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BY HEATHER E. WILLIAMS

Behind the Headlines, Beyond Jail
Jencks Act Materials

Lawyers can work in many practice areas, and knowing one area rarely means you know another. But there are some case or statute names that are familiar to virtually all attorneys—Miranda comes to mind.

In this article, the author provides the background of one of those familiar names. The so-called Jencks *Act, codified at 18 U.S.C. § 3500, was passed into law in response to the U.S. Supreme Court decision in* Jencks v. United States, *353 U.S. 657 (1957). It sets out when and how statements by government witnesses testifying in criminal cases must be produced to the defense.*

Here, the author describes the case and its remarkable parallels to a controversial time in U.S. history.

El Palomino

Clinton Jencks was raised to give of himself to others. Born in Colorado Springs in 1918, he was the youngest son of a postal worker with a strong social conscience. When local mine workers were on strike, Jencks remembers his family prepared food baskets for striking workers. It was an example he followed throughout his life.

After graduating from high school, Jencks worked for John Deere, putting himself through the University of Colorado, earning a Bachelor's of Science in Economics in 1941. World War II decided his next career move. He joined the Army Air Force. Trained to be a navigator, he was assigned to a B-24 squadron in the Pacific. By the end of the War, the U.S. government awarded him

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She plays cello, does Japanese brush painting and enjoys stitching crafts. She wishes she could bicycle and do yoga more. She is married and has four kids, two cats and two dogs.

Behind the Headlines, Beyond Jail is a project the author has been working on for about 1-1/2 years and includes almost 30 cases, all of which, like the *Jencks* Act and *Miranda* warnings, are a defendant-titled part of the criminal process. She has met wonderful people and impressive and inspiring lawyers in her research.

She gives special thanks to the following people: Alan Wagman, Dr. Clinton Jencks, Dr. Mark Thayer, Mrs. John McTernan, John Samore, Michael Meaney.

four battle stars, seven air medals and the Distinguished Flying Cross.

A civilian again, Jencks found work as an acid plant operator with a smelter in Denver. That trade led him to membership in the International Union of Mine, Mill, and Smelter Workers (Mine–Mill). Spare time was devoted to serving on the American Veteran's Committee.

About this time, in 1947, a mostly Republican Congress, over President Truman's veto, passed the Taft–Hartley Act. It was a governmental effort to aid business and an attempt to curtail the powers that unions had gained during and after World War II. A section of Taft–Hartley permitted the President to direct the Attorney General to file an injunction to prevent a continuing strike. Another portion required union leaders to complete National Labor Relations Board (NLRB) Form 1081 stating they had never been and were not now a member of the Communist Party.

That same year, Jencks was asked to and agreed to become a union official with Mine–Mill. As required by Taft–Hartley, on April 28, 1950, Jencks went to Texas and signed NLRB Form 1081, avowing he was not then a member of the Communist Party, avowing he had never been a communist.

Jencks worked with miners at several mines throughout New Mexico. Most of the miners at the Empire Zinc Mine in Hanover, N.M., were Hispanic and nicknamed Jencks "El Palomino" for his blond hair and blue eyes. Hanover was a union town. The land where families had lived for generations was now owned by the mine. Conditions in and out of the mine were worse for the Hispanic workers than for white workers in other mines. Few homes had interior running water. Safety was secondary, and hours were long.

Under Jencks' counsel, Empire Zinc Mine workers organized and struck. The mine went to court and gained an injunction to keep the striking miners from picketing. A few defied the order, including Jencks, who was imprisoned in solitary confinement for 16 months, the duration of the strike. In their stead, the miners' wives and female relatives marched, cursing replacement workers, standing up to the owners' intimidation. Their perseverance won out, and the mine conceded to demands, improving the miners' conditions.

The strike's success inspired a movie filmed in 1953 titled *Salt of the Earth.* It used blacklisted technicians and actors (including Will Geer, who later starred in *The Waltons* television show), a Mexican national—Rosaura Revueltas—in the leading female role, the miners themselves, and Jencks and his then-wife Virginia. Upon its release in 1954, the film became the only movie banned by the U.S. government. Revueltas was afterward arrested for subversive activity for her participation in the movie and deported for life. (For another local impact of the movie, see the sidebar on p. 31.)

In *Salt of the Earth,* one scene has Jencks at the dinner table with the leading miner, Ramon Quintero, played by real miner Juan Chacón, and a few others. Jencks asks Chacón if the photo on the wall is that of a relative.

Chacón replies, "That's [Benito] Juárez, the father of Mexico. If I wouldn't know a picture of George Washington, you would say I was an awfully dumb Mexican."

When the others try to stand up for Jencks, Jencks says, "No, he's right. I've got a lot to learn."

He had no idea how much or what. This was the McCarthy Era, and Clinton Jencks had come to the government's attention.

Witness for the Persecution

Enter Harvey Matusow. (The theatric Matusow would have appreciated that introduction.) Born in the Bronx in 1926 to Russian-immigrant Jews, Matusow was also a youngest son.

Matusow joined the United States Army in 1943 at age 17. He eventually was sent to Germany, assigned as a prison guard. Matusow used his time there to search for his brother, whose plane had been shot down in Europe. Through information gained in German prisoner interviews, Matusow followed directions to his brother's likely grave. Matusow was discharged in 1946, claiming a back injury, and returned to the United States, desiring, in his own words, an "identity."

The following year, Matusow joined the American Youth for Democracy, an arm of the American Communist Party, feeling it had the same *esprit de corps* he had experienced in the Army. He bumped from job to job, losing them through dishonesty or quitting from boredom. One job was to enroll Communist Party members—his lists included fictitious names. He had work at the "Jefferson School Bookshop, but was fired for stealing books."[1] Another store fired him for ringing up as a 20-cent purchase a $5.20 book, pocketing the $5. Selling Liberty Book Club subscriptions, Matusow did not turn in some of the money he had received.[2]

Matusow once claimed, "I would do anything for money."[3]

In February 1950, Matusow began working for the Federal Bureau of Investigation as a paid informant to testify against communists. A year later, the Communist Party kicked him out as an enemy agent, but that did not end his usefulness to certain government workers.

Matusow met Roy Cohn, then an Assistant United States Attorney in Manhattan in 1952. At Cohn's behest, Matusow testified about "Reds" in the Boy Scouts, the Young Men's Christian Association, and the U.S. Army, as well as in unions, Hollywood and politics. With Cohn, Matusow practiced his testimony, loving the battle of cross-examination.

This newest witness also helped to get Sen. Joseph McCarthy reelected in 1952. As a paid confidential informant,

The Labor of HISTORY

Labor strife can leave deep and long-lasting effects on a community. Such struggle in New Mexico led, among other things, to the making of the 1954 movie *Salt of the Earth.* And that production had an effect in Arizona.

Salt of the Earth Labor College was founded in 1993 in Tucson. Some in its founding group were veterans of the copper mines and even of the movie's production. The school describes itself as "a school for working people … . It's a place to come together and learn about the political, economic social and cultural forces shaping our lives."

More information is available online:
www.saltearthlaborcollege.org

Matusow testified against more than 200 people, swearing each was a member of the Communist Party. One of those 200 was Jencks.

In the summer of 1950, Matusow traveled west, landing a job as a square dance caller (or attending art school or running a pool hall or driving a taxi, depending on what story Matusow was telling) at the San Cristóbal Ranch outside Taos, N.M. There, he met Jencks and Jencks' family. Matusow related that Jencks made a speech at the ranch concerning trade unions and the peace movement. He testified that Jencks admitted to him he was a member of the Communist Party. This last statement was a lie.[4]

"When I learned that it was my testimony that was needed to indict Jencks—mine and mine alone—I was in my glory. This was big league stuff, and I was the star. Without me there was no game."[5]

That testimony was bolstered by J. W. Ford, a member of the New Mexico Communist Party since 1946. He also was a paid informant for the FBI, beginning in 1948. Ford claimed Jencks attended Communist Party meetings in New Mexico.

Trial

Jencks was indicted April 20, 1953, in United States District Court, Western District of Texas, El Paso, just a week before the statute of limitations ran. He pled not guilty to two counts of making false statements to a government agency, the NLRB.

Four assistant U.S. attorneys prosecuted Jencks. For his defense, the union and public donations aided Jencks in hiring John McTernan of Los Angeles.

McTernan had moved west after college in Amherst, Mass., and Columbia Law School in New York. Admitted to the bar in California July 1942, he practiced law for the next 53 years, successfully representing unpopular defendants and causes across the country. Along with his law partner of many years, Ben Margolis, McTernan was described by lawyer Mike Tigar as one of the "characters who enlivened California life."[6]

Before trial in Texas, Jencks' lawyers moved for the court to compel the government, specifically the FBI, to disclose all the records it had on Matusow and Ford. They requested accountings of the money paid these men, background records and their prior statements to FBI agents. The court denied the motion, finding Jencks had not made the required showing that the Government actually possessed any inconsistent statements.

At trial in January 1954, Matusow was the government's star witness, a leading role to which he had grown accustomed. He observed that, during trial, he was

paid a witness *per diem*, earned expert witness fees for his testimony on how the Communist Party operated and worked nights as a stand-up comic across the Rio Grande in Juárez, Mexico.

Jencks' defense—in addition to trying to impeach Matusow and Ford without benefit of any prior statements, consistent or inconsistent—was Jencks' heroic war record. An all-male jury convicted Jencks as charged within 22 minutes, before McTernan finished making his record on various trial issues. The court sentenced Jencks to five years' imprisonment, permitting him to remain free on $10,000 bond while his appeal was pending.

Matusow

At that point, Matusow either had an attack of conscience or simply saw another moneymaking opportunity. A lawyer named Nathan Witt heard that Matusow was reversing his earlier communist identifications. Witt urged Matusow to come clean, even at risk of prosecution.

For Witt, becoming involved in Jencks' battle was a continuation of his fight against false accusations concerning communism. He had attended Harvard Law School with Alger Hiss. Both became government lawyers, Witt with the NLRB, Hiss first with the Department of Agriculture and then with the State Department.

For both law school graduates, those accusations were made personal in 1948. Whittaker Chambers, a former senior editor of *Time* magazine—and a former Soviet spy—testified under Richard Nixon's questioning before the House Un-American Activities Committee that Hiss and Witt had for years been members of the communist underground. Witt left the NLRB and became involved representing Mine–Mill and its workers across the country.

Matusow, the "Most Hated Man in America," as he had become known, wrote *False Witness* in 1955, a nauseating read because of the author's willingness to lie, himself admitting to perjury when he testified that certain people were communists. One chapter, "Witness for the Persecution," was devoted to his role in convicting Jencks. His affidavit admitting his perjured testimony against Jencks was included as an appendix.

After *False Witness* was published, Jencks wrote to Matusow: "Welcome back to the human race."

With the appeal unresolved, Jencks filed his motion for new trial in January 1955. Matusow willingly participated for Jencks in the new trial hearings. After four days of testimony in March, the judge denied a new trial, continuing Jencks' liberty. Moments later, he found Matusow in contempt of court and ordered him imprisoned immediately to serve three years. Though Matusow bonded out in five days pending appeal of the contempt finding, he tasted what his future held.

Matusow was not believed.

United States Attorneys in New York and El Paso charged Matusow with perjury, not for his initial testimony saying Jencks and another were communists, but for his later testimony in which he said he lied. He received concurrent four-year imprisonment terms for perjury—for lying about lying.

Before and after his incarceration, Matusow aspired to be an entertainer. During breaks in Jencks' case, he wrote poetry and television skits. He was involved in various television shows from the 1950s to the 1990s—*The Howdy Doody Show*, *The Mike Douglas Show*, *P.M. Magazine*.

In his search for "identity," Matusow claimed he saw the airship Hindenburg explode, and that he was just outside the building when and where the World War II Armistice was signed. He invented a toy called a *Wheelo,* a stringless yo-yo employing a thick U-shaped wire attached to a handle, with a modified yo-yo traveling around the wire. He led a jew's-harp band in the 1960s that recorded folk music.

During the McCarthy Era, Matusow ran off with a senator's ex-wife to Havana, creating quite the scandal. He wed 12 times to 11 different women. One of those wives was a woman who was a member of the Church of Jesus Christ of Latter-Day Saints. For love, he converted to her faith to marry, took the name "Job," and settled in St. David, Ariz., a strong Mormon community in Cochise County.

But the small town of St. David had no television station, so Matusow traveled to nearby Tucson, where the local PBS station at the University of Arizona hired him. In 1979, Matusow created *The Magic Mouse Show* for children, brief entertaining segments that were syndicated across the country. The show earned awards for its educational content and featured guests, including the Dalai Lama who discussed nonviolence.

From 1991 to 1994, Matusow was the president of Tucson's Interfaith Coalition for the Homeless and appeared in a local production of *The Wizard of Oz*. He performed as Cockyboo, his clown persona. He said he advised Yoko Ono to show her art in London, which she did, and it was there that she met John Lennon, her future husband.

Harvey "Job" Matusow died January 2002, of complications after an automobile accident.

In 1988, author Bruce Jackson interviewed filmmaker Emile de Antonio. They discussed Matusow, because they both knew him. Jackson queried de Antonio on the many accomplishments Matusow claimed. De Antonio bluntly said, "Well, Harvey lies about everything."[7]

Appeal

Awaiting appeal, Jencks lived in Tucson, organizing miners at the smelters in Mammoth and the Ray–Sonora mine near the Mexican border.

But in October 1955, the Fifth Circuit Court of Appeals affirmed Jencks' conviction and the trial court's denial of the

new trial motion, denying rehearing in December. (A month later, the same panel of appellate judges reversed Matusow's contempt judgment, finding he had been deprived of even minimal procedural requirements.)

Before his case was argued in October 1956, at the U.S. Supreme Court, Mine–Mill asked for Jencks' resignation. The previous December, the Court had decided against the NLRB concerning its treatment of unions whose officials falsely signed the NLRB Form 1081. Now, in argument, when told of Matusow's recantation, Chief Justice Earl Warren said, "Yes, Mr. McTernan, tell us about that."

Finally, in June 1957, months after their *Roviaro* decision requiring the disclosure of a confidential informant's identity in some circumstances, and citing *Roviaro*, the Court held "Justice requires no less" than the disclosure to a defendant of the government reports concerning the government's witnesses, for investigation, for impeachment and to present a defense. The Court also found errors with several of the lower court's jury instructions.

On remand to El Paso, the government, still resistant to disclosing the FBI's archive on Matusow and Ford, offered to dismiss the charges if Jencks would resign as a union official. He agreed.

Where They Are Now

Defense Counsel

McTernan joined with Ben Margolis to form a firm in Los Angeles dedicated to representing the unpopular and their causes. From free speech cases in the 1950s, to representing a U.S. citizen convicted of traveling to Cuba without a passport in the 1960s, to attacking the Department of Justice-promulgated "use immunity" statute in the 1970s, to voicing the position of the California State Bar in an *amicus* brief regarding student busing in Los Angeles in the 1980s, McTernan's life has personified John Adams' example of championing a lawyer's obligation to defend the unpopular, no matter "the dictates of our passions." His dedication was recognized when he received the California State Bar's Loren Miller Legal Services Award in 1984. He lives in retirement in southern California.

Witt continued his battles on behalf of those persecuted as, either correctly or incorrectly, being communists. His cases exemplified his commitment to labor, and civil and constitutional liberties. Witt himself was called before Congress and asked to disclose communist affiliations of certain people, a disclosure he refused to make. He was described as a "great and charming" man,[8] and Mine–Mill's workers took him into their homes. After Mine–Mill merged with United Steel Workers in 1967, Witt continued on as counsel, retiring in 1975. He died at age 79 in New York City in 1982 after appearing in a 1979 documentary, *The Trials of Alger Hiss*.

Jencks

Precluded from labor organizing by his agreement, Jencks attended the University of California–Berkeley, earning his master's and then his Ph.D. in economics. While there, he worked as a teacher's aide in the Economics Department. One of his students was now-lawyer Michael Tigar, who has a reputation as an "activist" lawyer. Tigar has written on several occasions of the impression Jencks made on him.

After earning his Ph.D. in 1964, Jencks was hired by San Diego State University. He taught there until 1984 and now serves as a professor emeritus to that institution. During his tenure, he and Virginia divorced, and he is remarried to Muriel.

Jencks continues to live in San Diego. Standing on the stoop of his house, a sign encourages you to "Remove Your Shoes Before Entering." Though he has not been well recently, Jencks is gracious to this stranger (your author) on his doorstep. He is thoughtful and listening, comfortable in blue jeans and barefoot.

Even in retirement, Jencks is much in

demand as a speaker, especially given the recent 50th anniversaries of the making and release of *Salt of the Earth*. As he has said at these revivals, El Palomino speaks still.

The Law

Three months after the Supreme Court decided *Jencks*, in September 1957, Congress enacted Title 18, Section 3500, now known as the *Jencks* Act. The statute emasculates the Supreme Court's decision, agreeing the records should be disclosed, but limiting disclosure until after the witness has testified.

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endnotes

1. Notes based on reports to Jencks' attorneys, 1952, p. 1, Clinton Jencks donated materials, MSS-137 Chicano Research Collection, © Arizona State University (1994).
2. *Id.*
3. *Id.*
4. Affidavit of Harvey Matusow in support of Motion for New Trial (Jan. 20, 1955), *United States v. Jencks,* Case No. 54013; *see also* HARVEY MATUSOW, FALSE WITNESS (1955), Appendix.
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