(870) The Court: There is nothing to indicate any idea that I had that these defendants were guilty or were innocent.

Mr. Sacher: But you see I must say, and please believe me, I say it with the utmost of respect to the Court: I think the point is missed, because what I am making clear here is the following, that this Committee in the reports and pamphlets which it issued was always talking of things which it alleged were taking place at a time which fell at least within the period during which the grand jury was sitting. And if they were true then I maintain that since this grand jury must be presumed, at least from government point of view, to have discharged its lawful duty, they would have returned indictments for such activity. And the point I am making is that the failure to return indictments proves that there was no evidence of these things as fact. And when your Honor assumes that to be or presupposes that they may be fact, that to that extent you are not taking into account the real facts and indicating a prejudgment and bias of which we complain.

Now beyond that I cannot go, your Honor.

I am arguing on the basis of facts as I see them and facts which, frankly, seem to me to be utterly incontrovertible. I say that there can be no disagreement (871) with the proposition as a matter of law as well as fact that when it is charged by this Un-American Committee that certain serious unlawful conduct took place during a period or preceding a period during which the grand jury was sitting and the grand jury did not return an indictment for those things, then it must be said again as matter of law that the Un-American Committee was lying in its beard and lying in its bowels when it said what it did about the Communist Party and its leaders.

The Court: Now, I consider the difference between us a mere matter of law, and I will deny the motion. When I say I deny the motion—

Mr. Sacher: Again, your Honor, you are sort of prescinding me, as one of our friends here says when one is cut off prematurely—

The Court: I thought you were asking me to disqualify myself for bias and prejudice as indicated by the comments made on the afternoon of January 13th.

Mr. Sacher: Oh, I have another comment.

The Court: If you have some more comments—

Mr. Sacher: That is it.

The Court: —I will withhold my determination until I hear the full story.

Mr. Sacher: And I want to say to your Honor that every one of your denials so prematurely of (872) every motion I make indicates further that so great is your predisposition to dispose of us that you deny it before we have indicated that we are through.

The Court: I thought you were through.

Mr. Sacher: I did nothing to indicate that. As a matter of fact, my book is still open.

Now at page 759 an argument was laid before the Court concerning the treatment that had been given to Mr. Gates when he went to the University of North Carolina. As a matter of fact, the item was reported in the newspapers on the very morning that we argued this motion. And the experience that Mr. Winter encountered when he went to Michigan recently to speak at the Michigan State College and was denied those facilities, and hired himself a hall to which one of the students, believing that he still lived in democratic America, went to listen to Mr. Winter. That young man's name is Zarichny. He was a senior at the college and a veteran.

The Court: That is the boy that was expelled?

Mr. Sacher: That was the boy that was expelled for doing nothing more than listening, just listening.

The Court: I remember very distinctly what I said was that I am not in favor of expelling students for just listening to speeches. Is that in reverse of (873) what I said?

Mr. Sacher: It is not that I have it reversed, but that doesn't appear in the record at all.

The Court: I distinctly remember saying that.

Mr. Sacher: No, your Honor, there is no such statement in the record. I would like you to permit me, if you will—

The Court: I did make some comment about the idea of North Carolina—

Mr. Sacher: Yes. I want to read what your Honor actually said.

The Court: If it is all right for a university to let people come before the students and explain how they are indicted and they are innocent, then that is all right.

Mr. Sacher: No. That is what you denied last week. That is what I want to read to you.

The Court: I would if I was running the university.

Mr. Sacher: At page 759 I had occasion to make the following observation:

> "These governmental expressions and actions"—

referring to the vast variety of material we had submitted to the Court—

> "have already reflected themselves in a host of (874) actions in other places. For instance, only yesterday the defendant I represent, Mr. John Gates,"—

I have acquired a couple more clients since then—

> "was denied the right to speak at the University of North Carolina, Chapel Hill, on the ground that he is a defendant here; and the president of that college said, 'We are making no prejudgment as to Mr. Gates' guilt or innocence;' "—

a real American—

> " 'we do not pretend to speak on that, but,' says he, 'the statutes of this State prohibit the advocacy of the overthrow of the Government by force and violence on college grounds, and so we won't let him speak,' although all he wanted to talk about"—Gates—was about the indictment in this case.
>
> "Now, that is the impact of what has been going on."

And then here is what your Honor really said at page 760:

> "The Court: Well, do you think it is right for colleges to have come on the campus people indicted for crimes against the United States and plead their case before the students on the campus? I can't see how that is a proper thing (875) to do."

Then we sort of tangled a little. I said:

> "Is your Honor asking me that question or—
> "The Court: Well—
> "Sacher: I will be glad to answer it.
> "The Court: Well, you"—

The Court: I don't think I said, "Well Sacher."

Mr. Sacher: No, no, no. I am reading that. I just didn't want to take time putting in the "Mr" you know.

The Court: Oh.

Mr. Sacher: I am trying to save time here.

The Court: All right.

Mr. Sacher: And "The Court: Well, you say that it is a terrible thing that a man who is under indictment and who is to be tried for the crime with which he is charged should be excluded from a college building on a college campus where he frankly said he wanted to come and show the students how innocent he was. I don't know. Probably that is not before us except in so far as you bring it before us, but I must say I see nothing queer about that."

To which I replied:

> "May I then tell you what I see queer about that?"

And "The Court: Yes, indeed, you may. That is why I asked you that question."

Then I replied: "In the light of all that we have presented here, in the light of all the poison that is being poured into the ears of the American people, does your Honor mean that a defendant who has had no access to the minds or ears of these students, should not have an opportunity to enter a general denial before them and say, 'I am not advocating the overthrow of the Government by force and violence'?

"And what happens to our vaunted academic freedom? What happens to freedom of speech, and why is not the man still guarded by the presumption of innocence so that he may travel and speak anywhere in this country without having either a university president or a federal judge

see an impropriety in his exercising the right of free speech in the interests of expressing his opinions and innocence, and in the interest of saying, 'I want to assure you that I do not advocate the overthrow of the Government by force and violence.' "

And, finally, your Honor said:

> "Well, I haven't got the responsibility of (877) running the college. All I have to do is to run my courtroom, so I won't indicate any view as to what colleges should do or should not do."

To which I must confess I retorted as follows:

> "I think your Honor has indicated that view already."

I think, your Honor, that on the basis of all of this that there is here so large a body of objective fact—

The Court: That is supposed to show that I think these defendants are guilty?

Mr. Sacher: Yes. Not only do I think that this in its cumulative effect, plus what preceded—now bear in mind, your Honor, that I am not trying to assert here solely on the basis of what I have read that you are disqualified; but I say that when this is added to what preceded and what was set forth in the affidavit asking your Honor's disqualification, that in its totality I think it abundantly establishes the type of bent of mind for prejudgment which the rule or the section 144 of the Judicial Code is directed against.

And I respectfully submit that in these circumstances it would be no more than judicially proper that in this setting your Honor give consideration to (878) removing yourself from the further consideration of any matter in this case.

The Court: I take it the other defendants join in that application?

Mr. Crockett: I do, your Honor.

Mr. McCabe: Yes.

Mr. Gladstein: I do. Your Honor, I want the record to show that I join in that motion.

Mr. Isserman: I do, too, your Honor, on behalf of the defendants whom I represent.

The Court: That of course is a matter solely for my consideration and it is not appropriate for me to hear any comments from the United States Attorney. I cannot see that there was anything more at all in those excerpts than in the former ones. They were merely a discussion of matters of law applicable to the matters then before me, and certainly I had no indication of indicating, nor have I any opinion as to the guilt or innocence of the defendants. If I had it would be a different matter.

I will deny the application.

Mr. Isserman: If the Court please, it might be appropriate to continue, for me to continue the objections to the ground of the Government's motion to move the cases for trial, but before doing so I would say this—

(879) The Court: Let me get this straight. How many motions did you make? Just one or two, Mr. McGohey?

Mr. McGohey: I made what is probably a double motion. I moved to bring on to trial all of the defendants named in Indictment No. 128-87 with the exception of the defendant Foster. As to him I moved to sever.

The Court: That is in effect what I would consider two motions, but possibly one. But you have given me just the clarification I needed. That is the conspiracy indictment?

Mr. McGohey: Sir?

The Court: That is the conspiracy indictment?

Mr. McGohey: That is the conspiracy indictment, your Honor.

The Court: Very well. I will hear what each of the counsel for the defendants have to say in opposition.

Mr. McCabe: May I be clear in this, your Honor, that it is to be considered as two motions, because I should have something special to say with regard to the motion of the District Attorney to exclude the defendant Foster to trial.

The Court: I will consider them as two motions, so that what you have to say may be separately addressed to the part that you have just referred to, namely, the severance as to Mr. Foster.

(880) Mr. Isserman: If the Court please, this is the period—before going into this motion I would be constrained to ask for a short recess. My motion will take an extended period of time. And I would suggest, in view of the hour, that it be held over until the afternoon session.

The Court: Now you are about to oppose Mr. McGohey's motion?

Mr. Isserman: That is correct, your Honor.

The Court: And you say, in effect, that your argument is going to be rather lengthy and you would like to have it put over.

Now perhaps Mr. McCabe could give us his argument as to the second phase of that motion. Or would you rather wait until—

Mr. McCabe: I think chronologically my answer should follow the disposition of this first portion of the motion, your Honor.

The Court: Very well.

Mr. McCabe: In other words, the first portion goes to the proceeding of the trial.

The Court: We will adjourn now until 2.30.

(Recess to 2.30 p.m.)

---

(881) AFTERNOON SESSION

* * *

(883) Mr. Isserman: If the Court please, your Honor will recall just befort the noon recess I was about to state the objection on behalf of my clients John Williamson and Gilbert Green to the motion of the United States Attorney that this case be moved for trial.

In stating my grounds, which I will do before I argue them, I wish to indicate that I rely in part upon the affidavit which was presented to your Honor this morning, the affidavit of Benjamin J. Davis, Jr., and would ask that it be either marked filed or be marked as a pretrial exhibit in connection with this argument. Might that be done?

(884) The Court: I think its marking has already been done. It is sufficient to identify it, and it may be

considered as part of the matter you submit to me at this time in opposition to the motion as described.

Mr. Isserman: I also wish to rely on the previous affidavit of Mr. Davis, verified on January 10, 1949, which was before your Honor at the time of the last argument for continuance, and as well upon his previous affidavits in the case bearing on this same subject matter.

The reasons why the defendants I represent object to granting the motion of the United States Attorney are as follows:

1. The Government, through its executive, legislative, judicial and administrative agencies and officers, has taken such official action and issued such a continuous stream of attacks upon and villification of the Communist Party, its aims, policies and program as to make impossible the free and uncoerced consideration of the facts and evidence which may be adduced at the trial of any of the indictments, and makes impossible a rendition of a fair, impartial and unbiased verdict in accordance with the law and the evidence; and this action which is complained of continues up to the present.

(885) 2. While the Government has been engaged in this program of attacking the Communist Party and of subjecting its members to punishments and disabilities because of their political beliefs, private persons and organizations, including employers, business organizations and various religious, fraternal and self-styled patriotic organizations, have simultaneously been engaged through the press, the radio and all other media of mass communication, in a corresponding program, designed to coerce and intimidate the community into accepting their attacks on the Communist Party, which program still continues up to this very minute and has had substantial effect in accomplishing the designed objective;

3. As a result of the actions set forth in (1) and (2)—that is, the action by government and its officials and agencies and by private organizations—a condition of prejudice against the defendants has been created and exists throughout the country, and particularly in the Southern District of New York which makes a fair trial of the defendants impossible at this time;

4. As a result of the actions under point (1)—that is, the same governmental actions and private actions—the Communist Party and the defendants, (886) and the principles they advocate and teach have been falsely and maliciously associated with the advocacy and conspiracy to overthrow the Government of the United States by force and violence, which association has been repeated persistently and continuously over an extended period and still continues so as to condition the general public throughout the country and particularly in the Southern District of New York, including members of the jury panels from which the jury to try the defendants will be drawn, and including members of their families and their associates throughout the community, to the automatic acceptance of this false association.

As a result of the same actions by government and private bodies, as I have noted—this is item 5—each of the defendants has been prejudged by the public in respect to the charges contained in the very indictments against them, and thus they stand stripped by governmental action and instigation of the presumption of innocence without which the trial of any defendant would be unfair and in derogation of his rights under the Fifth and Sixth Amendments to the United States Constitution.

6. This Court in denying each and all of the defendants' requests for bills of particulars, has (887) failed to give due consideration to the following factors: The vagueness of the indictments; the nature of the case, and the scope of the defendants' activities which have been placed before the Court in the period covered by the indictments, engaged in by each of them in connection with their advocacy of Marxism-Leninism, and has failed to give due consideration to the scope and extent of the activities of the Communist Party in said period, all of which has been laid before the Court in appropriate affidavits. Thus, at this point, each of the defendants is compelled to stand trial without knowing the nature of the accusation against him and, without having sufficient information to prepare his defense, all of which is in violation of the rights guaranteed to each of the defendants by

the Fifth and Sixth Amendments to the United States Constitution.

7. Unless the trials of all defendants under any of the above indictments—I am referring now particularly to the two whom I represent—are continued for a sufficient period to allow the effect of the activities, governmental activities which I have mentioned, and private activities which I have mentioned by organizations of various kinds—unless time is allowed to allow the effect of these activities to be dissipated, each (888) defendant will be compelled to stand trial without due process of law and without the fair and impartial jury guaranteed to him by the Fifth and Sixth Amendments to the Constitution.

Eighth point: This Court has on a number of occasions regarded this case, and has so stated on this record, as "just another criminal case," which in fact it is not, and has failed to give due weight to the defendants' requests for bills of particulars, to the defendants' request for continuance, and to the defendants' request to have open hearings in which to establish by direct testimony the effect and extent of the governmental actions mentioned under point 1, which is a campaign that the government has conducted against the defendants and the Communist Party, and to determine the effect and extent of the actions mentioned under point 2, which is the action by the press and private organizations reflecting and carrying forward into the community the actions of the government; and to allow at such hearings a depiction on this record of the effect of these actions upon the rights of the defendants as I have outlined heretofore.

Next: The police preparation for the trial which has been referred to here this morning and the public impact of the announcement of such preparation (889) in the newspapers of this city last night and this morning, and a show of force and threat of potential violence by the police officials, have so affected the community that an additional aggravation to the effect I have described has been caused only this day.

In connection with these requests and these objections on behalf of my defendants, I request further that the

Court reconsider the defendants' motions for bills of particulars; that the Court reconsider the denial of defendants' request for continuance heretofore made and last denied a few days ago; and that upon such reconsideration and upon the additional matters presented here to the Court in the Davis affidavit and by counsel, to grant a continuance of any trial under any of the above indictments for not less than 90 days, and that such reconsideration and reargument and oral hearings be held before further consideration is given to the motion of the United States Attorney to move these cases for trial.

Now, a good deal has been said by the United States Attorney and by this Court and certainly by the defendants in their affidavits, in reference to the newspapers; and there is a persistence of a misconception which must be cleared up before the Court can give full value and full weight to the argument presented here (890) on behalf of my defendants; and that misconception, as Mr. McGohey stated it this morning, if I can paraphrase him correctly, that this Court should not be directed, or this Court should not direct what should appear in the press and what should not. At no time on any motion have we requested this Court to exercise any influence over the press. I would like to make that clear. At no time has the gravamen of any motion which has quoted newspaper clippings been that this Court should say to these newspaper men, "I will tell you what you should publish and I will tell you what you should not publish." That has not been the purpose of our motions.

At the same time newspapers have an effect upon the community. I think the Court would take judicial notice of that fact; and we are addressing ourselves to two aspects of newspaper publication when we refer to clippings: 1, that they reflect governmental action and are instigated by governmental action, and in many cases result from governmental releases for the very purpose of channeling that information to the public; and, secondly, that when matter appears in the paper, true or false, which affect the defendants, whether the papers have a right to publish such matter or not, if that matter has an (891) impact on the community which makes a fair trial im-

possible, then as long as the papers continue their publication, which this Court cannot stop—just so long this Court must consider this situation created and to take such steps as would not force the defendants to trial in an atmosphere which has been created by the newspapers and by the government and by the organizations whose publications have appeared on this record and have been produced here by the defendants.

I would like to make that clear. If a situation exists which prevents a trial at this time, there may be two remedies: One is to clear up the situation at the source; that is, to prevent the misrepresentation, to prevent the distortion of news, to prevent publication which is false and which injures the defendants and which incites the public. That is one possibility. That is beyond the reach of this Court. But there is another possibility, and that is not to allow the trial to proceed as long as the situation over which the Court has no control nevertheless continues to exist.

Now, in any argument I make about what appears in the press I am concerned only with these aspects of that publication. I am not concerned with action against the newsapers for distortion or malice when (892) it does appear; I am not concerned with the newspapers' right to continue its publication. But I am concerned and I am addressing myself to the effect in the community, to the effect on this trial, to the effect on the defendants, and even, I might say, to the effect on persons intimately connected with this trial, perhaps even the Court itself—and I don't say that lightly—

The Court: I would like to understand what you mean by that.

Mr. Isserman: I was going to get to it but I will be very glad to assist your Honor on that point now. In the Davis affidavit I call attention to an article in the New York Times which appeared only yesterday—paragraph 16 of the affidavit—and it refers—

The Court: Will you pause a moment until I get that? Paragraph 16?

Mr. Isserman: That is right, your Honor.

The Court: Oh, you mean something that some other Judge did?

Mr. Isserman: Oh, I did not mean that your Honor was affected, but I mean something—

The Court: I misunderstood you then.

Mr. Isserman: I am referring to the atmosphere which affects the judiciary itself. Now, I am not here (893) to interrogate your Honor on that point or inquire into your Honor's frame of mind in respect to it—

The Court: No, but if you had some point which legitimately bore upon something that I did, or some bias or prejudice that you claim I was laboring under, I would consider it not only proper but your duty to present it. I have no criticism of your bringing up points that are addressed to me. I think that is your right when there is something that is relevant to the subject, but I see now that what you have in mind has to do with someone else, namely, what Judge Watson in Scranton, Pennsylvania, is said to have remarked upon the swearing in of certain citizens of naturalization proceedings.

Mr. Isserman: That is correct.

The Court: And my question was merely for the purpose of clarification. Please do not get the impression that I regard as improper in any sense something that you may desire to raise as a question which involves me. That, as I said, is your right and your duty, provided only that it is done in good faith.

Mr. Isserman: Well, I, of course, so understood it, and my remarks were not addressed to that. But what I did say was that at this point I am not in a position to inquire into the frame of mind of your Honor. In other (894) words, I could not now submit your Honor to some examination with respect to how your Honor feels about some of these matters. I was merely saying that in passing.

The Court: Yes.

Mr. Isserman: And, of course, if we do object it must be out of something that your Honor has said or shown which is called to our attention.

Now, in the last few days—and I think it is appropriate to dwell upon this Watson incident now—Judge Albert Watson of the Federal Court in Pennsylvania, Scranton, delivered himself of a statement which is contained in the clipping to which I refer. In addressing citizens for

naturalization, or persons ready to be sworn in in a naturalization proceeding, he said to these persons that if anyone is critical—I am paraphrasing now; I am not quoting at this moment—if anyone is critical of the government or believes that the Soviet Union has a good government, or some such language, he said get rid of that person just as quickly as you can, and I recommend physical force.

That item was called to his attention, and he claimed as to the article that there was some misinterpretation; but in his explanation of the misinterpretation as he calls it, he still said that he was interested in protecting—he said, "I am interested in seeing that all (895) Americans realize the absolute necessity of protecting by force if necessary our way of life."

When he advises persons by force to attack opinion, persons who have opinions, who express criticism, he is violating the American way of life. He is traducing a constitutional principle, and he is acting as no federal judge should act under those circumstances.

Now why do I bring this here, your Honor? I bring it here because I say either Judge Watson was part of this machinery of the government which is creating this atmosphere of force and violence against the defendants and persons who espouse the same doctrines, or he had yielded too, perhaps even subconsciously, to the very atmosphere which we say exists which brings forth statements by Judge Watson and brings forth attack on the defendant Thompson, they are part of the same pattern.

Now, I am concerned about that pattern. I think up to this point the reason why I dwell on it is that this Court has not realized the weight of our argument in respect to these matters. The Court has said, "Well, there have been some articles in the newspapers. Well, people have a right to comment about a trial which is in progress." But this is much more than that. This is, as we have alleged and we are ready to prove (896) at oral hearings, pretrial hearings, that the persistence and continuous indoctrination of the public association of Communism with force and violence, which the defendants have denied, and which is the very issue in this case, has resulted in what is known as, in psychological terms, as an automatic or a conditioned response.

Now, I remember one day your Honor saying, "I don't see any crowds around the courtroom; I don't see any hysteria around the courthouse;" and your Honor was undoubtedly thinking of the type of situation that existed in Moore vs. Dempsey, which is the case your Honor will probably recall in which there was an angry crowd milling about the courthouse when a negro was on trial, I think it was in Missouri. We are not talking about that. We are talking about something deeper, something more sinister and something more effective, and it is not hot, your Honor; it is cold; and being cold it is deliberate and is driven deeply, and I am talking about the indoctrination of the American public to accept what is the big lie of this period—and I say "of this period" advisedly—which is to associate the defendants and their party with the concept of force and violence. The reason why I say it is of this period is because in our interst, in our determination (897) to fight the Nazis in the last war we analyzed what they had done to the German people and to the world, and we said that the Goebbels technique was the cold indoctrination of a people to induce the automatic and conditioned response which allowed them to destroy their liberties. And significantly enough, what was the big lie of Hitler? It was primarily the association of the word "Communist" with force and violence, and tying in with that the Jew and the Negro and inferior races; and our government spent much money in analyzing that propaganda.

I remember reading, and your Honor might recall, the "Office of the OWI" issuing that pamphlet that probably had a distribution of millions, which was called the "14 points of Nazi Propaganda" and in which it was pointed out that the continuous repetition of a lie, monstrous in its scope and extent, and no matter how monstrous, if repeated and repeated, has it effect upon the community. And we say what has been happening in this country, stipulated by government and instigated by government, has been that very thing.

The Court: Does that not depend somewhat upon whether it is a lie or is the truth? I say that as a matter of consideration of the law applicable to this. I should suppose that that would have some bearing on it.

(898) Mr. Isserman: I think your Honor's point requires some answer. The answer is—I think Mr. Sacher to a degree dwelt upon it before, but the answer is that it is not possible that the Communist Party, which has existed for 30 years in this country, which has engaged in activities as we have shown in our affidavits, nationwide, in every field of endeavor, could have committed what your answer implies, a host of crimes over many years without any governmental action being taken.

And your Honor remembers that on a previous occasion Mr. Sacher stood up here and said that the Attorney General in testifying only last spring before the Un-American Committee indicated that there was no evidence upon which this kind of proceeding could be brought. Now, if there had been drilling with armies and sabotage and if there had been the preaching of force and violence the defendants would have been brought to book a long time ago. But there hasn't been any. But in this whole-period there has been created by such governmental bodies as the House Committee on Un-American Activities a persistent campaign of lying, not reporting merely to the Senate or to the House, but spreading pamphlets far and wide across this land on the grossest of lies about the defendants and Communism.

(899) Now if your Honor says it is an issue of fact as to whether this is so. I say that is precisely why—

The Court: It is at least an issue of fact in this trial, if one is to be had. I would suppose that you had here that very question, based not upon surmise or newspapers but upon evidence. You also have a question of free speech, there is no doubt about it, that is involved in this case. And those issues and the law applicable to them, will have to be determined upon the basis of evidence that is adduced. And it seems to me the quicker we can get down to the factual matters and the disposition of them, the better it will be.

Mr. Isserman: That is correct, provided the atmosphere does not exist which prevents a fair trial. And that consideration in this case at this point is prime and much more important than speeding through a trial to a forced determination of an issue.

The Court: Mr. Isserman, I have been considering that argument in various forms a number of times already. Now, it is easy to understand how it may seem to counsel that the Court is just making up its mind too rapidly and without any adequate consideration. But as I indicated in the opinion that I wrote some time ago, I gave this matter the most careful thought and study. I read over (900) every single one of those clippings, the pamphlets and cartoons and radio scripts and everything else that was submitted to me. And, frankly, I could not draw the conclusions that you desired to have me draw. Now, if I am in error about that, an error by me may be corrected. But I still have to decide in accordance with my conscience and my review of the matters that are submitted to me.

Mr. Isserman: I might say this, that I ask for this reconsideration in part and partly for a further application on new material, because after a careful study of your opinion, and with all due respect to your Honor, I believe that your Honor has misconceived our approach to this problem. Now your Honor—

The Court: Attorneys often think that I do that. You may be right. I don't know.

Mr. Isserman: I would like to suggest this to your Honor. Two things are possible. Either this is false or it is true. Now, if it is false we have said, in order to indicate that the presumption of innocence has been taken away from these defendants by the Government, that we take testimony preliminary on that issue. That is one aspect.

But let us assume a man has committed a (901) robbery and it is a fact that he has committed the robbery, if that fact could be ascertained. And for day in and day out it has been pounded in the press that this man charged with crime is guilty and he has been—and that is pounded in by Government officials and over the radio, through the press and by private organizations, I say that even if that man is guilty, if the community has prejudged him and if the Government has been responsible the Government cannot bring him to trial until the atmosphere is cleared.

Now we say the Government has a choice. The Government can discontinue this campaign and perhaps ultimately have its trial or if it continues this campaign it has stepped out of its role as an impartial body and it has became part and parcel of a prosecution. It has assisted in prejudging the defendants, and no matter what the state is of fact, under the atmosphere created no trial can be held because, above all, what is required, guilty or not, of any defendant is a fair trial in which the minds of the jurors will be free to make up their minds.

And we said, and we are prepared to prove it through testimony, that the condition of the community is such that with the use of the modern techniques of communication and of mass indoctrination, that the (902) presumption of innocence has been taken away from the defendant by Government action and that the community is now in such a state that no fair trial can be held. And we say that has nothing to do with the question of guilt or innocence.

Now, if the Court please, it is not that the Government has ceased its activities. I heard Mr. McGohey say before that he did not issue the statement which appeared in the New York Star under the signature of Ira Wolfert yesterday. I have had a long association with newspaper men over many years in connection with my work. I know Mr. Wolfert to be a newspaper man of integrity. I am not challenging the statement of Mr. McGohey. But I know that some place around Mr. McGohey or from his office someone, or somehow this statement came out to the effect that this case is just one battle in a campaign. I am a company commander here who has been given the job of taking a single objective.

And what is the campaign, your Honor? The campaign is a struggle against Communism, a political issue entirely. Now, whether Mr. McGohey said it or not, two things flow from the statement in the paper, two things flow from that. One, that it is in the pattern of the argument we have been making here since the (903) first time we had the opportunity, that this is a political trial and this is one battle in a political campaign. It fits into the pattern, your Honor, whether it was said or not. And, secondly, the persons who read this—

The Court: Let me ask you a question. Of course you know that statutes forbidding the advocating, teaching or otherwise conspiring to overthrow the Government by force and violence have been on the books for some little time. It is not merely the one under which this indictment has been laid, but there have been others by the various States, and there is a good deal of background to that.

Now do you say that all of those trials in the past for violation of those various statutes have been political trials?

Mr. Isserman: Your Honor, I am talking about this trial.

The Court: You see, we can't tell—

Mr. Isserman: I am talking about the Smith Act.

The Court: —until we get the evidence. You have assumed that this trial is going to be a political trial and that all constitutional safeguards are going to be flouted and disregarded and so on. Now, naturally I can't accept any such thing as that, because it is my (904) duty to make sure that that does not happen and that the trial is based upon the issues framed by the indictment. And if those facts are proved I would suppose, since I have said a number of times already on these various preliminary applications, that the matter of teaching and advocating the overthrow of the Government by force or violence is naturally the sort of thing that is going to arouse a great deal of interest and a great deal of discussion in the newspapers and elsewhere, that it is inevitable. And what your various arguments come down to is saying—and I am now talking law and not saying that these defendants are guilty or thinking that they are guilty—is saying that if people do those things then they can never be tried and they must continue indefinitely. Now I can't accept that.

Mr. Isserman: You see, your Honor, the point I am making is this, that this trial today will never determine whether they do these things or not, because the atmosphere has been created—and I would like to talk law and say that the presumption of innocence, which is a legal concept, has been taken away from these defendants by the Government—

The Court: That is what you have been saying.

Mr. Isserman: And that is what we want to establish. And we have established prima facie in these (905) papers now on which we ask a hearing.

Your Honor mentioned the other trials. Although I say this trial is different from any other trial, your Honor remembers the Mooney case, which was a political case if there ever was one and took years to bring justice to Mooney; and it couldn't have been justice when he spent most of his years in jail improperly. Your Honor remembers—

The Court: He was not indicated under one of these criminal syndicalism statutes —

Mr. Isserman: It was political there.

Mr. Sacher: This thing happens when you have nothing real on anybody. That is the answer.

The Court: You see, Mr. Sacher, that is the whole question, that we will never know the answer to unless we get the evidence. If it appears—

Mr. Sacher: There is no need to persecute people. Just don't persecute them. That is the answer.

The Court: Let me tell you, if there is no evidence to support the allegations of this indictment I will throw this case out. Don't you have any doubt about that.

Mr. Isserman: Talking about other trials, if your Honor please, the Sacco-Vanzetti case was a case which was a political trial, in no matter what mould it (906) was cast, I think your Honor might be willing to confess now or admit that those men were sent to jail because of their opinions and were burnt because of their opinions. You remember we called to your Honor's attention the book on Sacco-Vanzetti recently published by Professor Morgan, in which he points out that 20 years after the event, your Honor, that the atmosphere in the community was such that any jury which would have been drawn in that case could not have been a fair jury. And, as he said, I recall, prejudice swept these men off the boards of history. And in the book the trial was described as a breakdown of American justice and the jury system.

Now in this case, and I have studied the Sacco-Vanzetti case very carefully, not only in conjunction with this case

and since the publication of the book, but ever since the trials were on and efforts were made to save their lives; and I say that at this time and now the condition of the community with respect to this case is more indoctrinated and more inflamed deep down—and now I am not talking about shouting of voices—than the community was at the time of the Sacco-Vanzetti case.

And what we ask your Honor to do is to examine preliminarily through the testimony of experts that we (907) can call and offer to call, that in fact the action of the governmental agencies and Government officials, well sponsored by the press and well sponsored by the private organizations I have enumerated, have in fact created that atmosphere. And we say that inquiry must be had before any trial is held in which any issue can be decided on the evidence presented.

Now, if your Honor please, I would like to call attention again to the effect of this action of the Government. The other day, and that is paragraph 15 of the Davis affidavit, the Herald Tribune said in talking—Exhibit No. 32. Your Honor finds it?

The Court: I have it. I remember that.

Mr. Isserman: The Herald Tribune in talking about this case said, "Defendants are charged with conspiring to overthrow the Government by force." Now we know that is not the charge.

The Court: Well, that was a matter during the colloquy with Mr. Unger about the first day that the matter came before me. I have it straight all right.

Mr. Isserman: We know that that is not the charge and your Honor knows that that is not the charge. Now it may be that whoever wrote the story for the Herald Tribune made a mistake. It may be that it was deliberate, part of this campaign to create difficulties (908) and to add to this atmosphere against the defendants. But if it was a mistake, your Honor, it is only an indication of how newspaper men, who are supposed to be trained to observe and read and who are trained to observe and study legal documents, are carried away by the very atmosphere which has affected Judge Watson in Philadelphia and affects the men of the press for writing this kind of thing. And you don't

know if it was a mistake or not, and we aren't going to ask your Honor to judge that—

The Court: I notice they corrected it this morning.

Mr. Isserman: Yes. Belatedly. But they haven't corrected what their newscaster said, as far as I know, on January 10th, at 11:15—Mr. Tobin—that the Supreme Court ruling on our application to consider the jury challenge was a ruling that the defendants must be tried as traitors. That I believe has not been corrected.

Now all I am saying is this, that, 1, the atmosphere is such that this kind of material bears and, 2, that the material itself builds on itself and snowballs downhill and snowballs to the point where it has already engulfed this courtroom, without regard to anybody around the building, without regard to (909) clamor or noise, but has engulfed this community in an association of the defendants with the charges in this case, which make a fair consideration of those charges completely and absolutely impossible. And that is the point we are making about it.

Now, if your Honor please, again, if the Herald Tribune newscaster made a mistake or if it was done deliberately, your Honor would again say this is freedom of the press, perhaps. And yet we say that even then it is the objective situation which results which your Honor must consider; but we say something more in this case. We say this is instigated by and part of a Government political campaign. And when the incoming Secretary of State appears in secret session before the Senate Foreign Relations Committee on the eve of this trial and the attention of the whole country is focused on that secret hearing, one paragraph is released for publication by the Senate Foreign Relations Committee which condemns the principles for which these defendants stand, and does it nationwide, and I warrant it was a front page story in every newspaper in this country. When that one paragraph, dealing with the very issues of this case, is broadcast, what is its effect upon the community? The Secretary of State must answer and make his confession of antagonism (910) of war on what the defendants stand for before he can be recommended for one of the highest jobs in Government.

What effect does that have upon a poor Government clerk or a post office employe? What effect does that have

on any person in private industry who may be called to sit in the jury box? I think Senator Pepper put it as well as we know in the affidavit. He says, "This is nothing new." He says, "But this will satisfy those who want to hear deprecations of these Communists weekly, daily or hourly and suspect anybody who does not keep up with these timetables." And he summed it up when he says that he knows that this is broadcast for the purpose of getting these deprecations day by day which affect and warp the judgment, and warp it in this case beyond any possibility of repair.

And one would expect that Senator Mundt of the Un-American Committee would say that the statement is very satisfactory.

What does that mean? It means that those hunting subversive activities require that as a standard. And it means that those who will decide otherwise, in this case here, your Honor—it means that anyone called to judge any of these issues will be bound by the pressure of this kind of condemnation in advance, beyond any possibility of putting that pressure aside, of (911) putting away their fear and clearing their minds of bias. And that is why there is an unseemly haste about bringing the defendants to judgment in that kind of an atmosphere because it couldn't be justice, your Honor. And that is the point we make.

Now what we are talking about—I hope your Honor will now grasp our pitch. In advertising—

The Court: I think I have been understanding what you have been saying. The only thing is, this is the second or third time you have been saying. I understand it all right. Don't make any doubt about that.

Mr. Isserman: In the light of your Honor's opinion I was constrained to feel that your Honor hadn't grasped this point. I would like to emphasize it in another way.

We have said a lot and we say a lot in our American scene of the effect of advertising, and we know, as the advertising propaganda experts tell us, that it is the repetition which counts, it is not so much what you say about it. But if you see the sign "Wrigley's" or your Honor's favorite toothpaste or somebody else's famous whiskey,

and you see them on the billboards, in the subways, in the newsreels or in the theatres or wherever you go, in the newspapers—sometimes they say nothing about the product; they say "Four Roses (912) is beautiful," and "Drink it now," they don't tell you how good it is or what it is. Or "Somebody else smokes Chesterfields." And what is the reason why billions are spent on that repetition?

The Court: I often wondered.

Mr. Isserman: Yes, and I believe your Honor has cause to wonder. And, with all due respect to your Honor, if your Honor stops wondering your Honor has the key to what we are talking about. Nothing to wonder about, because the fact is well known that as to repetition, the hammering away, the driving home, day in and day out—that makes people prefer Coca-Cola to some other drink.

Now in recent times that technique has been enhanced. Now it is television, radio, comic strips, newspapers, magazines, pamphlets; every possibility of mass communication has been developed to do that in advertising. But it hasn't stopped with advertising. It has gone further. It has gone into politics, as your Honor knows. And the place where the technique has taken over, or where it was first applied on a mass scale was Nazi Germany.

And I am shocked, your Honor, day in and day out when I see parallels between the statement of Judge Watson on the bench and what happened in Germany before (913) Hitler came to power. And I would like to refer to the statement of my client, which I endorse, in his affidavit in talking about the trial of which this is a counterpart. He refers to the Reichstag fire trial. I think your Honor will agree that history now shows that that fire was initiated by Goebbels and the Nazi as a propaganda stunt, as a diabolic means to seize power in Germany and paved the way for that seizure of power. And I say the attack upon the defendants by this indictment and in this trial, under the circumstances today, is a close parallel, so close a parallel to that trial that it shocks the conscience. I say that under those circumstances—

The Court: That is a point where I can't agree with you. I have not been able to draw that conclusion from

the evidence you submitted. It seems to me wholly insufficient to compare any such parallel as that.

Mr. Isserman: If your Honor finds the evidence insufficient at least your Honor must concede that the argument we make, if true, that the presumption of innocence has been stripped from a defendant, that he should not be brought to trial, and if your Honor says the evidence is insufficient we say on this basic most important issue in this most important trial, which is not just another case, that the thing to do is to take (914) the evidence and give us the opportunity on the witness stand of showing that the things we say are true; the bringing in of experts to indicate the effect is as we say it is, because we who work with people perhaps more than your Honor does know that effect in the community. We have seen it, we have felt it and we have studied it.

The Court: I have heard it plenty myself. I have been through many of these things, only different in degree. This is not the first time that a defendant or defendants have come into court and claimed that the publicity was such that a fair trial could not be had. There have been many, many instances of that in the past. And I have those to guide me.

Mr. Isserman: I think your Honor put your finger on a very important point on this matter of degree. That would presuppose on the one hand some comment which has no effect upon the trial. On the other end of this scale of degree we have a situation which has effect upon the trial. Now you say it is a matter of degree, and we agree with your Honor.

The Court: Do you remember the Hines case?

Mr. Isserman: That is a matter of degree.

The Court: Do you remember the Hines case? Do you remember the motion that was made there.

(915) Mr. Isserman: Does your Honor compare that case to this?

The Court: Well, I must say that the publicity was rampant there.

Mr. Isserman: Did it emanate from the Government? Did it emanate from the Congress? Did it emanate from the Attorney General? Was it carried over the air on

every radio station in the country? Was it published in pamphlets by church societies? How can your Honor compare it? I would ask that your Honor look again at the pamphlets and documents and the other items, the comic strips we have presented to you before and then tell us whether you can compare it to that case or not. I say one is on the lowest end of the spectrum, and this is considering the matter of degree, and is so far beyond any point at which any admonition by this Court can correct it, that we say a period of time must elapse before justice can be done, before a trial can be had on any matter connected with this situation.

If your Honor admits it is a matter of degree, your Honor admits, as you do, that we have a sound legal position, if it is established, and now it is a question of degree merely, we say let us discover the degree. And if you give us the opportunity, which we are asking (916) for now, we say that your Honor will decide that the degree is such that no trial should be had. Now I am sure my colleagues will have more to say on this point, but I would like to—

The Court: I hope not very much more because—

Mr. Isserman: I can't speak for them, your Honor.

The Court: —almost everything you have said here is a repetition of what you have urged before, except you did bring in one or two things that were new, such as the reference as to what this judge said in Scranton and asking me to reconsider about the bills of particulars. But the vast majority of things that you have commented on have been repetitious.

Now I will be very glad to hear what the others have to say, but I hope that they don't just say over again what you have been telling me.

Mr. Isserman: Well, I trust their judgment.

The Court: However, if they do, it will do no great harm, and I shall listen.

Mr. Isserman: What I would like to suggest is this. My argument on the bill of particulars goes into another direction. Does your Honor want to hear the other counsel on this point first before we go into that bill of particulars?

(917) The Court: You do not mean to say you are going to argue more on that bill of particulars, do you?

Mr. Isserman: I am not going to argue a motion on the bill of particulars but I am going to argue a reconsideration of that matter, which is quite another thing.

The Court: Well, didn't you argue at some length, or your colleagues, before Judge Hulbert on that question?

Mr. Isserman: We certainly did, your Honor.

The Court: I remember reading a rather lengthy opinion that he wrote.

Mr. Isserman: And we believe it is essential that before proceeding to trial we make another plea to your Honor to reconsider that situation, because here again a situation existed in which a trial cannot be held with due process. And I certainly do not intend to go into the matter of each particular or anything like that at this point, but I do want to argue the point that your Honor reconsider that matter. The matter is not foreclosed, it is still before trial; it is essential matter. It goes to due process, to the Constitutional points we have made.

The Court: You may argue to the extent that you feel that you desire to. I hope that when you all (918) get through the thing won't be so mixed up that it is a little hard for me to tell just which motions are before me. I thought you were making one motion and that there were various aspects to it. But perhaps there may be more. I only hope that before you all get through with these preliminaries someone will make it quite clear to me how many motions there are and just what is the designation of opinion.

Mr. Isserman: I have stated mine but would like to reserve the argument on the point. If my colleagues desire to say anything—

The Court: Now that we are on this bill of particulars why don't you go ahead and tell me what you want to do about that and then you will be through, and then your colleagues can let me have their views?

Mr. Isserman: Well, could I have a recess of a few minutes, if your Honor please?

The Court: Oh. you have enough knowledge of this to tell me the particulars.

Mr. Isserman: No, it is not a matter of knowledge. I just want a few minutes to take a smoke.

The Court: All right, I will give you a ten-minute recess.

(Short recess.)

The Court: Now I do not desire to hear any (919) further argument on the bill of particulars matter. It has just occurred to me that that motion was not only made and fully argued and fully considered by Judge Hulbert, but a motion was made for reargument which I referred to him and he gave it further consideration and denied it again. So that, after all that, I do not think I desire to hear any further argument on it. And I may say this: I think that I like to hear argument by lawyers more than most judges do. I am helped a good deal by it and I enjoy it, and I like to allow as much latitude as I can about that, and I intend to continue to do that. I merely want to mention the fact that there is a good deal of difference between arguing here, as you are today, and what it will be if, as and when we have a jury present. And I want you gentlemen to understand that profuse and prolix argument before a jury I consider not entirely proper, particularly where there is so much repetition. We will pass on that of course when we come to it, and I think I can assume that I shall have no occasion to rule particularly on it. But I don't want to be misunderstood because of the latitude that I am allowing here today and that I have allowed in the past.

So you may proceed, omitting the bill of particulars part which I now deny because of the (920) circumstances that I have referred to. I do not want to hear any more argument on that.

Now, if you have something to add on the other phase or phases of your motion I will hear you and I will also hear whatever your colleagues desire to say in support of that same motion or any other motions they may care to make.

Mr. Isserman: If I may, I would like to state for the record my objection to your Honor's ruling that your Honor will not hear any further argument on the request

of the bills of particulars. It was my opinion that, because of the fact that this case is now scheduled for trial before your Honor, a discussion of that subject in the light of the indictment was particularly appropriate, and that your Honor at this point in hearing the application to reconsider and examining the indictment, scrutinizing it for that purpose, would be of a different view than Judge Hulbert was. It is a very important issue. It will determine the scope of this case. It will certainly have an extremely profound effect upon its length and, above all, it will have an effect upon the rights of the defendants. Therefore I would like the record to note my objection.

(129) The Court: Well, under the practice of this court I would only refer it again to Judge Hulbert, and I have every reason to suppose that he would decide it again just as he has already decided it twice.

Mr. Isserman: But your Honor is scheduled to try the case, and your Honor certainly has to examine the indictments, and in the light of that indictment, with your Honor's experience in these matters, I am certain that your Honor after hearing us would reconsider and grant us a bill of particulars. I do not know if your Honor has read the indictment closely or not, but if you do—

The Court: I took it with me in my chambers and I spent ten minutes reading it over again.

Mr. Isserman (Continuing): If your Honor does, from your Honor's own experience on this side of the bench, I am sure your Honor will say that we could not go to trial on this kind of an indictment.

The Court: Well, there must be an end to such motions for bills of particulars, and the end is now, and you have your exception.

Mr. McCabe: If your Honor please, without interrupting I should certainly like to go on record most emphatically against being debarred from addressing ourselves to that point as we go to trial, and in the (922) light of experience in attempting to prepare for trial, since it is some time, some weeks or months ago, since Judge Hulbert ruled on that. I think the Supreme Court has said that we must preserve our rights up to the very time of trial to show that because of the refusal of the

bill of particulars the time allotted for preparation has been hopelessly inadequate. Therefore, if your Honor adheres to that ruling I wish to be put on record as emphatically feeling that my rights have been jeopardized and restricted by that ruling, and I take exception to it.

The Court: I should assume that everyone of the counsel for the respective defendants takes the same view.

Mr. Sacher: I should like, if I may, your Honor, to be given a moment in regard to this bill of particulars point, because I think there was an indication in your reference to the bill of particulars that you did not regard it as one of the basic things, that it is one of these preliminary procedural matters; whereas I believe that in the context of this indictment and in the nature of the charge a bill of particulars assumes a number of essential characteristics. In the first place I think that the vagueness and the generality of this indictment are such as to make it utterly (923) impossible to prepare for trial, and I think that what your Honor may be met with in the course of the trial is the repeated justifiable assertion by counsel for the defense that the matters adduced constitute surprise.

Now, we have no desire to delay the proceedings, but when the occasion arises let it be clear that the responsibility for whatever delay comes must rest squarely on the United States attorney for the indictment which he prepared and for the denial of the bill of particulars. So much for surprise.

So far as due process is concerned, what have we in this indictment other than a general charge that the defendants have been guilty of the outrageous exercise of their constitutional right to publish documents, to publish books, to teach, to establish schools, and above all to organize a political party—a thing which I think constitutes one of the great political heritages of Americans.

The Court: You leave out the part about the teaching and advocating the overthrow of the government by force and violence.

Mr. Sacher: I am sorry, I missed the beginning of your sentence.

The Court: I said you omit that part. You speak of it as though they are simply charged with (924) organiz-

ing a political party. But however that may be I will be the one solely responsible for the conduct of this trial and for the rulings that I will make. If questions arise about surprise I will rule upon them in due course.

As to the bill of particulars, I have now ruled that that matter will not be reopened, and I will hear no further argument now or hereafter on that point.

Mr. Sacher: Then I should like simply with a one-sentence objection to conclude what I have to say: I wish to except to your Honor's ruling on the ground that it constitutes a denial of due process under the Fifth Amendment, and that it denies the possibility of a trial such as is required by the Sixth Amendment of the Federal Constitution.

Mr. Crockett: If your Honor please, I should like very much to be heard on behalf of my clients concerning our objections to proceeding to trial in this matter. Your Honor indicated a few minutes ago that in your opinion there had been quite a bit of repetition, and I gather that you desire to have something new added.

It so happens that my background has been such—

The Court: I think a better way to put it (925) would be that if there is to be further argument I would appreciate a limiting of the argument to the new matter.

Mr. Crockett: I would like to do precisely that.

Mr. Isserman: If the Court please, if counsel is talking about the particular problem, I think it is appropriate now, but I have not quite finished my summary on the other point.

The Court: I am sure Mr. Crockett will defer to you and let you conclude your argument.

Mr. Gladstein: Before your Honor permits Mr. Isserman to do that I want the record to show my objection—I understand you will not permit argument in support of it—my objection to your Honor's ruling on the request for a bill of particulars, and particularly do I object, your Honor, to foreclosing, as you have done in the record a moment ago, even the possibility that the occasion may arise when your Honor will feel that it might be just to grant us a bill of particulars.

The Court: Well, if some action does arise I shan't take it amiss if someone raises the point again.

Mr. Gladstein: Well, I am glad to hear that, your Honor, so we will feel we have the right recognized by the Court, although I assure your Honor that we would have asserted such rights as we feel we have—

(926) The Court: Very well.

Mr. Gladstein: The Court recognizes that there may well be occasions during the course of these proceedings for the Court not to foreclose itself by what it has done today in considering or reconsidering our request for a bill of particulars. And I rather feel that that occasion will arise upon the effort of the United States Attorney to introduce the very first document or whatever particular it may be.

The Court: I hope it does not continue continuously to arise, but if it does, we will deal with it when it comes up, and I shan't preclude anybody from ever mentioning the subject of the bill of particulars again, but I think I will not be disposed to hear any great argument on it or to grant it; but I may be wrong about that, and I do not forbid anybody to ever say anything about it throughout the trial.

Mr. Gladstein: It is not a question of forbidding, your Honor—

The Court: Which language do you like best?

Mr. Gladstein: No, your Honor, you have misconstrued my point, or, perhaps I should put it this way, that I inartistically attempted to make my point. It is not, your Honor, that I understand that you have forbidden us from raising this question of asking for (927) a bill of particulars, but rather, I point to the fact that your Honor's ruling is such that you seem to have closed your mind to the possibility of the development of an occasion in this case when it would be appropriate for the Court, and, indeed, the duty of the Court to respond affirmatively to a request from the defendants that the Government be required to supply a bill of particulars. That is the point I wanted to put in the record in addition to my objection to your Honor's ruling on that question thus far.

Mr. Isserman: If the Court please, I will just be another few minutes: During the recess I checked up on the

—I tried to check up on the reference your Honor had made to Hines—

The Court: Well, I did not intend that as more than a passing comment. The chief thing I adverted to was that I have had a good deal of experience, and I know a great variety of things that have come up in the past where it has been claimed by defendants that there was so hostile an atmosphere in the community that there could not be a fair trial. Now, I gave all those matters the most thorough and painstaking consideration when I passed on that motion that resulted in the opinion that I wrote out; and, frankly, I have not seen anything substantial that was new in what you argued here today. (928) It seemed to me largely a repetition of what was argued before.

Mr. Isserman: I tried to check up—I was merely telling your Honor I was trying to check up on the Hines matter because when I heard it I had an automatic and conditioned response to Hines Pickles but I did not remember the other Hines matter.

The Court: I wasn't talking about Hines Pickles.

Mr. Isserman: The other matter, as I recall it now—and I remember the situation generally—was one which could not possibly have compared to the matters we have presented here. And I believe it requires, therefore, the most careful consideration by the Court of the matrial submitted even though its quantity may make that a task of some extent.

Now, in summing up I would like to call this to your Honor's attention, that we are concerned and we have pitched our argument not on newspaper stories as such; that we have charged a course, a persistent course of conduct by the government which has created the situation described in our affidavits; that the situation which has been created is not one of general animus alone, but one that is specifically related to the issues of this case; and we say the effort has been— (929) and to a substantial degree it has been successful—of associating the defendants improperly and falsely with a concept of force and violence which is the very issue of this case, and that is what requires your Honor's special consideration.

Thirdly, it is the amount of the material which has to be considered in its total impact, continuing right up to this minute; and, fourthly, that we have presented to your Honor in the limited form of affidavits, including the affidavit of Clyde Miller, the propaganda analysis expert, a sampling of the material to indicate a substantial definition of what was occurring and indicating at the same time that we could not indicate it all, and that we required to put the whole picture before your Honor a hearing which would afford us the full opportunity to call the witnesses to substantiate every allegation we have made, to the effect that in fact there has been the government instigation of this indoctrination and propaganda; to establish, in fact, that it has been carried on country-wide by newspapers and by organizations; and to establish, in fact, that it has had the effect which we have indicated today here and on our previous motions, and to establish, in fact, that the defendants have been prejudged on the precise issues of this case; and to establish, in fact, that they stand (930) now in this court with the presumption of innocence destroyed by the government.

The Court: All right, Mr. Crockett.

Mr. Crockett: I should like at the outset, your Honor, to subscribe to the arguments advanced by my co-counsel, Mr. Isserman, but I should like also to suggest to the Court a different approach to this whole problem of whether or not this continuous stream of government inspired propaganda has not had its intended effect—namely, to preclude the possibility of a fair trial for these defendants.

I make that suggestion from the background of my experience as a member of America's largest single minority group. I do that because I, as well as fifteen million other negroes of this country, have become more or less authorities on this question of prejudice inspired by newspaper propaganda.

This is not the first trial in which I have participated in which I have felt a sense of opposition that was not entirely justified. This is not the first trial in which I participated in which I approached it with the idea in mind that under the conditions surrounding the trial it would be impossible for my client to have a fair trial.

(931) Sometimes we who live her in the northern part of the United States are inclined to believe that prejudice against anyone because of race, creed, color or even political affiliation is confined to the southernmost portion of our country. I know, as a matter of fact, that that is not true. I also know how easily the prejudice against one particular group can be transferred to become a prejudice against another group, provided that second group has been closely identified with the first group.

In this particular case the government has moved for a trial of the twelve National Committemen of the Communist Party. In effect that amounts to a trial of the Communist Party itself. Many people who are by nature an entire minority group, or who have been made so by various forms of propaganda by such organizations as the Ku Klux Klan and various others that I can mention, have come to associate in their own minds a deep connection between the Communist Party and the struggle of the American negro people for complete freedom in this country. I am not persuaded that that connection is not well taken. Because of that connection, negroes, 15,000,000 negroes, will have their eyes centered on this courtroom, and if it is possible in an atmosphere of government inspired prejudice for (932) a group who themselves constitute a political minority in this country, to obtain a fair and impartial trial.

Now, the only person who can assure these 15,000,000 that the Government of the United States is still a government devoted to the principle under the law, the only person who has the power to do that is your Honor. What I have—

The Court: You mean by postponing the trial?

Mr. Crockett: That is exactly what I am suggesting, more or less along the same line that Mr. Isserman suggested in his argument, and that is that while your Honor has no control whatever over the source of the propaganda, —obviously you can't tell the Department of Justice to stop this, or to tell Congress to stop this, that or the other —your Honor does have control over the time at which this trial will be held, and it is that element of control that we are suggesting that your Honor use in this case.

Now, what is there to be lost by granting a continuance in this case? Is it a fear that the trial will cost the government too much money? I doubt that very much. Is it the fear that some of these defendants will not be available for trial? I doubt that very much. What, then, is there to be lost? I do not know, but I would like to hazard a guess—I seem (933) always to find occasion to refer to the United States District Attorney, and in this case I make the reference because during the noon recess I had occasion to read the American—the Hearst paper in this City—and I find another quotation by Mr. McGohey to the effect that this is the biggest trial of his life. Perhaps that is why he is so opposed to continuing it. As long as it is the biggest trial of his life, maybe he wants to try it to get it over with, or maybe also he feels that if the trial is postponed there will not be all of this national attention centered upon this courtroom, in which event Mr. McGohey no longer becomes the so called Colonel in this military army; he becomes what the law intended he should become—a defender of justice, a person concerned not so much with convicting the accused as with ascertaining the facts underlying this indictment.

I respectfully submit, your Honor, that under the circumstances this occasion affords an opportunity to your Honor, as the embodiment of all that is fair and just under the Constitution of the United States, to at least give some indication that in your judgment a fair trial can be held even though the group that is to be tried are members of a minority political group; because I suggest that in the absence of any such indication today, a lot of fear —a lot of faith—I probably (934) should have said "fear"—which now exists among 15,000,000 negroes of this country, the fear as to whether or not the wheels of justice turn properly in any section of this country, will find some support.

Mr. Sacher: May it please the Court, I think what this application gets down to is fundamentally a question of government morality. The question is whether the Government of the United States, which is already here in this court in the role of Judge and prosecutor, shall also be permitted to assume the role of prejudge as well as preempting the function of the jury.

Fundamentally our objection here is on this phase of our application that the government has used the media of mass communication as a funnel, a huge funnel for the transmission of lies, of falsities, of slanders, because it is convinced that without such lies and slanders there cannot be a conviction under this indictment.

And so what we are saying to your Honor is that the government at this time comes in with unclean hands. Unclean hands. And it is not beyond the power of this Court to say to the government, "Go, cleanse yourself and come back when you are clean."

(935) And I want once again to invoke the immortal words of Judge Brandeis in the Olmstead case when he said—I quote—"Will this Court sanction such conduct on the part of the Executive"—referring to improper procedures of search and seizure—"The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity, but the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the actor the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling."

I have no desire to detain your Honor any longer. I say that the proper administration of justice requires this Court to tell the government that until the things that pour forth from the government are stopped, and until there are dissipated the effects of those pourings forth, there cannot even be the pretense of anything approximating a fair and impartial trial.

I submit, sir, that the motion for a continuance for 90 days be granted.

Mr. McCabe: If your Honor please, without repeating what my colleagues have said, but adopting on (936) behalf of my clients what they have said, I would like to repeat now at the eve of trial that despite the fact that counsel for the defendants are not slothful persons, despite the fact that we individually have spent hours and hours and days and weeks in attempting to prepare this case, we

say now at the eve of trial that because of the previous rulings of your Honor and Judge Hulbert, we are not prepared for trial, and that we need at least 90 days for adequate preparation of the trial.

I would like to address myself to one other point which I think was perhaps passed over rather lightly today, and that is the alleged misquotation out of the whole cloth which Mr. McGohey charged against, I believe it was the Star, and a reporter named Mr. Wolpert, whom I do not know, and who, so far as I know, I have never seen. But if Mr. Wolpert made up out of the whole cloth the dramatic statement and attributed it to Mr. McGohey, that this was a part or a battle or a skirmish in a war, and that he was given the task of—I think it was a Colonel—giving him the task of seizing or capturing one objective, I say that is a most serious thing. Are the jurors summoned in this case to be the privates to assist Mr. McGohey in capturing that position? We must have some privates some place. He is a Colonel with his officers.

(937) Now, Mr. McGohey stated that he did not say that. I wonder whether in the interest of justice your Honor does not feel it necessary to make some further inquiry—

The Court: No.

Mr. McCabe: Well, I should like then to know whether Mr. McGohey said anything at that time, whether he spoke to Mr. Wolpert, whether he said anything which could have been construed or which could have been misconstrued as Mr. Wolpert apparently did.

Now, true we have no desire to restrict in any way the freedom of the press; but if at the outset of trial statements, misquotations are to be made up out of the whole cloth, then I say that we, representing the defendants, and the defendants themselves, find themselves in the position where they may fear misquotation of that sort. And I think it would be a wholesome thing if in order to prevent that, and to protect the defendants from the grave misfortune which fell to Mr. McGohey, some steps were taken by your Honor to find out who was at fault in that matter and if possible to prevent a repetition which might have a serious effect upon the attempt of these defendants through their counsel to protect their rights.

(938) Mr. Gladstein: Your Honor, I will be brief, but I would like to stress in addition to adopting the arguments that have been made, something that I think has not been touched on. I want your Honor to assume for a moment that Mr. McGohey did make that statement. I want you to assume it for the sake of our discussion. I want your Honor to assume that when Mr. McGohey rose a little while ago and denied that he had made that statement, I want you to assume that he did the contrary. I want you to assume that the man who represents the United States in this prosecution got up in this courtroom and said, "Yes, I did tell a newspaper with a large circulation in this city exactly what appeared there."

Now if Mr. McGohey had said that, your Honor, I think your Honor would then say to himself, "The government has definitely taken steps to prejudice conditions in this city, in this district, and should not be permitted to profit by that prejudice, and therefore until that prejudice has been spent, until the force of that prejudice, deliberately inculcated, has been spent, there will be no trial"; and I think your Honor would seriously consider and perhaps grant a motion for a continuance, if that were true.

Now, Mr. McGohey has said, however, that he personally is not the author of that statement. (939) I have not heard Mr. McGohey say, however, that no one connected immediately with his office; I have not heard him say, for example, that none of his assistants; I have not heard him say that no one in the United States Attorney's office made that statement. And if it is true that an assistant of Mr. McGohey made that statement, as representing the attitude of the office of the United States Attorney, then I say it does not make any difference whether Mr. McGohey personally was the author of those words or whether it was somebody else. And I ask your Honor to consider, if that be true, of what importance is it that Mr. McGohey is able in affect to hide behind the fact that he personally as an individual never spoke those words; and never personally authorized or directed the publication of those words. To the people of New York, to the people including prospective jurors, to the public, it stands that the United States Attorney's office, that the United

States Attorney has said, had confessed, "This is not a criminal case; this is a politically inspired proposition which is part of a military campaign."

Now, your Honor, if those be the facts, if there is any reasonable ground for suspecting that they may be the facts, it is wrong, it is unjust for a Court out of hand to deny the opportunity to ascertain that—

(940) The Court: That is just what I am going to do.

Mr. Gladstein: Out of hand?

The Court: I am going to decide it right here this afternoon. There is not going to be any such inquiry.

Mr. Gladstein: I think, your Honor, that that very conclusion on your part indicates that your Honor is unaware that we have not been able to communicate to you the extent of the prejudice that ensues from precisely that kind of statement coming from the office of the United States Attorney. Why, your Honor has heard a quotation—

The Court: Why, there will never be any end of trials if everything that comes out of newspapers, if you got the man who signed the article and the editor, and the various people who are supposed to have said this and that, and conducted an inquiry—why, we would never be through.

Mr. Gladstein: Now your Honor is generalizing about something that I am being very particular about. I am now talking about—

The Court: There was another article the other day that you wanted me to have an inquiry—or I guess it was perhaps Mr. Sacher who was urging that on me, (941) and I am just not going to do that.

Mr. Gladstein: Now your Honor is again generalizing concerning what newspapers said.

The Court: Well, I will generalize to this exent, that I am not going to have any inquiry whatsoever.

Mr. Gladstein: Now, if your Honor please, I want this clear: I am not asking your Honor to investigate newspapers or newspaper writers or the editors of newspaper. What I am saying is this: This is a very narrow and precise point. It is the function of the United

States Attorney to prosecute his cases in court and to prosecute them as criminal cases, and in doing that to uphold his oath of office and the highest traditions of justice in our country. It is even, indeed, his duty, not just something that might be expected from him, but his sworn duty and obligation not to seek to achieve a record of convictions, but to see to it that all of the rights accorded to a defendant by our law are fully given.

Therefore it behooves the United States Attorney to refrain either personally or through the medium of his office from generating statements of this kind which, when they get into the press can only have the effect of endangering the possibility of a fair trial.

(942) We are talking here, your Honor, about more than the rights of a particular defendant. We are talking now about the essence of the administration of justice. This is something that a Court, apart from protecting the rights and the interests of an accused, ought to be interested in from the standpoint of maintaining public confidence in the integrity and impartiality of the administration of justice.

Now your Honor, there was read to you today a statement proving that this poison that we have been bringing to your attention has been so great, there has been so much of it, that it has actually seeped into the Federal judiciary; and the almost unheard of thing occurred, that a judge of the Federal courts, sworn to uphold law and order, sworn to uphold the Constitution of the United States, actually used his courtroom to tell people to go out and use physical force and violence against those who possessed political opinions that might be different. That has even gone to the point of corrupting a part of the Federal judiciary. But, more important than that, your Honor, it has gone to the point of infecting people of this immediate community.

Now there was brought to your attention the other day something that particularly affects one (943) of my clients, Mr. Robert Thompson. Not long ago, and as a direct result of this barrage of propaganda, a terrible thing occurred. I am going to talk about it a little bit. This barrage is so great and has seized people to such an

extent that your Honor may even have noticed that a common criminal who made an effort to steal a boat the other day was reported in the press, giving as his excuse, that he wanted to go and fight Communism. That was his excuse for trying to steal a boat. Well, now, it so happens that only a month or two ago, the exact date was November 20, 1948—

The Court: Isn't this the same matter that was brought before me the other day?

Mr. Gladstein: I want to call your attention only to a portion of it. A man named Burke, a private detective, came uninvited into the home of my client Robert Thompson. Listen to what he has to say, your Honor, as to his reason.

The Court: I remember it from that paper with the underlined part. I have it very much in my mind's eye, as I read that the last time you had that matter before me.

Mr. Gladstein: He did not know Thompson. He said that. He was not a friend of Thompson. He said that. And he had never talked with Thompson. But he went (944) to his apartment. What was the purpose of his going there? This was his answer. "To give him a hard time, to start an argument with him." And he was asked, "Argue with him?"

And he said, "Yes."

"Well, what do you mean, give him a hard time?"

He said, "I was going to talk him about his organization and make fun of it." And he admitted that was his purpose; he wanted to go there to start an argument because Robert Thompson was a member of the Communist Party, about whom there had been taking place, as well as the other defendants, all of this barrage of incessant propaganda from the Government.

Judge Watson may have been either foolish or remarkably honest to express the vicious prejudice that he felt. This creature Burke was either foolish or perhaps honest in revealing by his confession his hatred, his bias, his viciousness and his readiness to commit crime. And he did commit crime.

But there are many people in this district, particularly those who may be called as prospective jurors, who may guard and who may be expected to guard very closely the prejudices which they share equally with the Judge who spoke so badly, who share the same kind of view as Mr. Robert Burke. But they will come in here and they will not admit that which is true. And the reason (945) they won't admit it is because they feel comforted and sustained by what is taking place. And, more than that, they feel encouraged to believe that it has become their duty to carry out a preconceived objective and, as Mr. McGohey said to enroll as faithful privates in the army that Mr. McGohey hopes to lead victoriously in the capture of a point in military command.

Judge, our country is an awfully big and strong and powerful country. We don't have to fear 11 men who are sitting here because of their views. That is what they are indicted for. They come to you and they say, with more proof than I am sure can be found in any case we have ever had, more than in the Sacco-Vanzetti case, more than in the Tom Mooney case, more than in the case during that period when the effort was made to destroy labor unionism, when they prosecuted the International—the Industrial Workers of the World, right and left, similar charges against them, although years later it was found—what? No, they didn't preach or practice sabotage. Years later, yes, that was the finding. But in those days, in that situation, men were tried. That is, it went by the name of trial, but it wasn't fair and it wasn't honest and it wasn't decent and it wasn't moral.

Surely it is unseemly, it is unbecoming for (946) us here in America to claim, as we do, not only to our own people but to all the world that we are dedicated to the principles of liberty, justice and equality for all and that we practice democratic principles. That is what we say. Isn't it unbecoming for us, when this mass of evidence has been presented showing what has been done wilfully and deliberately, to turn and twist and distort and poison the minds and the hearts of the people here, including the prospective jurors? Isn't it unbecoming for us to say the defendants must nevertheless go on trial?

Your Honor, I submit that this kind of poison which reaches such a high point as the evidence given by a Federal Judge, as the assault that took place in the home of my client Robert Thompson, that kind of thing we can't allow a trial to commence while that is happening. It is the duty of the Court to ensure a decent and honest and fair administration of justice and to give to the defendants a true and realistic conception of a fair trial under circumstances where we can get a neutral jury. Those circumstances don't exist today. If there be any question of doubt, that doubt ought to be resolved in favor of the defendants, not in favor of rushing pell-mell and headlong into a case where men were indicted only six months ago, when as we know (947) corporations violate the antitrust laws it takes frequently all of two years. And, by the way, there is no great clamor, there is no excitement against them, there is no poisoned atmosphere. But nevertheless the ordinary normal course of events is such that the corporations don't face trial for perhaps two years from the time of indictment.

Here today we are rushing into something that we will regret, your Honor will regret, we all will regret it because it is wrong.

I ask your Honor to grant the motion for a continuance of this case. We are asking for 90 days. We believe that we are entitled to that. But your Honor, surely you must recognize, be it 90 days or some other period, that a decent time interval must be permitted to elapse for the dissipation of this high point, this high pitch of excitement, terror, fear and prejudgment of the defendants, goaded on by what many people feel is that which is not only expected of them but they fear to do otherwise.

The Court: Mr. McGohey, have you got anything to say?

Mr. McGohey: Only this, your Honor: to say that in so far as I have been able to read or the members of my staff have been able to read and examine the (948) motion papers submitted today and the affidavits attached to them, and in so far as I have been able to ascertain from the long detailed arguments this afternoon, I suggest that there is nothing new in the nature of anything now sub-

mitted to you from the nature of what was submitted to your Honor back in October, what was submitted to you last Thursday or, indeed, what was initially submitted to Judge Hulbert at the time the motions were made before him.

In view of the fact that there is nothing new, I repeat here the denials that I made there; that so far as I am concerned, in so far as any member of my staff is concerned, I deny that anything that I or they or we together have done, as reasonably interpreted, could, reasonably interpreted, be deemed to cause a prejudice against any of the defendants or all of them. I deny that anything that the Government has done, that the Department of Justice has done, fairly interpreted, could be held to create a prejudice against the defendants.

And I suggest to your Honor that of course there will be a time when the fact of prejudice or its absence will be determined according to a procedure which the law provides for. There will be a time, if we get to it, when prospective jurors will be placed in this box and they will be caused to be examined as to their prejudice. (949) And it is not necessary that we have any experts to testify as to what the jury thinks because we will have the very best evidence– the jurors themselves.

I urge upon your Honor that the motions for continuance be denied.

The Court: Now have I got before me just the motions for continuance, so that your two motions are still in abeyance, or your one motion with the double aspect? Is that your understanding of it?

Mr. McGohey: My understanding is that you have before you motions for continuance and that the motions which I made with respect to moving the indictment for trial are in abeyance.

The Court: All right. I will deny the motion for the continuance, and we will hear argument tomorrow at 10:30 concerning those two motions or the single motion of the United States Attorney with the double aspect.

(Adjourned to January 18, 1949, at 10:30 a. m.)

(950) New York, January 18, 1949;
10.30 a. m.

The Court: Now, gentlemen, I think we are up to the point where whatever you desire to say in opposition to the pending motion, I will hear you.

Mr. Sacher: I am sorry, I didn't hear your Honor's statement.

The Court: I merely said that we are up to the point where there is a pending motion, and at the adjournment yesterday afternoon you and your colleagues were about to address the Court on the arguments you desire to make in opposition to that motion. If you have forgotten the motion I will remind you it is the Government's motion that the conspiracy indictment be moved for trial, and that there be a severance as to the defendant Foster.

Mr. Sacher: Mr. McCabe would like to address the Court on that.

Mr. McCabe: I had in mind, your Honor, as I walked in here today, I had hoped that after what was (951) said yesterday, that there would have been a relaxation of what we referred to in all seriousness as a state of armed siege or intimidation.

As I came in today I noticed that the same situation existed, and for the first time it was called to my attention—and I believe it was accurate—that the jurors who have been summoned here presumably to try this case are lodged temporarily in a room—I believe it is room 108—across the corridor. If I am wrong in that I would like to be corrected.

The Court: You know, I have already found that there is no factual basis sufficient to sustain the motion. I see no intimidation or evidence of intimidation or armed camp, or anything of that kind, and I found when I went out to lunch yesterday that I was very grateful that I had a little assistance in getting through the crowd outside and off to the place where I wanted to eat my lunch; and in that same connection you remind me there was a pending motion which I reserved decision on, and which I now deny, after having inquired into the matter carefully; and so that clears the way to this matter of the alleged armed camp and intimidation.

Now, I do not see any occasion to keep referring to that. I find that what precautions have been taken (952) seem to me entirely reasonable, adequate and proper.

As to the publicity and what the newspapers say, that is not a matter within my control, and I have no disposition to attempt to tell the newspapers what to do and what not to do.

Mr. McCabe: Your Honor's ruling of yesterday was, of course, based on the conditions as you saw them yesterday. So, therefore, any objection which was made yesterday would not go to the conditions as they exist today, and of which I am complaining now, particularly that the jury when they walk in must have in mind the presence of an unusual number of armed guards. That must have some effect on them, and I feel that I would be remiss in my duty to my clients if I did not make that statement on the record today.

The Court: I do not criticize you at all for bringing the matter to my attention.

Mr. Sacher: I would like, if I may, Mr. McCabe, I would like to make this brief observation, your Honor. Yesterday Mr. McGohey referred to public notification of the fact that there was going to be a picket line around the courthouse and urged that, I think, as justification for whatever manifestation of police force made itself evident yesterday. (953) There are no such notices and there will be no such picket lines today.

The Court: Well, I do not intend to have to fight my way through a crowd of booing and hissing individuals without some reasonable police protection. I do not like to have to push my way through crowds in that way. I think I am probably capable of doing it if I have to, but it is very distasteful to me and I should not want to do it.

Mr. Sacher: I do not think, your Honor, that there was any occasion yesterday for you to do any pushing. As a matter of fact, I saw pictures of your Honor in the newspaper which showed that you had a wide berth through which to move yesterday, and I do not think that anyone did anything which would justify the statement that the Court had to push its way through.

So far as booing and hissing and cheering are concerned, I dare say that those manifestations come within the category of freedom of speech too, and therefore—

The Court: I do not criticize them. I merely say that as far as the facts are concerned, I make whatever finding is required in accordance with what I have just stated and in accordance with my own personal observation, and I deny that application.

Mr. Sacher: Except that your Honor has made (953-A) a statement of what purports to be fact on the record, and I would like to make a statement of fact on the record.

The Court: Go ahead and do it.

(954) Mr. Sacher: That there were very, very few people other than passersby on their way to this court and the Supreme Court Building which adjoins this court house; that there was no turn-out of any kind; that there were far more police in and outside the building than there were civilians in or outside the building. And if your Honor refuses to recognize that I again appeal to your Honor to either make a personal inspection or direct some officer of the court to make a personal inspection to verify what I am saying.

The presence of large numbers of police, the same numbers as were present here yesterday in this court house, I maintain constitutes an invasion of the court house, a contamination of it with a police force and the aspect of violence which gives a characterization to this trial which it does not deserve and which it should not in all propriety receive.

And I again renew my request to your Honor that you order the immediate removal of the police from the federal precincts of this court house. I maintain that everyone is in perfect safety without the police; that, on the contrary, such dangers as may appear here will appear only because of the presence of the police. And I say to your Honor that the prejudice from the presence of the police and the movement of prospective (955) and actual jurors past a cordon of police coming into and going from the court can create only so prejudicial an atmosphere as to require a Judge who is bent upon a fair and impartial trial to order the removal of those forces.

I therefore again appeal to your Honor to exercise your power and control over the premises of the court house and direct the immediate removal of these police. There is no more occasion to have them here and there was no more occasion to have them here yesterday than there is in the trial of any ordinary case. The presumption of innocence I hope will be recognized by both Court and prosecution as surrounding these defendants as it does defendants in any other case. But, as a matter of fact, it is interesting to observe that one of our most important newspapers, the New York Times, observed editorially today that the police force here was entirely unnecessary; and that newspaper gave editorial recognition to the fact that there is no charge of any overt illegal act of any kind on the part of these defendants, that the only charge against them is that they quote conspired unquote to organize the Communist Party which it is alleged teaches and advocates certain doctrines; that the questions which will be involved in this trial will be whether that (956) party does or does not teach these doctrines, whether the statute under which the indictment has been brought is constitutional or not and whether in any event the occasion or, rather, the teachings by the defendants attributed to them by the indictment fall within the scope of the statute.

In light of the fact that all that this indictment is addressed to is political ideas and teachings, and in view of the fact that there is no charge of any illegal conduct or acts as such, I respectfully submit that it would command a much greater respect for the processes of this Court to allow the proceedings to go on in an atmosphere at least which bear the appearance of peace and calm, rather than bring into this court house all the falsity, and the police, which have characterized the publications and actions of the Government up to this date in the forms which we have set forth in our various moving papers for a continuance of this trial.

Mr. Crockett: If your Honor please, I would like for the record to indicate that on behalf of my clients I join in the suggestion that has been offered by my co-counsel Mr. McCabe and Mr. Sacher.

I should like for the record to indicate further a formal offer of proof on my part to establish the same (957) facts as we offered to establish at yesterday's hearing, and in addition to establish the fact that one hundred members of metropolitan police of the City of New York were encamped in the Federal Court House building here and that directly across the street from the Federal Court House building, in another building, a like number of one hundred members of the metropolitan police force were also encamped.

Mr. Gladstein: Your Honor, I want the record to show on behalf of my clients that I join in the protest that has been made by the attorneys that have spoken thus far. But I would like to add this in addition.

I don't think realistically that one can separate the impressions received from seeing large numbers of uniformed policemen outside the court house but in the immediate vicinity of it, and on the other hand police in uniform within the corridors of the court house. Yet I want to place special emphasis upon the latter condition.

Whatever justification your Honor may feel for the presence of police outside the court house, and that is something to which I don't subscribe and something about which I asked your Honor yesterday to inquire of Mr. McGohey or of the chief of police or of the Inspector who was in charge, as to whether any (958) facts were known would warrant the placing of so many police in this immediate vicinity. Notwithstanding that, I call particular attention to the atmosphere created within this very building, within the building that houses this courtroom.

Your Honor, no trial, no trial can really be a part of the process of administering justice unless it is conducted under circumstances that are calm, quiet, rational and judicial in atmosphere. We try people in this country, pretend that we try them only when the conditions are such that we say there is an atmosphere of reason; never do we concede that we have a right to try people in an atmosphere of hysteria.

Standing behind me here are two men who are attaches of this court, they are bailiffs.

The Court: But they are always there, at every criminal trial.

Mr. Gladstein: Your Honor, you haven't heard me yet. I have no objection, precisely.

The Court: If I seem impatient to you I am sure it is a very misleading impression.

Mr. Gladstein: I will accept that, your Honor, with what I think you intended to convey.

I want your Honor to know that I am not objecting to the presence of bailiffs in civilian costume (959) wearing the badge of the court. To the contrary, that is what I am bringing to your Honor's attention, that there is no possible earthly excuse for the men in the corridors who are supposed to be stationed there for the purpose of preserving order, to be wearing the uniform of the police. There is no earthly reason why. If it is only, for example, that someone must be in charge of those of the public who seek admittance to this room and for whom there aren't seats yet available, there is no earthly reason why an ordinary bailiff, an ordinary attendant of this court, wearing ordinary civilian clothes, with his badge, couldn't handle it. Instead of which, your Honor, as I walked into the court house this morning, at almost every five feet at least one uniformed policeman was stationed and in some instances two or three, on either side of the corridor. So that as I walked through the door, from the time I walked through there until I came into this courtroom, literally dozens of uniformed police officers were stationed there.

Now your Honor, please, must be honest and realistic. I know from experience what happens to people who every single day walk into and out of a courtroom under those circumstances. I have in mind a case that took place in the part of the country where I come from where that same condition existed, that same kind (960) of condition of intimidation and terror. We can't deny that prospective jurors when they actually enter the portals of this building, seeing the cordons of police on both sides, can't help but have communicated to them the idea that the Government has taken these extraordinary measures for their protection. Protection from what? Protection from the veiled, vague menace emanating from whom? From the defendants? From whom else? And that is what the desire is, that is what the objective is.

Can any person who is disinterested, who is detached from the issues in this case, deny that the rights of the defendants are prejudiced under circumstances of that kind? There is no occasion for those police officers to be either in this courtroom or anywhere in this building, your Honor. And so I am asking you at the very least—at the very least—to make an order that the uniformed police who are in and about the court house, in and about either this courtroom, the corridors or any room in the building, shall be removed, so that neither we nor the prospective jurors nor anybody else shall have occasion daily, not once but many times during the day, in the recesses, in the lunch hour, in the morning, in the afternoon, to have always the visual (961) evidence before them of a show of strength and force that communicates to everybody the idea that there is something to be feared from the defendants.

In the days that I came here prior to yesterday I saw no uniformed policemen around here, none at all. We came here on various occasions when motions were argued in this courtroom; it was just the same as our courtrooms out in the West. We have had cases about which there was public excitement. I have never seen not just the kind of concentration of force that was shown yesterday and still exists today but even a single uniformed policeman.

Your Honor, I ask you to reconsider the disposition that you have made and at least as of this time to order the immediate removal of every uniformed policeman in this building, other than those that you may have under normal circumstances who operate here. I do not know whether that is true; I am assuming it is not true. But if there are some who are normally here, all right. But I ask your Honor to make that order which will revoke the actions that have been taken especially in this case for the purpose and with the inevitable effect of impairing the chances of these men to receive what your Honor is supposed to give—a fair and impartial trial, conducted under conditions where rational prejudice is possible rather than hysteria.

(962) The Court: Now there is one thing that I mention just because I don't want to forget it, because it came into my mind last evening. I have not yet received the proposed questions to be addressed by me to the talesmen

at the trial. I have not received any from the defendants' counsel or from the Government, and I always like to study those matters over with some care and not merely say yes or no to particular questions, but to think of formulating questions of my own which shall bring out any matters of partiality or favor that might disqualify talesmen, and I would appreciate getting those so that I may study them before we come to the time of selecting the jury.

Now, Mr. Isserman, you were about to add something to the pending motion?

Mr. Isserman: Yes, if the Court please. I will try not to repeat what the attorneys for the other defendants have said, but on behalf of the two defendants whom I represent I wish to urge upon this Court that this matter of the showing of police force around this building cannot be reduced to the necessity of guarding the safety of your person as you leave the building. If it were just that we would not be standing up and talking about it.

The Court: I did not mean my safety. I do not feel that I am in the slightest danger. It is a matter (963) of being able to get through the crowds to get my lunch. If I have given any impression that I felt that my person was in any danger, I want to dissipate that. I see nothing to indicate any such matter as that.

Mr. Isserman: Well, I accept your Honor's point of view from the standpoint that it emphasizes even more the matter I am going to make, that this matter certainly cannot be reduced to a matter that your Honor does not want to be pushed through a crowd when you leave the courthouse.

The Court: No, I agree with you on that.

Mr. Isserman: It does not take 402 policemen; it does not take motorcycle squads and an emergency force and mounted policemen, detective and patrol wagon squads to take care of that little matter, and that is what we are talking about.

The Court: Well, I would not talk too long about my going out to lunch. I would let that rest where it is.

Mr. Isserman: Now, actually, your Honor, what we are talking about is the focus of this case has been distorted by the showing of this police violence and a showing of force and by its publication not only in the metro-

politan press, but I have seen papers from other cities and I have heard reports from other cities, and (964) in every one of them the headline was the same as it was here—"Heavy guard on trial" of the defendants in this case; and I say it is a distortion of the focus of this trial to associate, as has been the policy of the government for a long time past, to associate the idea falsely of force and violence with these defendants, and it is that we are talking about.

Now, a curious thing happened here today. Your Honor states one version of facts for the record and counsel state another, and I conceive that this conflict of fact should be resolved as other conflicts of fact are resolved, and I would like to repeat the motion made yesterday that your Honor call Chief of Police Inspector August Flath, who is in charge of this concentration of police, and inquire precisely as to the number of policemen which we say in the Davis affidavit are 402; that you inquire into the presence of motorcycle cops and emergency squads and mounted policemen and patrol wagon squads; that you inquire into the fact that for the first time this building has been used as a headquarters for the New York Police in connection with the trial, and there is a place where New York police can be stationed and maintained.

Now we ask you to do that to resolve this issue of fact so that the record will be clear as to (965) what we are talking about and so that the representations we have made here can be ascertained to contain the truth which they do contain.

The inescapable conclusion which every person must get from this concentration of police force is that the very presence of the defendants who for 30 years or lesser periods, ever since the Communist Party was organized, have been active in advocating and teaching the principles of Marxism-Leninism—that their very presence, notwithstanding their long loyalty to peaceful and lawful and constitutional activities requires this guard.

Therefore I join in the motions of the other counsel and ask that you hold the investigation which we have asked for yesterday and which the continued situation requires to be held today.

The Court: The motion for an inquiry is denied, and the motion to exclude the police is denied.

Mr. Isserman: Now, if the Court please, I would like to state for the record that if the Court had allowed us to present the evidence, that we would establish through the testimony of Chief of Police Inspector August Flath that 402 policemen have been assigned to guard this building throughout the trial; that in that category of 402 policemen are included (966) motorcycle cops, emergency squads, mounted policemen, police women, detective and patrol wagon squads, and that a headquarters has been assigned to the New York Police in this building in connection with this trial, and that New York police are housed in the building in connection with this trial.

The Court: Don't you think you gentlemen had better address yourselves to the Government's motion that the conspiracy indictment be brought to trial and that there be a severance as to Mr. Foster?

Mr. Isserman: If the Court please, before we go into that, your Honor ruled at the close of yesterday's session that the motions for a continuance were denied. There was embodied also in the motions I had made on behalf of my clients and which were adopted by the other counsel a motion that your Honor hold a hearing to determine that the facts set forth and alleged in the motion that I had made and in the affidavits of Mr. Davis, submitted yesterday and previously, and in the affidavit of Clyde Miller, previously submitted, were in fact true. Your Honor, I believe, has not specifically ruled on that request.

The Court: Well, I denied that motion. I might not have used the descriptive language that you just used, but it was my intention to deny that (967) motion, and for the record I deny it now.

Mr. Isserman: In that connection, if your Honor please, I would, with leave of the Court, without referring to it at length, add one exhibit to the ones filed yesterday, if I may.

The Court: That may be marked.

Mr. Isserman: Mr. McGohey, do you want a copy?

Mr. McGohey: Oh, yes, please. Thank you.

(Copy handed to Mr. McGohey.)

Mr. Isserman: It being offered for the same purpose as the others have been offered. Here is one for the Court (handing).

And we offer to prove and state that if we had been allowed, that we would offer to prove that the facts alleged in the grounds in the objections to proceeding which I made yesterday—

The Court: Well, this newspaper clipping is something new.

Mr. Isserman: Yes.

The Court: I did not see that yesterday.

Mr. Isserman: Yes. I ask that that be added as an additional exhibit. It could not have been added yesterday because it only came out yesterday afternoon.

The Court: Better let me just look at it before I pass on the matter.

(968) Mr. Isserman: Surely.

The Court: What has that got to do with this case? I don't follow that.

Mr. Isserman: Your Honor, this is another example of how persons of unstable minds are affected by the barrage of publicity and propaganda which has been instigated by the government and which has been carried on, as we have indicated, by religious and fraternal organizations to associate improperly and falsely the Communist Party with the idea of force and violence.

Now, here counsel stands up for the defendant in that case and says, "My man did this because he has been reading a lot of literature, a lot of religious literature about this, a lot of other literature"; and in his case it is urged that he was inspired to commit the acts he committed by what he has read, and it indicates too that not only persons of unstable minds but others in the community are affected by this, as we have indicated in respect not only to this defendant to whom I am referring, but affect in a manner that Judge Watson has been affected, as we indicated yesterday.

The Court: But the man in this article did the acts in 1944.

Mr. Isserman: That is right. And if your (969) Honor will recall our affidavits, we say that this campaign instigated by the government antedates 1944, and, in fact,

we assert that it has been going on as long as there has been an Un-American Activities Committee, and that it has gone on uninterruptedly.

The Court: All right, it may be marked.

Mr. Isserman: I asked yesterday that your Honor examine the material that we have previously submitted and your Honor would know from that that this article is in line with the other material we have submitted, and that we have said that this campaign instigated by the government has been going on for many years, reaching a crescendo before the election period and again before the trial. It is precisely the point we make as to the long period of indoctrination which has stripped the defendants of the presumption of innocence as I argued yesterday.

Now I would like to state for the record that if your Honor had allowed us to have a hearing on this point, that we would have established the allegations contained in the objections to proceeding which I made yesterday; that we would have established the allegations in the affidavits of Benjamin J. Davis, Jr., filed yesterday and previously, and in the affidavit of Clyde Miller, heretofore filed.

(970) I would like to note one exception on the record in respect to the matter contained in those affidavits, in respect to the statement attributed to Mr. McGohey in the Star, in Sunday's New York Star—we will establish that that statement was made by one of his assistants and not by Mr. McGohey.

Mr. Gladstein: I desire, your Honor, that the record show that I make on behalf of my clients at this time the same offer of proof that Mr. Isserman has made for his clients. For the sake of brevity and for the sake of saving the time of the Court I will not repeat but merely adopt the arguments in support of that offer with this additional observation regarding your Honor's query concerning the new exhibit that has just been introduced.

Your Honor has pointed out that the acts concerning which the person involved in that article, mentioned in that article, was convicted, occurred in 1944, and your Honor asks how can that possibly therefore relate to the matters that we have brought to your attention concerning 1949? Do I understand you correctly?

The Court: Well, it did seem a little remote.

Mr. Gladstein: Well, then, I think we should answer it so that the remoteness will be dissipated.

The point is, your Honor, that today, yesterday, (971) on the 17th of January 1949, that man gave as his reason for having done something four years ago the very kind of propaganda that we have been complaining about which has poisoned the minds of people. In other words, your Honor, he does not attribute to a condition in 1944 that which he did. He is today saying, he is today offering as an excuse, as a justification for what he did, this point; and that is what we complain about.

(Marked Pretrial Exhibit 2.)

* * *

Mr. Sacher: Your Honor, I too wish to embrace and adopt on behalf of the clients I represent the offer of proof that Mr. Isserman made on behalf of his clients, with just this brief observation concerning the (972) situation of this man Monti who is covered by this last pretrial exhibit.

Your Honor has pointed to the fact that this seems like a pretty remote item, having happened in 1944, and all I would like to point out to your Honor is that the anti-Soviet sentiments which this young man entertained were sentiments that were entertained at the height of World War II when the Soviet Union was highly regarded in this country and its sacrifices widely appreciated and applauded; while millions of their men were dying in battle the Montis were able to escape with civilian airplanes.

Now, if Monti could entertain such sentiments in that atmosphere of heightened appreciation—none of which, believe me, was gratuitous—what is to be said for the sentiments that are entertained in this period when we are avowedly engaged in the cold war? I say to your Honor that far from being remote the Monti report has a profound significance as bearing on the force and effectiveness and validity of the position taken in the defense in this case that governmental outpouring, and the dissemination of that outpouring over the radio and through the press has had a deeply prejudicial impact on the possibility of conducting a fair and impartial trial in this case.

(973) Mr. Crockett: I should like to have the record indicate, your Honor, the adoption on behalf of my clients the offer of proof made by Mr. Isserman as well as the supporting arguments made both by Mr. Gladstein and Mr. Sacher.

Mr. McCabe: I should like the record to show likewise with regard to my clients, your Honor.

Now perhaps—

Mr. Sacher: Our clients have requested a conference with the attorneys. Would your Honor permit it for about five minutes?

The Court: Well, I really would like to get down to work here about this motion that the indictment be moved for trial, and that the question of Foster's severance be treated.

Mr. Sacher: Well, five minutes—you know the name of that song, "Only Five Minutes More."

The Court: Well, what is it you want to do in the five minutes?

Mr. McCabe: Well, your Honor sees this, that because of the lack of facilities in the courtroom our clients—so far, we have had to be somewhat—well, not content, but it raises the question of their separation—

The Court: I have no objection to your talking with your clients. Why don't you take them over as a (974) group here, and take it up with them, and we can wait a moment or two.

Mr. Sacher: Thank you.

Mr. McCabe: While I am on the subject, your Honor, it is obvious that during the trial of the case it is going to be a hardship, and impossible and unfair for our clients to be separated. I want my clients right beside me.

Mr. Gladstein: I want the record to show, too, your Honor—ordinarily when I try a case and represent people I have my clients sitting alongside me at counsel table.

The Court: Is somebody preventing you?

Mr. Gladstein: Yes, of course, the very conditions provided here has made it impossible.

The Court: What kind of conditions—

Mr. Gladstein: Your Honor, may I—

The Court: Yes, I just want to get a word in after a little while.

Mr. Gladstein: Well, you can get it in now, Judge, and I will reply to it.

The Court: I was just wondering what kind of arrangement you wanted. You have several defendants there. Now, I want to have you have every conceivable opportunity to confer with them and have them alongside (975) you, but you have certain physical limitations that have to be considered. Now, what I suggest is that you give that thought and you indicate to me some time later precisely what you would like to have done that would be most convenient to you and which would render possible such consultation as you might desire to have and make it also possible at the same time for you lawyers to confer together, and if it is at all reasonable I will permit you to do that.

Mr. Gladstein: All right, then I will make some suggestions on this perhaps after this little recess.

The Court: Yes, give it some thought, and then tell me later what you wish to have done.

Mr. Gladstein: Well, what I really want is to be in a position when I am conducting the defense of people to have them sit with me, consult with me, have the benefit of their advice and to be in constant conference. That is part of a defendant's right.

Now, it so happens that the arrangements in the courtroom are such that one of my clients is a good 20 or 30 feet away from me, and it would be absolutely impossible for me to confer with him. I do not unfortunately share with him, and I am sure he does not have either, any telepathic powers of communication back and forth with me, and even if we had some kind (976) of a magic radio understanding between ourselves I am sure that there would be difficulty, because I have another client in this case, and the three of us, I am sure, could not get on that kind—

The Court: Well, maybe you think that over and make a helpful suggestion later on.

Mr. Gladstein: Yes.

Mr. McCabe: I may say, your Honor, that Mr. Saypol and myself and Mr. Crockett discussed that situation, and it was suggested that we bear with this for a while to see what could be done later.

The Court: I may say I have attended trials myself where I have been defense counsel and where I got much less in the way of facilities for consultation—

Mr. Sacher: But I have heard your Honor complain of that. You said that was bad.

The Court: Well, I may have discussed it privately in conversation as between lawyers, but I do not think I raised any serious question about it at the trial. But my disposition here, as I told you before we started, is to give you every physical facility that can be given for a proper defense here, and that is precisely what I am going to do. So that if you think it over and suggest what you desire, if it is at all within the bounds of reason I will permit it.

(977) Mr. Sacher: May we then have this conference that we spoke about?

The Court: Why don't you go right over there? They are all right together there—unless you think somebody may be listening. It won't take but a few minutes.

Mr. Sacher: Well, we do not want to have conferences with people surrounding us. We would like to have it in private, if we may.

The Court: Where do you want to have this conference?

Mr. Sacher: Well, if you have got a room.

The Court: What do you suggest, Mr. McGohey, about that?

Mr. McGohey: Well, your Honor, I would consent to letting counsel, since they complain about the arrangements, which are the best that we could make physically, and if they want an opportunity now to confer with their clients, I would not oppose it, your Honor.

The Court: You think there is some room here—

Mr. McGohey: Well, there has been made available a room in here for records; isn't that so, Mr. Sacher?

Mr. Sacher: Yes, but that is a pen. We do not want to be in a pen.

Mr. McGohey: Well, I don't insist on that.

(978) The Court: What kind of a room is it that you like?

Mr. McGohey: Pardon me, your Honor—

The Court: I am trying to be helpful, that is all I am trying to do.

Mr. McGohey: Your Honor, I think the record should show, and I am sure that none of the counsel are overlooking it, there has been a room made available on the fourth floor, the only room that was available for consultation. Now, at the present time, I suppose, your Honor, if we took a few minutes, it would probably save a good deal of time right now, and let counsel consult with their clients.

The Court: If I thought they were going to consult about how they could make the arguments on this pending motion brief and to the point, and so that I would have that matter before me for prompt decision, I would—

Mr. Gladstein: I object to your Honor's statement. I do not think our desire to consult with our clients, and our clients' desire to consult with us is a matter of this Court's speculation of this subject matter, and I resent the fact that your Honor is suggesting we are talking unduly in defense of our (979) clients' rights. I would like to have the record show that.

The Court: I hope it has not appeared to you that you have been deprived of any such right. It certainly has not been my intention to deprive you of any such right.

Now we will take the ten-minute adjournment which we should have taken in the first place, and you can all go upstairs on the fourth floor and have your conference. In the meantime I will be busily reading some authorities.

(Short recess.)

(980) Mr. McCabe: If your Honor please, before the recess some comment had been made upon the seating arrangements, and in accordance with your Honor's suggestion we will try to work out something and have a suggestion to make either at the end of the day or tomorrow.

The Court: There is no hurry about that. I will give it consideration when you submit it.

Mr. McCabe: Now as to that portion of Mr. McGohey's motion which contained a motion for a severance as to the defendant William Z. Foster, on behalf of Foster I wish to object to the granting of such a motion.

Foster has been indicted with 11 men with whom, according to the indictment, he has been closely associated,

associated, according to the words of the indictment, in a conspiracy to do two things; to set up an organization which would advocate the overthrow and destruction of the Government of the United States by force and violence, and also to advocate and teach the duty and necessity of the overthrow of the Government by force and violence.

Normally of course a man charged in a conspiracy, apart from reasons which do not exist here, unless we consider the number of the defendants, is tried with his fellow defendants. And I say that if Mr. Foster (981) is to be tried on this conspiracy bill he should be tried with his fellow defendants.

I believe that I do not have to argue at this time that because of the danger to Mr. Foster's—well, to his life, if he were to undergo the rigors of a trial such as this promises to be, that it is impossible for him to be tried with his fellow defendants at this time. As I say, the Government is confronted with two propositions and two only. One is to defer the trial of the case until such time as either it is determined that Mr. Foster is able to stand trial or until it is determined definitely that he will never be able to stand trial.

Now the Government by its pressing for trial has evidenced a feeling on its part that from its standpoint the case should not be deferred. They have moved for trial. I say therefore that if the Government is, through no fault of Mr. Foster's, prevented from bringing Mr. Foster to trial then it should dismiss the indictment as to Mr. Foster.

Foster's illness is certainly not his own fault. Whatever Foster is charged with doing, with teaching, advocating and conspiring, was done over a considerable number of years and at a time when, in the very nature of things, his physical condition, if it permitted him (982) to do the things charged in the bill of indictment would have permitted him to stand trial. And the Government did nothing during that period when Foster would have been in a position to meet face to face with his accusers. So, as I say, the Government having chosen, and I do not say that was done deliberately of course, but having chosen to bring this indictment at a time when Mr. Foster could not meet his accusers face to face, should not leave hanging

over him the prospect of facing a trial on a conspiracy charge alone.

There are serious legal possibilities which would ensue from that situation. As consider what happens in a situation of this sort when the very nature and legal effects of the teachings of the Communist Party are on trial. Certain things might very well be established and be established to the point, perhaps not of being res adjudicata—I don't want to be pinned down to that—but through a decision of an appellate court certain conclusions, certain legal conclusions might be pretty firmly established which would bind Mr. Foster even though he had not been able to raise his voice or meet face to face the persons on whose testimony those conclusions would have been established. And they might come very close to becoming the law of the case. So that if Foster at some (983) future date were brought to trial on this conspiracy bill he might very well be confronted with the argument: Well, after all, the Supreme Court has said thus and so regarding that point which you wish to argue. And this argument then: "I wasn't there, I couldn't participate in that trial" might be a very slight effect. I say that is one of the arguments against holding over his head the prospect of a solitary trial.

I don't think I have to press to your Honor, in view of what has already happened in this case, the almost intolerable burden, the expense and physical preparation which would be entailed in such a trial. Of course at this point I can't address myself to the single bill of indictment. But I say that from the Government standpoint, of course I don't decide that—as I say, the Government would be losing nothing in this case by dismissing the bill as to Mr. Foster, because if he has been guilty of any offense against the law, if in any possible way they could procure a conviction on a charge of this sort, they would have brought a companion bill by joining the Communist Party.

So for that reason, your Honor, I respectfully object to the motion of the Government for a severance and make the suggestion instead that if any action is to be taken it should be in the nature of a dismissal (984) of the bill of indictment charging conspiracy.

Mr. Crockett: If your Honor please, I would like very much to be heard on this matter of the severance as to Mr.

Foster. I recall that on at least one previous occasion when it came up, to some extent we who represented the other defendants were deprived of an opportunity to speak perhaps on the idea that we had no interest in this question. We have as a matter of fact a very real interest.

The Court: I don't remember curtailing—

Mr. Crockett: That was in your Honor's absence. I believe your Honor was on vacation at the time.

The Court: Oh.

Mr. Crockett: But subsequent to your Honor's return from vacation I believe I have had occasion to speak to your Honor about the matter, at which time I pointed out the absolute impossibility of preparing for the defense of my two clients because of the fact that I had had no opportunity whatever to confer with Mr. Foster. The Court will recall that I made the statement that if Mr. Foster walked through the door I wouldn't even know him.

Now I have been here in New York for the past two months in an attempt to prepare this case for trial with all possible dispatch. During that period I have had absolutely no opportunity whatever to talk to the (985) principal witness in the defense of my clients. Now, it has been due to no fault on my part.

As the Court knows, Mr. Foster has been ill. As a matter of fact, the affidavits I believe, with a considerable degree of unanimity, pointed out that at most Mr. Foster can confer one or two hours a day. So long as he is a defendant in this case obviously the first claim upon his attention must be that of Mr. McCabe who is representing him. To that extent I have been denied an opportunity to speak with him.

The second point I would like to emphasize to the Court is more or less a question of law. I believe it is a correct statement of law that it is most unusual for the Government to move for a severance where the indictment has been against a group in a conspiracy case, and there must be a sure showing of unusual circumstances to warrant the granting of any such motion. I believe also that it is a matter of law that while severance is discretionary with the Court, it comes perhaps a bit too late on the day of the opening of the trial. There is considerable basis for the

law taking that point of view, one of which is a matter that I have just mentioned—the fact that up until that time the defendant Foster, as to whom a severance is requested, is an active participant in the trial, a (986) defendant himself. There might very well be a reluctance on his part to confer with anyone other than the attorney who is representing him.

I point out all those things because I am very much mindful of my oath as an attorney. I recognize the fact that it is my sworn duty to leave no stone unturned in preparing for the defense of my clients. I can't possibly, unless the Court orders it, put on the witness stand or even offer in evidence the deposition of any witness whom I haven't consulted with beforehand. To my way of thinking it would be an act of folly.

I therefore suggest in all sincerity, as a matter of fact I offer it in the form of a motion, that in the—shall I say—unlikely event that this Court agrees with the motion for a severance, that he give to the attorneys, to me and to my clients—that there should be an adjournment allowed. I suggest adjournment for this reason, your Honor: if there is a severance obviously there is no immediate need to continue with the preparation of Mr. Foster's case. For that reason Mr. McCabe probably will not be required to consume the one or two hours a day during which time Foster is available for conference. I hope, I have every reason to believe that I will have an opportunity (987) during some of those two hours period a day to confer with Mr. Foster and to that extent prepare to represent my two clients as I would like to represent them, and as I am sure your Honor expects me to represent them.

Mr. Gladstein: Your Honor, I want to adopt for the clients I represent the statements that have been made by Mr. Crockett and to add this: During the period of time that I have been involved in this case seeking to prepare it, against obstacles I have never been confronted with before because of the vagueness of the indictment and the refusal of the Court to grant us any bill of particulars, I have found this to be true and I assert it to your Honor as a fact, I assert it as an officer of this court. More important to me in the preparation of the defense of the two men I

represent, more important than what they can tell me, more important than my conferences with them is the necessity of conferring with Mr. William Z. Foster. And this necessity is not met merely by a severance against Mr. Foster in this case. It is not met by that at all.

A superficial appearance of fairness might seem to be given by the United States Attorney and the Court in acknowledging that the illness of Mr. (988) Foster makes it impossible for him at this time to stand trial. But what happens to the remaining defendants? I speak for two of them whose case would be prejudiced by that kind of condition. In other words the granting of the motion and no more would seem to create an appearance of being fair to Mr. Foster. And by that very fact we create an untenable situation for the remaining defendants. I speak for only two of them. But I know that in my conferences with those two men again and again they have said to me, in response to inquiries I have made, inquiries any lawyer makes in the preparation of his case, "That is a matter on which I cannot give you the facts; I wasn't there. Mr. Foster is the man who knows. He is the man who has that information."

I have sought to see Mr. Foster. I have had exactly one opportunity to do so. That was very narrowly limited because of the condition of his health, a condition which I hope and believe will improve so that it would be possible for me in the preparation of my case for my clients to see this absolutely indispensable witness for a sufficient period of time to obtain those facts without which, your Honor, I just can't present the kind of defense that these men are entitled to. I would not be doing my job for them. And they are (989) entitled to have me do the best job that a man is capable of doing.

Now the reason is that I just can't get the facts that are exclusively and peculiarly within the knowledge of Mr. Foster, and I urge your Honor therefore to make that disposition of this request by the Government that will not prejudice the chances of my clients to be properly represented.

What I am trying to point out is this, that it will not serve the purposes that I feel are essential, for Mr.

McGohey to say, "Well, Mr. Foster is sick. We will sever as to him, so he does not have to be here. And if you want to use him as a witness, well, we may arrange something in the nature of a deposition or something of that sort." That is not the point. The point I am making is that more important than having Mr. Foster as a witness is my opportunity to have conferences with Mr. Foster for the purpose of obtaining those facts which go to the defense of my clients. Whether they are exposited by Mr. Foster or not as a witness, he has a fund of information as the chairman of the National Committee and national chairman of the Communist Party that no one else can possibly have.

And I say, your Honor, that I feel earnestly and I urge your Honor to believe and accept this, (990) that the two men I represent would come into court with the chance of being properly defended very much weakened and minimized, with great prejudice ensuing to them if your Honor does not grant the kind of motion that Mr. Crockett has just made, a motion that I want to join in on behalf of my clients; so that your Honor will make that kind of disposition of this question of the condition of Mr. Foster's health so as to enable me to have reasonable opportunity in the preparation of my case for my clients, not necessarily with a view to having the testimony of Mr. Foster but that indispensable information without which I can't defend them properly.

The Court: Have you had opportunity to confer with Mr. McCabe, who has been doubtless spending his intervening time since I denied the motion in November, to get some of that fund of information from him?

Mr. Gladstein: Mr. McCabe will tell you, your Honor, how many times he has had a chance to see Mr. Foster. I don't know exactly, but I have once or twice—

Mr. McCabe: I will address myself to that.

The Court: Mr. Reporter, will you read my question.

(Record read as follows: "Have you had opportunity to confer with Mr. McCabe, who has been doubtless spending"—)

(991) The Court: Have you had an opportunity to confer?

Mr. Gladstein: Yes, I have conferred with Mr. McCabe, oh, yes, certainly I have conferred with him. But I have not conferred with Mr. Foster except on the one occasion.

Mr. Crockett: Since presumably that question also goes to me, your Honor, I would like to point out to the Court that Mr. McCabe lives in Philadelphia and for the most part he has been commuting over here, so that our conferences have been very few, and very, very far betwen.

The Court: Yes, Mr. Sacher.

Mr. Sacher: May it please the Court, I do not wish to detain you too long on this because I think the arguments advanced by my colleagues are persuasive enough to justify the request which they make of the Court and the opposition which they expressed against the motion made by the United States Attorney. I wish only to make these comments.

It seems to me that the application for the severance which, remarkably enough, has not been supported by any argument that I have seen or heard at any time since the motion has been made, we are in the rather absurd position of arguing against a (992) motion without hearing its proponent advance the reasons for it.

The Court: Would you rather that I hear from Mr. McGohey?

Mr. Sacher: I think that we ought to have something to shoot at in concrete form perhaps, and let the defense have his reason why he wants a severance.

The Court: I think it would be better if you had indicated that to me before embarking upon the argument in opposition to it. I can't see that it makes very much difference. I will give you opportunity to reply after he has said what he desires to say in support of the motion.

Mr. Sacher: All right, that is satisfactory for the moment.

I should like to make this observation, that I cannot conceive that it is out of any solicitude for Mr. Foster or for these defendants that this application for a severance is made. The motion is made to serve the convenience and the interest of the prosecution. Quite obviously the medical testimony which your Honor has received is more than abundant to establish that Mr. Foster is not in a position at

the present time to proceed to trial which will entail certain strains, etc. And so all that the prosecution is seeking (993) to do by this motion for severance is to circumvent an otherwise fully justified request for an adjournment of the trial. I think Mr. Crockett is quite literally correct when he says that the application of the Government for a severance seems quite unprecedented, because ordinarily in a conspiracy case the tendency of the Government is to drag in more than is necessary and not to eliminate the necessary. I think your Honor's experience at the Bar confirms that. And the number of acquittals in conspiracy cases indicates that the tendency of the prosecution is in the direction of indicting and prosecuting and insisting upon proceeding against an unnecessary number of defendants.

And in this case we are confronted with the anomaly that the Government, having selected the 12 whom it wished to proceed against, now desires, because of the illness of one, to seek a severance. I respectfully submit to your Honor that in our opinion an appropriate exercise of discretion requires the denial of this application and that, on the contrary, your Honor should consider the wisdom and the justice of adjourning the case pending further reports on Mr. Foster's health.

The Court: Has anyone got a copy of my opinion that I rendered at the time I denied that motion last November? I think I have something in there on this (994) subject.

(Paper handed to the Court.)

The Court: Let me just go through it for a moment. Very well.

Mr. Sacher: Excuse me one moment, your Honor.

The Court: Yes.

Mr. Sacher: Is there anything in your Honor's opinion that you wish to call to my attention?

The Court: No. I see that what I thought I put in there I put in.

Mr. Sacher: You did?

The Court: Yes.

Mr. Sacher: It is always satisfying I guess to the author to find that he had adequately expressed his intention.

The observation I wish to make in this connection is that some of the prognosis that has been made in this case is favorable. Dr. Finger who is Mr. Foster's immediate physician, and Dr. Foster Kennedy, who I am certain is at least as eminent in his field as the two doctors whom your Honor designated—concerning this stand I do not intend any unfavorable reflection, as likewise—

The Court: You don't want to certify them?

(995) Mr. Sacher: I don't think my certificate would be worth very much.

The Court: They are all right.

Mr. Sacher: But the point I am stressing at this moment is that the prognosis is not of such a character as to exclude the possibility if not the probability that in time Mr. Foster will be in a position to proceed to trial. On the other hand—

The Court: Maybe to testify.

Mr. Sacher: Maybe to testify. Maybe. And to testify perhaps in court.

One thing however is certain, that all doctors agree that at the present time and all that their testimony goes to, that at the present time Mr. Foster is not in a condition to engage in any sustained period of physical activity. Now, that inability to participate in sustained activity supports certainly as much the request of the defense for an adjournment as it would an application for a severance, because the very advantages that the Government would get from a severance would create their corresponding disadvantage to the defendants in their ability to present their defense.

And in that connection let me make this observation also. Let there be no mistake about it. It is not just 11 men who are on trial. It is an (996) important political party in the United States that is on trial in these indictments. And the chairman of that party, who has devoted the best years of his life to the building, the creation and the furtherance of it, should not be directed to lay down the flag at this critical moment, that is critical in his own personal life and critical in the life of the organization to which he contributed so much.

And in that connection let me say to your Honor that I know of nothing which could have so dangerous an impact on Mr. Foster's very life than to direct this trial to proceed with the possibility of the execution and capital punishment of that party without his being given the opportunity to appear here and defend it not only before your Honor but before the people of the country and the people of the world.

And I earnestly suggest that the insistence on the part of either the prosecution or the Court that this trial proceed at this time without the participation of Mr. Foster would be something that is likely to have a serious consequence to him, to say nothing of the serious consequences to the 11 defendants who would remain in the trial, and to the political party with which he is identified.

I don't think I need call upon your Honor's (997) imagination in this realm. I think your Honor will appreciate on the basis alone of the particular position he occupies in the party, and certainly the prosecution which undoubtedly has done a lot of reading in order to be ready for trial right now must know how significant and large has been the role in the contribution of Mr. Foster and how utterly material and indispensable is his testimony to the proper defense of this case.

Now your Honor appreciates that proper preparation here does not consist merely of counsel, either his own counsel or other counsel in this case conferring with Mr. Foster. That perhaps might be the least of our problems. But if we are to be guided by the innumerable proceedings that have taken place before administrative as well as judicial agencies, we may anticipate a parade of stool-pigeons and spies and liars of all kinds, and the rebuttal of that testimony by the defense will necessarily entail sustained periods of conferences with Mr. Foster. And I point these things up to your Honor because I believe that in view of Mr. McGohey's prognosis as to the duration of the prosecution's side of the case, and in view of the thousands upon thousands of dollars that are being incurred in expense not only by the Federal Government but apparently by the municipal government as well (998) to supply these hundreds upon hundreds of policemen, I re-

spectfully suggest the wisdom of not rushing forward with a trial in this context, when the refusal to await Mr. Foster's possible recovery and ability to testify here may rise to the dignity, or shall I say indignity of constituting a denial of due process under the Fifth Amendment as well as a denial of the rights of the other defendants, both under the Fifth and Sixth Amendments to the Constitution.

The Court: The longer the trial lasts the more opportunity or possibility of calling him as a witness will exist.

Mr. Sacher: I am awfully sorry, your Honor, I did not hear that.

The Court: I say, the longer the trialis—you were emphasizing the fact that it is going to be such a very long trial—I would suppose that was perhaps an argument the other way around. That if the trial is to take many months the opportunity for Mr. Foster to improve in his health so that he might possibily be a witness, as you yourself said, in court here, would be an argument the other way around.

Mr. Sacher: Your Honor's observation compels me to enter the realm of medicine, which I tread with great trepidation. And what I wish to say to your Honor (999) in response to that is simply this, that if in his present condition Mr. Foster should get the reports which will have to be given to him of the testimony given by this parade of spies and stool-pigeons to whom I have already referred, that the impact of those on him will prevent the recovery which will enable him to give us the assistance which we need. I should like to see him in an improved state of health where the impact of these lies will be less than they would be at the present time and when he would be of assistance to us.

Now if these—I don't know; at the moment there occurs to me a line from Christopher Marlowe in which he says, "If these delights thy mind do move, come live with me and be my love." And I was about to say, if these various reasons that have been advanced should perchance commend themselves to your Honor, I should imagine that the better part of wisdom here would be to postpone this trial until such time as there can be a reasonable certainty as to

whether we can or cannot proceed without the testimony of Mr. Foster.

Mr. Gladstein: Your Honor, though I have addressed you on this matter, may I say something possibly in addition to what I have said?

The Court: Yes, you may.

Mr. Gladstein: I suppose that these matters are (1000) matters of perhaps individual or personal nature. To me the most important thing in the preparation of a case is to know that when I step into that courtroom, regardless of what happens thereafter, I can give my clients a good defense to the best of my ability and in accordance with the rights that they have.

Of course there are things that happen after a trial begins, be it long, be it short, that create problems. But speaking for my clients and myself I want to put the emphasis not where Mr. Sacher does as far as he is concerned—he has his own way of working and I have mine; what I attach importance to, over-all importance, regardless of what may happen after the case begins, regardless of how long it may be or how short it may be, regardless of how many witnesses there may be, the important thing is that I do not feel that it is just to the men I represent for me to be placed in a position of going to trial without first having had a fair chance to obtain from the man who peculiarily has it the information, the knowledge, the facts that I must have.

And it is not just a question of my conferring with Mr. Foster. I want my clients to be present when these conferences occur; I want my clients to have an opportunity even in my absence to confer with him.

(1001) I represent two men. And while it is true, your Honor, that in substance and effect what is being done here in the minds of the people is to place on trial a political party, in legal contemplation there are a certain number of individuals who are on trial, a certain number of individuals. I represent two of those individuals, and I appear here to defend them and to present this case in their best interests. I know that I can't do that because I stand before you now unprepared to conduct their defense, and they are unprepared simply because neither they nor I

have had the chance to confer with Mr. Foster.

I do not say that those conferences will be lengthy, I do not say that they will be endless; but I must have some reasonable opportunity. I haven't had that. As I say, I have had exactly one brief conference with Mr. Foster. Every one of the lawyers has his own peculiar problems concerning the representation of the men that he defends.

Therefore, your Honor, I ask you to consider at least in so far as I am concerned that if I am compelled, if my clients are compelled to go to trial now, I am put in the position where I just can't find it possible to give them a prepared defense, a defense they are entitled to. And I ask your Honor, whatever disposition is made, (1002) to bear that in mind and to make such ruling as will afford me the opportunity and my clients the opportunity to have that chance of conferring with Mr. Foster for that period of time that will enable them to stand here and say, "Yes, we are ready."

Mr. Isserman: If the Court please, I will try not to repeat what other counsel have said, but I do believe that on behalf of my clients one or two points should be made.

The Court: I wish I could get straight just which clients each lawyer has.

Mr. Isserman: That is one of the difficulties of the seating arrangement.

The Court: Would you mind indicating to me, Mr. Isserman—

Mr. Isserman: My client is Mr. Gilbert Green—

The Court: Just walk over and indicate to me which of the defendants you represent.

Mr. Isserman: My client is Mr. Green, the second from the end.

(Defendant Green stood up.)

Mr. Isserman: And Mr. Williamson.

(Defendant Williamson stood up.)

The Court: Now I didn't get that, I didn't catch those names.

(1003) Mr. Isserman: Mr. Gilbert Green and Mr. John Williamson.

Mr. Gladstein: Do you want the others to stand?

The Court: It seems to me the trial involves the guilt or innocence of these individuals. I consider that to be my concern here. It may be that it has a wider horizon. But I think you gentlemen should clearly understand that my view of my duties here are and is the guilt or innocence of these particular individual persons, not as a group, not as members of a party but as individuals, separate and distinct. And it shall be my concern to see that their rights as such are protected.

Mr. Isserman: I am very glad your Honor has come to the conclusion that there are wider horizons to this case, mindful of your Honor's earlier statements, and perhaps they were made because your Honor wasn't familiar with the issues, that this was just another case. It is quite clear now that it is not. And in the concept of wider horizons, it is only a concept outside of the scope of legal issues. I mean, the fact that the public understands it to be a trial of wider horizons, like the New York Times did this morning when they said ideas and principles are on trial, and as the New York Star said yesterday, Marxism and Leninism were on trial.

(1004) The Court: I am not going to be influenced by what any newspapers tell me the issues are or are not. Now, I wish we could leave the newspapers aside a little bit here and get down to the matters that immediately concern the Court. I am going to be the one to decide what the issues are, and I am going to try to do that with every bit of fairness that I am capable of, and it only bothers me for you to keep telling me that some newspaper says the issues are thus and so and some other newpaper says the issues are thus and so. I am the one who has to decide that.

Mr. Isserman: That is true. I was adverting to that merely because of your Honor's reference to wider horizons.

The Court: Let us not get off the subject. We are talking about Mr. Foster's severance.

Mr. Isserman: And, of course, it is very difficult to keep the newspapers out of it, with half the courtroom filled with newspaper men, your Honor, which is not usual in an ordinary criminal case.

Now, the points I would like to stress are these: when Mr. Sacher was talking about an execution before trial in effect of the Communist Party, because in effect, its national board members are on trial, 1005) including its chairman, Mr. William Z. Foster—just before he had done that I had written in my notes the word "decapitation," because that is precisely the reaction that I had reached independently of proceeding in this trial without the chairman of the Communist Party; and without considering the newspapers, it is inherent in this indictment, your Honor, inherent in this indictment as a matter of law, which finds reflection in the companion indictments, that the Communist Party is on trial, and you can't take that out of this case, as much as your Honor will insist the form is through charges against twelve individuals.

But certainly if in July 1948 one of these men had not been on the national board, and another man had been, that other person would be on trial in his place, and therefore, it is the one common characteristic that these men have as they appear before you, that they are members of the National Board of the Communist Party, and that is what the indictment says. So we can't keep that out of this trial.

Now, to compel a Party to go on trial without its national chairman, which Mr. Foster is and has been, is to make it go on trial with a punishment or decapitation or an execution preceding that trial.

(1006) Now, Mr. Foster is chairman of this Party by no accident. He did not hold the largest number of shares and was therefore elected to the head of it; but this came out of his 50 years of labor history, his 50 years of struggle for the working class of this country, and out of his interest in developing a Communist Party as a party which will best serve those interests; and I am not asking your Honor at this time to agree with that.

Now, as a result of his experience, as a result of his participation, your Honor, he has necessarily acquired a wealth of knowledge and experience about the very issues which will be put before this Court, the pamphlets and the publications and the ideas and the advocacy of those ideas, and the principles of Marxism and Leninism.

And there is before this Court the sworn statements of a number of defendants and of counsel which I would like to call to your Honor's attention: On November 10th the defendant Gilbert Green filed an affidavit bearing on the importance of Mr. Foster not only as a witness but in preparing the case of each and every one of the defendants. That affidavit he filed on behalf of all.

(1007) On November 4, an affidavit was verified by Gus Hall, one of the defendants, which bore on this question.

Again on January 10, in the argument before your Honor last week, the defendant John B. Williamson filed an affidavit in which he indicated the importance of the knowledge that Mr. Foster has and the evidence that he can evoke and produce bearing on the issues of this case and in assisting these defendants in preparing their case.

And on the same day Mr. McCabe filed an affidavit, as a lawyer for a number of the defendants, as an officer of this court, in which he said after conferring with other attorneys in the case, that he reached the conclusion that the statements previously made by Mr. Hall and by the defendant Green are amply borne out by the actual preparation that we were required to make under the sweeping ambit of this indictment which embraces a world without specifications.

And those affidavits show, your Honor, that as to the one period in the indictment about which there is any specific motion as to time, the period from April 1945 to July 1945—July 26th, I believe it was—when the constitution of the Communist Party was adopted. (1008) That meeting was July 26, 1945.

I call your Honor's attention to the dates which are mentioned, first of all the beginning date April 1, 1945. Then it goes on in paragraph 2 to a discussion of a draft resolution on or about June 2, 1945. Then it goes on to a discussion of the calling of a meeting of the Communist Political Association on or about June 18, 1945, to amend and adopt a resolution; and finally the last date mentioned is July 26, 1945, when a special National Convention was called at which the Communist Party was re-established in its present form. That period is the only one in the span of

three years which has been specifically mentioned as to certain incidents and as to time.

The affidavits which I have referred to show that Mr. Foster had peculiar and special knowledge of that period; that for a year or more before that time he had analyzed and studied the objective economic conditions in this country which formed the basis of the innumerable discussions participated in by thousands of persons which led to the political action which is described in this case as a crime. I mean described in the indictment as a crime.

Now, he has that special and unique knowledge (1009) which bears on what the government charges to be a principal and key issue of this case, as well as the wealth of experience and special knowledge that he has in his long work as chairman of the Communist Party and his work on behalf of the working class before that time.

Therefore, the two arguments that have been made here by the others have significance for my defendants, and they are two separate arguments. One is that Mr. Foster is needed as a witness, and secondly, as Mr. Gladstein ably put it—and in that respect I work like he does—that he is essential in the preparation of this case, and I have to say to your Honor that on behalf of my clients, because of the difficulties in reaching Mr. Foster in respect to that preparation, aside from his being a witness, that I cannot represent to this Court and will not and must represent the contrary, that my clients are not ready for trial.

Now, I think in this case—we are not talking generally—I think in this case under the special circumstance of this indictment, of the fact that a Party is really on trial, the severance of its chairman is a crippling blow at the entire defense, and therefore (1010) there should be no severance, and there should be time allowed to give Mr. Foster the opportunity to recover which is indicated in the affidavit of his personal physician, Dr. Finger.

Therefore, I join in the motions that have been made by counsel for the other defendants.

Mr. McCabe: If your Honor please,—

The Court: Before you go on, I do not remember any motions by the defendants. They are opposing the government's motions. Perhaps some motions crept in there without my identifying them.

Mr. Crockett: Your Honor, I think the record will show a statement on my part to this effect, that in the unlikely event that your Honor grants the prosecution's motion for a severance, that your Honor will also grant an adjournment so that we will have sufficient time to confer, if possible, with Mr. Foster in preparation for this trial. I made that on the occasion of my last remarks to this Court.

The Court: Well, there is no use in being anticipatory. Why don't you reserve matters of that kind until I dispose of the motion that is pending, and then we won't have the record confused?

Now, that is the only motion, isn't it, Mr. Isserman?

(1011) Mr. Isserman: If your Honor please, I reserve my standing on the motion suggested by Mr. Crockett and merely repeat that what I have said, or state what I have said was in opposition to the motion of the government.

The Court: Upon my disposition of the government's pending motion there is nothing to preclude you and your colleagues from making such motion or motions as you may then be advised.

Now, Mr. McGohey, what have you to say?

Mr. McCabe: If your Honor please, when I first rose I addressed myself to the one portion of the motion for severance which affected me as counsel for Mr. Foster. I represent Eugene Dennis who sits on the end of the bench and Henry Winston, who is the fifth man from this end. They are, respectively, the general secretary and the organizational secretary of the Communist Party.

The Court: Mr. Dennis and Mr. Winston?

Mr. McCabe: Yes. And they with Foster each could say with respect to the Communist Party quarum magna pars fui.

The Court: Yes, from Virgil.

Mr. McCabe: Yes, and I hope that after this is over they will be able to say as Aeneas prophesied when he was threatened by the threatening storms (1012) "Haec forsitan et olim meminisse juvabit."

The Court: Yes, you and I will remember about Aeneas. We are not so sure about some of these other people.

Mr. McCabe: That is when Aeneas assured his companions that perhaps some day the vicissitudes of this period would be the subject of happy reminiscences among them.

The Court: I think that is when he was addressing Dido. He had occasion to make that comment when he was looking at these pictures or facsimiles on the doors of one of the temples there and admiring the craftsmanship, and Dido was explaining about it, and that is when he made that remark which you just quoted.

Mr. McCabe: That is the first element of feminine beauty we have had in the case so far, your Honor. But let me say that despite the fact that my clients have held such an important position in the Communist Party, they have constantly had to say to me, "Well, now, on that subject see what Bill has to say; Bill was the one, and in some cases I was opposed to that; and I recall Bill's argument in favor of that."

Your Honor has said something about the ability of co-counsel to confer with me and get second-handed (1013) from me—

The Court: I said the opportunity. I feel very clear in my mind that the intimations made in my opinion and the lapse of time that came thereafter afforded such opportunity, and I suppose that at least to some extent that opportunity was availed of, but I was not talking of the actuality, but, rather, the opportunity.

Mr. McCabe: The opportunity was there, and my co-counsel sought to avail themselves of it. They plagued me with questions to put to Mr. Foster, but I found that I had questions enough of my own to put to him and was not able to prepare their cases for them, your Honor.

And let me say this, this man Foster is a vibrant, eager personality. He is a fighter. Something has been said about two-hour conferences here. Let me say that despite all my efforts to make the conferences I have had calm discussions of our problems, Foster's absolute anguish at the threat to the Communist Party is so great, his eagerness to meet the lies which he knows will be introduced in this case is so great, that I would say in 45 minutes the energy that he has is usually burned out, and despite the

fact that he is supposed to be lying down I have had to curtail my (1014) conferences with him because of that fact.

I will say to your Honor that had I been able to say to him last November, "We have six months in which to prepare. Now, Bill, all you have to do is to just calm yourself, build up your strength, keep on improving the way some of these doctors think you can improve, and then, by God, you can go down in court and face those liars and ruin them and destroy them in front of a jury." I think that might have been possible. I say, I do not know at all, and I have nothing to base that on except my knowledge of the man.

And that brings us back to another point, your Honor. I hesitate to mention the almost verboten phrase, a bill of particulars, but had I been able to say to him, "Look, Bill, here is what they allege. They allege that at thus and such time thus and such happened. Now, what is the real truth about that?"—had I been able to do that instead of having to wonder what was going on in all parts of the world this time or that time, or some other time, trying to cover all that, then I think that I might possibly have been prepared to represent Mr. Dennis and Mr. Winston here today. As I say, I hesitate to bring that up again, but it is not my fault. I say it is the fault of the United States Attorney in preparing the indictment; I say it is the fault of the Judge who first (1015) considered the request for a bill of particulars, and I say now that your Honor will have to bear the responsibility for that now that the case is called for trial if your Honor declines to read our requests for a bill of particulars and to make a ruling upon such questions—

The Court: You know, as to that bill of particulars, it was argued at such length before Judge Hulbert, and then it was re-argued before him; that is, it was brought on for re-argument and given reconsideration, and if I were to accept another motion for a bill of particulars, under the practice of the court here I would refer it to him, and he would naturally decide it the way he already has. If I felt that it had been perhaps something decided hastily that needed further consideration, why, I would en-

tertain it; but the matter has been given such thorough consideration, and I am familiar also with many motions for bills of particulars in the criminal term of this court, and they are so often denied, that it seems to me that it is reasonable to suppose that his consideration was made in accordance with precedent.

Mr. McCabe: May I say this, your Honor: I don't recall the time he took to consider it. It seems to me it was very brief, but my memory fails—but my (1016) memory plays me tricks on that. I do not see how he could have read the requests. I will say this, that he certainly did not read it first with any notion that he would try the case, and, secondly, with any notion of the difficulties with which we would be confronted; and I say it is not unreasonable at all now, since you are going to try the case that you should exercise your independent judgment as to whether a reconsideration of our request would not expedite the trial of the case and permit a fair trial to these other defendants.

I respectfully urge that as I oppose this motion for a severance.

I just want to add one point: Your Honor has said something about twelve or eleven persons being on trial; that they are not being tried as a Party. I call your Honor's attention to the fact that the indictment itself charges that the crime which they committed was conspiring to form a Party. So the Government brought the party into this case.

The Court: Well, I still say that the issue before me concerns the guilt or innocence of these individuals separately of the crime with which they are charged.

Now, Mr. McGohey, what have you to say, sir, (1017) in support of your motion?

Mr. McGohey: If your Honor please, there was a suggestion made in argument that it was unseemly suddenly, at the time the case is called for trial, for the United States Attorney to make a motion to sever as to one defendant.

I should like to refresh your Honor's recollection of what has occurred: Back in November when the case was then on the calendar for trial in the regular calendar part,

we had a discussion then and a long argument was had on the question of an adjournment because of the health of the defendant Foster. And I announced at that time after the Court had selected two hospitals which the Court would ask to assign doctors, that upon the coming in of those reports—or rather, I announced then that if at the end of the adjourned period, which your Honor fixed to be yesterday, if the condition of the defendant Foster were as it was represented to be in November, and which your Honor then found that it be such that he ought not to be forced to go to trial, I would, on January 17th, move to sever the case against Foster.

Now, whether or not that ought to be done is another question, but I should like the record to be (1018) perfectly clear that there has been no unfair advantage taken by the United States Attorney, because I announced two months ago or two and a half months ago that I would make this motion.

The Court: I notice in my opinion here of November 22, 1948, I stated: "United States Attorney, John F. X. McGohey, has stated that he will be prepared to proceed with the trial on January 17, 1949, with or without Foster"; and that was in response to some indications by me on the argument that it looked as though, from those doctors' reports, he might well not be able to go to trial at this time.

Mr. McGohey: That is right, your Honor.

Now before I proceed further with the arguments that have been advanced this morning, I desire upon this record to take exception as a member of the bar and as an officer of this court, and as an officer of the Government of the United States, to the charge implicit in the argument of Mr. McCabe that this case is to be tried—that the Government's case, rather, is to be supported by the evidence of liars, and the argument of Mr. Sacher, that in addition to the liars there are to be the stool pigeons and the other people of bad character.

(1019) I am proceeding with this trial in accordance with an oath to which I swore, which I intended to carry out when I took it, and which, as I stand before God and your Honor today, I can say at the end of four years I have observed with scrupulous fidelity.

I have never in my life, either as a United States Attorney or in other public offices which I have held ever offered to a court or to a jury a witness whom I knew to be a liar. I do not intend now to vary from that practice, and the witnesses that I shall offer, in so far as I, by careful investigation have been able to ascertain, I assure this Court are not liars.

Now, as to the question of whether or not it is usual in conspiracy cases to move for severance of one or more defendants, I represent to your Honor upon an experience of some years that it is not at all unusual, and, of course, your Honor knows well from your practice before the bar and from your experience upon the bench that it is not unusual. It is done frequently.

Now, it is suggested by Mr. McCabe, the attorney for Foster, that Foster will be under some legal disability if the trial proceeds now without him, and that Mr. Foster thereafter must come to trial, and (1020) it is suggested that something that may happen in this case, if it goes to trial, or something that may be thereafter decided in an Appellate Court will in some way bind Foster when he comes to trial.

The Court: There is nothing in that.

Mr. McGohey: Well, I shan't press it any further, your Honor. It just has no foundation in law or fact.

Now, as to whether or not counsel have been able to confer with their clients, let me relate a bit of history in the case, your Honor: The indictments were returned in July of last year, July of 1948. Upon the arraignment of the defendants a period of 30 days was asked within which motions might be made. That period in and of itself was unusual. It is not customary in this court to grant such a long period within which motions are to be made.

There were a succession of motions along that line so that by the time this case was moved for trial—by the time the motions actually came on, rather, in October before Judge Hulbert, there had been a total period of 67 or 69 days, I am not sure which, that the defendants had to make their motions in.

Now, during that time there were a series of (1021) applications made that the bail limits of the defendant

Foster and others who were in the Southern District of New York should be enlarged, and one of the reasons assigned for that enlargement of the bail limits was that Foster—and one of the affidavits is made by the defendant Foster—that he be permitted to travel throughout this country for the purpose, among other things, of consulting with people in his Party in the preparation of his defense.

It has not been suggested, and it was not suggested at that time, that he was unable to travel. Indeed, another one of the reasons urged why he should be given permission to travel outside the district was that it would be necessary for him to confer not only with members of his Party, but with lawyers in whom he had trust throughout the country, and in addition to help raise funds to defray the expenses of making his defense.

Now, what do we come to today, your Honor? We have before this Court affidavits by Dr. Finger, who is Foster's own doctor; we have affidavits by Dr. Foster Kennedy; we have affidavits by Dr. Cary Eggleston, and by Dr. Henry Alsop Riley.

Now I pretend to no more skill in medicine (1022) than Mr. Sacher does, and I have just as much nervousness in talking about it as he does, but if these affidavits taken together mean anything, they mean this, that as of today this defendant is not able physically to stand the rigors of a trial, and the prognosis is that he is going to have to have the same kind of careful attention apparently for a long period of time. He appears to be a man of 67 or 68 years of age who has a cardiac history.

Now, I do not know anything about the treatment of heart cases, but on the basis of what the doctors represent and on the kind of treatment which they say he ought to have, it seems to me that any of us reasonably must infer that in the foreseeable future Foster is not going to be able to come into this court either as a witness or as a defendant.

Now, God forbid that something should happen to this man which would take away his power of speech or reason, but if that should occur, is it to be argued that we should wait until such time as maybe some miracle would happen that would restore him to the vigor that would permit

him to be made a witness? Certainly when this indictment was returned there was no knowledge that I had that Foster was a patient. There was no (1023) intention to indict a man who could not be tried, and these defendants are in no other position than many defendants are when some witness whose testimony they would like to produce is unavailable for any one of a wide variety of reasons.

It is suggested that there is unseemly haste. I suggest, your Honor, that the very nature of the charge is such that this case ought to be tried as promptly as it can be tried now six months after the indictment. I submit that the only fair way is to sever as to the defendant Foster.

Let us assume that your Honor were to grant a continuance for six months, as was suggested by Mr. McCabe. Can there be any doubt in the light of the history of what has happened in this case since October when the illness of the defendant Foster was first announced, and urged as a reason for adjournment, in the face of that fact, can there be any doubt that at the end of six months from now the argument would still be made, "Well, maybe if we wait a little longer, maybe even though Foster is getting older, maybe he will get well"?

Your Honor, I suggest that there has been no reason urged before you today which should justify the denial of the Government's motion to proceed. I urge it (1024) and ask that it be granted.

Mr. Isserman: If the Court please, there are two matters of fact that I would like to straighten out. I am sure Mr. McGohey—

The Court: I said in reply you gentlemen would have an opportunity to reply to anything that Mr. McGohey said, so you may go ahead.

Mr. Isserman: Now Mr. McGohey—

The Court: And I must say that he has made an impressive argument on the matter here. I do not see how I could do otherwise than grant the motion, but I will hear what you say.

Mr. Isserman: However, your Honor, the impressive argument is based on at least two serious misstatements of fact which I would like to call to your Honor's attention right now.

The Court: I am listening to you.

Mr. Isserman: And in the light of these misstatements the arguments cease to be impressive.

He said Mr. Foster made an affidavit in which he stated that he and other defendants desired to have the bail limits enlarged so that they might travel around the country. I do not know if Mr. McGohey told you the date of that affidavit, but it was August 25, 1948. That is when it was verified. It was annexed to a motion (1025) dated September 2, 1948, which was to be argued on September 8, 1948. I am referring to the motion papers in that particular aspect of this case. The motion is dated September 2, 1948, signed by Unger, Freedman & Fleischer, addressed to Mr. McGohey, and notes Mr. Foster's affidavit of August 25th is annexed and will be relied upon in an argument on September 8th.

The Court: Excuse me just a moment. I was thinking as you proceeded about the date of that attack that he had—

Mr. Isserman: September 2nd, your Honor. That is the next thing I was going to mention.

The Court: Yes.

Mr. Isserman: Dr. Finger has said in a number of affidavits—I am looking at his latest one, dated January 5, 1949—

The Court: I remember there was one in August. Am I wrong in that?

Mr. Isserman: —in which he said on September 2, 1948, he was called in to attend Mr. Foster.

So we have the affidavit signed on the 25th of August, the notice to Mr. McGohey on September 2nd, the argument on September 8th. But Mr. Foster was (1026) never able to avail himself of the enlargement of bail because on September 2, unfortunately for himself and for the defendants in this case he was stricken. So that this opportunity—

The Court: Were there, two attacks both in September? I had a vague recollection that the first one was August some time.

Mr. Isserman: There might have been something—

Mr. McGohey: I beg your pardon, Mr. Isserman, may I hand up to the Court a copy of Dr. Alsop Riley's report

dated November 11th and call your Honor's attention to the language about half way through that second paragraph?

The Court: Excuse me, Mr. Isserman, while I look at this.

(Report handed to Court.)

The Court: Well, my memory is generally pretty good and it seems to be right this time too. It was August 21st or 22nd that he had his first attack.

Mr. Isserman: Yes, he had a slight one, but he signed the affidavit he expected to be able to travel around, as he said he required.

And then on September 2nd he had another attack which made that out of the question. So that the point (1027) I am making is that the enlargement of the bail on which Mr. McGohey makes such a large point was no enlargement as far as Mr. Foster was concerned, and from that point on he was incapacitated.

The second point I make is that both Dr. Finger and Dr. Kennedy have not eliminated the possibility of Mr. Foster's recovery and of Mr. Foster's ability to testify or assist the defendants.

In the last paragraph of Dr. Finger's affidavit of January 5th he says, "In view of some improvement in these last several weeks it may be presumed that further improvement is to be expected in a like period to follow. However, Mr. Foster is still unable to cope with any strain and cannot participate in a trial at this time without the possibility of lasting and serious damage to himself which may even prove fatal. He may at present engage in very short conferences under very favorable circumstances, such as at home where he may lie down when fatigued and in situations which are not calculated to make for excitement or strain, and such conferences might have to be canceled or terminated upon sign of weariness or exhaustion."

And Dr. Kennedy in his last report, January 7, 1949, referring to the last paragraph, says, "His mind (1028) is clear; his answers are direct and to the point; his capacity for sustained work is very decidedly limited; he

is capable, I believe, of answering written questions fully and clearly if given time and an unemotional atmosphere in which to do the task.''

Mr. Foster is not in a position suggested by Mr. McGohey of being unable to assist, to render vital and necessary assistance to the defendants. What is required are the conditions which make his testimony available and his assistance and advice on preparation available to the defendants, and it is to that end we have addressed our argument, and if circumstances require that time be given to Mr. Foster, that he only have one-hour conferences, then we ask the Court to accommodate the processes here to that condition which we cannot change. We can't make Mr. Foster better and we don't want to make him worse, and we need his testimony.

Now, with that posture before your Honor, with the question posed that way, then Mr. McGohey's argument has no validity, and the representations of both defendants and counsel as to the need of his testimony, supported by affidavits, should put this Court in a frame of mind where some arrangement is worked out whereby Mr. Foster's advice can be used, his testimony can be obtained, and no damage done to him, and that is possible under this (1029) situation.

The Court: I will grant the Government's motion in both aspects, and we will take a recess until 2:15 when we will take up the matter of the challenge.

Mr. Gladstein: May I understand what the motion is? I understood there were two motions.

The Court: There is a single motion in a double aspect to move the conspiracy indictment for trial, and to sever as to Mr. Foster.

Mr. Gladstein: We have been addressing ourselves to the motion to sever. That is what I understood.

The Court: Well,—

Mr. Gladstein: I wish your Honor would treat the two separately because I have something to say after you treat with the question of the motion for severance.

The Court: Well, I will hear what you have to say now, and if it causes me to change my mind as to the disposition of any part of the motion, I will do so.

(1030) Mr. Gladstein: Yes. Well my point is, your Honor, that as I understand it you have indicated to us that if you grant, if you were to grant Mr. McGohey's motion to sever then you would hear from us on the question of whether or not there should be an adjournment as to the remaining 11.

The Court: That is right.

Mr. Gladstein: Therefore I suggest your Honor correct the record if you will.

The Court: It does not need any correction, Mr. Gladstein. I have indicated that in connection with what Mr. Crockett said if it desired after I grant the Government's motion to make some new motion for a continuance, I will hear the motion, I will hear the argument.

Mr. Gladstein: Yes. But I want it clear on the record, your Honor, to see if I understand this. That what you have granted is the motion for severance and that we are still entitled to address ourselves to the other motion or the other aspect of the motion of Mr. McGohey, namely, that the other 11, the indictments as to the other 11 go on trial. Is that right?

The Court: I think not. I think it has been quite clear here that there is one motion with a double aspect. The two things are very naturally connected together. He moved the indictment, the conspiracy (1031) indictment for trial at the same time and as part of the motion to sever as to Mr. Foster. And that is what we have been hearing the argument about.

Mr. Gladstein: But I have considerable to say on that, and I wonder if your Honor wouldn't be good enough to hold in abeyance your ruling until—

The Court: No, I won't hold it in abeyance. But I will, as I said a moment ago, listen carefully to what you have to add, and if it gives me some reason to change the ruling that I have made, I will change it.

Mr. Gladstein: Thank you, your Honor.

Mr. Sacher: Will your Honor hold that until after lunch?

The Court: I am eager to dispose this morning of whatever may relate to this pending matter here, and I may say in that connection I do not conceive what can be

brought up in the matter of an application for continuance now that would lead me to grant it. I have denied so many motions for continuances here yesterday and today, but I will hear some more if they are to be made. But I want, if possible, to make such progress that at the opening of the afternoon session we could proceed with the trial of the challenge and take such evidence as may be offered by either side as to that, because it is my understanding that there has been (1032) filed a challenge similar to the one that was filed last November and withdrawn.

Mr. Gladstein: Yes. My only point, and I had that in mind, your Honor, and that is what I wanted to address myself to this afternoon—as I say, I understood your Honor to say that we were going to adjourn for lunch; my only point—

The Court: Yes. I thought you gentlemen were through on this pending matter—

Mr. Gladstein: My only point—

The Court: That is all right.

Mr. Gladstein: My only point is that the challenge as I see it is pre-trial and should be presented prior to any disposition on the part of the Court of the motion of Mr. McGohey that the indictments against the remaining 11 defendants be placed on trial.

The Court: No. I think that the motion that he has made appropriately comes first as far as the trial itself. That has not yet started.

Mr. Gladstein: I understand that.

The Court: Your disposition of the challenge—or my disposition of the challenge is not even over.

Mr. Gladstein: I was wondering whether your Honor was going to let me participate in that.

The Court: I indeed will, and receive such (1033) evidence as is relevant to that issue, and that will precede the trial, which is I understand your point.

Mr. Gladstein: Yes, it does precede. But my point is, and I think, if your Honor will bear with me, I will discuss that after we get back. But I regard this as coming prior to the trial itself.

The Court: I do too.

Mr. Crockett: Your Honor will recall that I initially offered the motion for an adjournment and then at a subsequent discussion your Honor suggested the propriety of renewing that motion after you made the ruling on the subject.

The Court: I did, and I just said the same thing a moment ago.

Mr. Crockett: I would like at this time to renew the motion for continuance in this case and also to state the reasons why I think a continuance should be granted.

The Court: Very well.

Mr. Crockett: I prefer however to do so after the recess, which I believe is called for one o'clock.

The Court: You may do that.

Mr. Sacher: I think before your Honor rises I should like to point out that Councilman Davis, who is a New York City Councilman and a member of the New York (1034) City Council has to attend sessions of the Council every Tuesday at 1:30 and has committe work. Now that raises a problem I think in connection with the conduct of the trial which we need not perhaps take up at this moment; but if it is agreeable with the Court Mr. Davis would like to attend that session of the Council this afternoon. So that I should like to inform the Court—

The Court: I don't want to pass on what I will permit him to do when the trial gets underway and we have a jury here. But as far as the present application, if Mr. McGohey has no objection, why, I will permit him to do it.

Mr. McGohey: Oh no, your Honor, I have no objection. And I take it that Mr. Sacher making that in the presence of Mr. Davis—

Mr. Sacher: I do.

Mr. McGohey: —that Mr. Sachers' waiver of any right involved also includes the waiver of Mr. Davis.

Mr. Sacher: That is correct.

Mr. McGohey: With that understanding, I have no objection whatever, your Honor.

The Court: Very well. We will recess until 2:15.

(Recess to 2.15 p. m.)

(1035) AFTERNOON SESSION

* * *

Mr. Crockett: If your Honor please, at the recess I had just renewed my motion that we be allowed (1036) a continuance in this case. I would like to amend that motion to ask for a continuance for a reasonable period of time.

In support of that motion I would like to emphasize again the sheer necessity of my having an opportunity to talk with the principal witness in this case, Mr. Foster. Now, I am aware that more or less the same arguments were made by me at the time we were considering the question of severance. I am also aware that merely because the Court did not agree with me does not necessarily mean that the Court does not appreciate the validity of the reason which I am advancing. I repeat it at this time for the sake of emphasis because I think the Court must be fully aware of the fact that even though we were given a continuance of 60 days, the medical reports indicate very clearly that it would have been a physical impossibility for Mr. Foster to confer not only with me but with the attorneys for the other defendants.

I am in hopes, however, that now that Mr. Foster's case is no longer to be tried right away, if I am given a reasonable period of time it will be possible for me to confer with Mr. Foster in order to fully prepare to defend my clients.

(1037) Now, in that connection I raise the question—What is to be lost by granting of such a reasonable request? I am mindful of the fact that Mr. McGohey stressed that the situation would be practically the same if Mr. Foster should suddenly become unable to talk. That is a situation with which we are presently confronted with. The fact remains that Mr. Foster is physically available provided I am given the time to talk with him, and that is all I am asking for.

Now, it has also been suggested that this case is of such paramount importance that its trial should not be delayed. That is a strange suggestion, it seems to me, coming from counsel for the Government. Just what is the basis for this importance? I can't see where there is any imminent

danger to the Government of the United States or to the people of the United States. As has been pointed out before, the Communist Party has been in existence for years and years, and at no time has it been suggested that it constituted an imminent danger either to the Government of the United States or to the people of the United States. And in that connection I think it is important to notice the language of the indictment itself. Strange as some people have it, this is not an indictment that charges any conspiracy to try to overthrow—that charges (1038) a conspiracy to overthrow the Government of the United States. If that were the case, though I do not concede that it necessarily would follow, there might, it seems to me, be more reason to insist on an immediate trial. But here, the indictment is a conspiracy to set up an organization—to do what? To teach and to advocate the necessity of doing so. Now, I think your Honor will agree that there is a tremendous time space between mere teaching and advocating—assuming that that were true—and the actual carrying out of what is proposed in the teaching and advocacy. As a matter of fact, independent judgment must intervene between the two things.

(1039) Obviously then since this indictment makes no reference to any overt acts on the part of these defendants and merely talks in terms of what they believe, what the teach and what they advocate, there is no indication whatever of any immediate necessity to rush this case to trial, especially when it means the denial to the defendants of one of the essential elements of a fair trial and that is that their counsel will have adequate opportunity to prepare for the trial.

The last point that I would like to bring to the attention of the Court again has to do with the indictment. One of the defendants that I represent, Mr. Carl Winter, as I believe I mentioned to the Court before, is, like myself, a resident of the State of Michigan. Under those circumstances while he might have personal knowledge of what if anything has been done by the Communist Party in the State of Michigan, he would not have personal knowledge of everything that has been done and that might possibly be encompassed in this indictment. The indictment is not limited to what if anything was done by the Communist

Party in Michigan or any other particular section of the whole world. The indictment in specific words alleges that this so-called conspiracy occurred not just here in the Southern District of New York but elsewhere. (1040) And elsewhere I believe includes the whole world.

Now that to my way of thinking points up the absolute necessity of being given an opportunity to talk to the man who has been the head of the Communist Party during the entire period covered by this indictment. Perhaps there may be some information that he can point to that I am able to go to and get that might be of value in defending my clients. But in the absence of the Court granting a reasonable adjournment in this case so as to permit me to do that, then I respectfully submit that my client is not being given the advantages of his constitutional right to a fair and deliberate trial in which his attorney will have had adequate opportunity to prepare his defense.

Mr. McCabe: If the Court please, I should like to add a few remarks to what Mr. Crockett has said.

A great deal has been said here about the inability of counsel to confer with Mr. Foster. With that I am in agreement. I don't know whether it has been pointed out to your Honor that restrictions arising from his ill health restrict not only the duration of any conference which he may have, it restricts the number of conferees. I might derive much more benefit from a conference with Mr. Foster if I were allowed to have Mr. Dennis with me, but he is allowed (1041) to talk to only one person at a time. And, further, he is allowed to talk only during a short and specific period in the afternoon, when experience has shown that he is best able to have a conference.

Had I been able to go up there in the evening and talk to him, had somebody else been able to go up in the evening, the situation might perhaps have been just a little bit better; it wouldn't have been much better. But I call that to your attention lest when someone mentions the word conference your Honor has the idea of all of us sitting around together and talking over the case. That has been absolutely impossible.

This case, your Honor, while you have referred to it as just another criminal case, is novel in the experience I think of most all counsel. I know it is novel to me, in that very

often in the trial of a case, well, a murder case, something like that, you can talk to the witnesses yourself. You do that as a matter of course. You find out what it is all about. But when I talk to Mr. Foster about some of the aspects of this case, well, I might as well be talking about some of these medical terms from which both Mr. McGohey and Mr. Sacher have shied away. The implications of this case open up an entire new vista (1042) of investigation. I have had to go to school all over again, and I am frank to say that my age has made the learning a little more difficult. Therefore, when I talk to Mr. Foster after talking to Mr. Dennis I find that I miss the point of the whole conversation entirely. And all through this these defendants are entitled—

The Court: You even make Mr. Dennis smile at that.

Mr. McCabe: Well, I have never quite admitted to him that I miss the point. He has told me that I miss the point, but this is the first time I admitted it openly.

The Court: Don't lay it on too thick now.

Mr. McCabe: So it is terribly important not only that counsel talk to Mr. Foster but that the defendants themselves have an opportunity to talk to Mr. Foster. And with the number of defendants here and with the scope of inquiry unlimited as it is, although it is still within your Honor's power to limit it, bring it within reasonable bounds, presently with the scope of the inquiry unlimited I say that we are simply unable to go to trial.

Now the request has been made for a reasonable continuance. Mr. McGohey today constricted the scope of our inquiry considerably; that is, we are in agreement as to who are liars and who are not. If we could eliminate inquiry as to some of the false testimony (1043) which has already been given in other Government cases, if we knew that we were not going to have to meet the absolute falsehoods, then I would say again the scope of our inquiry would be limited and brought within reasonable bounds. Of course I can see that Mr. McGohey said that he was not going to put on any persons known to him to be liars. If he would only expand it to say that he would not put on any witnesses known to us to be liars or just known to be liars, we might restrict that considerably. But I see we probably won't be able to agree on that.

Now let me say again: since the recess, your Honor, we were speaikng before recess of the effect of this whole situation upon Mr. Foster's health. And someone has pointed it out well, that the effect on his health, and I think I mentioned it the other day, I think it was repeated here today by Mr. Sacher, the effect on Mr. Foster's health

of a trial without him is apt to be just as bad as the effect on Foster's health on a trial with him. I said the other day I conceived a great personal admiration for this man, and I think I pointed out that he resembled Ty Cobb a great deal, both in his physical appearance and approach to situations.

I remember one day seeing Ty Cobb sitting on the (1044) bench when his ankle was so badly broken that he couldn't even tie it together enough to get out there. And if you ever saw a man suffer the torment of the damned it was Cobb on that bench unable to get out there and do the things that he knew he could do better than anybody else and see things done in a less than perfect manner.

And that is the way Foster feels about this. It happened since recess. I got an urgent summons. "You are my lawyer. Come up and see me. I want to see you this afternoon. I want to know what is the effect of this ruling, what is the effect not only on me, what is the effect on the Communist Party? What is the effect on these other defendants? And I want it this afternoon. I don't want it tomorrow or some other time."

And that is going to go on if this case goes on to trial without the opportunity of Foster having made the contribution. I say not only a contribution to the case of the defense—I still have some of the illusions which I have cherished in my years of practice; that Foster's contribution to this case would be a contribution to the case of the Government; that Foster's ability to expose the weakness, the falsity of the Government's position would be a positive contribution to the Government's case that is to be tried here. Not only to the Government's case, but far more than (1045) that, beyond the case which is to be presented here, but Foster's contribution is necessary to the preservation of the ideals which are set forth in the Constitution of the United States to which I believe he is more devoted and certainly equally as devoted as anyone in this room.

I say, for that reason I ask your Honor now to grant a reasonable continuance in this case so that the case will not go to trial without the contribution which Foster and Foster alone can make and will make if given a reasonable opportunity. I would say that if he knew, if he knew that

just devoting himself and putting that brilliant mind of his down to the task of building up his strength to the position where he could participate, I think the man is capable of doing it, and I think that it should be done.

Mr. Sacher: May it please the Court, your Honor made some references this morning as to what transpired last November, and as one famous New Yorker used to say, "Let us look at the record."

On November 12th, at page 643, your Honor said as follows:

> "I am impressed with the fact that it would not be fair to the defendants to force them on for immediate trial without the presence of Mr. Foster."

(1046) I say to your Honor that the situation on January 18th is not different from what it was on November 12th. It is no more—

The Court: It is different to this extent, Mr. Sacher, that in the interval, which is a substantial interval, there has been given that opportunity which they said they had not been afforded up to that time. Now you know that these applications for continuances involve a host of elements that a judge in the exercise of his discretion must balance and must consider from every angle. Now, I have paid very close attention to all the arguments that have been made about that and I have tried my best to reach a just conclusion about it. And the fact that I have had so much experience in the past with cases where similar questions have been presented, leads me to feel that I am just about at the point where I don't think that additional argument is going to be helpful.

(1047) Mr. Sacher: I think the record ought to be set straight—

The Court (Continuing): But it is not as though I did not understand or that I had not given the proper consideration to these various elements. I have done that as well as I could, and I really think that we have reached a point where we have got to get going with the trial.

Mr. Sacher: Well, your Honor, I think one thing must be recognized, the fact that there was a 60-days adjourn-

ment does not in and of itself establish its reasonableness. The reasonablenes of an adjournment must be ascertained and determined in the context of the circumstances in which it is granted.

Now, all I need do is ask your Honor to compare the letters of the court-appointed doctors of last November with those which they issued just a few days ago, and those letters confirm that all of the difficulties that the defendants themselves encountered in meeting with or conferring with Mr. Foster at that time—that is, at the earlier date—have been encountered and are still encountered at the end of the 60 days. All we are really saying to you is that what we asserted then has been proved to be correct by events that have since (1048) transpired. We urged upon your Honor then to grant a 90-day continuance on the theory that any lesser number of days of continuance would not fulfill the purpose for which the continuance was granted.

Now I want to make this observation too: It has to be recognized that in this kind of an action any conduct, any words, any deeds or actions of Mr. Foster at any time during the three-year period covered by the indictment would be admissible into evidence under the theory of the Government on this case.

The Court: That is, in furtherance of the conspiracy?

Mr. Sacher: Precisely. Regardless of whether Mr. Foster remains a party or not, I take it there is no doubt, as your Honor has just said, that any conduct alleged to be in furtherance of the conspiracy that seems to have some relevance or materiality to the theory of the Government would be admissible on this trial. And that therefore means that in anticipation of and in preparation for this eventuality, a tremendous eventuality, because as we have all acknowledged, Mr. Foster, as chairman, has occupied a pre-eminent position, a position which has placed him in various activities at the very center and heart of these activities.

Now, these defendants, apart from lawyers, but (1049) these defendants who are defendants must confer with Mr. Foster. They must discuss his acts and their acts and the relationship between the two and the significance of them here.