered to be produced is irrevelant the whole statement will be examined by the court *in camera*. After judicious excision the court will turn the statement over to the defense. If the Government elects not to comply with the order the court has the option to strike from the record the testimony of the witness or declare a mistrial.

The last section is of cardinal importance for it defines what statements are within the statutory rule:

> The term "statement", as used in [the act] means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

It is clear that grand jury minutes are not within the statute. Only statements made to an "agent of the Government" are governed by the statute, and the grand jury is not such an agent within the meaning of the statute. On the con-

43. 245 F.2d 870 (3d Cir. 1957).
44. Id. at 871.
45. 103 Cong. Rec. 7401-02 (1957).
46. 71 Stat. 595 (1957), 18 U.S.C. § 3500 (Supp. V, 1958).

trary, the grand jury is made a part of the federal judicial process by the Constitution.[47] Any doubt on this point is resolved by the legislative history of the statute. "Let us make it clear that we are talking only about records of statements made to a Government agent. Grand jury proceedings could not possibly be based upon the provisions of the bill, because a grand jury is not a Government agent."[48]

In the committee discussions preceding the passage of the statute it is apparent that not only did Congress desire to keep grand jury minutes out of the orbit of the statute, but it also felt that they were not within the rule of the *Jencks* case. Excoriating the "misinterpretations" of the *Jencks* rule that led to decisions like the *Rosenberg* case, "the committee rejects . . . any interpretations of the *Jencks* decision which would provide for the production of . . . grand jury testimony. . . . "[49] The committee felt that the statute would be effective in correcting widespread misinterpretations and popular misunderstandings of the opinion in the *Jencks* case. That it did not do so with regard to grand jury minutes has become eminently clear. In the Southern District Court of New York, considered only for illustrative purposes, there have been at least five opportunities to consider the interaction of the *Jencks* case and subsequent legislation on the traditional rule of secrecy of grand jury minutes. The results have not been uniform. In two cases[50] the court has directed that grand jury testimony of a witness who has testified at the trial be turned over to the defense on the authority of the *Jencks* case. Two other decisions have rejected any such interpretation.[51] Another has granted full disclosure after inspection by the court.[52] There is ample evidence that the statute has not robbed the *Jencks* case of all vitality, and it is becoming common practice under its authority for every accused to demand the grand jury testimony of hostile witnesses. A study of the considerations involved is thus necessitated.

The senate report accompanying the bill sets forth the express purpose of the statute. It is "to provide the exclusive procedure for handling demands for the production of statements and reports of witnesses."[53] Though the statement seems absolute it is deceptive, for upon further reading it becomes clear that grand jury minutes are not within the statute. Furthermore, "the proposed legislation, is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned."[54] Therefore, unless the *Jencks* case has in some way affected the law pertinent to grand jury minutes, such material must continue to be governed by the traditional rule and may be

47. U.S. Const. amend. V; Cobbledick v. United States, 309 U.S. 323 (1940).

48. 103 Cong. Rec. 14545 (1957).

49. S. Rep. No. 981, 85th Cong., 1st Sess. 3 (1957).

50. United States v. Palermo, Crim. No. 152-189, S.D.N.Y., Jan. 13, 1958; United States v. Stromberg, Crim. No. 154-86, S.D.N.Y., May 29, 1958.

51. United States v. Consolidated Laundries Corp., 159 F. Supp. 860 (S.D.N.Y. 1958); United States v. Angelet, Crim. No. 142-349, S.D.N.Y., July 25, 1957, aff'd per curiam on other grounds, No. 24970, 2d Cir. May 19, 1958.

52. United States v. Hoffa, Crim. No. 153-18, S.D.N.Y., May 14, 1957.

53. S. Rep. No. 981, 85th Cong., 1st Sess. 2 (1957).

54. Id. at 3.

delivered to the defense only after a clear showing of inconsistency and only after *in camera* inspection by the court. It is submitted that *Jencks v. United States* has enunciated a policy which extends as well as to grand jury minutes as to statements to the FBI.

The Jencks Case as an Expression of Policy

Public policy supports a reasonable and necessary inquiry into the domains of privilege.[55] In *Jencks* the statutory privilege of the Executive to withhold statements and reports[56] was scrutinized and balanced against the right of the accused to all evidence legitimately bearing upon the credibility of an opposing witness.[57] The Government took the position that the prior statements made by its witnesses to the FBI were privileged, and that without a showing of inconsistency the defense had no right at the trial to obtain these statements. The Supreme Court thought otherwise. Impeachment of an opposing witness has long been the most effective common-law weapon in the arsenal of the defense; but to require that the defense first show an inconsistency before it can obtain a prior statement is anomalous if not begging the question. How, the Court asked, can an accused show an inconsistency unless he first looks at the statement? An accused is not to be denied his right to defend himself because the prosecution refuses to surrender to him a privileged statement. To obtain these statements the only thing an accused must show is that the requested evidence is "relevant, competent, and outside of any exclusionary rule."[58] If the Government chooses to prosecute a person for a crime it is not free to deny him the right to meet the case against him, and if the Government elects not to produce relevant statements of its witnesses touching the subject matter of their testimony, the action must be dismissed.

If the *Jencks* decision is meaningful as an expression of a rule of fair play the Supreme Court must not have meant one rule to apply to prior statements to government agents, and another and contradictory rule, to grand jury testimony. Since the *Jencks* case dealt only with the executive privilege the crucial question is whether grand jury minutes are otherwise privileged to the extent that the policy declared in *Jencks* should not apply. There is nothing in the concept of grand jury secrecy that is not also contained in the concept of executive secrecy. Indeed the consideration supporting the executive privilege, national security, is unquestionably of greater moment than any supporting the grand jury privilege. If the Court held that the former must yield when the Government decides to prosecute, the latter must be within its sweep. As pointed out above,[59] there is no principle which militates against lifting the veil of secrecy when justice demands. The principal argument urged against grand jury disclosure is the protection that will be lost to the grand jury witness. But from what is he to be protected? If the witness has testified to

55. Hickman v. Taylor, 329 U.S. 495, 497 (1947).
56. 1 Stat. 28 (1789), as amended, 17 Stat. 283 (1872), 5 U.S.C. § 22 (1952).
57. 3 Wharton, Criminal Evidence § 903 (12th ed. 1955).
58. Gordon v. United States, 344 U.S. 414, 420 (1953).
59. See p. 245, supra.

one thing before the grand jury and to another thing at the trial it is a patent injustice to conceal the prior testimony under the mantle of protection. In fact, one wonders how realistic this rule of secrecy is. If the witness testifies to a transaction at the trial, counsel for the defense can ask him if he testified to the same transaction before the grand jury. Then counsel can ask him if he remembers the substance of his testimony. If the witness' memory is short the defense may ask the prosecution to allow the witness to refresh his memory by reading his prior testimony. If the rule of secrecy can be abrogated in this fashion it seems unreasonable to deny the defense direct access to relevant testimony in the name of protection.

It is sometimes urged that the testimony of the witness before the grand jury should not be surrendered because it contains matter which is foreign to every issue in the trial. This is to ignore the rule of the *Jencks* case which requires that the accused be given only those statements "touching the events and activities as to which [the witness] testified at the trial."[60] It might also be observed that this objection would be more true of statements of the FBI which by nature range further than the guided testimony before a grand jury, yet these must be surrendered under the *Jencks* rule.

United States v. Consolidated Laundries Corp.[61] is typical of those cases which have held that the *Jencks* case has no application to grand jury minutes. That court decided that the traditional rule still governed and that the accused must show inconsistency, in which case the procedure outlined in *United States v. H. J. K. Theatre Corp.*[62] would be followed and an *in camera* inspection held. This is the very procedure disapproved by the Supreme Court at least with respect to prior statements to government agents. In the *Jencks* opinion there is some support, though admittedly slight, for assuming that the Court meant its disapproval to apply to the procedure used to obtain prior statements made before the grand jury. The Court cited *United States v. Cohen*[63] as typical of the *in camera* procedure not to be followed. The *Cohen* case dealt with a demand for both testimony of a witness before a grand jury and prior statements given the prosecutor, and, though the circuit court appears to have ruled only on the statements in the possession of the prosecutor, it is not unreasonable to expect that if the Supreme Court meant to declare a different rule for grand jury minutes the opinion should have made the distinction. In any case, the procedure followed prior to the *Jencks* case was the same for statements of government witnesses and grand jury minutes.[64] The rationale behind the procedure is the same except that in the case of executive privilege the rationale is stronger. Since *Jencks* changed the procedure for the one, by implication it changed the other. The procedure should be the same in both cases and since

60. 353 U.S. at 668.

61. 159 F. Supp. 860 (S.D.N.Y. 1958).

62. See note 35 supra.

63. 145 F.2d 82 (2d Cir. 1944).

64. Compare United States v. Lebron, 222 F.2d 531 (2d Cir. 1955), with United States v. Cohen, 145 F.2d 82 (2d Cir. 1944).

only the defense is adequately equipped to determine the effective use for purposes of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.[65]

The recent case of *United States v. Procter & Gamble Co.*[66] throws a rather dim light on the problem. A civil action based on the Sherman Act was brought by the United States on the heels of a grand jury investigation in which no indictment was returned. In preparation for the civil action the Government admittedly used the minutes of the grand jury, and the defendant demanded the same privilege to prepare for trial. The district court granted the defendant's motion[67] but was reversed by the Supreme Court.[68] The case is not strictly in point but merits discussion because of its language.

It is to be noted that this was a civil action and as pointed out above[69] the rules allowing disclosure of grand jury minutes have been rigidly restricted to criminal actions. Further, the testimony was sought prior to the trial merely for preparatory purposes and not, as under the *Jencks* case, after the witness had testified where the minutes would be sought for impeachment value. The decision, thus, does not bear against disclosure in a proper criminal action. On the contrary, though the Court did not "reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like,"[70] a footnote reference is appended on this point which specifically cites the *Jencks* case.[71] The note cites one other case, *United States v. Socony-Vacuum Oil Co.*,[72] a 1940 case holding that the defense has no right to grand jury minutes merely because the witness has testified concerning matters therein contained. This has generally been considered the leading Supreme Court holding on the problem. The perplexing question now is why the Court cited the *Jencks* case in connection with the *Socony-Vacuum* case. The cases are clearly in conflict in spirit if not in fact. Perhaps the Court was serving notice that the *Socony-Vacuum* case has been modified by *Jencks* and can no longer be taken as definitive authority for refusal to disclose grand jury testimony. This much would seem clear: the Supreme Court definitely feels that the rule of *Jencks* has some bearing on grand jury minutes. Though the Court in the *Procter & Gamble* case pays homage to the traditional rule of secrecy and asserts that even in a criminal case the veil will be lifted "discretely and limitedly"[73] there is nothing in the holding which runs contrary to the proposition that in a criminal action the rule of the *Jencks* case should be extended to grand jury minutes. If anything, the citation of *Jencks* lends support to the proposition.

65. 353 U.S. at 668-69.
66. 356 U.S. 677 (1958).
67. 19 F.R.D. 122 (D.N.J. 1956).
68. See note 66 supra.
69. See p. 247 supra.
70. 356 U.S. at 683.
71. Id. at 683 n.7.
72. 310 U.S. 150 (1940).
73. 356 U.S. at 683.