And there is one other point I wish to stress before I am through, your Honor, and that is this, that at this November session we are talking about there was no hint from Mr. McGohey that he was going to move for severance today. Despite the suggestion contained in your Honor's opinion of last November, the fact remains that when you advanced that suggestion on November 12th Mr. McGohey renounced it, and I would like, with your indulgence, to read you a few words, because I think they emphasize the consternation with which the defendants greet at this time the granting of the severance and the insistence on our going to trial immediately.

At page 648 your Honor introduced the subject as follows:

"The Court:"—

The Court: You know, I had the power to sever as to Mr. Foster on my own motion. I did not have to wait as to such matters as that.

Mr. Sacher: But the fact is your Honor did not do it, and therefore we had a right to assume—

The Court: I indicated in my opinion (1050) very clearly what was going on.

Mr. Sacher: No, I do not think we should be in the position of that lawyer who was once told by Judge Holmes when he advanced an argument that was a little too long, Judge Holmes asked him whether he ever read French Romances, and this fellow drew himself up in all his Massachusetts propriety and said, "Of course not." And the old man said, "I suggest you do. You will learn the art of suggestion."

Now, if your Honor thinks that we should read your opinions with a view to discovering hints or suggestions, I submit that we lack the imagination, and we certainly do not have the obligation to do so.

The Court: Well, I have read some of those 17th Century French Romances myself, but I find little in them to guide me in this case.

Mr. Sacher: That is just what I am getting at.

Now, at page 648 your Honor said:

> "I am wondering if it is not practical to have some progress made before the thirty days"—at that time your Honor was considering a 30-day adjournment—and I resume the quotation of your Honor's remarks: 'The problems as I see them that are posed by this are, first, the question of whether there is going to be any (1051) severance as to Mr. Foster.' "

You raised a question to which you did not provide the answer.

And Mr. McGohey replied: "I don't get that."

And the Court said, "Any severance, whether any action is to be suggested"—you were saying this to the United States Attorney—"whether any action is to be suggested either by you or by the counsel for the defendants, that his case"—that is Mr. Foster's case—"can be severed so as to proceed with the others. And then there is the question that has already been suggested by defense counsel, of the possibility of deposition. Isn't it going to be possible before the thirty days are up to get some report as to what the likelihood is on this question, so that we won't come back again in thirty days, if I fix the date of thirty days, and then go into it all over again."

And here was Mr. McGohey's response, and again I repeat it is as true and as valid today as it was on November 12th. He said, "I would be agreeable to that. With respect to the severance, I do not urge that point because as I understand the position of the defendants, that would not solve this problem at all," says Mr. McGohey. "Whether the Government severed as to the defendant Foster or not, it is the claim of the (1052) defendants that, even if he were not named as a defendant, I take it they would make the same sort of argument—this his testimony is so important that they would be denied due process if they had to go to trial without him."

Of course, if he has to be around at the trial I think he ought to be around for the defendants.

Now, is there any difference in the situation on January 18th from what it was on November 12th? If Mr. McGohey thought on November 12th that if Mr. Foster—

quoting him—"has to be around for the trial I think he ought to be around for the defendants"—has he changed his view? Does he today think that Mr. Foster should not be around for the defendants? What explains this change in situation?

I think, your Honor, that the summing up of this record is pretty decisive of the question that is to be acted on now. I think it is as true today as it was then, and when I say "I think" I am just using terms of art. I think that the doctors' letters demonstrate that the situation today, on January 18th, is no different from what it was on November 12th, and that the same considerations which impelled the Court and the United States Attorney to recognize the need of Foster's presence at this trial, coupled with the statements embodied in the (1053) affidavits, that there is some promise or presumption of a continued improvement in his condition warrants at this time in our asking your Honor to do no more than we asked you to do on November 12th. Why not grant that at least 90 days' extension? That is the point I am making. In other words, events have proved that the adjournment which we asked for, which was fully borne out and warranted by subsequent events, and which your Honor did not grant, was justified, and that the lesser period which your Honor granted has proved itself to be inadequate for all of the purposes which have been urged upon the Court in the last two days as well as upon those that were urged upon you then. And I respectfully submit that it is as valid to say today as it was in November that the insistence upon trial without the aid of Mr. Foster will be as great a denial of due process at this time as it was then. There is nothing in the picture which justifies a different conclusion today.

The Court: Gentlemen, I will deny the application for a continuance and we will now proceed with the challenge to the panel.

Mr. Gladstein: Your Honor, may I request that you continue the matter for 30 days? I cannot say that I am prepared to defend either of the clients (1054) that I represent. I simply am unprepared; I have not had the time to obtain evidence that is essential in order to permit me to defend them. Two months just has not been enough.

I do not want to argue with your Honor; I do not want to fight about it; I wish I knew how to persuade you to understand that with the additional time that I need I believe I could be prepared, but I am not now. I believe that this does go to a question of due process. I do not think this Court wants to commence proceedings with the knowledge that upon very substantial grounds each of the defense lawyers asserts vigorously that he has not had a chance due to the illness of a major witness and a most important person to prepare his case.

The Court: Well, if this is a denial of due process I just don't understand the meaning of the term, I really don't. I have tried to give consideration to every single element involved here, and I have heard argument at great length and I simply cannot see the matter in any other light than the way I have decided it. Your motion is denied.

Mr. Gladstein: Then, your Honor, I ask for a continuance of 15 days. And let me say in that connection—

The Court: I will indicate now that I not (1055) only will not grant a continuance of 30 days or 15 days, I will not grant any continuance. It is my intention to proceed this afternoon with the trial of the challenge to the panel.

Mr. Isserman: If the Court please, I join in the motion made by Mr. Crockett for the original—for the 90-day extension and adjournment of this case. Without restating the arguments, I adopt the arguments he has made and other counsel have made, and state that it is a denial of due process in violation of the Constitution to compel my clients to go to trial at this time.

The Court: Very well.

Mr. McGohey: May I just add one thing to this phase of the discussion, your Honor, and that is, to call the Court's attention to a statement made by me on November 17th, and which, according to—

Mr. Sacher: What page are you on, Mr. McGohey?

Mr. McGohey: Starting at page 669 and continuing on page 670. I am sure Mr. Sacher was not aware—it occurred five days after—when he quoted what he just quoted.

We were talking about the question of fixing a date, and I said this, starting at the bottom of the page there, the second sentence:

> (1056) "If we fix a date today, say the 4th of January, or some other date around early in January, I would suggest, and I now make a representation to the Court, that if on that date which the Court fixes for trial, the defendant Foster's condition is such that he cannot and should not be put to trial, that I will then move to sever the case as to Foster and be ready to proceed to trial with the remainder of the defendants."

The Court: Mr. Gladstein, I think you have the affirmative on the challenge.

Will somebody furnish me with a copy of the—

Mr. Gladstein: I was about to do that, your Honor.

May the record show that I am presenting now to the Court not only the original papers of the challenge but also a document entitled "Notice of addition of a supplementary ground," which simply asserts an additional ground omitted from the original challenge, and a copy of which I now offer to Mr. McGohey.

The Court: I think it would be a good idea to pause for a moment until I glance over the challenge and the supplementary grounds of challenge. I intend to glance at them both, and I shall study them more carefully later on.

Mr. Gladstein: Now, your Honor will find (1057) appended to the challenge a motion and a supporting affidavit requesting—you will find it—I think they are all put together, your Honor—

The Court: Let me just find it before you continue, because I find it very helpful when counsel is referring to a paper if I have before me the part of the paper we are speaking about.

Mr. Isserman: Might we have a five-minute recess while you do that?

Mr. Gladstein: Do you want to do that, Judge?

The Court: I really don't feel it is necessary unless you feel that to present your proof on this you need a few minutes. But let me just glance at this. I am pretty

familiar with the general subject matter, and I am looking now for your motion which you say is appended. I passed the challenge to some exhibits, and here is an affidavit. Is the motion you speak of at the bottom of the challenge?

Mr. Gladstein: I think if you started backwards, your Honor, you will find that.

The Court: Yes, it is entitled under the heading "Motion for hearing."

Mr. Gladstein: That is right, your Honor.

The Court: Let me look at that first, because that is a preliminary matter that we ought to dispose (1058) of before we begin taking any proof.

Now, the substance of that preliminary motion is stated in paragraph 7 in the notice of motion as follows:

> "No Judge of said Southern District should sit and preside over the proceedings to be conducted in connection with the presentation of said challenge and motions. A judge not from the said Southern District should be assigned to hear and preside over said proceedings."

I would be glad to hear what you have to say in support of that?

Mr. Gladstein: First of all, your Honor, I think that the entire challenge should be submitted to the senior Judge of this court, Judge Knox, for the reason that—and on this you will have to accept my word for it because you have not had a chance to read the papers at all—for the reason that the challenge and the supporting affidavit and exhibits set forth a picture which establishes that the operation of the jury system in the Southern District of New York involves the participation of each of the Judges of this court, but particularly the chief judge of this court, and a good deal of the documents are devoted to a presentation of facts concerning the activities of Chief Judge Knox in connection with the creation, the (1059) development, the supervision and the operation of that system of jury selection. So that that system involving Judge Knox and all of the judges of this court is one with which obviously he would be more familiar than you, for example, who have been on the bench—

The Court: I did not have anything to do with it.

Mr. Gladstein: I say, than you who have been on the bench—

The Court: But your point is that the Judges of the Southern District of New York having to do with the matter are biased and prejudiced. It so happens that you have one Judge here who had nothing to do with that.

Mr. Gladstein: Originally. But my point is, your Honor, that every Judge—now, I don't want to go into the presentation of the merits of this motion—

The Court: Which is it that you say shows the prejudice that the Judge had something to do with it or the Judge had nothing to do with it?

Mr. Gladstein: That all of them were necessarily involved is the gist and the thrust of these motions. But my point is, your Honor, that since what is requested in effect is that none of the Judges of this court sit in judgment upon the challenge to the jury system, since (1060) that is the purpose of the request of these documents, appropriately that matter should be submitted to the Chief Judge of this court. Otherwise, in effect what your Honor is doing is saying to me that you have the authority to determine this question as involving all of the other Judges, and I would assume—

The Court: I do say I have the authority to decide it and I think I am going to decide it.

Mr. Gladstein: But, if your Honor please, I think it would be naturally so that the Chief Judge of the court would be the one to pass upon this kind of a motion.

The Court: He is not going to pass on this one.

Mr. Gladstein: Now, as I understand it, then, I am applying now—I am asking your Honor to refer this matter of the challenge to Judge Knox—

The Court: That is right, and I decline to do so.

Mr. Gladstein: Then I ask leave of your Honor to permit me to make an application now to Judge Knox to hear this matter.

The Court: I grant that. You may. We will take a ten-minute adjournment and you may go and address yourself to him, and then we will come back here again (1060-A) in ten minutes. I think that will be enough to dispose of the matter.

(Short recess.)

(1061) The Court: Now we are back on the question of whether the character of this proceeding is such that all of the judges, including myself, here in the Southern District of New York, are disqualified to try the challenge.

Mr. Gladstein: Well now, your Honor, may I review the record for a moment?

The Court: Yes.

Mr. Gladstein: I first asked your Honor to refer to Judge Knox as the Chief Judge and as one who is personally—

The Court: I had a pretty good idea of what he was going to do because he assigned me to take care of this case, and that is just what I am going to do.

Mr. Gladstein: Your Honor, you haven't let me state what has happened.

The Court: Well, I did not mean to interrupt you.

Mr. Gladstein: Yes. Well, I am perfectly willing to have your Honor interrupt me and that part of it will be all right. I understand that I will not have the same opportunity, but that will be all right too.

I just want, however, to have the record clear. I asked your Honor to refer to Judge Knox, the Chief Judge of this court, one motion, namely, a motion which we are making for a hearing before a judge not of the Southern (1062) District of New York of our challenge to the array, to the panel, to the jury lists, to the entire venire, and to quash the indictments and dismiss them. Now—

The Court: I take it it is not a question of disqualification. You are rather addressing yourself to the discretion of the Court as to whether as a matter of judicial propriety or desirability it might be better to—

Mr. Gladstein: No, my first point is that I asked your Honor to refer it to the Chief Judge because, as I said, the documents that we have filed, the supporting affidavits and the supporting documents, all sworn to, make clear a certain personal knowledge and participation possessed, knowledge possessed by and participation exercised in the setting up of this jury system by Judge Knox which would in all reasonable likelihood make him appreciate, with a great degree of sensitivity, the appropriateness of our suggestion that it would be better for all concerned to

have this kind of a matter held before a judge not of this Southern District.

Now, to my request to have that motion by an outside judge referred to Judge Knox your Honor ordered—well, your Honor denied that request. Then I asked your Honor to give me leave to apply to Judge Knox not to hear the challenge of course because (1063) obviously he would be the least qualified person to sit upon and determine the kind of matter involved here, but merely for the purpose of presenting to him this motion for a hearing before an outside judge.

The Court: He said he wouldn't have anything to do with it and it was up to me.

Mr. Gladstein: Let me recite the circumstances that took place. Of course I had no part of that. Your Honor declared a ten-minute recess for the purpose of permitting me to make that application and the record will show, I think I am quoting you correctly, your Honor said, "I grant your application to take this matter of the motion for an outside judge to Judge Knox." A ten-minute recess was declared for that purpose and counsel went outside, and the clerk took the papers for the purpose of ascertaining where in the building Judge Knox was so that when we were notified we could go up there.

I spoke to Mr. McGohey of the desirability of having the court reported present in the chambers of Judge Knox, if that is where he wanted to have the matter presented to him, and Mr. McGohey agreed that it would be good to have a record made of what took place before the Chief Judge.

While we were waiting, the next thing I knew (1064) was that the bailiff said, "Well, everybody inside," and I came inside and the first thing that I heard was that your Honor—oh no, I beg your pardon. I went over to the clerk and asked what happened, wasn't Judge Knox here, and the clerk said, "Judge Knox said he would have no part of it."

Can the record show that when you nodded your head just now you were saying "Yes, that is correct"?

The Court: Well, if I did not say "Yes" I now say "Yes"; that is what he told me that Judge Knox said, and that is what I expected him to say.

Mr. Gladstein: But, your Honor, my point is this: you made an order authorizing me to present to Judge Knox our application, our motion for an outside judge, and I didn't designate your Honor as my representative for that purpose. I have—

The Court: The practice here in this court in such matters is that the clerk then proceeds to the other judge to see whether he desires to hear the matter. The clerk, in accordance with the usual procedure, did that, and Judge Knox said that he did not desire to hear it or have any part of it. I suppose, indeed it is obvious to me, that he did that because the case has been assigned to me and he thought I was fully competent to take care of it, which I think I am.

(1065) Mr. Gladstein: But, your Honor, I hope that you won't take as a reflection on your ability anything I say.

The Court: Oh, no. No. Now, if you have any impression that I am of the over-sensitive type so that when somebody is raising a perfectly legitimate law point that is addressed to my conduct, that I take umbrage at it or feel badly about it, you may eliminate that from your thinking. Because I believe it is your duty and the duty of all lawyers to present their points firmly and with courage, irrespective of persons. And I shall never take any umbrage at your thinking any such thing as you have done here today as long as counsel maintain their respect for the Court and their notion of the Court's dignity; you will find no umbrage by me, no feeling that there has been anything done to make me feel embarrassed or uncomfortable.

Mr. Gladstein: Yes. Well, indeed I want to confess of course that from the very outset of these proceedings I intended, as I do now and I hope always will in any case, to present just as firmly and ably and vigorously any point which I feel has merit for the benefit of those whom I represent.

The Court: That is what lawyers are for.

Mr. Gladstein: That is right, Judge. And now (1066) we agree on something.

But on this question, on this question of whether Judge Knox should respect the order which your Honor has

made, which this Court made, that I be given an opportunity merely to present this application to him, I do not see that I have been given an opportunity to obtain the benefit of that order, but to the contrary, your Honor, what has now happened is that in effect you have denied my right, that has been a denial of my right to apply to Judge Knox. Now, surely—

The Court: You know, I don't give orders to Judge Knox.

Mr. Gladstein: No. But I think at least attorneys ought to have the right to knock on the door of a judge and say, "Your Honor, I want to present something, something of importance."

The Court: Why don't you get back at the point that you want to urge on me? Because this matter of the application to Judge Knox is all over with now and we are right back where we were, and you are about to address yourself to me with the arguments that you claim will show that the judges of the Southern District of New York, including myself, should not hear this challenge.

Mr. Gladstein: Yes, but I don't think your Honor should foreclose me so quickly, although—

(1067) The Court: Well, if I seem to foreclose you quickly, you may go on for a few additional moments on this preliminary matter about Judge Knox.

Mr. Gladstein: Of course if going on your Honor isn't going to—in other words, if you have closed your mind to the persuation of argument there would be no point in simply going on. I hope your Honor—

The Court: You see, Mr. Gladstein, here is a matter that I am thoroughly conversant with. I know how we judges here in this district go about sending matters from one to another. We don't give commands to one another here. It would be improper that we should do so. What we do, however, on occasion, as now, is to indicate that there is something which he may desire to hear. The communication is by the clerk, as always. He said that he did not wish to hear it. That disposes of the matter. When you say I have a closed mind, I suppose in a sense on this matter it is true that I have; I do not see anything left to argue there. I think you have squeezed all the juice out of that particular orange.

Now, why don't you get on to the merits of your claim that the judges here should not try this issue.

Mr. Gladstein: If you would permit me, your Honor, to carry forward a little bit the allusion that (1068) you have just made, which happens to be closely identified with the State from which I come, from which the citrus fruits are a product—

The Court: No Californian ever misses the chance.

Mr. Gladstein: I would suggest, your Honor, that what has happened to me in connection with the right to apply to Judge Knox has not been an orange but a lemon. I want the record to show that never has it happened to me that a judge will not permit me to present an application to him and to at least hear, oh, in some reasonable manner, however limited, at least an assertion of the reasons why that particular judge should entertain that application. And certainly it has never happened to me that when an application has already received the judicial approval of one judge, that is to say, that one judge has said, "Yes, you may apply to another judge," then certainly never until just now has it ever happened that the other judge, without letting me see him personally, simply send word down that he would have no part of the matter. I think that that however is perhaps some kind of reflection, the nature of which it is not necessary to detail.

Now as I understand it, your Honor wants me to proceed before you on the question of this motion (1069) for a hearing before an outside judge?

The Court: That is right. Now you have it exactly right.

Mr. Gladstein: Of course the record will show, I take it, that I am excepting to your Honor's original order by which you refused to refer the matter to Judge Knox and I am also noting an exception to the determination by Judge Knox that he would not permit me to present this application to him, even though your Honor had granted me permission, granted me leave to present that application. May the record so show?

The Court: Yes, it may.

Mr. Isserman: On behalf of my clients I would like to join in the objection made, if the Court please?

Mr. Crockett: And the same goes for my client also, your Honor?

The Court: Now I wonder if there is any way that I can convey to you lawyers the notion that I tried to express yesterday, which I did solely because I desired to have the record give each one of the defendants all the protection that he should have under the law, namely, that when a motion or any objection or other application is made and an adverse ruling is made, it may be deemed that each of the defendants has the benefit of the exception taken by anyone, except where (1070) counsel for some particular defendant or defendants desires to disassociate himself from the exception and not take that benefit.

I say that to save you the trouble of each time saying that you desire to join in, because it may be assumed, because of the community of interests here and the fact that each man has an almost identical interest in such things as have been raised here, that each have the benefit. Now perhaps as Mr. Isserman indicated yesterday there is some disadvantage to some of you in doing that. But I think not. I think it is clearly to your advantage to do it.

I do not say that you may not arise and say that you take or join in the particular motion or join in the exception. You may do so if you desire.

Mr. Crockett: Your Honor, I appreciate the ruling that was made yesterday, and I would like to state to the Court that my reason for joining specifically in the objection today is that the proceeding that has just taken place involved not so much a ruling by your Honor as a ruling by Chief Judge Knox. And I wanted the record to indicate an exception on the part of my clients to not only the ruling by your Honor but also the ruling by Chief Judge Knox.

The Court: Very well.

(1071) Mr. Sacher: I take it then, your Honor, that your Honor's statement will embrace an exception to Judge Knox's ruling on behalf of all the defendants?

The Court: I think so.

Mr. Gladstein: Now, your Honor, the motion is for a hearing before a judge not of the Southern District of New York of our challenge and of the motions connected with the challenge.

This motion asserts, in sum, the following: first of all we point out but very briefly what the character of our challenge to the jury system here is. That challenge asserts in sum, the deliberate creation and maintenance and the operation for a period of years right up to the present date of a system of jury selection in this court, whereby the juries have become and they are the organ, that is, the tool, of an economic class or group consisting of the rich, the propertied and the well-to-do, including those who are economically powerful, executives, proprietors and salaried officers, directors and supervisory agents of corporations.

We assert that that objective was achieved by the method of systematic, purposeful and intentional discrimination against and exclusion in whole or in large part from the array of the panel, the venire, the (1072) jury lists, of the vast majority of the eligible population in this district; and that that was done by applying and practicing discrimination on the basis of social, economic, geographical, racial and political grounds.

I am not asserting here all of the facts set forth nor am I describing fully the contents of the challenge, but I advert—

The Court: That is all in the paper.

Mr. Gladstein: Yes. I advert here merely to the brief summation which states the essence here in this particular motion.

Now the motion also says that in the challenge we assert that the creation, the maintenance, the operation and the administration of this type of system of jury selection are in violation of law, in violation of the public policy of the United States, in violation of the Constitution of the United States, including particularly the Fifth and the Sixth Amendments under which there is guaranteed to an accused indictment by a grand jury that is a neutral, true representative body of the people; and in the Sixth Amendment, a fair and public trial at the hands of a fair and impartial jury.

We assert further that this method of selecting juries violates the due and proper administration of justice and the appropriate supervision thereof.

(1073) Now in the challenge, we point out in this motion, it is asserted that the creation, maintenance, operation and administration of this system of jury selection—

The Court: Let me interrupt you just a second. I sometimes find it is helpful to counsel if a thought in the Court's mind is expressed. I am glancing at this Glasser case. Was that claim that the grand jury or the petit jury was not properly made up?

Mr. Gladstein: I will give you the answer in just a moment, your Honor.

The Court: Yes, I see it is. It is the grand jury. I see it.

Mr. Gladstein: I think it was the grand jury.

The Court: That is what I thought. And your motion here at this time, as we get to the merits of it, has this double aspect of claiming that the indictment should be quashed because the grand jury was not properly constituted, and also that the petit jury which is to hear the trial is not properly constituted. It has that doubt aspect.

Mr. Gladstein: By reason of the illegal nature of the entire system of which both are a part.

The Court: But I want to get it clear that your attack had that to it, that it was against the (1074) two separate elements.

Mr. Gladstein: And all of the lists, your Honor, from which the two were drawn.

The Court: Yes.

Mr. Gladstein: This particular jury, the particular grand jury was composed of 23 persons.

The Court: I know. I have that.

Mr. Gladstein: So that, if I may borrow the language that the Court has used—I hadn't intended to use it, but I will, now that it has received judicial approval—our attack is upon the grand jury, the petit jury panels, all of the lists of jurors from which both grand and petit jurors are drawn and, indeed, the entire system of jury selection here.

Now, in the motion for an outside judge we say that this illegal object has been achieved by the clerk of the Jury Commissioner of this court, pursuant to the direction and supervision of then Senior Judge of the court,

now under the new rules designated as the Chief Judge. We say that the continued maintenance and operation and administration of that system of jury selection has occurred and is still occurring with the knowledge and the acquiescence of all the judges of this court. We say that all of the judges of this court possess a bias in favor of this system (1075) of jury selection and they have a substantial interest in maintaining and perpetuating it, and certainly in defending that system against challenge or attack.

The hearing of this challenge and the motions and the determination and decision thereon should, consistent with the principles of fairness and due process of law, be conducted before a tribunal that is not biased by any slightest participation in the system of jury selection that is being challenged or interested in any way in the outcome of that challenge. We say therefore that no judge of this district, whether he directly and immediately participated with Chief Judge Knox ten years or thereabouts ago in the creation and development of this system, or whether he has since come to the bench here and has merely participated with full knowledge in the continued operation of that plan, no judge—

The Court: If you mean that as applicable to me, I say I don't know anything about it. I don't. I haven't the remotest idea how these juries are got together. I have only been on the bench here as you know a short time.

Mr. Gladstein: How long has it been, your Honor?

The Court: Well, July 1st, 1947, was the (1076) great day, as I remember it.

Mr. Gladstein: Well, that is over a year and a half.

The Court: Yes. But I haven't had a thing to do with getting up these juries, not a thing.

Mr. Gladstein: Oh, it is not a question of getting them up, your Honor. My point, and I will develop it a little more fully a little later on—

The Court: You said "had full knowledge thereof," you remember, and I merely tried to say that I haven't got full knowledge thereof. Indeed, I say I know nothing about it except to have sat in perhaps two or three jury cases, and if seeing the few jurors that came before me

on those occasions is knowing all about it, why, I suppose it may be said that I do. But I don't think I know anything about it, and I am going to listen to the evidence when I get around to it.

Mr. Gladstein: In effect, your Honor, rather than pleading full knowledge your Honor is pleading total ignorance of it, is that right?

The Court: Well, I am not pleading it. I am stating a fact. Perhaps you want to have an investigation as to that fact. But I tell you it is so. And I tell it to you only because this bias you appear to be talking about would not seem applicable to me, unless it be (1077) that you conceive this bias and prejudice to be such that I would not care to find anything wrong that any of the other judges said or did or decided. And I think that is quite unwarranted. The reasonable supposition is that a judge will be true to his trust.

Mr. Gladstein: Oh, your Honor—

The Court: As I intend to be.

Mr. Gladstein: I know your Honor has every intention of being true to his trust, but I take it that we will not have to prove to your Honor the obvious, although it is something that Justice Cardozo once called attention to; even judges, said he, are human. And I am going to make the assumption that you, your Honor, fall within that designation. Being human therefore—

The Court: You may be right.

Mr. Gladstein: I am right. I am assuming, your Honor, that the judges of this court maintain toward each other the usual cordial, fraternal and professional relationships that I know are maintained between the judges of other Federal districts; that they confer with each other, indeed that they have regular or perhaps irregular conferences, and that they have many occasions, social, professional or other types in which to find themselves together.

(1077-A) I also think it is safe to assume that one who, judging from what your Honor says, is a junior on the bench as compared for example with Chief Judge Knox, who has been on the bench for about 25 years, would attach considerable weight for example to the opinions of Judge

Knox and to, indeed, the expressions of Judge Knox on any particular subject. I think it is safe to assume that, is it not, your Honor?

(1078) The Court: Well, I do not suppose that I would be likely to give what he said less consideration than I give to what other people said.

Mr. Gladstein: I thought it was a little stronger than that, your Honor.

The Court: Well, you go ahead and make your argument without asking me how much I like Judge Knox and how much I would do in this way and that way, because I really can't see how this challenge of yours differs very much from that in all the other cases where, so far as I know, the challenge has always been tried by one of the Judges who participated, just as much as the other Judges of this District, including Chief Judge Knox, participated in the formulation and construction of the jury system in each of those particular courts.

Mr. Gladstein: I think not. Meanwhile, may I—

The Court: Why don't you get to work and saw wood on it instead of beating around the bush so much?

Mr. Gladstein: Well, your Honor, what have I—

The Court: Well, maybe I have been doing the beating around the bush, I guess it is possible, so you go ahead and tell me what you have to say in support of it.

Mr. Gladstein: In our supporting affidavit to this motion for an outside Judge we point out first that (1079) this entire system was initiated by Judge Knox, and that at all times since he has maintained supervision over it. We also say that all of the Judges, including yourself, your Honor, necessarily must have some knowledge and do have some knowledge of the manner in which this jury system operates. Indeed, your Honor, it seems to me that it is difficult to accept the notion that a Judge can sit on the bench for a year and a half and not have some notion of the manner in which persons are chosen to fill the jury boxes in cases in which the trials—and particularly would that seem to be true of yourself because of your own special interest in this very question prior to the time you were appointed as a Federal District Judge.

The Court: I have been pretty busy here with a whole lot of things. But anyway, I tell you I do not know any-

thing about it. Now you say when you put two and two together it will show that I know all about it. It may be so. I am listening and I will hear what you have to say about it.

Mr. Gladstein: It is just that your Honor shows such an eagerness to learn about it when I am trying to show that to disinterested persons it would seem much more fair if someone from outside this particular (1080) district were called in to judge a matter of this kind where all of the judges are necessarily involved in the operation and the administration of justice, including the selection of grand and petty juries; and I do not think that your Honor's statement that you do not have particular knowledge of how the clerk operates, and so on, is any adequate answer to what I am saying.

I point out, for example, in this affidavit we assert that no judge of this court, so far as we know, has ever publicly expressed any disapproval of or denied acquiescence in the maintenance and continuance of this system of selecting jurors.

Now, perhaps your Honor wants to make that public assertion now, I do not know.

The Court: Will you read that back, Mr. Reporter?

(Statement referred to read.)

The Court: No, I don't want to make any such statement.

Mr. Gladstein: And we also say that of necessity any judge of this court is an integral part of the system of administering justice, which includes, of course, the process of obtaining and selecting juries, grand and petty. We say, and it certainly is true, that each of the judges of the court has suffered, allowed (1081) and permitted the maintenance of this system of administering justice.

Now, the senior judge, Judge Knox, we assert in our affidavit has publicly defended this system against criticism, and he has asserted in substance and effect that this system, your Honor, will be maintained without change unless and until he is compelled by higher authority to abandon it. We are assuming, of course, that you are not a higher authority than Chief Judge Knox. That, of course,

is simply going to be a part of the kind of case that would be presented. So that in other words, you would be confronted with the proposition, you would be confronted with the proposition that in the record of the case on the challenge there would be evidence not only of Judge Knox's participation in the thing that we challenge and call illegal, but also that he has said he will not tolerate any change in it unless he is ordered to by some higher authority, and, of course, that would be nothing short than the Court of Appeals or the Supreme Court of the United States, but certainly not a member of this Court.

Now, your Honor necessarily would not be unaware of the public impact of any ruling which might be made in which you recognized the validity of our claim that this system of selecting jurors is illegal. That would (1082) be a weighty consideration, and since you sit in this courthouse with Chief Judge Knox, I think as a human being, rather than giving the benefit of the doubt to the defendant, to the accused, in a criminal case, as a Judge is supposed to do, very likely the benefit of any doubt would be given to Judge Knox.

Moreover, your Honor, in the papers—

The Court: You say there is some presumption as to the constitution of the jury that is the equivalent of the presumption of innocence with which the defendants are clothed?

Mr. Gladstein: No, I did not say that. I am simply saying that in a criminal case at every stage from the beginning—

The Court: Well, I am asking you, at this stage of the challenge, have you not got the burden of proof?

Mr. Gladstein: We have the burden of going forward with the evidence, and that is true, and we are prepared to do that. I assume that is going to happen.

The Court: Well, you shift the phrase on me there from the burden of proof to the burden of going forward. But if you have any authorities to indicate that there is some presumption that the constitution of the jury is illegal, and that I must start thinking of (1083) the burden resting on the prosecution, you better show me that, be-

cause my understanding of it is that it is the other way around.

Mr. Gladstein: I made no such statement. I did not mean to imply that.

The Court: All right, then we understand one another.

Mr. Gladstein: Now, one other thing I was about to call your Honor's attention to, and that is this: In the challenge papers there are sworn statements to the effect that closely related to and identified with the creation of this type of jury system and with its continued operation thereafter is a certain association of which your Honor is an honorary member, and that is the Federal Grand Jury Association of the Southern District of New York.

The Court: Am I a member of that?

Mr. Gladstein: All of the judges of this court are honorary members of that association. The association says so, your Honor.

The Court: Well, I don't deny it. It is the first I heard of it.

Mr. Gladstein: Now, I suggest that under those circumstances, inasmuch as the nature of our challenge is such as to encompass, to embrace every aspect of this (1084) system by which jurors are obtained and selected, that it would be highly inappropriate for a judge of this court to insist on passing upon that aspect of the matter, and that it would be far wiser, far better, for a court to use whatever authority it has, whatever discretion it may possess, to invoke the assistance of someone completely disconnected from the thing that is being challenged, a judge not of this district, an outside judge who will come here with that which your Honor cannot possibly give to this hearing, to this trial. Your Honor necessarily—

The Court: You are raising a constitutional issue, aren't you?

Mr. Gladstein: I am, your Honor.

The Court: So that—

Mr. Gladstein: But not only that—

The Court: So that on that issue any finding of fact that I might make is reviewable; am I wrong about that?

You see, sometimes a finding of fact if supported by substantial evidence is conclusive upon Appellate Courts. On a constitutional issue it is my understanding that Appellate Courts may inquire into the findings de novo.

Am I wrong about that?

Mr. Gladstein: But you see, your Honor, there (1085) are two aspects to this. In the first instance, you have the question of due process. That is true. In the second instance you have the question of the appropriate supervision of the administration of justice, and that raises not a constitutional question—

The Court: Yes, that is right, that is not a constitutional question at all, and I take it that here again you are approaching the problem from the double aspect, the constitutional aspect and the supervisory aspect?

Mr. Gladstein: Yes, of course. And, indeed, in every respect in which we find that our challenge is meritorious and this system of jury selection is illegal. But on this question for an outside judge we suggest that the appropriate attitude for judgment on this matter is obtained by an analogy drawn from a decision of the Supreme Court in Tuney vs. Ohio—your Honor is familiar with that case—

The Court: Tell me about that.

Mr. Gladstein: Well, it is a case in which a judge had a direct interest in a matter before him, and the essence of the decision of the United States Supreme Court is that the trial of an issue, any issue must be held before a tribunal that is not biased by any interest in the event. Now, interest may take a (1086) number of forms. Interest may be financial; it may be proprietary; it may be personal, or it may be of a general nature. But I say to your Honor that every single judge of this court necessarily has, must have, and should recognize that he has some interest in maintaining against successful challenge the administration of justice in which he participates in this court. We have a right—

The Court: I think you have a wrong notion of this prejudice business with judges. You seem to assume that the judge instead of approaching a matter with an open mind and a desire to see what the evidence shows and make a proper finding, that he is going to be thinking

whether somebody is a friend of his, or he knows him well, and he will be affected by it, because he is another judge in the same court, and so on. I do not understand it that way. I can't see why it is not just as proper for a judge here in the Southern District of New York to hear this challenge as it was for judges in all these other federal districts to try similiar challenges in the past. I can't see what the difference is.

Mr. Gladstein: Well, in this instance the challenge demonstrates on its face the direct, immediate and continued participation in it of judges of this (1087) court—of a judge of this court who is the Chief Judge of this court.

The Court: Why wouldn't the other judges in the other federal districts have the same interest, differing only to a slight degree—

Mr. Gladstein: Well, they don't have the same system, your Honor—

The Court: Well—

Mr. Gladstein: I have some knowledge of how the jury system operates in other districts. I have some knowledge of that. I have some knowledge of how it operates in the State of Washington, which has two districts; in the State of California, which has two; in the Territory of Hawaii, and also in the State of Oregon. In none of those districts—

The Court: I think I read a California case that you had to do with. Wasn't it Judge Hall that tried a case out there that you tried a challenge?

Mr. Gladstein: That is right.

The Court: Didn't you go right ahead before Judge Hall with that matter without challenging him as not the proper person to hear it?

Mr. Gladstein: Their system of jury selection is quite different from that involved here. Quite different.

The Court: Well, his opinion indicated he (1088) apparently knew quite a little about it.

Mr. Gladstein: Well, we helped him a good deal, of course, in supplying him with the authorities and with evidence on the subject, so I don't wonder that his opinion reflects some knowledge. But that system is quite dif-

ferent from the one here. I have never heard, never seen any evidence of the kind of system of selecting jurors which we have found to exist here.

The Court: How many judges are there in that district of California besides Judge Hall?

Mr. Gladstein: That is in Los Angeles, and I forget the exact number, your Honor. There are four in San Francisco and there are about eight or nine or perhaps ten in Los Angeles.

The Court: As many as ten?

Mr. Gladstein: Yes, I think so.

The Court: But, in any event, you recall no application made by you there that it be tried by a judge from San Francisco as distinct from Los Angeles?

Mr. Gladstein: No, there wasn't the occasion to do it, your Honor.

The Court: Well, it would seem as though there might have been just as much occasion there as here.

Mr. Gladstein, Well, the difficulty is that (1089) without going into the details of the challenge your Honor can't get a picture, and perhaps the best thing to do would be for your Honor not to—I have very little to add on the question of a motion for an outside judge, but I would not want your Honor to rule adversely on that motion without having a full appreciation of what is involved, and then perhaps your Honor could see better the desirability of invoking the assistance of some other judge. I think, in other words, rather than my trying in five or ten minutes to make an abstract argument as to why another Judge should be called in, perhaps if the evidence unfolded your Honor would be able to see, or perhaps if I went into a little more in detail about the nature of this proof we are going to present—

The Court: You better tell me all you desire about it because I am right on the brink of overruling this point, and if there is something about it that you think will affect my judgment, you better go right to it now.

Mr. Gladstein: I think perhaps I better do that.

I do not want your Honor to be unbalanced on the brink, so I suggest that you sit back and take it easy now, if you will, while I proceed to—

(1090) The Court: I always try to sit back and take it easy. I have been utterly amazed that I don't get more excited since I have been made a judge, but somehow or other I don't seem to.

Mr. Gladstein: Now, your Honor, of course, in what I say I am speaking for my clients alone, but I am authorized to say that the other attorneys join in that which I say, although they speak for themselves respectively, and I speak for myself and my clients, and if they have something to add I am as sure as you are that they will act.

This challenge which we have filed is addressed not just to a particular jury panel, not just to the grand jury that returned the indictments in this case, but to the entire system of the selection of jurors in this district. And that means the lists that I used, the array, the venire and all of the panels that are drawn from those lists.

Our grounds of challenge were seven in number originally, and now eight by reason of the addition of one that I have just filed. Let me refer to those, if your Honor will, so that it will be clear in your Honor's mind just what it is we are presenting.

Your Honor will see in the notice of challenge to the array we have set forth these grounds—and I want (1091) to summarize them for you: We say first that the panel, the array, the venire and the jury list—perhaps I could use some term that we would agree referred to all of them. Does your Honor have a suggestion on that so that I do not have to repeat each of those, but I want to embrace all of them in my remarks—

The Court: I think if you merely refer to your challenge I shall understand it as covering all those phases.

Mr. Gladstein: All right.

The Court: So that you need not repeat each time.

Mr. Gladstein: Fine.

Now we say that all this panel was improperly and illegally selected and drawn in that they have been and are systematically, purposefully and intentionally selected and drawn in such manner as to be the organ of an economic class or group consisting of the rich, the propertied, the well to do, including the economically powerful, the executives, the proprietors, the salaried officers, directors, and supervisory agents for corporations.

We assert that this was achieved by systematic, purposeful and intentional discrimination against and excluding in whole or in substantial part from the array and the jury lists of persons who are qualified to serve (1092) as jurors, who are among the following classes or groups in the community, namely—

The Court: I have read right ahead. I see all those subdivisions, (a) to (i) inclusive.

Mr. Gladstein: That is, the poor, those who are economically depressed, without property; those who are of humble station in life; the manual workers—that is, laborers, mechanics, craftsmen and other manual workers; persons who work by the day or hour; persons who by reason of lack of means are compelled to and do reside in definite and defined geographical areas of the community where rents are low and housing is inadequate and inferior. Negroes are excluded, and other racial and national minorities; women; persons who are not members of or closely allied with the upper strata of social life in the community, and persons who are affiliated to the minority political parties, particularly the American Labor Party and the Communist Party. In other words, that those classes have been discriminated against and there has been exclusion in whole or in substantial part of those groups or classes of people in the community who otherwise could and would and who are fully qualified to serve.

Now, therefore, we say that the grand jury of 23 (1093) which was selected from a larger group which, in turn, came from these jury lists, made up and resulting from the pursuit of this kind of system of selecting jurors that I have referred to, was illegally composed. It was not drawn from a cross-section of the community; it was not, in fact, truly representative of the community, and it did not constitute an impartial cross-section of the people.

Now, we say that this discrimination and exclusion, or these discriminations and exclusions occurred despite the fact—and we assert it to be the fact—that the excluded groups and classes at all times did and now do constitute a substantial portion, a very large portion of the population of this district, entirely eligible for jury service, and that large and substantial numbers of persons in and of the classes and groups excluded were in all respects qualified to act either as petit jurors or as grand jurors.

Now, these particular defendants fall within one or two or more of the classes or groups of persons so systematically and intentionally excluded. Two of the defendants are negroes. The trades of the others: one is a furrier and an officer of a union in that field—

The Court: Which one does he come under?

(1094) Mr. Gladstein: That is Mr. Potash.

The Court: I mean under subdivisions A to I, inclusive? I suppose he might come under several of them? Craftsmen?

Mr. Gladstein: Of course, I want to say this, your Honor: We have asserted this, but your Honor knows that this is not a necessary element in a federal court. That is to say, an accused need not be a member of an excluded group to be entitled to challenge, and challenge with a beneficial result successfully an improper selection of jurors, because the inhibitions which Justice Jackson felt were imposed on him in such cases, for example, as the Fay case, which your Honor tried, arose by reason of the fact that he was there dealing with a State, and therefore could not apply the 14th Amendment, and consequently was not free, as he said, to impose upon the State courts of New York those notions of good public policy which a federal court would impose in the federal courts.

The Court: Every defendant is entitled to a constitutional jury.

Mr. Gladstein: Yes.

But we point out that notwithstanding the lack of necessity, that those whom we represent fall within one or another of the excluded classes, it so (1095) happens that they do.

Now, Mr. Potash is, as I say, a furrier and a member of a labor union, an officer of that union. Mr. Thompson by trade is a machinist. Mr. Hall, my other client, is a lumberjack and steel worker; Mr. Foster, not now, but in his days has been a sailor, a construction worker, a railroad worker, and a very well known labor organizer. Mr. Dennis, by trade a teamster, an electrical worker and lumberjack; Mr. Gates, a construction laborer; Mr. Williamson, a pattern maker; Mr. Green, a metal worker; Mr. Winter, a draftsman, and Mr. Stachel, a cap maker.

Now, we further point out that the defendants have been indicted and face trial precisely because of their advocacy and teaching of certain principles which are known as principles of Marxism-Leninism; and because of their participation in the activities of the Communist Party of the United States, based on those principles; and that for many years they have devoted themselves to the welfare and the interest of the working class, the unemployed, the poor, the oppressed, and those who are victimized by economic, racial, national and political discrimination everywhere in the country—all of them within the excluded groups that have been described in this motion.

(1096) In so doing the defendants personally and as members of, and officers of the Communist Party for many years espoused, and they do now, the social and political and economic views which are antagonistic to the interests of precisely that class or group comprising the rich, the propertied and the well to do of which the juries in this court have become and are in virtual possession, and indeed the organ.

Now, my motion recites a portion of the preamble and a portion of one article of the constitution of the Communist Party. The preamble states that: "The Communist Party of the United States is a political party of the American working class, basing itself upon the principles of scientific socialism, Marxism-Leninism. It champions the immediate and fundamental interests of the workers, farmers, and all who labor by hand and brain, against capitalist exploitation and oppression. As the advanced party of the working class, it stands in the forefront of this struggle.

"The Communist Party recognizes that the final abolition of exploitation and oppression, of economic crises and unemployment, of reaction and war, will be achieved only by the socialist reorganization of society—by the common ownership and operation of the national economy, under a government of the people led by (1097) the working class."

The Court: You are reading from this paper, and I can read ahead pretty fast there. Are you still on the question of whether a judge of this district should try the

matter, or are you partly on that or partly introducing the subject of the challenge too?

Mr. Gladstein: No, I am still on that question. I am trying to develop for your Honor fully the reasons why no judge of this district should sit.

Now, one more portion of this constitution, because it is for teaching, it is for advocating and for believing in those views which are set forth in that constitution that I am reading from, as set forth in these papers, that these men are on trial.

"The purposes of this organization," the constitution states, "are to promote the best interests and welfare of the working class and the people of the United States, to defend and extend the democracy of our country, to prevent the rise of Fascism, and to advance the cause of progress and peace with the ultimate aim of ridding our country of the scourge of economic crises, unemployment, insecurity, poverty and war, through the realization of the historic aim of the working class—the establishment of Socialism by the free choice of the majority of the American people."

(1098) Now, as the motion says, men who devote their lives to the advocacy of views of that character who are brought to trial before a jury that is composed, selected in the manner that is described in these papers, are put in this position: that the interests of the group or the class that is favored by the illegal and discriminatory system of jury selection are precisely most directly affected by the principles, by the advocacy of the principles and the purposes of the Communist Party of the United States.

Now, we assert first, therefore, that because of these facts the manner of selecting the juries in this court first constitutes a violation of the Fifth and the Sixth Amendments particularly. So we raise our constitutional points as our first points, in that the defendants are, of course, therefore deprived of due process of law, and of the right not to be required to stand trial except upon an indictment returned by an impartial grand jury, and of the right to a fair trial, if a trial there be, at the hands of an impartial petty jury, all, of course, to the irreparable prejudice of the defendants.

And as we pointed out, prejudice would exist in any case, but particularly in this case where it is for these views that I have adverted to that these men are on trial.

(1099) Our second legal point is that over and apart from the constitutional question, the due and proper administration of justice in this court and the appropriate supervision of it contemplate and provide necessarily that the method of jury selection followed here shall insure, as the courts have put it, an impartial cross-section of the community.

Your Honor is familiar with that language, isn't that so?

The Court: I certainly am.

Mr. Gladstein: So that the juries, both petty and grand, shall be partly representative of the community, so that in any case the accused shall be required in a criminal case to stand trial only upon an indictment that is returned by a neutral grand jury, and shall be required to be tried only at the hands of a neutral petty jury.

Because of the facts asserted here, our second point is that what is happening and what has happened in connection with the creation and the operation of this jury system violates appropriate concepts and standards of the administration and supervision of justice in this court.

The Court: Have you got a memorandum that sets forth the pertinent statutory provisions and cites the cases that you are going to give me here?

(1100) Mr. Gladstein: Your Honor, I attached merely a reference— a recitation of the cases, but I will be glad to do this—

The Court: Well, I was thinking of the amendment of statutory provision.

Mr. Gladstein: Yes, I have those.

The Court: If in the morning I can have that—

Mr. Gladstein: Yes.

The Court: I always like to have before me the exact wording of the statute without asterisks and underlining, but just the plain, unvarnished words of the statute; and as to the cases, you need merely put the list of them with the citation. I think I have some here already, but I will try to have them all, and I do not want anything elaborate, but just what I have indicated, you can give to me in the morning.

Mr. Gladstein: I will be very happy to do that, your Honor.

Now, our third point is a point of public policy. We assert—and correctly—that the public policy of the United States contemplates that the method of jury selection in the federal courts shall insure an impartial cross-section of the community on the juries. Your Honor is familiar with that as a matter of law, (1101) isn't that so?

The Court: Yes, I think I am.

Mr. Gladstein: Our fourth point is that under the statutes—and I won't bother now to refer to the language because I will bring those to your Honor tomorrow—

The Court: Of course, it is a rather technical subject, too.

Mr. Gladstein: Certain portions are, but I think certain portions are so plain, your Honor, that even laymen, unversed, unspoiled in the training of the law, clearly and plainly see when a thing is so unfair that it ought to be thrown out.

Our fourth point refers to the failure of this district to comply with certain governing statutes. Now, 1861 to 1867—

The Court: Now you are on your supplemental point?

Mr. Gladstein: No. We call that the fourth point. That is not the supplemental one. You mean the one that was added? That is the eighth one—

The Court: Let me get the page.

Mr. Gladstein: That is 1861 to 1867.

The Court: I have it, on page 8.

Mr. Gladstein: Yes. There are about seven sections, your Honor, which make it plain that they (1102) constitute a statutory command to the federal courts, including this one, of course, that in obtaining juries the effort shall be made to obtain an impartial cross-section of the community so that the juries are truly representative of the community, and so that they will in fact as well as name be juries of and for the community; and your Honor is well acquainted with that requirement of the statute, so that thus far I have referred to four separate legal points. First, the constitutional point, a denial of rights under the Fifth and Sixth Amendments; second, a denial or a violation of the appropriate standards of the administration of

justice and supervision of justice in federal courts; third, a refutation of our public policy, the public policy to which the United States is committed in the matter of juries; and fourth—

The Court: I don't understand that third one. It seems to me to be included in the first two.

Mr. Gladstein: Well, it may well be regarded as closely related and embraced—

The Court: I think it is just expressing in different fashion what is included in your first two, but if you will call my attention to the part of your challenge in which you have phrased that point, and let me look at it—

(1103) Mr. Gladstein: On the question of public policy?

The Court: No, this third point of yours that I consider offhand to be—

Mr. Gladstein: This is on page 8, your Honor?

The Court: Yes.

Mr. Gladstein: On page 8 of the motion there is reference to sections 1861—

The Court: That is your fourth point?

Mr. Gladstein: Yes, that is the fourth.

The Court: Well, I am talking about this third point.

Mr. Gladstein: That is page 7.

The Court: Page 7?

Mr. Gladstein: Yes. No. 3.

The Court: Well, I think you will find on reflection that that is in the first two points that you spoke of. The constitutional point is No. 1. No. 2 has to do with the supervisory powers of the federal courts over the constitution of juries and so on.

Mr. Gladstein: That is right.

The Court: The underlying principles being very much the same.

Mr. Gladstein: Yes.

(1104) The Court: And then you have as your third point which you have so far been calling your fourth point, that the statutes applicable to the matter have not been complied with. Am I not right about that?

Mr. Gladstein: Yes, except that I think that the spelling out in our third point of a statement of public policy is a valid point of law which, it is true, finds support in the

constitutional principles and the statutory command, but that over and beyond what is set forth in the Constitution and in the statutes I assert that the cases support the proposition that as a separate point of law it is true that it violates the public, the national policy of the federal government for juries to be chosen in a federal court in such manner as to prevent a truly representative body, a true cross-section of the community from passing upon the rights of those who come into court.

The Court: Well, if that does not go under either point 1 or point 2, then it is just a matter of phraseology. But let us not pause at that because I know now precisely what you are talking about, and that is the first thing that I always try to do.

Mr. Gladstein: Now, sections 1861 to 1867,—as I say, I won't refer to the exact language because I will have that here tomorrow, your Honor—but they too (1105) provide the manner in which juries can be chosen, and your Honor is perhaps familiar with the language which says that the clerk and the jury commissioner shall choose, shall so select juries as to insure—the language is—"an impartial jury."

The Court: I am not familiar with that language. The one that I have naturally most familiarity with is the series of statutory provisions affecting impaneling jurors and jury panels in the State of New York.

Mr. Gladstein: Yes.

The Court: And I have had no occasion up till right now to consider the statutes applicable to the federal court. I will see those in the morning.

Mr. Gladstein: Yes.

Now, our fifth point, your Honor, is that there is a specific command contained in one of those sections which over and beyond the question of requiring the jury commissioner and the clerk to obtain and follow a system that will insure—

The Court: I am ahead of you now. I see. On account of race or color, the discrimination there.

Mr. Gladstein: Yes. There is a specific command of Congress that there shall be in the choosing (1105-A) of jurors a section of persons who make up the jury system no discrimination on account of race or color.

The Court: Yes.

(1106) Mr. Gladstein: Now our sixth point is that under another one of those sections it is provided that there shall be no discrimination on the ground of political party affiliations.

Our seventh point is that—

The Court: Is there a questionnaire that they submit to prospective jurors here?

Mr. Gladstein: There is. We will introduce it in evidence, your Honor.

The Court: As we are getting close to the recess period I think if you would get one of those questionnaires out, a blank one, and let me have it to study overnight it would be helpful to me. I think if you got it out right now, because I find—

Mr. Gladstein: I will see if I have it.

The Court:—when my mind is going along a certain subject it is a pretty good thing to satisfy myself right there or else I have a little peg that holds back my thinking of it.

Mr. Gladstein: You know, I was just thinking—I thought I might have it. But I could get one for you. Or, I will tell you, Mr.—the clerk's office has blanks and they will be very happy to have—won't your clerk get one?

The Court: Yes, he will. He has indicated (1107) that he will, so you need trouble yourself no more about that at the moment.

Mr. Gladstein: Our seventh point there, your Honor, is that—

The Court: Incidentally, do they ask in that questionnaire whether a person is a Communist or not?

Mr. Gladstein: No, not in the questionnaire that I have seen.

The Court: Well, that is all right. That thought passed my mind as you read about this statute, and I thought that would be a curious thing to have in there. But there is no such thing?

Mr. Gladstein: There is no such question in the questionnaire.

The Court: Yes, all right.

Mr. Gladstein: Now our seventh point is that there is applied here a $250 property qualification which in effect is a means test. Now that of course is carried over into Section 1861 by virtue of a provision in the Judiciary Law of the State of New York. Section 596 of the Judiciary

Law of New York provides for that qualification and that is carried over into the Federal court here and applied by the clerk. And by the limitation, we say, we point to the limitation of a $4 a day jury fee that is provided by another section there, both of which (1108) operate in practice discriminatorily against members of the working class, those who are poor, particularly those who work for hourly or daily wages. And those statutes and the economic qualifications, restrictions contained in them, on their face and as applied and construed violate the Constitution of the United States, particularly the Fifth and Sixth Amendments.

The Court: Hasn't that already been passed on somewhere?

Mr. Gladstein: Not so far as I know.

The Court: I have some recollection—

Mr. Gladstein: We believe that to impose a property qualification upon the right and the privilege and, indeed, the duty of a citizen to participate in the administration of justice, to impose property tests, means tests, constitutes the imposition of an unconstitutional condition.

The Court: Do you agree that if something has been done almost since the founding of the country and that the continuity with which such provisions have existed, has a good deal to do with the question of due process?

Mr. Gladstein: Well, your Honor, when you ask that question—

The Court: Because I suspect that something (1109) like this has been in for a long, long time.

Mr. Gladstein: It may be true. Yet you know, your Honor reminds me of the answer—I hope, I think it is not reversed, but I think you will correct me—wasn't it Mr. Justice Brandeis who in Erie Railroad v. Tompkins referred to the fact that when Swift v. Tyson was overruled he said we had been upholding for over a hundred years an unconstitutional condition. I think you will find that in his statement. So I would say—

The Court: Well—

Mr. Gladstein: —that the mere fact that a property qualification has been imposed for some time is certainly no excuse for throwing it out if it is unconstitutional.

Now the eighth—

The Court: Well, I confess offhand I do not have the same reaction to that last one as I do to the part about the deliberate exclusion of certain classes of people.

Mr. Gladstein: Well, am I to be encouraged, your Honor?

The Court: No, no, that does not preclude you at all.

Mr. Gladstein: No, your Honor didn't listen. (1110) I was just about to say, are you encouraging me to feel that this is the only one of the seven points I have so recited to which you do not attach merit on the surface?

The Court: If there has been deliberate discrimination of the kind which you say, I should think it raises an extremely serious question. That depends on the evidence.

Mr. Gladstein: Oh, yes, of course.

I want to refer to the last of the grounds because it is a separate, added ground. Sections 1861 to 1867, your Honor, we point out, imposes upon the clerk and the Jury Commissioner—and I will have those statutes for you tomorrow—the duty of selecting persons to serve as jurors.

The Court: You are on a supplemental one now?

Mr. Gladstein: Yes, that is right, Judge.

Now we assert here, and it is supported by an affidavit that all of the attorneys have signed, that continuously since about 1940 a certain private organization, namely the Federal Grand Jury Association of the Southern District of New York, of which you are an honorary member, Judge, even though you did not know it, has been supplying not just individual names of persons but entire lists of persons to the clerk of this court and to the Jury Commissioner for inclusion in the grand and petit (1111) jury panels.

In essence, and without going into this in detail, because I am simply trying to give you the picture so that you will be able to see whether or not you should or maybe want to pass on this, Judge, as a member of the Southern District—

The Court: It sounds very interesting.

Mr. Gladstein: I don't want to arouse just your interest. I want to arouse that in you—

The Court: I did not mean the kind of an interest that you were quoting from that Supreme Court case a little while ago. I meant, when you say you are interested in something, the ordinary connotation, not the disqualifying one.

Mr. Gladstein: I was not going to try to pick you up on that at all. I was going to say that I want to arouse not just your interest but I want to arouse it sufficiently so

that you will see the appropriateness of having a judge not connected with this court in any way come in to sit in on this matter.

But now on this last point what we say in essence is that the clerk and the Commissioner have in effect abdicated the functions which the law imposes upon them. Because what has happened is that this private association, this private organization which (1112) has no authority by law to be selecting jurors, has been supplying lists of names which, upon qualification of those names, are willy-nilly placed upon the active lists and those people became jurors and are jurors. To the tune of hundreds of them, a very substantial part of the names contained in the lists from which every grand and petit jury drawn in the last ten years or thereabouts has been selected by some outside association that had no authority in law to do it.

Now of course it is true that when these names are given to the Clerk, the Commissioner, naturally those people have to qualify; that is, they are asked to fill out the questionnaires. It is presumed I suppose by the Assqciation when it supplies names in the first place that these people will qualify. But the fact remains that, in the first instance, this private Association selects, prepares lists and provides those lists for this court. That Association has no authority to do it. And therefore we say that the Clerk and the Commissioner have failed to discharge the duties that the statute imposes upon them and, in effect, have delegated those duties illegally to some outside unauthorized private organization.

Now those are the eight points of our challenge, (1113) and I was wondering, since it is almost time to close, whether I could stop appropriately at that point and have with me the statutes in the morning.

The Court: I would like to dispose of this question of whether this matter should be heard by any of the judges here or some judge from another district this afternoon.

Now I suppose each of the other counsel would like to say something about this and that will probably take us some little time. So perhaps it is as well to adopt your suggestion. And we will adjourn now until tomorrow morning at 10.30.

Mr. Gladstein: All right, your Honor.

(Adjourned to January 19, 1949, at 10.30 a. m.)

(1114) New York, January 19, 1949;
10.30 o'clock a. m.

* * *

(1115) Mr. Gladstein: When we concluded yesterday I had enumerated for your Honor the eight points, legal points upon which we contend that the entire system of selection of jurors, both petit and grand, in this district are absolutely in violation of law and in violation of the Constitution.

Now before going on to a description of what the nature of our case will be so as to make clear to your Honor that you should not sit in hearing upon this challenge and that it would be fitting for your Honor to call in an outside judge, I want to refer just briefly to two of those eight grounds that I have mentioned. Your Honor will recall that the first that is asserted in our motion is the constitutional ground, and then we—

The Court: Now, don't repeat them all, because (1116) I listened yesterday, and while I do not know that I could submit myself to a long cross-examination as to the details of each of the eight points, I am sure I have them sufficiently in mind to listen to what you have to add now.

Mr. Gladstein: Yes. I merely want to underline my seriousness in respect of two particular grounds about which your Honor raised a question. One was I think listed as point 3 in the motion and involves our contention that as a matter of public policy, quite apart from the Constitution of the United States or any statute, although it may be true that there are concepts contained and I believe they are and I understand they are within the statutes applicable and within the Constitution that support this point of public policy—nevertheless, quite apart from that fact, this point of public policy is based upon a fundamental proposition that in accordance with the highest traditions of our country, in accordance with the finest morals of our people, it is a violation of the national policy of our country to have a jury selected in the manner that I have described as being true here in the Southern District.

And the other point about which your Honor raised a question has to do with the $250 property qualification, and your Honor asked whether it was not true that perhaps that

had some long standing, continued support in (1117) statutory or other forms. And, as I said to your Honor, that fact, the fact that a vice, that a sin, that a crime in effect has been committed for a hundred years does not mean that it is any the less a crime, a sin, a wrong at the present time.

And I want to say on that very question that it is not more possible to defend a property qualification upon the right of any American citizen to participate in that part of body politic which involves the administration of justice than it is to impose a poll tax upon the right of a man to go and cast his ballot in an election in a free country, and so I assert with vigor—

(1118) The Court: Where does that come from? Isn't that in a statute?

Mr. Gladstein: It is, but that does not make it any more valid than the fact that the poll tax requirements in various states are also contained in statutes, your Honor.

Your Honor must remember that it is not the federal statute that imposes any $250 property qualification. It is a provision contained in a New York statute; and I say that New York has no more right to impose a $250 qualification, property qualification, or any property qualification on my right as a citizen to come in here and participate in the functioning of the courts than South Carolina or Georgia or Texas has the right to impose upon the right of a free man any property qualification before he can go in and cast his ballot at an election.

The Court: Remember what you are arguing now is that I and all the other judges here—

Mr. Gladstein: I understand.

The Court: —in the Southern District of New York are laboring under such a bias and prejudice that we are not properly qualified to hear the question.

Mr. Gladstein: Now, of course, it could be (1119) asked, How many violations of law do there have to be in connection with the New York system of administering the jury business before it is thrown out? We have eight, any one of which in itself would be adequate.

The Court: You have not proved them yet. That is what I hope you will get around to some time.

Mr. Gladstein: I am trying to point out, your Honor—I am coming to the proposition that the nature of our proof is such that your Honor should not sit on this matter.

The Court: That is what I want to listen to.

Mr. Gladstein: Now I want to talk a little bit about that. Let me restate first of all in non-legal language those eight points very briefly.

The Court: All right. Now I remember those points very well, but go ahead and tell me the eight of them and put them down from 1 to 8 and then 8 back to 1, and make sure I have got it in mind.

Mr. Gladstein: Well, I just don't want your Honor to think of these as just eight points. It is true that there are eight separate legal grounds asserted, but I want to state in non-legal language what the thrust, what the gist of this thing really is.

The Court: All right.

(1120) Mr. Gladstein: And I won't spend much time on it, but I want to say this because of the importance that I attach and that every one of the attorneys here and every one of the defendants, and I am sure the people themselves, attach to what we are presenting here, what we are asking you to have another judge come in and pass upon.

Now, as your Honor knows, the very notion, the very notion of having the people participate along with a judge in the functioning of courts and the administration of justice is itself a basic democratic principle. That is perfectly obvious.

Whereas, a system of jury selection and function should be democratic, should be impartial, should seek to obtain neutral cross-sections of the people so that the jury, as an ultimate body, in its quintessence is truly representative of all the people without discrimination, our proof will show that here, here in this courthouse, the jury system has been captured by Wall Street and by Park Avenue, and that that capture has been carried out by the court attaches of this court under the direct supervision and instigation of the chief judge of this court, and with the either affirmative or silent acquiescence of every single judge of this court. And (1121) with the particular connivance of an outside, unauthorized, private organization, that Federal Grand Jury Association of the Southern District, of which your Honor and every single judge, and Mr. McGohey, are all honorary members.

And our thesis is that an undemocratic jury system violates every decent concept of law, order and justice.

Now, we are going to offer in proof of this challenge evidence the detailed nature of which I don't want to discuss now but the highlights of which I want to mention to underline my argument that your Honor ought not to sit here.

We have appended to our moving papers an official document, or, I should say, a copy of an official document—

The Court: That constitution?

Mr. Gladstein: No, your Honor. You mean the constitution of the Communist Party? No, that is another official document.

The Court: Well, it is attached to the papers.

Mr. Gladstein: Yes.

The Court: I thought that is what you meant.

Mr. Gladstein: That is quite correct, but I am now referring to an official document of the (1122) Administrative Office of the United States courts.

* * *

Mr. Gladstein: Well, it would be the third in that series, and it is marked C.

The Court: I have it before me.

Mr. Gladstein: Yes.

Now let me make a few remarks to that—about that document because of the effect of that document upon this court and everybody connected with it.

Your Honor will observe that that purports to be a copy of a document which was dated—there are two documents; one is a covering letter and the other is a report or memorandum. Eight years ago, January 1941, the Administrative Office of the United States Courts had occasion to make an investigation of the system of qualifying, summoning and impanelling jurors in the (1123) Southern District of New York. That investigation was conducted under the direction of a gentleman by the name of Mr. Tolman whose official position was with the Division of Procedural Studies and Statistics of the Administrative Office, and as your Honor knows, the Administrative Office was created for the purpose of exercising coordinative and supervisory control over all of the clerks and jury commissioner's offices in all of the United States District Courts.

The Court: An excellent thing, I thought.

Mr. Gladstein: I beg your pardon?

The Court: An excellent thing, I thought.

Mr. Gladstein: Yes. And it was excellent also, I think, that they had occasion to make an inquiry as to what was going on in this court right here in connection with the manner in which people were obtained for the purpose of sitting in those jury seats.

Now, after this report was made—I should say after the investigation was made, a report was prepared and submitted to the Director of the office, Mr. Henry P. Chandler, who is still, I believe, the Director of that office; isn't that so, your Honor?

The Court: Yes, he is.

Mr. Gladstein: And Mr. Chandler then had occasion (1124) to submit copies of this report to other districts in this nation. That is, to all United States Circuit and District Judges for their information as to how the method of jury selection was going on in this court.

Now, that document reveals some most amazing and startling and shocking things. That document shows that around ten years ago, roughly, around 1938 or 1939, under the direction of the chief judge of this court, what they called a revamping of the jury structure here began. Prior to that time the courts here were administered as they are everywhere else, as far as I know, in the United States. That is, potential jurors were chosen at random from the voting lists because the people who appear on the voting list are by and large, generally speaking, those citizens who are qualified and eligible to serve as jurors.

The Court: Exclusively from the voting list?

Mr. Gladstein: Primarily. Primarily this is. Whether it was exclusively, I don't know, but primarily.

The Court: All right.

Mr. Gladstein: But what happened about ten years ago was that it was decided to throw that system into the ashcan, so to speak, and to substitute for it a system which is the opposite of democratic, fair, truly representative; (1125) and this is what took place, as our affidavits show: instead—well, first of all—

The Court: Now all this time I am thinking, where is the bias? Where is the prejudice? What kind of a judge

must you have specially? I am think about that, and doubtless you have got it in mind.

Mr. Gladstein: I certainly have, your Honor.

The Court: Don't creep up on it too suddenly.

Mr. McGohey: If your Honor please, in that connection—

Mr. Gladstein: Excuse me, Mr. McGohey. Your Honor, I take it, what you are trying to say to me is that you have been patient with me, and of course your Honor realizes that I am also patient—

The Court: I did not say I have been patient. I do with you gentlemen what I do with all lawyers in every case I hear. I like to hear legal argument. On the other hand, this point is a preliminary point, and we had a good deal of argument yesterday, and frankly, I can't see anything in it. You argue in effect that I have such a respect for Judge Knox and those who got up the jury system that I could not possibly find anything defective about it; and then further when, as it seems obvious to me, judges from other districts, federal judges, will (1126) doubtless have the same respect for chief judge Knox that I have—

Mr. Gladstein: But not the same inhibitions, I hope.

The Court: Well, if I have inhibitions maybe they are working without my knowing it, but I am not conscious of it.

Mr. Gladstein: They very frequently do, your Honor.

The Court: Let us hear what Mr. McGohey has to say on this point.

Mr. McGohey, what is it that you desire to say?

(1127) Mr. McGohey: Just on the point your Honor had raised, I was about to raise at that time, to suggest that it seems to me that what we are hearing now is the recitation of the evidence that is to be produced on the trial of the issues of whether or not the jury is or is not properly constituted.

The Court: That is the way it seems to me, too.

Mr. McGohey: It seems to me, your Honor, that we are unduly delaying and encumbering the record with a double recitation, because I anticipate and hope that there will be the fullest exploration of these points when we come to that part of the proceeding. But I do not see why the record should be encumbered with the same thing twice.

I do not know what bearing the Tolman Report or this letter of Mr. Chandler's of February 5, 1941, with respect to the Tolman Report can have upon this question that is being urged now, namely, that no judge in this court could possibly be exempt from a bias.

Now, while I am on that, I suggest that this letter shows on its face that it was sent by Mr. Chandler, the Administrator, to all United States Circuit and District Judges, so that if this has some effect, if it had the effect that I assume counsel is going (1128) to argue that it had, it apparently had it on every United States judge of circuit standing or district standing in the United States.

The Court: You see, those things occur to me, too. But I think it is better for us to have Mr. Gladstein develop the point in his own way, and we will see; maybe he will strike something that will lead to rest the matter on the argument so that we can proceed. But I am disposed to listen to him and see what he has to say.

Mr. McGohey: Very well, your Honor.

Mr. Gladstein: I want to express my appreciation of what Mr. McGohey said. I like to hear Mr. McGohey express thoughts like that, your Honor, especially the one that he just did express, because although it would be premature to my plan of presentation to raise it now I think inasmuch as Mr. McGohey has expressed this thought it might be a good idea to sharpen it up.

That is just one of the points I am making, that whereas this type of jury selection was described in and referred to every district court in the land, this is the only one where they adopted it, this is the only one where it has been operating and this is the only one where it is now operating. And, therefore, rather than derive an inference—rather than derive an inference—from the fact that this report was sent around the (1129) country that all the judges are disqualified—they may well be; I don't know who the judges are Mr. McGohey is talking about; but let me put it this way: none of them in their districts so far as I know is part or parcel of a system of jury operation such as the operation here, whereas the opposite is true about every single judge here.

Now, Judge, you have been here, as you say, on the bench only a year and a half and therefore are in a position of course to disclaim any responsibility for what occurred in the first instance.

The Court: The curious part of it is that what I say is I don't know anything about it. I am interested to listen to what the evidence is going to show.

Mr. Gladstein: I am very happy to tell you.

The Court: Of course from your standpoint, the fact that I don't know anything about it, had nothing to do with it, that only shows my prejudice in a stronger light perhaps because I may have more regard for those who got it up. But to me, the fact that I approach it de novo, knowing nothing about it, having no understanding about it whatsoever, seems offhand to be an element that would be a desirable position to have the judge in. But maybe not.

Mr. Gladstein: I think not. I think (1130) the reason that the answer "not" should be answered "Yes—not" is this, that your Honor couldn't help himself; you are a part, an integral part of the administration and function of justice in these courts. It is no answer to say to us, as your Honor just now has done, that you came in after this offense was committed and while it was in process of operation. Under your very eyes in the last 18 months the very same system, the very same offensive system, offensive to the true concepts of a democratic jury system, have been occurring right here.

Now I do not think, your Honor, that the disqualification of a judge of this court to sit on this kind of a matter depends exclusively upon the fact that he personally actively participated in the development or the original, the genesis of the system or any aspect of its operation. It is equally valid to say that a judge who by his passive acquiescence has permitted this to continue in operation without taking affirmative steps on the subject ought not to sit. It is not a question of bias; it is a question of being tied in with a system of which the judge is necessarily and has been necessarily a part.

And to disinterested persons, members of the public, it would seem far more fitting, your Honor, that a judge

who has been part of the functioning of (1131) this type of jury system for a year and a half and who can say merely that he didn't know anything about it ought to step aside in good grace and with dignity and say, "Well, on that matter we will allow somebody who is wholly detached from this particular district to sit upon that kind of a motion."

And now, your Honor, there are special reasons why the remarks that I have just made apply particularly to yourself because, as is well known, perhaps it was the last or close to the last, but a very well known famous case that your Honor handled before the Supreme Court of the United States just before you were appointed to the bench had to do precisely with the question of jury selection, not in the Federal courts it is true, but in the State courts of New York. So that the subject was one about which one can't say that it has never lay in your mind to take any interest in the matter. You as a practicing attorney stood before the Supreme Court of the United States and spoke about the necessity of having a democratic jury system in the State of New York.

The Court: And as I understand it the fact that I then fought for a democratic jury system shows now that my mind is so biased that I am not fit to (1132) sit here and hear your case? That seems a little inconsistent to me.

Mr. Gladstein: If your Honor please, please don't distort the meaning of what I say, because what I am saying is: the fact that 18 months ago or thereabouts your Honor stood before the Supreme Court demanding that it condemn an illegal, vicious kind of jury system in the State courts, plus the fact that for 18 months your Honor has sat on this bench in the Federal courts and has seen in operation a system which to the naked eye reveals the kind of discrimination and exclusions that have been taking place and your Honor has done nothing about it.

The Court: I haven't noticed any such discrimination. If you say it is open to the naked eye, I don't know how I was supposed to see it. I have had two or three jury cases, perhaps more. I have seen juries. They looked all right to me. I noticed no such discrimination. But I

have no knowledge of just how they select these people. I am waiting to hear about it.

Mr. Gladstein: Your Honor, you know in the Fay case you relied on the results. Your Honor knows that you made an analysis of the composition of jury lists. That is exactly what you did. And you showed that as a necessary result of those lists it couldn't be (1133) otherwise than that there was discrimination against classes and races and groups of people. And your Honor pointed out in his brief to the Supreme Court, a copy of which by the way I have and from which I have profited in the reading—

The Court: Well, you know, I got licked in that case.

Mr. Gladstein: Well, that is one of the reasons, your Honor, that I have profited, because we intend in this case to supply those things which the Supreme Court of the United States said that had you supplied them to them—

The Court: That is just what I am waiting for here. I remember what Justice Jackson said, and I have a great deal of familiarity with this subject, and if I have any bent of mind it is certainly in favor of a democratic jury. You may say just the opposite, but I say it isn't so. And I am anxious to hear what you have got here.

Mr. Gladstein: Your Honor said yesterday that if what I said was true it raises a grave and serious question.

The Court: That is just what I said.

Mr. Gladstein: That is an understatement. It raises—my point is this: I agree with what you have said, but it is a mild way of putting it.

(1134) The Court: Does that indicate prejudice?

Mr. Gladstein: No, no. No, your Honor—

The Court: You get a little tired of all this prepudice business. I am not aware of any prejudice about it at all. And the subject is one that I know something about.

Mr. Gladstein: I am not going to address your Honor on the question of prejudice. If anybody wants to talk to you about prejudice, that will be discussed by one of the other attorneys. I am talking about the fact that you are inevitably, inextricably, indisputably tied in with a system

for 18 months under which undemocratic, illegal juries have been parading in and out of this court, illegal, undemocratic and unconstitutional grand juries have been sitting in this court and you as a member of the bench of this court haven't done anything, haven't said anything to interfere with the continued operation of that thing. Therefore you are acquiescing, actively or passively, you have been acquiescing in the continued maintenance of that system. And it would be fitting for your Honor to recognize that it would be far better from the standpoint of instilling confidence in the public as to their courts of justice if a member of the bench of that very court which is being subjected to the challenge that I (1135) assert here, were to step aside and call in someone who has been wholly disconnected, because your Honor has not been and is not wholly disconnected. The very fact, the mere fact that your Honor has been, as I say, functioning as a judge of this court for the last year and a half, permitting this system to continue, doing nothing to change this system, and especially in the light of the background that I have mentioned concerning your Honor's—

The Court: Mr. Dennis has a little suggestion for you there that Mr. Sacher is looking at. I think he means to give it to you.

Mr. Sacher: No. This is a private communication. Thank you.

The Court: I had no idea of desiring to see it, Mr. Sacher.

Mr. Sacher: Oh, I understand that.

The Court: I thought he intended it for Mr. Gladstein and I attempted to do what I thought was a courteous thing in calling his attention to it.

Now, please, don't try to misunderstand things like that. You may assume that when I say things I say them in good faith. I have no desire to do otherwise, and I think you gentlemen will do better to recognize that.

Mr. Sacher: I don't like to get the feeling (1136) that the clients are under the surveillance of the Court.

The Court: Well, all right. I am sorry that you take it that way.

Mr. Gladstein: Now I want to say: As I understand it, Mr. McGohey's suggestion is and I gather your Honor's suggestion is that the actual operation, that is, my full description of the actual operation, the details, the evidence and so on concerning this system be reserved for presentation in the event your Honor decides before you—after the decision of the motion or before such judge as may be called in; is that right?

The Court: I am just on the brink of deciding it now. So, such arguments as your colleagues desire to advance on the subject of the disqualification of myself and my colleagues here I think should be made promptly.

Mr. Gladstein: But I don't think I understood your Honor to answer the question that I have put. That is to say, I understood from Mr. McGohey and from your Honor's statement that what I was about to discuss, and that is the nature of the jury system and how it was developed, your Honor feels should be reserved for—

The Court: I do.

Mr. Gladstein: —for presentation in connection (1137) with the challenge if, as and when that is presented to you.

The Court: I think so.

Mr. Gladstein: Well, I will then conclude, I had planned to say more about this to you, but I will conclude, knowing that there are other attorneys who want to speak on this subject.

Judge, it is not just how I feel about it, it is not just how I feel that under the principles established by Supreme Court decisions it is necessary for the protection of the accused for you to step aside in a matter of such import—your Honor has recognized the seriousness of the thing that I have been talking about; it is not just a question of their right. It is more than that. What I am talking about is something that you as a member of the bench of this court should recognize as involving a question of public interest, not just a question of protecting the rights of the accused but a question in which the courts themselves must necessarily be concerned.

What I am saying in effect, your Honor, is that in this building for the last ten years, due to things that

are illegal and unconstitutional, justice has been polluted at the very source. Now that pollution taints necessarily in the minds of the people every (1138) single person that is connected with it in this building, even though it began before your Honor stepped on the bench. And it would be far better for the Court to recognize that the important, the basic thing if the confidence of the people is to be maintained in the integrity, the honesty, the impartiality, the lack of corruption in their system of administering justice, it would be far better in the minds of the public, from the viewpoint of preserving that confidence, if no judge of this court insisted, as your Honor is doing, on sitting in this matter. It would be far more fitting for every single one of the judges here to say, "I may have no bias, I may have not created this, but I recognize that no matter how I do it, if I insist on hearing this challenge and if I decided against the challenge the people of the Southern District of New York are not going to accept that as the decision of an impartial judge. They are going to say to themselves, 'Well, what can you expect? All the judges, all the court attaches, the clerk, the commissioner, were accused and one of the judges insisted, one of those accused insisted on sitting in judgment on the accusation against them.' "

The Court: Now what is the alternative? Every time a lawyer says you are prejudiced you (1139) should step out, irrespective of whether there is any basis to the point?

Mr. Gladstein: Judge, I haven't talked with you about prejudice. I have talked to you, I have urged you to understand that the question of prejudice is an entirely different approach.

The Court: Well, the substance of what you appear to say is that if a lawyer says to a judge that the judge should step out and let someone else come in, then irrespective of justification for that statement, if the judge remains there will be an impairment of public confidence in the court. And I can't see how that would follow.

Mr. Gladstein: Of course not, it wouldn't follow, and I didn't say it.

The Court: I would suppose that the judge was to address himself to that question, as to all others, and look at all that is presented about it, giving it consideration and give a considered judgment as to what he should do. And that is precisely the way I am approaching the subject.

Mr. Gladstein: The key to the difference between what you have just said, your Honor, and what I am contending is a little magic phrase consisting of four words that you slipped into that last statement. (1139a) I think it was "regardless of the justification"—

The Court: I don't think you ought to say "slipped in" now. I gather you meant that colloquial expression in a nice way.

Mr. Gladstein: Oh yes. Everything I say to the Court is always meant in a nice way, your Honor.

The Court: I know.

(1140) Mr. Gladstein: What I meant was, you said "Regardless of the justification." That is just the point. What I have said thus far, and what I am prepared to say in addition, in detail with supporting data and reference to fact, demonstrate more than enough justification, more than enough justification in the minds of those who sit in this courtroom and hear what I say. More—

The Court: I am the one who is important about that. It is the impression you make on me, not the impression you make on the spectators that is going to be the determining factor; and, frankly, the argument leaves me entirely cold. I have in mind the fact that in numerous other cases precisely identical questions were presented without the judge or any of the judges of the district being disqualified. I have in mind the fact that I have before me here your own case before Judge Hall out there in the Southern District of California where you had precisely the identical question, and not one word said about the judge being disqualified and all the other judges being disqualified. You say "without justification." What justification do you want a person to have?

Mr. Gladstein: The judges in that district had nothing to do with the question. As a matter of (1141) fact, they took the position they did not. And that case, by the

way—first of all, I don't want to imply by anything I say that I am in agreement with the decision Judge Hall made. I have great confidence—

The Court: It is pretty bad for you. I don't see how you could be in agreement with it and still maintain your position here except when the evidence comes out. That is what is going to be determinative here. What is the proof?

Mr. Gladstein: Well, let the record first be straight—

The Court: You will get to that, I know. You will get to that. You may assume that I am going to overrule the objection to my sitting, or any of the other judges sitting. I do not want to preclude argument by your colleagues, but as I have listened here yesterday afternoon and this morning my mind has slowly crystallized on it, and I cannot see that it is even arguable. There may be something more to it than you have indicated, so I think you had better let your colleagues have their say about it, because I am almost to the point where I am going to decide that question.

Mr. Gladstein: Before I complete, your Honor, I want to say first of all on the question of the decision by Judge Hall, let it be clear first of all that in that (1142) case the decision is being appealed and I have great confidence that it will be reversed.

But secondly—and this is important to the issue we are discussing—I think we should have this clear now. The evidence in the case before Judge Hall in no way involved any of the judges, and in no way was supported by the kind of particular evidence that we possess as to the manner in which this particular jury system has been functioning.

Now finally I want to make clear my point because your Honor said it is not important what the spectators think. Your Honor misses my point. Your Honor says you are the person who must be impressed by my argument. That is true in the sense that your Honor rules. But in ruling, your Honor, this Court, must take into account the fact that the nature of the question that you are ruling on is one about which there is bound to be public interest, and that there will never be any allaying, there can't be

any allaying of the feeling in the minds of the people, not just those who sit in this room, the minds of the people that there will be a question in their minds forever if your Honor sits on this kind of matter and ultimately decides to uphold the jury system of this court.

So I say simply from the viewpoint of the (1143) courts and the maintenance of the public confidence in the integrity of the courts, quite apart from preserving the rights of the accused,—which in itself is an adequate reason—both reasons argue for your Honor's stepping aside and permitting someone from outside this district to sit on the matter coming in here completely detached and unconnected from any aspect of the origin, the development, the moulding or the continued maintenance and operation of that system of which every single judge in this district is necessarily a part.

Therefore, I urge your Honor not to overrule the motion for an outside judge.

I understand that there are other approaches that your Honor ought to hear, and perhaps I hope one of the other attorneys will be more persuasive than I have been.

The Court: I will certainly listen to them.

Mr. Sacher: May it please the Court, I rise not because I have any illusion that I will be any more persuasive with your Honor than Mr. Gladstein was, but solely because I think that another phase of this motion ought to be laid before the Court.

I intend to address myself to the specific question that your Honor raised in the latter portions of Mr. Gladstein's presentation—namely, as to your Honor's personal bias and prejudice in the matter of hearing and (1144) deciding this issue.

I think that it is important to bear in mind certain things which have been said concerning the legal posture of this challenge. Your Honor observed yesterday, and I think quite correctly—indeed the Supreme Court of the United States used substantially the same language you did yesterday in its decision in the Fay case when it said that when the determination of constitutional questions depends upon the determination of questions of fact, it will give great weight to the findings of State courts, but

it will nonetheless make an independent investigation of the evidence where the question of constitutionality enters upon what the evidence reveals.

It is, however, important to point out that even if our attack on the composition of the jury lists, et cetera, were limited to constitutional arguments—which, by the way, constitute a very substantial portion of the challenge here—it would nevertheless be true that the Appellate Courts, and, above all, the Supreme Court, should not be burdened with the findings of a judge the propriety of whose sitting in the case is assailed in the first instance, if the same objective—that is, an investigation of the facts—can be had by one who is not so attacked.

(1145) Secondly, it is to be pointed out that there are three other bases on which the challenge is predicated: First, that in the proper administration of justice the composition of these lists, et cetera, must be rescinded for the reasons set forth in the challenge; second, that the public policy of our country precludes the propriety of a jury list, et cetera, composed as these are; and, thirdly, that these jury lists, et cetera, contravene the statutes to which Mr. Gladstein referred yesterday, namely, sections 1861 to 1867 of the Code.

The Court: Have you got the sections there?

Mr. Gladstein: Your Honor, I looked all over this morning and I have not been able to find a copy. I will undertake to get you a set.

The Court: Very well.

Mr. Sacher: Now, I fear me that whatever validity there is concerning the argument that the Supreme Court of the United States would in its consideration of any appeal taken from a disposition made by your Honor, have the power and the right to look into the evidence itself on the constitutional phase of our challenge, that the same might not be true in regard to the factual bases of the three other grounds to which I have referred.

Now, the significance of that lies in the following: Your Honor in the decision of this challenge acts not (1146) only as trier of the law but trier of the facts as well. Unlike the role you may or will play in any substantive trial that takes place here, you will be judge and jury of the facts that are laid before you.

Now, what is the meaning of that? You will be called upon to pass on the credibility of each and every witness who will pass through that witness chair. We have in this challenge asserted, and in the first instance I think have established, that more than 350,000 negro men and women in the City of New York are systematically, deliberately and purposefully excluded from jury service in this court.

Our papers further establish that hundreds upon hundreds of thousands of trade unionists are systematically, deliberately and purposefully excluded from the jury lists and from the jury panels in this court.

Oh, yes, there are token representations on these juries. I have heard more than one judge say, "I remember a negro on a jury that I once had"; and another one says, "I remember that there was a man who said that he was a member of a trade union on one of these things." But those token appearances are the tokens which condemn the operation of the system and which far from demonstrating that what we have as a fair cross-section of the community proves that the negroes, the trade unionists, (1147) the poor, the Jews, the East Sider, the Harlemites, the East Bronxites—all are excluded because the jury here is an exclusive club of the rich, the propertied, and the well to do who cannot afford to be contaminated with trade unionists, with Jews, with negroes, with people from the East Side, and the foreign born.

Now I say—

The Court: I have been waiting for you to finish the sentence. Now I think these things are not proved by oratory.

Mr. Sacher: That is true.

The Court: They are proved by witnesses on the witness stand and by exhibits. Now you are just repeating what has in substance been said by Mr. Gladstein.

Mr. Sacher: No. My point is different.

The Court: Very well. Perhaps there was a slight difference that I had not perceived. Go ahead.

Mr. Sacher: Your Honor has put his finger on what I think constitutes the difference—namely, that witnesses have to be called. That is the point I am making.

The Court: That is just what you were saying.

Mr. Sacher: Precisely. Now you are the one to pass on the credibility of those witnesses.

Yesterday, Judge Knox, acting not like a judge (1148) in a democracy, not like a judge who would even be willing to hear a lawyer, come up and say, "Judge, I just want the opportunity of"—

The Court: Better leave out comments about Judge Knox.

Mr. Sacher: Well, we are outraged by what was done yesterday, your Honor. We are outraged by that.

The Court: You have no basis for being outraged, and you go ahead and attack me, because I am the man that you say is not fitted to sit here and hear this matter. Judge Knox is not the man who is going to hear it. I am. Now you have a right to proceed to indicate anything which you please about me that makes me disqualified or makes it improper for me to sit here, but please don't bring in Judge Knox.

Mr. Sacher: Well, you permitted us yesterday to go to Judge Knox; and like a royal personage he said we could not enter his presence, and we did not, and he sent a courier to tell us we could not enter his presence, and that is the point I am making.

The Court: Now please confine yourself—

Mr. Sacher: All right, if you don't wish to hear it I will never afflict your Honor with anything you don't wish to hear. So I shall desist from that.

The Court: Go ahead.

(1149) Mr. Sacher: I say then the following: We have accused in our papers, we have accused Judge Knox of being the bete noir in this whole jury system. We have charged that he is the progenitor of it.

Is that correct, your Honor? He is, isn't he?

The Court: I think you have been charging that.

Mr. Sacher: And I think we do not attribute to him paternity of something that is not legitimately his when we charge him with that.

The Court: No. You say it is a vicious, illegal, discriminatory and unconstitutional system.

Mr. Sacher: Precisely, and we say that he is the father of it.

Now, he is going to have to appear in this chair at some point during this trial and he is going to have to testify.

Now, there is one point in which I am in agreement with your Honor, and that is that it would prove to be terribly embarrassing to any judge to sit in judgment upon his chief judge; and I dare say that that embarrassment, while it would be less, would nevertheless be intense even if you called in judges from other parts of the country. But the embarrassment certainly could hardly be as acute as that which your Honor or any other judge right in this building might feel; and notwithstanding (1150) the fact that we appreciate that judges from the outside might feel a lesser embarrassment, we thought that in the first instance it might be desirable if no judge of equal jurisdiction considered this matter; and it was for that reason that we sought to invoke the supervisory power of the Supreme Court to appoint or designate some officer of the Supreme Court to inquire into this matter.

Now the Supreme Court denied that application. That is not to say that we are obliged to submit to a trial either by judges of the Southern District or to a trial by your Honor. Up to this point we have said that your Honor has indicated bias and prejudice against these defendants. We made that assertion and that charge when so far as the record indicated your Honor's role would be limited solely to that of acting in the capacity of judge alone. That is, I mean in the sense of passing on questions of law alone. But now that your Honor in the conduct of the hearing on this challenge must fulfill a joint function, so to speak, the function of passing upon legal questions as well as upon questions of fact, and since your Honor's determination of those questions of fact must rest upon the appraisal you make of the credibility of the witnesses who are called by both sides, then I submit, in the light of those earlier statements made by your Honor, and by the complaints (1151) that we made of those statements, that in the setting of an inquiry in which your Honor is to determine credibility of fellow judges, of the clerks of this court, of the jury commissioner, and of all the fine gentry with whom you are co-equal in the Grand Jurors

Association, et cetera—I think your Honor should not be burdened with all these trappings in the search and effort which a judge must make in the attempt to discover where the truth lies.

I can't help but feel that while it takes a great stretch of the imagination for me to conceive myself as ever being in the august place in which your Honor is, I can nevertheless imagine this much, that I would encounter the greatest embarrassment in having to sit in judgment on the credibility of any colleague or any associate in the administration of justice in this court.

And I therefore submit, your Honor, that in these circumstances the law as well as a proper exercise of discretion would require that some other judge be called in.

In the last analysis I think Mr. Gladstein's observation is quite true. While it is true we have to impress you, the fact remains that the judges of our country, since we are still a democracy, have to impress the people with the fact that there is an even-handed, impartial administration of justice, and I just can't conceive how any citizen will feel that there was some- (1152) thing in the situation which justified your Honor's adamant insistence that you try it. After all, you are paid by the year. You will be paid whether you try this challenge or some other judge does. You are not like the poor people who are excluded from the jury. They work by the hour, by the day, by the week, a few fortunate ones. Why is there such tenacity on the holding on of this challenge? Why can't we have a judge from the outside who, like your Honor, is sworn to uphold the law? Why can't we, without any concession or acknowledgment on your Honor's part that you are incapable or disqualified from acting, invite a colleague from New Jersey or California or elsewhere to do that?

In this connection—

The Court: Now we are going to have a little recess in which you gentlemen will come into the chambers and explain just what you want done about these physical arrangements, unless you would rather do that this afternoon. We are going to take a recess anyway, and if you would all like to come into my chambers, you may do so; and if you don't, you may decide not to.

(Short recess.)

(1153) The Court: Now, Mr. Gladstein, you need not provide me with a copy of the statutes because I have a copy before me now, so that when you get around to that I think—

Mr. Gladstein: Maybe you have an extra one. I think I have had mine purloined.

The Court: Well, if you desire to borrow this one, I have one here.

Mr. Gladstein: Thank you very much.

Mr. McCabe: If your Honor please, I had not expected to address myself to this question of the propriety of your Honor's hearing our challenge to the jury, but as I sat here I noted several things that were said today which led me to attempt to add something to what has already been said.

Just before the recess Mr. Sacher made some remark about Judge Knox. Your Honor, with perhaps commendable respect for a fellow judge, immediately cut him off. I do not recall your Honor's words; it was something to the effect, "Well, I don't want to hear anything about Judge Knox." Now, that is a good thing to have among a group—

The Court: I don't believe you got the point of it, Mr. McCabe. As I have had occasion to say here before, I think counsel has the right to make any (1154) representations or offers of proof or claims about things affecting my disqualification for bias or prejudice or otherwise because I have the responsibility of trying the case. I thought that that was not so about Judge Knox. Judge Knox is not trying the case. I am. And I thought that comments about him were not relevant. That was the reason I made the statement.

Mr. McCabe: This entire presentation of proof will constitute the most vigorous sort of attack precisely on Judge Knox, your senior judge. And will show that what we say about Judge Knox will be completely relevant.

The Court: Well, what you say about Judge Knox that has to do with the constitution of the jury system here and the manner of selecting jurors may be relevant. But what was said about Judge Knox's statement that

he did not desire to hear the matter yesterday afternoon in my judgment has no relevancy to the question before the Court.

Mr. McCabe: Well, I notice the same, it seems to me—you will probably tell me that I misunderstood what was said—the same regard for a fellow judge when the question of the bill of particulars came up, when I asked your Honor to reconsider it in the light of the fact that your Honor was going to be the one who would be (1155) faced with continuous objections because we had not been furnished with a bill of particulars. You said that: It is a rule of our court I believe, and Judge Hulbert passed on that, if the matter came up again you would refer it to Judge Hulbert. Now of course I realize that it would result in confusion if one judge were constantly overruling another judge.

The Court: You see, I am not an appellate court judge.

Mr. McCabe: Yes. But there was not reluctance it seems to me to reconsider a matter which had already been passed upon by another judge, even though that judge after passing upon it had really dropped it in your lap because you were the one who was going to feel the results of his refusal to grant our praper for a bill of particulars. And it seems to me there that there was, well, I thought perhaps a little too great regard for a fellow judge's actions after those actions had passed away from his desk and were on your Honor's lap.

At the conclusion of the session yesterday afternoon when Mr. Gladstein was addressing himself to that portion of the laws of the State of New York, which provide for a $250 property requirement for eligibility for jury service, my recollection was that your Honor then said something to the effect: Is it possible that (1156) even something which is not in strict accordance with the law may by long and unchallenged usage acquire or rid itself of some of the infirmities attached to it by its not being in conformity—

The Court: I was talking about due process.

Mr. McCabe: Yes.

The Court: I thought it was pretty well established as one of the indications in due process that a certain

procedure had been long in force and unchallenged or if challenged the challenge rejected. I was raising that only in connection with the due process point.

And I may say, too, that from my familiarity with the general subject matter I would not feel that that was a very substantial point. I am ready to be enlightened on it. But I am not supposed to come to my task as a judge here without that background of experience and understanding that a judge should have. And I suppose it is not possible to take every point that is urged by counsel except in the light of that experience. And some of these things did not impress me very much, and that was one of them.

Mr. McCabe: What impressed me about your Honor's reaction to that point was that we here are attacking on constitutional grounds a system which we claim is illegal but which has back of it that same sanctity of (1157) years of usage here under the direction of this very court. And it seems to me that that pointed in the direction of the impropriety of your Honor's sitting upon it.

Now the last point I make seems to me very important, your Honor. Your Honor seemed to indicate today that the fact, as you stated, that you knew nothing about the jury system, about the manner in which jurors were selected in this district, was a guarantee that you would have no bias in favor of the manner in which jurors are selected in this district. And I thought to myself—we were discussing the Fay case and you went in that Fay case with a vigorous, determined and prolonged attack upon the blue ribbon system in the City and County of New York; I thought to myself that at that time you were looked upon as the starry-eyed reformer who was shocked at this blue ribbon jury system and its injustice, that you must have been filled with that, that zeal, that horror at an unjust jury system; and then you fight that from outside the rail where you have certain powers, then you are put on the bench where your powers are far greater.

Well, it would seem to me, I thought, that at the very first meeting of judges you, fresh from the Fay case, even though a freshman member of that (1158) bench,

would immediately say, "Gentlemen, before I am assigned to a jury trial I want to assure myself that the method of selecting jurors for this court is not tainted with the same abuses which I have attempted to expose in the manner of selecting jurors in the County of New York."

The Court: I did not do that.

Mr. McCabe: You did not. Not only you didn't do that, your Honor, but according to your own statement you made no inquiry.

The Court: I have been pretty busy since I have been in on this side of the bench. I used to think I worked hard, but now it is just nothing but work.

Mr. McCabe: I say, your Honor, that the very fact that you were willing to accept without question the manner of selecting jurors in vogue, without inquiry at all, seems to me to presuppose and to carry with it the absolute guarantee that your Honor was willing to accept the judgment of your seniors, you were willing to take things as they are, and now after a year and a half to be called upon to pass upon that system when it is under attack I say, frankly, your Honor, that I couldn't remain silent.

I feel, as it was expressed here today, that regardless of the most extreme effort which your (1159) Honor would make to pass upon the factual questions and the legal questions which must come before you in the challenge to the array, that is something which should be left to someone who is outside the family.

I might remark on one further thing. Your Honor remarked on Judge Hall's decision in the Local 36 case which Mr. Gladstein tried. If your Honor will read, I think the last paragraph of that decision of Judge Hall, it is close to the last paragraph, Judge Hall there said, and I do not pretend any degree of accuracy in my recollection, but the effect of it was: We will not interfere with the discretion and the duty which the law places upon the jury commissioner and the clerk of the court. We will correct them if they are wrong but we won't interfere with them.

And precisely the opposite has been the situation here in the Southern District of New York. The courts haven't

only interfered with, they dominated the selection and they have permitted outside agencies to dominate that selection.

Mr. Crockett: I shall, with the Court's permission—

Mr. McCabe: Did you find that point, your Honor?

The Court: I will read the part that I think (1160) you referred to. Judge Hall says:

> "And it is my conclusion, in the exercise of that power of review, that neither the clerk nor the commissioner showed any bias or prejudice in the selection of names or sources of names of prospective jurors, and that neither of them systematically or intentionally or arbitrarily excluded any person or persons, or groups or classes of persons, either on account or because of economic status, occupation, rate or quantity or method or time of pay, race, religion, sex, social connections or affiliations or lack of them, or political affiliations; nor does the system and method or process used by them now, or for the 1946 grand jury, result in such exclusion."

Now I take it you refer to his expression about his power of review?

Mr. McCabe: Yes.

The Court: That is what I thought.

Mr. McCabe: That of course is not the point. The quotation I had in mind—do you have that?

Mr. McGohey: I suggest, your Honor, that the following sentence is the—

The Court: Well, the following sentence reads as follows:

> (1161) "The geographic selections made by them were in accordance with the various orders of the senior judge made pursuant to the command and the power given him in 28 United States Code Annotated, Section 413."

That of course has a new number in the Revised Code.

Mr. McCabe: Here is the quote, your Honor, at page 799.

The Court: What column?

Mr. McCabe: The bottom of the first column of 799.

The Court: Yes.

Mr. McCabe: "The making of a jury list is not a judicial act. The manner of securing names for the jury lists is for the clerk and the jury commissioner to determine; the duty is non-delegable and no other person has a right to participate in such selection"—

and there are case cited—

> "* * * except that a court may * * * direct the jurors to be selected from such parts of the district as shall 'not incur an unnecessary expense or unduly burden the citizens of any part of the district.'
>
> (1162) "In United States v. McClure the court stated, with relation to the duties of the officers of that district court charged with the matter of securing jury lists, that it 'is their responsibility', and no court has the right to tell the duly constituted jury commissioners how they shall discharge the duties and responsibilities imposed upon them by the law. A court has the power only to declare their actions null and void under circumstances of malfeasance or misfeasance."

And I say precisely what was not done here.

The Court: It is not always easy to communicate a thought from one person to another, but the thought I have tried to convey here has been that, from my familiarity with these cases, of which there are many, I have been impressed by the circumstances that in all these cases the inquiry, such as you are about to initiate pursuant to the terms of your challenge, was heard and decided by a judge of the district where the system was set up, in every case. And so, naturally, I feel that the claim of impropriety and disqualification and so on, or put it whichever you will, lacks substance. That is what I was trying to (1163) say and that is what is leading me to take the view that there is no impropriety in my following the precedents in other cases and hearing the challenge and making the necessary decision.

Mr. Crockett: If the Court please, I am mindful of the fact that your Honor has already expressed your predisposition to deny this motion and that in itself perhaps should require practically no extended remarks on my part; but since your Honor has also assured me that I will be given ample opportunity to make an opening statement just before we proceed with the taking of testimony on this challenge, I shall defer much of what I had intended to say at this time until that time.

The Court: I did not really mean to indicate that when we get to the issue that you ought to go over all the various grounds of it.

Mr. Crockett: I have no intention of doing that.

The Court: I indicated that you have the right, and I shall permit you, to state clearly the position of your client in the matter.

Mr. Crockett: Thank you, your Honor.

I want of course to adopt the motion in behalf of my clients and also the supporting arguments that have been made by the other attorneys for the defendants. (1164) I would like to do a little more and that is to try to button up if I posibly can exactly what it is we are contending here. I have outlined it in the form of three proposals, the first of which is that the issue which is presented by this challenge goes to the very roots of the system by which justice has been supposedly dispensed here in the Southern District during the past eight or nine years.

The essence of that is that we are alleging in effect the existence of a conspiracy between the jury commissioner, the jury clerk, the judges of the Southern District of New York, all for the purpose of denying to certain specified classes their constitutional rights to participate in the operation of the government through the medium of serving on juries.

(1165) I submit that that is a very fundamental proposition; that the gist of it is in effect to put the Government on trial rather than having these defendants on trial, and that we have the burden of proof on that issue, and we intend to sustain that burden of proof.

Now, because of the fundamental nature of that issue we come to the second proposition, and that is that the

evidence which we are prepared to present is such as undoubtedly in the minds of the people of this district, indeed in the minds of the people of the whole country and of the whole civilized world, will create a conviction that our contentions are well founded in fact as well as in law.

We can't escape the fact that this is a political trial. For the first time in the history of this country a political party is being tried. We, then, as the defendants of that political party have set out to do a very large job. And that is not so much to convince your Honor—I have every reason to believe that we will—

The Court: Better start with me and take the world up in due course.

Mr. Crockett (Continuing): Not only to (1166) convince the people who live here in this district but to convince the whole world that under the system of justice as administered here in the Southern District of New York, no political trial can be justly decided in this particular district.

Now, we hope, incidentally, after we have convinced, shall I say, the world, and the people in that district, that incidentally we will also have convinced your Honor.

But that brings up this issue: It is highly possible, and I have seen it happen time and time again, that you convince everybody else but you don't convince the one particular person whom you wish to convince most. Sometimes that might result from some inner prejudice on the part of that particular individual of which he is not particularly aware; and I have noticed during my lifetime that prejudice has a way of just lodging there inanimate without expressing itself until some particular things happen which gives it something on which to operate. We don't want to run the risk of having this as the occasion on which any prejudice which your Honor might have and might not be aware of to find an opportunity to operate.

It is for that reason that I come to the third (1167) proposition that the judge who decides this issue must be, shall I say, like Ceasar's wife, above reproach. His decision must be made in such a way that he can allay all

of the suspicions that, as a matter of fact, the issue, even though won by the defendants, was actually lost in the decision. Now, I think that is highly significant, and I think it is something to which the Court should give very careful consideration before it passes on this motion. Because from the standpoint of people who have prejudices, I have found from my own experiences that they more or less divide, shall I say, roughly, into three groups: there are those who are conscious of the existence of the prejudice—just conscious and that is all. There is another group that is not only conscious but gives vocal expression to their consciousness. That is another group. And there is still a third group that not only gives the vocal expression but actually tries to do something about it.

Now, our hope is that we will have this issue determined by a judge who falls into that third category, one who not is content to observe that, well, perhaps there has been some discrimination, but who has no inhibitions whatever about doing whatever is necessary (1168) to end that type of discrimination.

Now, I will not dwell upon the points made by Mr. McCabe—the points which I think have considerable validity—but from my own point of view I have noticed, for example, the reluctance on the part of your Honor to even reconsider independently our application for a bill of particulars. Your Honor deferred to the previous ruling made by Judge Hulbert, presumably, at least as a reasonable person until I can conclude otherwise, that it was out of deference to the seniority which Judge Hulbert holds over your Honor; and I am also mindful, sitting here and going over the whole process of analyzing prejudice and how it manifests itself, I am also mindful of the fact that notwithstanding what I consider the extreme discourtesy of Judge Knox in refusing even to let us come up and talk with him about making this application, your Honor seemingly has just brushed that aside. I do not dwell on that point because I have a sort of feeling that perhaps that is a basis for a reversible error, and I do not want to see it corrected at this time. I only mention it in order that your Honor can get the gist of what I am driving at, that very frequently we have these prejudices, and

we are not aware of them, and the burden of my entire argument is that your (1169) Honor will seriously consider that possibility before he passes judgment on this motion to call in an outside judge.

Mr. Isserman: If the Court please, we have been in disagreement with the Court on a few occasions in the past few days. At this moment I happen to have some slight disagreement with the position taken by my colleague. And I say that in all deference to his position, and that is, I do think the action taken by Judge Knox in conjunction with this Court in refusing to hear us, was error. But on behalf of my clients I would like to see that error corrected now, and if your Honor would say, "I will give you ten minutes or enough time as is needed to go to Judge Knox," we would be very happy to go and clean that error off the record.

The Court: Well, the requisite permission is not given.

Mr. Isserman: I understand your Honor's position, but I just wanted to make clear that we would like to see errors corrected as we go along.

Mr. Sacher: In other words, it is Mr. Crockett's wish and not yours that is being fulfilled at the moment.

Mr. Isserman: That is correct.

Now, I don't want to repeat what has been said (1170) before, but I think there are a few points that require highlighting on this matter because it involves a question of, one might say judicial ethics as the matter has unfolded before your Honor.

Your Honor is familiar with the line of cases which hold that not only should the judges of the courts and the district attorneys act in every way which indicates the complete impartiality that they should have, but also they should refrain from doing anything which even has the appearance of not acting that way; and cases have been reversed where it was argued below that error or prejudice was not manifested, or bias was not manifested when it appeared to the United States Supreme Court that it had the appearance of such bias and prejudice. I do not have the cases here but I could have them here at the afternoon recess or shortly after the afternoon recess.

Now, in this case we have a complex of circumstance which I think goes beyond even a mere appearance of

interest, and I think that is what Mr. Gladstein was talking about as much as prejudice, that his interest in the issue which in a judging of the judicial proprieties should really move your Honor not to hear this case. I mean, of course, this part of the case we are talking about.

Now, at the outset of this new system which Mr. (1171) Gladstein talked about, as is reported in the memorandum from the Administrative Office of the United States Courts which your Honor has before you, it is stated that Judge Knox personally undertook the revamping of the jury system.

I am mindful of the statute to which your Honor called attention, but our complaint on this challenge is such that we are saying that in whatever supervisory capacity Judge Knox or any other judge of this court acted in respect to the jury system, that it was a completely illegal capacity.

And Judge Knox has not merely started the system but has maintained it and insisted on maintaining it as a personal matter, far beyond the mandate of any statute and into the realm of unconstitutional action.

Several years ago in defending the system—and I bring this up now only on the point I am addressing myself to—Judge Knox, in testifying before a Judiciary Committee of the House, said, "I am told from time to time that the selection of jurors should be a democratic process and that persons who serve in the United States District Court for the Southern District of New York are handpicked."

And then Judge Knox said this:

> (1172) "In answering to this indictment I cannot do otherwise than admit my guilt."

And then he said: "Nevertheless, unless restrained by an authority to which I must yield"—must yield—"jurors in my district will continue to be hand-picked and it will be done with care."

Now, I am interested in several aspects of that remark because it bears on this point. Judge Knox did not say: "The Southern District of New York bears the guilt; the clerk bears the guilt or the jury commissioner bears the guilt for this system." He said, "It is my guilt,"—indicating years after the initiation of the system his own direct, personal participation in it.

Now, I say, and our argument will show that Judge Knox has had an authority to which he must yield and has not yielded, and that is the cases in the United States Supreme Court which we will go into on the challenge which indicate that Judge Knox has not heeded the clear mandate of those cases that juries shall be truly representative of a cross-section of the community. And that mandate, as your Honor well knows, as urged in the Fay case for federal juries, is much higher than it is of any jury of New York State.

(1173) So we have here a deliberate, conscious, publicly declared statement by Judge Knox of his intention to continue the system.

Now, that is something more than just creating a problem for your Honor that your Honor will decide an issue and not be concerned about Judge Knox's position. I would be concerned about that position, openly declared before Congress, if I were a fellow judge of Judge Knox's. I could not help but be influenced by that position.

And certainly it would seem to—now we come to the seeming aspects of this as it seems to counsel for the defense and certainly to laymen—that when a senior judge or chief judge takes such a firm position, and we are challenging the entire position as being unlawful, that it creates a problem for a fellow judge who in rank is below the chief judge.

Now, that statement of Judge Knox's before the Judiciary Committee might be to your Honor as weighty as the statement of Judge Hulbert in his decision on the bill of particulars. I ask your Honor to consider that point very seriously. But that is not the whole story.

Next we come to the Grand Jury Association. What I say is substantially alleged in the challenge. That Association has played an important part not only (1174) in the grand jury system of New York but in the petit jury system, in moulding it, in shaping it, and they have said that in their own publication. I will only quote one part which reads as follows:

> "Under the general guidance of Judge Knox the credit for this great improvement in the grand jury panel"—

and the improvement was destroying this cross-section nature—that is my own interpolation—

> "goes to Mr. Palmer, clerk of the court, and to his able predecessor, and to their able assistant, Mr. McKenzie"—

who I have no doubt will be heard from before this hearing is over.

> "Your Executive Committee is very, very glad indeed that our relations with them rest on such foundations of reciprocal confidence, that we have been permitted to cooperate with them to a material degree in their perennial task of making the grand jury panel ever better and better."

The Court: Now, you consider that to mean worse and worse?

Mr. Isserman: I consider it to mean more and more the organ of the class, the propertied, the well to do (1175) and the rich. And, in fact, your Honor, if you read the roster of the Grand Jury Association, it sounds like a rich man's club and nothing else.

The Court: That is what we are going to hear about in due time.

Mr. Isserman: I bring that up for this reason: I do not think I can brush off the grand jury's effect on this motion because it would not give—

The Court: It is interesting to consider what a person means by "better and better." Until we know what they do, it is premature to interpret it.

Mr. Isserman: Yes. Let me yield a point for a moment and say that even if the Grand Jury Association really made the grand jury panels better and better, under the law it could not be their business and it would be unlawful, because it is an interference with the grand jury system by a private group.

Now, that is no accident, your Honor, because there will be in the record the by-laws of this association which say in its objects that one object of this private association is to assist the grand jury in carrying out its functions under the law, and I say that no private association can do that without tainting the grand jury system, no matter how noble its objectives may be.

(1176) Now, those by-laws say that the judges of this court and the United States Attorney are honorary members of that association, and Judge Knox has addressed the association, and I am sure there are other relationships which will be established as the challenge goes on.

Now, I was mindful some years ago when representing some of the Hollywood unions in that strike that occurred there on the West Coast of appearing before the National Labor Relations Board in an argument involving various parties, and one of the parties involved was the Association of Theatrical Employees—the IATSE Union, if your Honor is familiar with it. And before the argument started, Mr. Houston, a member of the Board, opened his wallet and said, "I have here an honorary membership card"—it was a gold card—"an honorary life membership in this union." He says, "It means nothing to me except that I have it. I was in the theatre business some years ago." And he said, "I offer to disqualify myself because of that honorary membership," and the issue was not nearly as grave as the issue in this case. And I think if your Honor has expressed surprise at his honorary membership, your Honor might want to determine that fact, and I am sure if your Honor found that he was an honorary member of (1177) an association which will be under severe attack in this challenge, that your Honor would not want to sit in the case.

Now, I want to make another point: One of the focal points of attack in this case is the heavy selection of jurors from what all of us in New York understand to be the "silk stocking" district, the 17th Congressional District. I don't want to burden your Honor with the figures now, but our papers show that 56 per cent of all the jurors on six certain panels that were analyzed and selected as a sample, came out of that district which only had 20 per cent of the voting population last fall.

We are pointing a sharp focus, a sharp beam on that district, on the people who have been drawn to serve on New York juries to judge people of all other districts, on the persons who reside there, on their associations, on their economic status, on their wealth, and on their social position in the social register and otherwise, which was one of the sources from which jurors were taken.

Now, I believe your Honor lives in that district, I am not sure. But if that be so, then there is another reason why your Honor should not sit, and I wish to call your Honor's attention to this fact: A few months (1178) ago in the United States Supreme Court there was an argument involving the validity of restrictive covenants, a very important case involving civil rights, basic civil rights of living the way you have a right to live in this country, the way you have a desire to live in this country, without regard to race, creed or color.

Your Honor will recall that Justice Douglas did not vote on that issue, and everybody wondered why, and then it was carried either in the U. S. Law Week, or some of the other papers—and there might have been another judge, I don't know if there are two—there were two. I think Justice Rutledge, a humanitarian if there ever was one, and deeply interested in these problems, also did not participate; and the story was—and I don't know if it is true—that they did not because they lived in a house or in an area which was affected by restrictive covenants, not by the one under adjudication but in general. In other words, they wanted to avoid any appearance of interest in the controversy.

And I say to your Honor that our attack upon the jurors taken out of that district is a major attack, and if your Honor does live in that district I think your Honor should give that point very serious consideration.

The Court: I don't really know the number of the district I live in. I know where I live. It is (1179) 14 East 75th Street. Whether it is in that 17th district or not, I don't know. I do not see that it has an awful lot to do with the case.

Mr. Isserman: What address did your Honor give? I am sorry, I did not get it.

The Court: I gave 14 East 75th Street. There is no mystery about it. It is in the phone book.

Mr. Isserman: (Addressing Mr. Gladstein) That is in the district, isn't it?

I asked our 17th district expert from San Francisco.

Mr. Gladstein: Judge, isn't there a question that you are accustomed to ask aliens when they seek citizenship in the United States as to how the political subdivisions are

created and what district they are in? I think that if you had voted in the last election you could not help but be aware of the fact—

The Court: Well, I voted. I have not missed a vote since I was 21, and I do not intend to miss any either.

Mr. Gladstein: Then you would know, your Honor, it was the 17th District.

The Court: I would not know that—well, maybe you are right, maybe I would know. I just don't recall (1180) it at the moment.

Mr. Isserman: Now, there is one other point: I concede that your Honor has been busy since he has been on the bench. I have heard your Honor state that your Honor has not looked into how this system of selecting juries, how this system which we call an illegal system of selection of juries in the Southern District, functions. But the end product, the end product of that process is certainly before your Honor in the form of jury lists, and it takes but a casual looking down those lists to see that no one from Harlem is on them—perhaps on one panel of four or five hundred there may be one person—no one from the lower East Side; no one, or practically no one from the Chelsea district, the poor portion of the Chelsea district; no one from any districts in the Bronx; and certainly any judge looking at that list and looking where people reside, and looking at their qualifications as well, would know that whole geographic areas are excluded from every list you looked at, and that we are prepared to demonstrate; and also that the presence—the fact that manual workers should be representative on these lists was highlighted by their absence.

Now, we are not in this challenge in the proof that your Honor will get, we are not proving matters that (1181) are beyond easy comprehension. And the point I would like to make is this: That your Honor's failure to have known of the situation, particularly because of your Honor's role in the Fay case—and as to that case I want to say I sympathize completely with your Honor's position and with the minority opinion of the United States Supreme Court, and only regret that the majority opinion sought to charge the defense in that case with a greater burden of proof at the time of the jury challenge than they

had exercised. We will try to correct that error, your Honor, to be sure. But, certainly, your Honor, with your interest in these matters, with your interest in the Fay case, and your participation in that case only recently, just before your Honor got on this bench, should have noticed this situation.

And we say if your Honor has not, then it is an indication of a lack of sympathy at this time with the problem, and we think for all these reasons, for all these substantial reasons, your Honor should refer this matter to Judge Knox for reassignment to an outside judge.

Mr. Gladstein: Your Honor, could I add a very brief statement of a thought that has occurred to me since I made my presentation? It will only take a couple of minutes.

(1182) This stems from the argument presented by Mr. Sacher as to the proposition that you have to pass on the credibility of the witnesses who take the stand. Do you recall he pointed out that it may be true, Judge Knox will be a witness.

Something else occurred to me at that moment that I want to call your attention to. It is inevitable, of course, that the attaches of the court are going to be witnesses. That is to say, you are going to have the jury clerk or his chief deputy or some of the deputies and the jury commissioner. They are going to be sitting in that witness stand and they are going to testify under oath.

Now, Judge, if one could posit this assumption, that the jury clerk would get up there and say in answer to a question, "Did you really purposefully discriminate on geographical, political or social or economic grounds?" And he said "Yes, I did," well, there would be no problem, Judge. Even you—

The Court: That happened in one or two of these cases?

Mr. Gladstein: I beg your pardon?

The Court: That happened in one or two of these cases.

(1183) Mr. Gladstein: Let me finish. Even you would have no problem of embarrassment in saying, "that is enough, I don't need any more, this jury system is out and I am throwing it out." But, Judge, that is not what is

going to happen, in answer to that question. Let us be realistic enough to recognize that what is going to happen is that those men are going to be called in and are going to take the stand and are going to insist that never have they discriminated, it wouldn't have occurred to them to discriminate. And you are going to have to pass on that truth or the falsity of that statement.

Now that statement is emanating from men who work right here, attaches of this court, men who will be here after this case is over, men who are part of your own force. And you are going to be put in the position of deciding on the basis of that statement whether they are telling the truth. But don't you know, Judge, don't you realize that what they say on that stand doesn't decide it, and that you would be normally and naturally impelled to lean on and seize that as a crutch on which to deny a challenge, when actually all your life as a lawyer you knew that that kind of a statement was not worth listening to? Because in your own brief,—Judge, wait—

(1184) The Court: It seems to me that the entire Federal Judiciary of all the districts in the country are naturally going to have a certain respect for the other members of the Federal Judiciary. And I can see, as I put the shoe on the other foot, I suppose if I were called to go out to Missouri or California or Texas to decide such a thing, and I have been thinking to myself as you have been talking here, and the clerks of the court came and testified there, I can't see that I would be in any different position than I am here, in another part of the Federal Judicial System, my own, where the clerks or other persons testified here.

Mr. Gladstein: Well, Judge—

The Court: I would expect any judge in the United States to have respect for Judge Knox, for example, and not only Judge Knox but for the other members of the Federal Judicial System.

So that I really cannot see where all this prejudice comes, unless it be to lead to the conclusion that unfortunately nobody is qualified to hear it and, therefore, the trial is to be put off.

Mr. Gladstein: I didn't say that.

The Court: I know you did not. But it is like a lot of these other arguments—that it is almost (1185) a logical conclusion.

Mr. Gladstein: It is a question of their identification and interest here. For example, and I am not going to ask a question now because you are not on the witness stand, but I may assume certain things that I think must be true. I can assume that you couldn't have been a member of this Court here for 18 months or more without having established some personal acquaintance with the jury commissioner, with the clerk of the court—

The Court: As a matter of fact I have not.

Mr. Gladstein: —with the clerk of the court. You certainly must know Mr. Connell.

The Court: Oh yes, I do.

Mr. Gladstein: Yes, certainly. All right. Now Mr. Connell can be expected to say, "Oh, I certainly didn't do such a dastardly thing as to discriminate and exclude; I know that the law forbids that." But, Judge, if he said that to you in your presence it is quite different than if he made that statement while some other judge was passing on the matter. And I will tell you why. I want to read back to you what you said in the Fay case. When you described the system that you were attacking you said: "This exclusion"—and I am quoting—"This exclusion was systematic, intentional (1186) and deliberate."

Then you said: "The officials of the Division of Jurors denied this, as such officials uniformly do in these cases."

Now my point is that it is wrong, that it verges on the border of indecency to ask us to have our rights passed on by somebody who is identified with this system because he is a member of the bench here, who personally knows the clerk here, who is going to be judging upon and weighing—weighing—in the balance of truth or falsehood the validity of that clerk's testimony.

The Court: Now the process of weighing has reached its conclusion. And I deny the motion.

* * *

(Recess to 2.30 p.m.)

(1187) AFTERNOON SESSION

* * *

Mr. Gladstein: If your Honor please, I want to present in a bit of detail the character and type of proof and the nature of proof that we desire to offer, and relate this to the issues, the legal issues which I have already referred to, and which I will not take the time to repeat, because your Honor has those in mind.

Our proof is going to show, commencing with the origin of the jury system that is in operation in this court—

Mr. McGohey: Mr. Gladstein—pardon me, your Honor, I would like to ask Mr. Gladstein if he would mind if at this time before we undertake the argument of so much of the motion as attacks the impaneling of the grand jury and the petit jury, if I might be permitted to interrupt to make some motions for the record, which I think may have some effect.

The Court: I am sure Mr. Gladstein will have no objection to that.

Mr. Gladstein: Not is all.

The Court: I gather that there is some reason for putting them in at this time.

(1188) Mr. McGohey: Oh, yes, indeed, and I think it desirable to make them now so that Mr. Gladstein and his associates may address themselves to these motions which I propose to make.

I understand that we are now proceeding to the consideration of the motion attacking the impaneling of the grand jury and the petit jury.

The Court: The challenge to the entire system and to the various parts.

Mr. McGohey: Yes.

Now for the record, your Honor, I desire formally to deny that the array, the panel, the venire and the jury lists and the grand jury are improperly and illegally selected by the exclusion in whole or in substantial part of the classes specified on page 2 of the notice of motion filed before the Court.

Secondly, I now move to strike so much of the motion before the Court as attacks the grand jury, on the ground that this issue has already been determined and has been

determined by Judge Hulbert in the consideration of motions heretofore filed by him.

In an affidavit sworn to on September 28, 1948, the defendant Foster challenged the selection and composition of the grand jury upon the ground that there was not a single member of the laboring group, nor (1189) a single Negro on the grand jury, and that there was a systematic exclusion of all working people and all members of the colored race.

The Government filed opposing affidavits with the clerk of the court and two of his deputies and an assistant United States attorney who had for years been in charge of the grand juries.

In an opinion filed on October 22, 1948, Judge Hulbert found as a fact that neither workers nor Negroes were excluded from the jury.

As I see it now, the defendants seek to escape this opinion and the effect of this opinion in the case by urging that they have newly discovered evidence which in the exercise of diligence could not have been previously discovered.

Their affidavit, however, on page 11 in fact shows that this alleged newly discovered evidence was, in fact, discovered on November 1, 1948, and no petition for rehearing was filed; and I urge upon the Court that the information which it is now said is newly discovered, is, in law, not newly discovered.

The Court: Would you mind, Mr. McGohey, directing my attention to that portion of the challenge and supporting papers which refers to the newly discovered evidence? You referred to page 11 of the affidavit, and perhaps I (1190) was looking at page 11 of the notice.

Mr. McGohey: The paragraph, your Honor, starts at the bottom of page 10 and continues over and finishes on page 11.

The Court: Starting with the words "It happens"?

Mr. McGohey: "Heretofore". Starting with the word "Heretofore" at the bottom of page 10.

The Court: There are several page tens. But let me go back. Perhaps it is the notice. Yes, I have this notice.

Mr. McGohey: I am in error, your Honor. That is page 10 of the notice of motion.

The Court: I have it. If you would just pause for a moment until I read that.

Is it that single paragraph that you have reference to, with its comment on the written report of the Administrative Office? That is the only newly discovered evidence, is it, or alleged newly discovered evidence?

Mr. McGohey: Well, it does not appear here what the newly discovered evidence is, your Honor. But if you will just excuse me for a moment while I find this page in the affidavit—

The Court: Well, they do say in that paragraph, starting at the bottom of page 10 of the notice and (1191) continuing about 10 or 12 lines down on page 11 that "for the first time on or about November 1, 1948, certain evidence came to the knowledge of defendants." They don't specify all, but they add "and particularly the written report of the Administrative Office" and so on.

Now what I am asking you is, whether that is the only part of their papers that refers to any so-called newly discovered evidence.

Mr. McGohey: Yes, your Honor.

The Court: Have you anything to add to what you have told me before, before I hear the other side?

Mr. McGohey: No, your Honor, except that I have here available for your Honor a photostatic copy of the opinion of Judge Hulbert in which he decided the motion in connection with the grand jury (handing to Court).

The Court: Perhaps I had better send for the file with those motion papers in it.

Mr. Koch, will you get those for me, please.

I will hear from the other side as to that.

Mr. McCabe: If your Honor please, before making a reply to the motion of the United States Attorney I should appreciate it if you would grant us a short recess so that we may confer among ourselves and perhaps do a little checking of the record ourselves while your Honor is awaiting the file for which you have sent.

(1192) The Court: Well, it seems to me that you must remember the motion that was made before Judge Hulbert. And part of his opinion that I have before me here indicates quite clearly that the same question was raised before him, that is as to the grand jury. Now if—

Mr. McCabe: We prefer not to trust to our memories, your Honor. I think we should like to consult the record ourselves, among ourselves.

The Court: Very well. I will grant a short recess for that purpose.

Mr. McGohey: Before the recess, your Honor, may I in order to help counsel suggest that the challenge to the array appears on pages 28 and following of the affidavit of the defendant Foster sworn to on the 28th of September 1948. That was an affidavit offered in support of the motion that was argued before and decided by Judge Hulbert back in October.

Mr. McCabe: And, further to assist us, I wonder if Mr. McGohey has a copy of the motion which he just made.

Mr. McGohey: No, I haven't your Honor. I have made that motion orally upon the record.

The Court: Yes.

Mr. McCabe: I have notes on it. But there again I would prefer not to trust to my notes. If we (1193) had a more accurate—

The Court: I think the motion is a very simple one, and if you desire a few moments to examine the motion papers that you served previously and to confer about it, I will allow that.

Mr. McCabe: I should appreciate it.

Mr. Sacher: Mr. McGohey, what page was that on?

Mr. Shapiro: 28.

The Court: This only has to do with the part of the challenge that was addressed to the grand jury.

Mr. McCabe: We understand that.

(Short recess.)

(1194) The Court: Mr. McGohey?

Mr. McGohey: Your Honor, it was suggested yesterday that perhaps before defense counsel made their argument they ought to have the opportunity of hearing the argument of the United States Attorney in support of its position, and I am prepared, if I may, now to argue the motion which I then made to the Court about striking that part of the motion.

The Court: I would think that would save a little time.

Mr. McGohey: I would think so, sir.

The motion I have made is to strike so much of the motion which the defendants are making as challenges the constitution of the grand jury of this district which returned the indictments now moved for trial.

I call your Honor's attention first to the provisions of Rule 12 of the Federal Rules of Criminal Procedure. Subdivision (b) relates to the motion raising defenses and objections, and section 2 of that subdivision relates to defenses and objections which must be raised.

It provides that defenses and objections based on defects in the institution of the prosecution or in the indictment or Information other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. The motion (1195) shall include all such defenses—and I stress that—all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the Court, for cause shown, may grant relief from the waiver.

Now, the point I stress is that this objection to the constitution of the jury is not only one which the defendants should make before trial, but I assert that they did make it before Judge Hulbert, and that he passed upon it.

Now, it may be claimed that they propose now to show cause why they should be granted some relief, and I suppose that that argument will be based on the allegation in their moving papers that since the decision of the motion by Judge Hulbert they have come into possession of evidence which they call newly discovered.

Now, in the motion that came on before Judge Hulbert —in fact, it was a separate motion, I think—it was—there was argued—

The Court: Well, when you say it was a separate motion, you mean there was a separate motion addressed to the grand jury proceedings as a whole—

Mr. McGohey: Yes.

The Court (Continuing): And as part of that (1196) was their charge that the grand jury had been improperly constituted?

Mr. McGohey: That is right, your Honor.
Now Judge Hulbert in his opinion says this:

> "Regarding the serious charge of the defendants that 'there appears to have been a systematic exclusion of all working people and all members of the colored race from the grand jury' the proof must be clear to sustain it. That no colored persons were called for grand jury duty is not a ground for quashing an indictment so long as the record does not show that colored people were deliberately or intentionally not called for jury service because of their race or color."

And then a case is cited in support of that proposition of law.

> Continuing: "Also the mere fact that no wage earners were on the jury would not be enough to entitle the defendants to complain unless it is shown by facts that wage earners were intentionally excluded from the grand jury"—

and cases cited again.

> "The defendants have failed to present any facts"—

and the word "facts" is underscored in the opinion—

> (1197) "to show that colored persons or wage earners were intentionally excluded from the grand jury. Indeed affidavits submitted by the Government in opposition to the motion adequately controvert the defendants' bare conclusion.
>
> "Moreover, it is a fact of the court's own knowledge that many colored people called to serve on juries in this court, and many working people, or people of the so-called laboring group, frequently seek relief from jury duty because of the disparity between the juror's fees and their regular wages, and the well known fact that jury trials in this court occupy not days but weeks and sometimes months.
>
> "For all of the foregoing reasons the motions to dismiss must be, and the same hereby are, in all respects, denied."

Now, the newly discovered evidence which is referred to in the pending motion appears to be a series of tables and charts which constitute conclusions drawn from some examination of the records in the jury clerk's office.

Now, all of those records were in the jury clerk's office back in October when this motion was (1198) made, and, indeed, for a long time prior to it, and they were availed of, and according to the affidavit in support of the pending motion, they were found, they say, on November 1st. But they were there for a long time before that. It is a—

The Court: May I interrupt you just a moment?

Mr. McGohey: Sir?

The Court: Was this Exhibit C, which is Mr. Chandler's communication to the United States Circuit and District Judges under date of February 5, 1941, and the memorandum of January 2, 1941—were they publicly available also?

(1199) Mr. McGohey: I think they must have been, your Honor.

The Court: Yes.

Mr. Gladstein: Where?

Mr. McGohey: In the office of the clerk of the jury commissioner, certainly if not in his office in the office of the Administrator of the Courts in Washington. It seems to me to be a wholly new concept, your Honor, for somebody to come into court and say that a public record which by its date is nine years old was newly discovered when the record is nine years old. I am talking about what we understand in law as newly discovered evidence, something which could not by due diligence have been discovered in advance.

The Court: That is right.

Mr. McGohey: Now I suggest that it could have been discovered by due diligence either in the office of the Administrator of the Courts or in the office of the jury commissioner here, or in the clerk of the court here. Because I think the report on its face indicates that it was addressed to the judges of all the courts of the United States.

So I suggest that the claim now of newly discovered evidence is not sufficient to move the Court to grant relief so as to permit this question to be argued de novo.

(1200) I am also informed, your Honor, that during the time when this motion before Judge Hulbert—that is, when the papers on the motion before Judge Hulbert were being prepared there were several clerks representing attorneys for the defense in this case actively working in the jury clerk's office and they were coming in there from time to time and they were either purchasing jury lists or they were examining papers in the jury clerk's office.

Now we have had this question presented once to a judge of this court and he has passed upon it and I urge that that decision is now the law of this case, and that it is too late now to raise anew the question of the constitution of this grand jury. That I believe is settled and should not be taken up now any more than any attempt now to urge that there should be a bill of particulars granted in this case.

I think, your Honor, that if we are ever going to get this case tried there has to be some finality of decision. This of course is not a court of last resort. If there were some error of law or some error of fact in the findings which Judge Hulbert made, some error of fact in his findings and some error of law in his decision, the defendants are protected in that and they will have their right in an appellate court (1201) to take it up. But they ought not, I submit, be permitted to come back month after month raising the same question, particularly when they do it on the basis that they have found out something new which they didn't know before, but which clearly they could have known and could have learned with the diligence that they were even then exercising in their preparation.

The Court: I suppose it may likewise be true that under Rule 12 this motion was required to be made at a certain time and the Court was empowered to extend the time within which to make any of the motions. The time was set and the motions were made. And, at least, it would be necessary to move for some leave of court as a preliminary to the renewal of any of those motions.

Mr. McGohey: Yes, indeed. And bear in mind, your Honor, that these motions were made at the end of the extraordinarily long period of 67 or 69 days from the time of arraignment.

The Court: Well, I will hear from the other side.

Mr. Gladstein: If your Honor please, I want first of all to express surprise in the legal sense at hearing this afternoon from Mr. McGohey a motion to strike any portion whatsoever from our challenge to (1202) this vicious, illegal and unconstitutional system of jury selection. When I say legal surprise, I say that advisedly because it seems to me beneath the dignity of an officer of the United States Government, faced with that kind of accusation, to attempt to throw up any technical barrier whatsoever to the fullest and completest examination of the charge that we made, which is a charge, your Honor, nothing short of this: that the system that is called justice in this court is corrupt.

The Court: But you made the charge before.

Mr. Gladstein: I will come to that and prove that we did not.

The Court: That I think would be more relevant to the point.

Mr. Gladstein: As well as several other things I want to say. But I want first of all to finish my opening thought which is that, while I want the record to show my claim of surprise in the legal sense, I must confess that it does not come as any surprise since the opening merely of these proceedings the day before yesterday, it doesn't come as any factual surprise to me to find that while we are about to consider one of the most important things that a court of this Government could ever be called upon to consider, an effort is being made to prevent precisely that kind of investigation.

(1203) Now Mr. McGohey says, rather slightingly, all that the charging papers say is that for the first time, about November 1st, these defendants learned of the existence of a particular report. Now to understand the import, the consequence and the significance of that discovery I think it would be necessary for us first to look at what we say in our charging papers, the sworn affidavits, and, secondly, at the contents of that report which we first learned about around November 1st and which would open the eyes of anybody, no matter how he might have suspected what was going on and would have provided that evidence from which no disinterested person could turn and say, "That is not proof, that is not something that a court should not hear."

The Court: I think it would be perhaps reasonable for you to assume that I remember the eight points in the charge, but if you desire to repeat them again I will listen. But I think I am pretty well aware now of just what they are.

Mr. Gladstein: I wasn't—your Honor, I wish—

The Court: I thought you said you felt it necessary to tell me again what was the basis of your charge.

Mr. Gladstein: No, your Honor.

(1204) The Court: Very well, then, I misunderstood you.

Mr. Gladstein: Yes. The record I think will bear out that your Honor is pursuing a directional line of thought, and the line of intention is completely at variance with what I am trying to ask you to do.

The Court: That is all right. No harm has been done.

Mr. Gladstein: I hope not, your Honor.

First I want to call your Honor's attention to the full statement in our affidavit which has nothing to do with the grounds, the legal grounds, the eight specifications, but to the statement that sets forth that portion that deals with the question of the discovery of new evidence.

At the bottom of page 10 of the moving papers we say this—

The Court: Now you're reading from the notice?

Mr. Gladstein: Yes. We say that "Heretofore the defendants did move to dismiss the indictments herein upon the ground that the jury returning the same was illegally composed"—that is the language that is found in the notice, in the motion that was passed on by Judge Hulbert.

"Said motion was denied. Thereafter, evidence, the nature of which is referred to in the attached (1205) affidavit, has been newly discovered, evidence which in the exercise of due diligence could not have been obtained prior to the filing of the said form of motion; evidence which for the first time came to the knowledge of the defendants on or about the 1st of November, 1948, and particularly the written report of the Administrative Office of the United States Courts referred to in said affidavit and thereto attached."

And I might here interpolate to say that I ask Mr. McGohey, I challenge Mr. McGohey to establish that the report we are talking about here was ever a public document in the sense that it was disseminated for public information. The fact being that it was distributed merely to the judges of the courts and to the officers and—did your Honor know about this letter?

The Court: I don't know whether I did or not, to tell you the honest truth.

Mr. Gladstein: You have been here a year and a half and you don't know about the existence of this letter?

The Court: Well I say, I don't know whether I did or not. I haven't read it yet.

Mr. Gladstein: Well, all right, suppose we do that now.

(1206) Mr. McGohey: If your Honor please, I don't know whether it is necessary for me to object at this point, but I do want to interpose an objection to counsel undertaking to cross-examine the Court as to what the Court's knowledge is.

The Court: Well, I can take care of myself.

Mr. McGohey: A public record is a record which is available in a public office, and we all understand that. I don't understand that there is any provision of law that says only those things are public which are handed out on street corners or mailed indiscriminately to everybody. The word public record is a term of art that lawyers understand.

The Court: I don't mind an occasional question from counsel addressed to the Court, and I don't think you need worry about me being unduly catechized.

Now as far as the public document business, Mr. McGohey is quite right. The test is not whether they are publicly disseminated or mailed to everybody but whether they are publicly available.

Mr. Gladstein: You mean, whether I could walk into the clerk's office, for example, and ask to see all of his records on file, is that right?

The Court: Well, whether the particular document under consideration, which is this communication (1207) from Mr. Chandler—

Mr. Gladstein: I would like to hear Mr.—your Honor, I ask Mr. McGohey now as an officer of the court—

The Court: Why don't you just leave it to me to determine that in due course? That is a matter of mine, as to whether something is a public document or not, and we don't have to do a great deal of talking about it. I can readily ascertain whether it is or is not and that will dispose of it.

Now you go on with what you started to tell me.

Mr. Gladstein: Yes. And I would first like to know—

The Court: And let me do the deciding about whether this is a public document or whether it is not.

Mr. Gladstein: Would your Honor care to turn to the document itself, which is Exhibit C, I believe? It is in that large envelope. Do you have it in front of you?

The Court: Do you think the contents of it are important in order to decide whether it was available to counsel?

Mr. Gladstein: The contents of it are basic, fundamental to the whole consideration of this question and to any appreciation of what I am going to say, and I trust I am going to be given an opportunity to say (1208) this.

The Court: Well, if you have any idea that I have been preventing you from making such arguments as you thought you desire to make, I am afraid you are making a mistake.

Mr. Gladstein: I was not referring to the past, Judge. I was referring to the future.

The Court: Well, let the future take care of itself. You know, sufficient unto the day. And I suggest that possibly it might be a good idea if I read it to myself or, as it seems rather lengthy, perhaps you can refer to such portions of it as you think are pretty well apposite.

Mr. Gladstein: I think so. I would suggest that at this point, and then I will go back to the moving papers.

The Court: All right.

Mr. Gladstein: Now, your Honor, this document which is dated January 1941 is an official document in the sense that it is a memorandum prepared by a person, an officer of the Administrative Office of the United States Courts.

(1209) As a result of an investigation conducted by him here in New York in this building, he submits this report to his chief, that is, the Director of the Administra-

tive Office of the United States Courts, and he says that the memorandum has been prepared in response to a request for information regarding the practice in administering the jury system in the Southern District of New York and particularly regarding the preliminary investigation of jurors in that court.

Now, in the second paragraph of the memorandum, Mr. Tolman, the author of the document, and he who conducted the investigation along with the clerk here and Judge Knox and others, says this: He says that "The jury system here in this district is one of the outstanding features of the court, and its results have been praised among others by such people as the United States Attorney and his staff and by the Federal Bureau of Investiga tion. The attaches of the clerk's office, he says, "are proud of it."

Now, this is the interesting statement concerning the origin of the system. He says that "This system took its present form three or four (1210) years ago"—and that would take us back to 1938 or 1939, thereabouts, roughly about ten years ago. That is, ten years ago now, three or four years prior to the date of the report.

"At that time," he says, "the quality of the jurors was regarded as inferior."

And so what happened? Judge Knox personally undertook what he calls a revamping of the structure of the system of jury selection.

Now, one of the difficulties it is said that have been found with juries was that due to generally economic conditions in the City of New York there were too many people on the jury panels who had lost their jobs due to unemployment and were on relief. In other words, citizens of the United States who in all respects were qualified legally to serve as jurors, and who had qualified as jurors, and who had served as jurors, but who had lost their jobs because of economic depression, over which they had no control, were on the juries, and Judge Knox wanted to get rid of them.

The Court: Well, you don't maintain seriously that the juries should be composed entirely of relief workers and housewives?

Mr. Gladstein: Of course not.

The Court: It is a question of how the whole (1211) matter is handled.

Mr. Gladstein: Yes. I assert, and I thought it was clear, that the jury should be that quintessence of the pursuit of a system which fairly and squarely allows every eligible person in this district, without discrimination or exclusion of any class or group whatsoever on any ground, to be called for service and to participate in this part of the body politic.

And I understood your Honor to have committed himself to that same view in the Fay case, isn't that right?

The Court: Well, you know, as a lawyer you argue certain things, and I believe that I have a bent of mind definitely in favor of juries from a cross-section of the community, and without the slightest hesitation I can say that as far as discrimination and deliberate exclusion of any class or race, it would shock me.

Mr. Gladstein: I was about to say that it is hard to believe that any member of the bar, no matter how he wants to represent the interests of his client, could ever bring himself to make representations in the strongest possible terms—as your Honor did to the Supreme Court of the United States in the Fay case—on a matter of the deepest, most fundamental importance (212) to our whole system of justice merely for the sake of the professional retainer that was involved; and I assumed that those representations and that kind of representation to the highest court in our country on that kind of a subject could not have come from any consideration other than a deep conviction, presumably, of the correctness of what was said.

The Court: Well, I don't think you need worry too much about what I did or did not do as a lawyer in defending people that I did defend. I really don't think that has very much to do with what we have to decide here.

Now, why don't you go ahead and show me how this matter was really new and that you could not have reasonably been expected to ferret it out sooner?

Mr. Gladstein: If I can pick up the thread, it seems to me your Honor invited me to summarize this, this docu-

ment, which I started to do, and then your Honor—and I don't resent this—

The Court: Perhaps I led you astray.

Mr. Gladstein: Oh, no, Judge, you did not lead me astray but you interrupted and asked me a question—I have been led astray before and in a different manner—but you asked me a question, and, of course, we got talking back and forth.

(1213) Now, if it is all right I will go right back to the document.

The Court: Don't lead me astray either and I won't lead you astray, and so we will call it quits.

Mr. Gladstein: Your Honor, I am trying to lead you in the paths of righteousness in your decision.

Now, at the outset we see that according to this report the chief judge of this court undertakes to do something which, as my colleague, Mr. McCabe, pointed out, in the book of Judge Pearson Hall is an unheard of thing, and that is to say that instead of allowing the clerk, the jury commissioner, to perform their duties as the law required, and if any question was raised, well, that would come up in litigation and the judge would pass on it, and if something was wrong the judge would so decide. No, no. That is not what happened here. Judge Knox decided that he would take a hand in the subject personally. And so, as this document says, he not only took a hand in it, but he undertook to revamp the entire structure. In other words, he was going to remake it closer to his heart's desire.

What did he do? Well, one of the first things he did was to appoint a jury commissioner. And how is that jury commissioner described in this document, (1214) your Honor? "An attorney of excellent standing at the bar who has good business and social connections." I quoted that from the document. The jury commissioner that Judge Knox appointed to take charge of the initiation of his revamping, his remaking of the jury system, was a man who had good business connections, good social connections, and who was willing as a public service to give a large amount of time to the jury problem.

And that is not all that Judge Knox did. He also arranged for the appointment—"He arranged for the appointment as deputy jury clerk an energetic young man of

pleasing manner who is a good judge of character''—these are quotes, your Honor—''who is a good judge of character''—and now here is the significant language—''and has a thorough, practical knowledge of the social, racial and economic groups of New York City and their geographic distribution.''

The Court: Well, you know, that sounds terrible to you, but it does not sound bad to me at all.

Mr. Gladstein: I can understand that, your Honor. I can understand your saying that.

The Court: What is there so bad about that? You want a man for such a position who knows what he is about, and if he has experience and knowledge, why isn't that helpful?

(1215) Mr. Gladstein: I would like to ask your Honor this question: What did you mean when you say you want a man who knows what this is about?

The Court: Well, it says a thorough practical knowledge of the social, racial and economic groups of New York City and their geographic distribution.

Mr. Gladstein: Why would he need that, Judge?

The Court: The very things you said you wanted to have.

Mr. Gladstein: Why would he need that? Why not a competent, honest officer here? Why would he need that? Why wouldn't I, who have no knowledge of New York City whatsoever except what I have gained in connection with this challenge since about November 1st, or thereafter—why wouldn't I be adequate if I were honest and decent and followed the precepts laid down by the Supreme Court, namely, that—

The Court: Well,—

Mr. Gladstein: May I finish?

The Court: Yes, you may. You may indeed.

Mr. Gladstein: Because if it is not going to impress your Honor, it does not matter, but at least let us have the record clear. Why wouldn't I, without (1216) any understanding of the geographic distribution of the social classes—that means the social groups; that means those in the social register, those in the so-called upper classes—why would I have to know about that and where they are located? Why would I have to know that they are lo-

cated, concentrated in the "silk stocking" district, where your Honor happens to reside? Why would I have to know that in order to fairly administer a system of jury selection? Why would I, for example, have to know anything about the racial groups in this city? Is it necessary for me? Is it necessary for me to know that the negro people in this city have been compelled to reside under incredibly crowded conditions in a section of Harlem, in a ghetto? Is it necessary for me to know that, Judge? Yes, it is necessary for me to know that if I am going to discriminate against them, that is right. But it is not necessary for me to have any knowledge of that if what I am really trying to do is to take the register or the voting lists, or any other documents which give the names and the addresses of the citizens of this community who are eligible to vote and eligible to serve as jurors, and simply at random send out as many notices as I need, and send them here, there, thither and yon—

(1217) The Court: Now, you remember what we are talking about. What we are talking about is whether this is a document that was available to you before you made your motion on this very identical point before Judge Hulbert.

Mr. Gladstein: Your Honor, I said we did not know this at that time, and I want to point out as a result of the contents of this document what it then led us to do that we could not have done before we knew of this document. We could not possibly have known and could not have done. And not withstanding what Mr. McGohey has said here today—I don't know whether he wants to take the witness stand on this subject or not, but I invite him to; I would like to examine him on this subject, but he does not have to.

I want to tell you this: This document was not public in the office of the jury clerk. No person, no citizen, nobody who walked in there, that is, except maybe the U. S. Attorney's office, except maybe your Honor as a judge, I am sure you had access to it, except apparently you did not even know about it, and you have been gracing the bench here for 18 months. Nobody could go in there and ever get a glance at this document because it wasn't out there on the bench or the table or the desk for anybody to see.

(1218) Do you know where it was? When Mr. McKenzie comes in and testifies he will tell you where it was. It was locked up. It was a secret. It wasn't public.

How can a document that is secretly concealed be a public document? This was not published anywhere. Oh, yes, judges got it. They did not give it to the public, and the clerks did not either.

Your Honor will pardon me. I mentioned this morning I have a cold, and I have contained my coughs not to infect you, because you mentioned that this morning.

The Court: Certainly.

Mr. Gladstein: Well, that is why Judge Knox got two men special. He arranged it. First he gets a jury commissioner with good business and social connections. And second, he gets a man who knows how the populace of this city are divided, stratified according to their social position, according to their race, and according to the economic position they occupy in the city; and not only that but he has an understanding and knowledge of how they are distributed in the city. He knows where the Italian Americans live; he knows where the negroes live; he knows where the poor Jews live. That is what this means. If it is (1219) not spelled out, Judge, then, for heaven's sake, listen to what Justice Murphy said when he talked about how this discrimination occurs. In your own case Justice Murphy said what? He talked about—

The Court: Why don't you stick to the point, Mr. Gladstein?

Mr. Gladstein: Well, your Honor, I am on the point.

The Court: Well, I have what I think is what you intend to convey to me, namely, that this was something that was not available and that you did not find, that you could not have found with due diligence, and that it was not just a document in and of itself, but it led you to numerous other things—

Mr. Gladstein: Yes, to understand why—

The Court: You see, I caught on to all that.

Mr. Gladstein: You will pardon me as I go along, Judge, if I, so as to sharpen and heighten your appreciation of what I am saying—I trust you will pardon me if I occasionally refer to something that the Supreme Court may have said. And so I call your Honor's attention to

something that Mr. Justice Murphy said in one case when he was talking about this question of discrimination, and he said this. He said: "We are (1220) dealing here with a very subtle and sophisticated form of discrimination which does not lend itself to easy or precise proof."

Well, of course. Yesterday your Honor asked me if the questionnaire, for example, that is used in the clerk's office, if that contained the question, "What is your political affiliation?" and I honestly said to your Honor that so far as I know no such question was contained in it; and your Honor said, sure, it would be rather strange if there were.

Strange? We would have to assume an abysmal ignorance on the part of the clerk or the commissioner or anybody who wanted to discriminate to put that kind of a question in the questionnaire. They don't parade these things. When the clerk comes in here, or the commissioner, as witnesses in this case, they are not going to carry placards on their backs saying, "I have discriminated." These are things that are concealed. These are things that are denied, and I take it you meant what you said when you told the Supreme Court of the United States that it is uniform to have them deny these things when they are called into court, and I know that it happens to be so too in cases I have tried.

And, by the way, you have referred to the one in Los Angeles, but there is a more recent and more (1221) important one that came out of Hawaii, that I am going to refer to, your Honor, a little later on, in which I was also involved, and I prefer to talk about that one, because that one we won.

The Court: Is there anything in there about this newly discovered evidence point we are talking about?

Mr. Gladstein: I will come to that. That is a question of discrimination. A question of discrimination.

Now let us go back to the document—

The Court: Your defendants here did make what appears to be the identical motion before Judge Hulbert—

Mr. Gladstein: It wasn't—

The Court (Continuing): And you raised the same identical question.

Mr. Gladstein: Not so, your Honor, and I will come to that.

The Court: Well, you had better come to it pretty soon because—

Mr. Gladstein: Is your Honor making up his mind before hearing me on this?

The Court: I am making it up as I listen to you, and a good deal that you have said had had its part in crystallizing my mind on it, which I suppose is one of the purposes of argument.

(1222) Mr. Gladstein: Shall I continue, your Honor?

The Court: Yes, if you wish to.

Mr. Gladstein: So that there can be no mistake in the record, I better say I do.

The Court: I think you had better stick to this point about the so-called newly discovered evidence and what the explanation is for having raised the question before.

Mr. Gladstein: Yes, your Honor, but in order to have you understand what the rest of the evidence is that we want to submit here, you have to hear me in connection with this document.

The Court: All right.

Mr. Gladstein: Now, we start for a moment at that point about ten years ago when Judge Knox decided to take this jury system and remake it, and put two men in charge.

Now, what was the next thing that Judge Knox did? And this is what the report says. Next, "The sources from which prospective jurors were chosen was given close attention. The registry lists of voters had previously been the primary source of names."

The registry lists of voters had previously been the primary source of names.

"Judge Knox decided to supplement"—notice (1223) that word "supplement," your Honor, because later on I am going to come back to this—"Judge Knox decided to supplement this by other more select materials." More select materials. "Chief among these was the subscription edition of the New York City Telephone Directory arranged by street numbers and location rather than alphabetically by names. This Directory"—and I am reading from the report, your Honor—"This directory is especially valuable since it permits the jury clerk to select names from neighborhoods where he knows persons who are most likely to be suitable material reside."

That is the clerk, you see, with the practical knowledge of where the poor and the rich live, where those in society and those not in society live; where those who have the wealth that is concentrated in and represented by Wall Street live, and where the workers live. So he uses a special type of telephone book which is arranged not alphabetically by names, Judge—oh, no—it is arranged in such a manner that he can pick out the district or area in this city from which he wants to select those that are regarded as suitable to him and to Judge Knox.

Well, now, what kind of people were they that were supposed to be s elected as suitable? The (1224) next sentence gives you the idea—and I am quoting—"Who's Who in New York, Poor's Directory of Directors, the Engineers' Directory, the Social Register, and various college and university alumni directories are also extensibly used." Extensively used.

That is the kind of source. You notice that there is no mention of any trade union list. Not at all. There is no mention here of any list of members of any negro association, although there are numbers of them in this city. There is no mention of any such thing. Those that are mentioned here belong to the associations that contain and live in the neighborhoods wherein reside precisely the members of the class that we have described in our papers as the rich, the propertied, the well to do; and by that process of selection, your Honor, it necessarily follows as an inevitable consequence that there is a concomitant exclusion of the others. Workers, negroes, women, the poor and those without property, manual workers. That is the group.

Well, the report says that "The choice of names from the various sources listed above is made by the deputy jury clerk under the direction of the clerk and the jury commissioner."

So the halo of authority is placed on the brow of the deputy who has been assigned to do this devious (1225) thing by Judge Knox; he does it under the direction of the two men whom the statute says must do what? Select jurors in such a manner as most to insure an impartial jury. "Impartial" the statute says. So the jury commissioner and the jury clerk supervise that deputy appointed by Judge Knox to do this kind of thing.

Now, your Honor, that was not known, that was not known to us. We had no way of knowing it, and it was—

The Court: That is the question, whether you had any way of knowing it. It was what you could ascertain by due diligence.

Mr. Gladstein: The question is whether it was newly discovered. That is one question.

The Court: But you know, I think—

Mr. Gladstein: I have just got through telling you, Judge, this is not a public document.

Mr. McGohey: I suggest, your Honor, that we find out, if it is not a public document, how did the defendants' counsel get it?

The Court: I was thinking of that. I think that is what Mr. Gladstein was about to address himself to.

(1226) Mr. Gladstein: That question? I have that way down in the list. I have a number of other questions I would like to address myself to first.

You know, I think more important than the question of how I happened to learn about this is the fact that this has been taking place. What difference does it make how I happened to get hold of this document? You know what is important? What ought to be important to you, your Honor, what is important to the people, and what ought to be important to Mr. McGohey, is what this document says, not when I learned about it or how I happened to learn about it. These are the facts. And the important thing is that they are true, not how I happened to learn about it.

How is it, your Honor, that you did not happen to learn about it? How is it that you have been sitting here for a year and a half, never once asking yourself—

The Court: There must have been some conspiracy?

Mr. Gladstein: To keep it from you?

The Court: Yes.

Mr. Gladstein: Well, maybe, if it was a conspiracy to keep it from you, how much more of a conspiracy to keep it from me and the rest of the people?

The Court: Well, why don't you get down to (1227) work now and show me how it was that you could not with due diligence find out about that before you made your motion before Judge Hulbert?

Mr. Gladstein: Judge, please—

The Court: The contents of the paper I should think have been sufficiently revealed to me to get the general idea—

Mr. Gladstein: Not yet, because you still don't understand what happened. You might now say, "Well, what they did was simply add some more select people; maybe that is wrong; there are cases that say that is wrong, and it was shocking," but let us see what the rest of it was.

The Court: What I really believe is that you have no right to renew a motion of this kind after the time has expired. I don't see how you get around that, but I am interested at the same time to see whether this particular item of evidence could have been discovered with reasonable diligence or whether it could not. But you may argue about that in such manner as you think is going to be most helpful.

(1228) Mr. Gladstein: Now your Honor said for example, well, it has never come to your mind that there was anything illegal about the manner in which juries are selected here. And on the surface of it that idea probably would not necessarily occur to other people here, even lawyers who were interested in the question, and lawyers might raise a legal point because they suspect that something may be true, but they do not have the evidence of that fact. Now if subsequent evidence is newly discovered which they did not know about and which demonstrates that there is something unconstitutional, illegal, rotten in the system that operates here, Judge, it is not merely that they have the right to present that. There is another point involved that I want to discuss at some length a little later, and that is this: Quite apart from the rights of any litigant, it is a question of the duty of those who administer justice not to seek to throw up barriers against the fullest possible exploration of the facts, the evidence and the truth about this. Because if public confidence is shaken or lost by the people in the system whereby justice, so-called, is administered in this court by virtue of the fact that this court, faced with the facts that we are laying (1229) before you and with our offer to present additional facts, if this court should say, well, something was said about that or some part of that some months ago and therefore—