

Counsels' Statements and Preliminary Motions

The Court: Said about it? Why, they made a motion addressed to the same identical point.

Mr. Gladstein: Not the same identical point.

The Court: Well, that is what you haven't shown me yet.

Mr. Gladstein: I can't treat them both at the same time.

The Court: All right, get at it. Don't hurry too fast about it because I want to let it sink in.

Mr. Gladstein: Now we say—do you think you understand the purport of this document, Judge?

The Court: I have got the general tenor of it—

Mr. Gladstein: You have.

The Court: (Continuing)—pretty well in mind.

Mr. Gladstein: Except one more thing I want to mention about it and then I will leave it.

There are a number of things in here that I haven't come to, and, of course, they will be a part of this proceeding in any event and I intend to come to them. I don't think it is necessary to mention them now. I will (1230) reserve the right. I understand I have the right to reserve mention of them later; is that right?

The Court: Well, I have shown no disposition to prevent you from referring to things that you want to call to my attention, but I would like to get this particular matter before me now disposed of.

Mr. Gladstein: All right.

Now, let us get back to the affidavit. You remember we stopped at that point where the affidavit refers to particularly the discovery of this letter about November 1st. And we say that that evidence supports the charge made that the system of jury selection from which both grand and petit juries derive, was and is illegal, improper, unconstitutional, contrary to public policy. All right. We say further: "The same vices which permeate the method of selecting petit juries likewise permeate the method of selecting grand juries, except in one respect, and that is the grand juries are more select than the petit juries, and the vice is the greater in respect of grand jurors."

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But mind you, your Honor, as our papers say: Both the grand jury groups and the petit jury group are products of a single system, are spawned by that system, are tainted by that system, and every single grand jury and petit jury that results from the pursuit of that (1231) system is necessarily illegal.

Now we then say this: "Inasmuch as the evidence hereby tendered to be introduced by the defendants at the hearing of the aforementioned challenge and motions will establish"—that is, the same evidence—"will establish not only the illegal and unconstitutional composition of petit juries but likewise the grand juries in this court, it is timely, proper and a matter of right that the defendants address the challenges and motions both to the petit juries and the grand juries and the entire system of selection thereof and receive a full and complete hearing."

Now we then point out this: "The process of discovering and developing evidence to demonstrate the illegal exclusion and discrimination in connection with the jury system of this court costs a lot of money and takes a lot of time."

Your Honor, you have seen, you probably glanced at some of the exhibits attached, the kind of analysis that has to be made. You can't just pick up a jury list and on its face say, "Well, I can tell right now whether that seems to have been developed illegally according to a system that is illegal." You have to subject each of those things to analysis and to study. All right. That takes time.

(1232) The Court: Let me tell you what I am looking for here. You remember reading from the bottom of page 10 and the top of page 11 of your notice.

Mr. Gladstein: Yes.

The Court: That is the part where you referred to the motion previously made before Judge Hulbert.

Mr. Gladstein: Yes.

The Court: And to this newly discovered evidence as you call it. Now you say there, "Thereafter, evidence, the nature of which is referred to in the attached affidavit." Would you call my attention to the page of the attached affidavit to which you refer in that paragraph of the notice? Perhaps you have reference to the affidavit as a whole.

Mr. Gladstein: All of it. All of the things contained in there. For example—

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The Court: I thought perhaps there was something special in there to explain this point, but I see there is not.

Mr. Gladstein: Well, there are a number, Judge, and I intend to refer to them. I can characterize them in a general way now in this way: You have references there to maps, to charts, to tables.

The Court: I say, I think I understand what you meant.

(1233) Mr. Gladstein: All right.

The Court: Your answer has clarified just the point that I wanted clarified.

Mr. Gladstein: Now after the development of this evidence, generated in the first instance by the discovery of this report as to how this system was started here in New York and how it has been functioning, what motivated it, and what the characteristics of it were, after that discovery, then these studies were made. And lo and behold what came up were the facts that revealed something entirely different from that superficial appearance of fairness and impartiality which naturally would be sought to be placed as a facade around any system which those in charge of it intended to be quite the contrary of honest, decent, moral or democratic.

And when the facts were ascertained they were so shocking that we in the first instance sought to place them before the Supreme Court of the United States in a petition, in an application for leave to present this matter to the Supreme Court. Now, when we filed our application, what was it that we filed, Judge? I do not have a copy of—yes, I do have.

It is entitled, "A motion for leave to file and petition for the exercise by this court"—that is, (1234) the Supreme Court—"of its supervisory authority over the District Court for the Southern District of New York to void indictments and to quash the venire of petit jurors, for a rule to show cause why mandamus and prohibition should not issue for rule absolute and for stay."

The Court: It did not include the grand jury?

Mr. Gladstein: It didn't? Yes, it did.

The Court: All right.

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Mr. Gladstein: In our petition there we ask the Court to rule favorably upon our contention that illegality and unconstitutionality permeated the following:

1, the entire system under which jurors, petit and grand, are selected in this district.

2, all of the petit jury panels, including those which had been selected for the day upon which the trial of these defendants was scheduled; and

3, or C, all of the grand juries which have been drawn from or which derived from the pursuit of that system, including the particular grand jury panel from which was drawn and the grand jurors who were drawn from that panel and who returned the indictments in (1235) these cases.

All that was presented by way of application to the Supreme Court of the United States.

Now, in opposition to that application the Solicitor General filed a written opposition, a written statement. And what was it that the Solicitor General said?

The Court: Well, I hope it is going to be something that has to do with this newly discovered evidence part, because that is what—

Mr. Gladstein: It has to do with the right to present evidence. Isn't that what your Honor is considering, is interested in?

The Court: Well, I am interested in disposing properly of the motion to strike the part of your challenge that has to do with the grand jury.

Mr. Gladstein: Well, this has to do with that subject.

The Court: And I am getting down pretty close to the point where I am going to decide it.

Mr. Gladstein: I certainly don't think your Honor should—

Mr. Isserman: If the Court please, the Court has said that on a number of occasions before any counsel (1236) or other counsel have had a chance to speak. I think it is absolutely unfair for your Honor to begin to decide motions before we state our grounds of objection.

The Court: May I make a suggestion to you. There are four of you talking at once—

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Mr. Crockett: I am not talking.

Mr. Sacher: I want to join Mr. Crockett; I join with him, too; I wasn't talking.

The Court: So that the reporter may get what you have to say, as I take it, each of you wishes to make a brief protest, and if you will talk seriatim and make your protest, then it will all get down.

Mr. Crockett: I would like to speak first, your Honor, because I feel this subject very, very keenly and very, very personally. I hope that before the hearing is over I will be given an opportunity to speak, not only as a member of the bar of this court but also as an American citizen who for once is ashamed to see a representative of my government trying to cover up the rotten situation that exists right here in the Southern District of New York.

I hope also that I would be given an opportunity to speak on behalf of 300,000 black people who have been segregated right here in the Southern District of New York and who because of their segregated condition have (1237) been made the victims of this despicable system that has just been described by Mr. Gladstein.

That is all I have to say at this time.

Mr. Isserman: If the Court please, I would like to note on the record that before Mr. Gladstein had finished his argument the Court had said that the Court's mind was about made up on the question before the Court. And that statement was made before I had any opportunity on behalf of my two clients to urge objections to the Government's motion on this most serious matter. I would like to say it is not at all in accord with the Court's statement made a few minutes ago that any discrimination would shock you. If it was shocking to you, you would hear the defendants.

Mr. Sacher: I want to make clear, your Honor, that I have an argument which is based on the most recent decisions of the Supreme Court of the United States which say that Mr. McGohey's motion is no good. My argument is addressed to the proposition that what is involved here is not the private rights of any individual but the integrity of the jury system.

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Let me read to your Honor what the Supreme Court of the United States said in *Ballard vs. United States*. And it bears out what Mr. Crockett has so touchingly said right here in this court. The court there said: (1238)

“The point illustrates that the exclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme as well stated in *United States vs. Roemig*: ‘such action is operative to destroy the basic democracy and classlessness of jury personnel.’ it ‘does not afford to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the law makers have not seen fit to withhold from, but have actually guaranteed to him. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our (1239) courts.’ ”

These injuries are not corrected by any effort on the part of the United States Attorney to cover up the filth, the corruption, the anti-democratic tendencies and pressures which adhere in the system. And we say that this will be a day of infamy in the history of this court if we are not permitted to adduce the evidence to demonstrate what the Supreme Court says is the injury. The injury to democracy, the injury to democratic institutions, the injury to a purported classlessness of a jury system.

We want to demonstrate that the jury system here is a class system, the organ of the rich, the propertied and the well to do. The injury is to society. And you don't determine the right to demonstrate such injury by the lowly shysterish suggestion that there isn't enough evidence to show a new state of facts sufficient to warrant a presentation of such a case.

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I say to your Honor that what is involved in this attack here is an attack upon those things which are rotting the foundations of democratic government and the administration of justice in our country.

Mr. Gladstein: Your Honor,—

The Court: Now I wish to read from the motion (1240) made to Judge Hulbert which—

Mr. Gladstein: You wish to what? I didn't hear it. Excuse me, your Honor.

The Court: I say, I am about to read from the defendants' motion papers before Judge Hulbert which seem to me to express almost in Mr. Sacher's words that he just used the same point that he is raising now.

Mr. Gladstein: Judge, you understand,—I have no objection to your Honor's reading.

The Court: Do you desire me not to read it?

Mr. Gladstein: No, your Honor, but do we have an understanding, when you have concluded, I mean, that I can complete my argument?

The Court: Well, we will see. At the moment I prefer to read—

Mr. Gladstein: I have something—

The Court: What I desire to read—

Mr. Gladstein: I have something new that I haven't read to you.

The Court: Mr. Gladstein, don't you think it might be well to defer to the Court's wish to read from this?

Mr. Gladstein: Yes, indeed.

The Court: I don't like to be unpleasant about (1241) these things, but it seems to me that it is only proper, and I shall proceed to read from this affidavit.

“Moreover, the selection and composition of this grand jury paved the way for those who were seeking these items: not a single member of the laboring group in the community were on the panel from which the grand jury herein were finally selected; not a single negro was on the grand jury which returned these indictments; there appears to have been a systematic exclusion of all working people and all

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members of the colored race from the grand jury, a matter which requires this Court's careful inquiry. The grand jury was composed almost in its entirety of executive, manufacturers,"

and so on and so forth.

And Judge Hulbert, after hearing full argument on that motion, denied it and wrote the opinion that has been referred to.

Now, it may well be that the question is important. I do not challenge that or in any way contest it. But the custom of courts from time immemorial is to have some finality. When a matter is decided the appropriate way to review an adverse decision is by appeal.

Now, therefore I would like to hear only what (1242) may be said as to the reason why, without leave of court and after the time provided for the making of motions according to the rules, this matter was renewed. If there is some legal argument to be made on that I should be glad to listen to it.

Mr. Gladstein: That is what I thought I was addressing myself to, Judge. But it seems every time I start developing a point to that stage where the clarity and convincing character of it is about to become apparent in the record, and I think and I hope to everybody, I always manage somehow to draw an interruption that prevents the full development and fruition of that argument.

Now you want to know why this is newly discovered and why we are entitled to a trial. Well, I was about to say to your Honor that when we applied to the Supreme Court of the United States, because we felt that nobody in this court should actually pass upon a matter so shocking and which permeated the entire system of administration of justice here—when we did that a written opposition was filed by the Solicitor General. And I have a copy of it here. It was addressed to the Chief Justice of the United States under date of January 8th, signed by Mr. Philip B. (1243) Pearlman, Solicitor General.

He refers in his letter to the application that we filed and this is what he says. He says: "I desire also to

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apprise the court"—oh, by the way he mentions earlier that the litigation, the litigation before the Supreme Court, as he says, is being handled by him and he refers to the fact that Mr. McGohey appeared as counsel below. All right. Now he says: "I desire"—I am quoting—"I desire also to apprise the Court of certain pertinent facts in connection with No. 317, an application for leave to file a petition for the exercising of this court of its supervisory authority over the district court in the Southern District of New York, to void the indictments and to quash the venire of petit jurors"—et cetera. "The substance of the matter urged by petitioners was the subject of a similar motion filed in the District Court for the Southern District of New York shortly before November 15, 1948, at a time when the petitioners' trial was scheduled to commence on November 15, 1948. Because of the alleged illness of petitioner Foster the trial date was extended to January 17, 1949.

"The Government urged upon the Court at that time that the attack on the jury system in the Southern (1244) District of New York be disposed of in the period intervening before the trial. Petitioners answered this request by withdrawing their motions attacking the jury system. At that time Judge Medina, who presided, informed counsel for petitioners that if they desired to renew the motion the matter would be heard on January 17th before a jury was impaneled. Petitioners have not renewed their motion in the district court"—we hadn't at that point—"Instead they applied to this court for consideration of a motion which properly should be made in the district court and which they have been assured will be considered by that court.

"In these circumstances I respectfully submit that there is no occasion for the Supreme Court to inject itself into the proceedings. In the event that petitioners feel aggrieved by any determination in the district court, their rights will be amply protected by the established remedy of appeal."

And after the Supreme Court of the United States had received the written opposition of the Solicitor General in

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which he asserted as grounds for the Supreme Court refusing to hear our attack upon the entire jury system, including the grand jury, and including our motion to void the indictments, the Solicitor General (1245) as grounds for his position said that we had been promised, we had been assured a hearing right here in New York, and that, under those circumstances, the Solicitor General urged upon the Supreme Court that we be required to present our case here rather than before the Supreme Court in the first instance.

The Court: All right. Let me hear from Mr. McGohey about that.

Mr. Gladstein: I beg your pardon?

The Court: Let me hear from Mr. McGohey about that.

What do you say about that, Mr. McGohey?

Mr. McGohey: If your Honor please, I am not familiar with what the Solicitor did except that I received a copy of it. I do not challenge what Mr. Gladstein says the Solicitor did. I was not consulted by the Solicitor, although Mr. Shapiro—

The Court: You have no way of knowing whether the Supreme Court was informed about this prior motion before Judge Hulbert?

Mr. McGohey: As I understand it, Mr. Shapiro, my associate, was in Washington at that time. As far as I have been informed by him there was no other communication to the Supreme Court than that which Mr. Gladstein has just read.

(1246) Mr. Sacher: Where did the Solicitor General get his information from? May we have an answer to that?

The Court: Just a second. I desire to have the minutes of the hearing before me on the occasion when that challenge was withdrawn. I think whatever I said at that time I should like to look at and refresh my recollection.

Mr. Sacher: I think the important thing, your Honor, is not what you or anybody else said at the time. The important thing is that the Solicitor General of the United States induced the Supreme Court of the United States not to grant a petition filed by us to accept original jurisdiction

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to inquire into the whole jury system in this district, on the ground that we had been assured, as Mr. Gladstein says—

The Court: Mr. Sacher, whether you like it or not, I am going to look and see what I said.

Mr. Sacher: Oh, by all means look at it.

The Court: That is what I desire to do.

Now I think perhaps it may not be easy to find it. Have you got it all right?

Mr. Shapiro: Right here (handing).

The Court: That is fine. Let me just glance at it.

(1247) Well, it is too bad we didn't look back to this a little sooner. This challenge that was then before the Court apparently has nothing to do with the grand jury at all. And it is just what I thought at the time when it came up a little while ago.

Would you hand this to Mr. Gladstein and let him look at it (handing to clerk).

It has to do only with the panel that was—the petit jurors to try the case, which was but natural, in view of the fact that the motion before Judge Hulbert had disposed of the grand jury phase of the case. Your challenge then was not addressed to that phase of the matter at all.

Mr. Gladstein: Your Honor, as a matter of fact, that motion, which, as you will recall, it was urged by the Government was not sufficient in detail, that motion says that it was a challenge to the entire array, the panel and the venire and the jury lists. Now, that encompasses both the grand and petit jurors.

The Court: All right, let me have it back. I do not so read it. But I will take it under advisement over night, and I will also look into this matter of whether those reports are matters of public record.

Mr. Gladstein: Your Honor, if you are going (1248) to adjourn now—

The Court: Do you want me to hear some more argument now?

Mr. Isserman: If your Honor please, I haven't begun to argue this matter yet.

The Court: As I say, you want some more argument tomorrow, and I will decide then, after I have given the

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matter a little thought over night, just what, if any, argument I will hear in the morning.

Mr. Gladstein: It may be that your Honor would decide that we have established our point and that the motion of the Government will be denied at this point, so that we can continue? I assume that is possible.

The Court: I think it is possible but not probable.

* * *

(Adjourned to January 20, 1949, at 10.30 a.m.)

(1249)

New York, January 20, 1949;
10:30 o'clock a. m.

* * *

The Court: Oh yes. Now as I understand it, Mr. Gladstein, the evidence that you are going to adduce here with reference to the petit jury is the identical evidence that you are going to adduce with reference to the grand jury?

Mr. Gladstein: In great part that is correct. In other words, the entire system involves—

The Court: I got the impression it was practically the same thing. It covered the whole picture as one whole.

Mr. Gladstein: It does.

The Court: Now what I am going to do is to reserve decision on Mr. McGohey's motion and take the proofs. That will give me an opportunity to study into (1250) that matter a little more fully. My disposition has been to grant his motion, but I think it is better if I study that a little more carefully, and I would appreciate receiving from each side a memorandum of law with such authorities as either of you may desire to call to my attention on that subject.

Mr. Gladstein: Yes. I wish we had known that yesterday, Judge, because we spent most of the evening preparing the law and have it here. But we will present a memorandum.

The Court: Well, you have not lost anything by doing that, and I have been giving it a good deal of thought

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overnight, and it seems to me that this is the best thing for me to do.

So we will now go ahead with the rest of the proceeding.

* * *

(1251) Mr. McGohey: Now, if the Court please, preliminarily this morning may I call the Court's attention to the fact that at the opening of yesterday's session the question was raised about the seating (1252) arrangements of the defense and their counsel, and the Court suggested a conference at the recess; and, as your Honor knows, that conference was held.

I should like the record now to show that subsequent to that conference there has been a rearrangement of the seating whereby defendants are now seated immediately to the rear of their counsel in such a way that counsel by slightly turning around in their chairs can consult with their clients.

The Court: It seems to me it is a very excellent arrangement. Excellent and satisfactory.

Mr. McGohey: Well, I don't ask for an expression from the counsel for the defendants, except to have the record show that the seating was rearranged.

The Court: Yes. And I may in connection with such records and files as counsel for the defendants may later desire to have here, there will be provided some place in the court house where they may be kept so that they need not be brought to the court house and back every day, and I think over in that corner there will be ample space to keep filing cabinets and things of that kind. As I have indicated from the beginning it is my disposition to give every physical facility to assist the defense in presenting their case in a comfortable and adequate way.

(1253) Now, Mr. Gladstein, I think it is up to you to proceed with your proof.

* * *

Mr. Gladstein: I was presenting to your Honor a statement as to the character of our case. May I continue with that?

The Court: You may do that, Mr. Gladstein, but I have read through the papers, not all the exhibits because

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I assume that those exhibits would be offered from time to time; I do not object to your going ahead and making a statement, but I have a pretty good idea now of what your points are, and I would suggest that you make your preliminary statement reasonably brief if you can.

Mr. Gladstein: I will do the best I can. What I have in mind is presenting the picture as it develops so that the continuity of it will be clear in the Court's mind, and so that the Court can appreciate in advance the character of the cases we are going to present and the evidence we are going to offer in the record.

The Court: Now of course you realize that what concerns us is not some system that was in force years ago but the system now, with the possible exception that (1254) as to the grand jury you go back a few months prior to the present time; namely, the grand jury at the time of the indictment and not the grand jury in 1800 is the time we are interested in.

Mr. Gladstein: Oh, well, I was not planning to go back to 1800, your Honor. I was merely planning to go back to the origin of this particular system so as to show, as the cases require that we show, and as they say we have a right to show, that from the time of the genesis of that system there has been maintained a continuous pattern of illegal discrimination and exclusion.

The Court: Well, if you desire to make a meticulous examination as to each year I will not rule now how far back you may go but will rule upon it as the question is presented.

Mr. Gladstein: Very well.

The Court: What is the year that you say the system was initiated?

Mr. Gladstein: About ten years ago. And when I say "about" I gather that from the document which is dated 1941—

The Court: Yes.

Mr. Gladstein (Continuing): —and which says "some three or four years ago." And my best judgment at the moment is that it was about 1938, and that would (1255) be, since this is only the 20th here, 19th or 20th of January 1949—

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The Court: I think a reasonable amount of proof showing the continuity is perfectly proper.

Mr. Gladstein: Yes, I do too.

Now in my statement as to the nature of the system that was being set up about ten years ago I had, you remember, your Honor, pointed out that under the initiative of Chief Judge Knox the first step that was taken was the appointment of two persons to take charge of and supervise the initiation and development of this new system.

The Court: Now I think you may assume that I have a pretty good memory.

Mr. Gladstein: Yes. I mention—

The Court: I do not say I know everything, but I think I remember pretty well, and I distinctly remember your saying that.

Mr. Gladstein: All right.

The Court: I remember reading about that in that exhibit which was Exhibit C as you have designated it in your papers.

Mr. Gladstein: I wanted to mention that merely by way of a brief resume so that your Honor will have in mind simply the highlights of what I have said before I (1256) go on.

The Court: All right.

Mr. Gladstein: Now the second step which was taken under the supervision of Judge Knox was the switch, the switch, from one source from which prospective jurors were drawn to an entirely different type of source. As our exhibit shows, the primary, the chief source from which jurors had previously been obtained up to the period of about 10 years ago was the registry list of voters. That was changed.

Now what I want particularly to call your Honor's attention to is that in the report in the exhibit it is said that the change consisted in resorting to so-called supplemental, and that word is used there, supplementary sources. I ask your Honor to give thought to that expression because I am going to show that the so-called supplements became the things that were primary. In other words, the so-called effort to modify by amending the system did in very short order become a substitute for the original. So

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that, if I can borrow some parlance from parliamentary technique, in effect what was done, your Honor, was that an amendment was made to a motion, and then by virtue of another action the amendment was substituted for the whole. And the supplement became virtually the exclusive source from which jurors (1257) were obtained.

And those supplementary sources, as the exhibit enumerates, consists of such select sources as the Engineers' Directory and the Directory of Directors, and Who's Who in New York, and the social register, and various other select sources in which are to be found not the names of manual workers, not the names of negroes, in such things as the social register, but the names of the so-called elite who live in districts like that which your Honor occupies, and who do business in places like Wall Street, which represents the greatest concentration of wealth in the world. Those are the sources which are here called supplementary.

But this is what happened after resort to the supplementary sources was had. By the way, that resort took a period of some three or four years, as we will show in evidence. So that during the period of about three or four years extensive—that is the word that is used in the exhibit, extensive—use was made of these so-called select sources.

What happens then to the names that were in the jury lists? May I borrow a homely analogy by calling the jury list, the active jury list, a group of names that are put in a barrel. In other words, what the active list amounts to is a barrel containing the names of (1258) prospective jurors, of persons who have qualified and who are called on panels to serve here.

Now so far we have reached the point where under Judge Knox's personal supervision and intervention they have gone for a period of some three or four years to the select sources to get the names of people to put into that barrel. But, of course, they had started with a large number of names in that barrel which had been derived in the first instance from selection, by means of selection from the registry lists of voters, which is the fairest available list of all eligible persons, citizens who would be entitled to perform jury service and to be called on.

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The Court: I would just like to interject a thought here, and I do it when things come into my mind as a lawyer is arguing because I always used to appreciate a judge doing that when I was on the other side of the bench.

As I see the central issue here it is not so much who was put in as who was excluded. The claim you make is that there was a deliberate, intentional and systematic exclusion. So I hope you will bear that in mind, as doubtless you do.

Mr. Gladstein: Oh, I really do. And I want to say at this point, your Honor, that the very process of inclusion itself constitutes an exclusion. In other (1259) words, if one resorts to the so-called select lists for the names that are to be included in the jury lists he thereby, necessarily, as a concomitant of the action that he takes, excludes large sections of the people, many classes, groups and races of the people. And I am going to have some law to cite to your Honor on that in a little while.

But I am glad that your Honor makes the point at least that what is important here is the question of what goes into the active lists rather than what comes out, because you see that little wheel box which is on the table and which is the one that is used for the purpose of pulling out names of prospective jurors. What happens when you try a jury case is that the clerk puts 300 or 400 or 500 names in that box. Isn't that right, your Honor?

The Court: You know, you keep asking me questions.

Mr. Gladstein: Well, I will withdraw the question.

The Court: I don't like to be unpleasant about it, and I don't mind answering questions, but I take it a lot of them are rhetorical. And that must have been a rhetorical question because you know perfectly well that I have seen these jury wheels and I don't know exactly how many names they put in. So when you ask me those questions I am going to treat them largely as rhetorical, as I really (1260) think a good many of them are.

Mr. Gladstein: Very well. But the point I want to make is this, that however many are placed in there before the commencement of a trial, what happens when litigants come into court, when men come into court such as the defendants who are here in this case, they are confronted

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with a box like that in front of them into which there have been put little slips of paper or cards bearing the names of the persons who are on the jury panel and those persons are in a room somewhere across the corridor here in this courthouse. Now, of course, what happens in a jury trial is that the clerk twirls that wheel box around and then, in effect, with a blindfold over his eyes, although he doesn't actually put one on, reaches in there and pulls out a card bearing the name of a prospective juror. And to all intents and purposes and for all appearances that is a very fair and impartial and random selection, because what could be fairer than applying the rules of chance to get the name of a person out of that box?

But this is the important thing. We are not concerned, we are not concerned here with the appearance of fairness in pulling the names out of that wheel box. We are concerned with the question of how those particular names happened to get into that wheel box. Because, if I can use another analogy, also homely—it seems to be (1261) the direction in which I lean—our point, your Honor, is this: if in the first instance, unknown to a litigant, the clerk were to fill that wheel box with daisies and dandelions then he could wheel that box around and pick from it all day long in my presence and never pull out a rose.

So what we are concerned about is how in the very first instance they came to decide that such and such names were to go into the active lists or into the barrel out of which names are taken and put into this little wheel box.

As we have already indicated, we are going to prove that, among other things, a private, unauthorized outside organization, the Federal Grand Jury Association of the Southern District of New York, not only made recommendations but actually supplied whole lists of names which were taken wholesale by the clerk and which provided literally hundreds of the names that went into that box.

And I may pause for a moment, if your Honor will, to indicate that on that very subject the Supreme Court of the United States has spoken in no uncertain terms. And your Honor I am sure is familiar—

The Court: Civic minded women.

Mr. Gladstein: Yes. The Glasser case.

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The Court: I know. I am fairly familiar with (1262) those authorities. You may call my attention to them, but I think you will do right if you assume a certain familiarity on my part with those cases. Now, go ahead. I don't want—

Mr. Gladstein: I won't bother to summarize the case, but I think at this point it might be well for your Honor perhaps, despite his familiarity with the case—you may not have had occasion to look at it in a year and a half or so, and I think this one paragraph, it might be well to read it at this point. The Supreme Court said this, and I am quoting:

“The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class but in addition it is also openly partisan.”

Can I pause for a moment to break into the words of Mr. Justice Murphy to say that what he is saying here amounts to this: he says that when the clerks, when the (1263) courts obtain jurors in that manner they are creating a jury system that actually is the representative or organ of a special class. But he says not only that, not only have they committed a crime but they get caught at it because it is so open and frank. Because in the last sentence he says, you see, “It is also openly partisan.”

(1264) In other words, it is bad enough when the law is violated, but it is even worse when the violation of the law becomes clear.

Now, to go on with the last portion of what Mr. Justice Murphy says. He says this:

“If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of

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doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions.”

Now, they not only did that, your Honor, they not only went to select sources and private organizations from the membership lists of which they drew their jurors by the hundreds, as we will show, to put into that barrel, but then they went about this very interesting thing. You see, that barrel already contained the names of a lot of people, a lot of citizens in New York City who had previously qualified as jurors and had been acting as jurors. Those were the people who had been drawn from the registry lists, and they were the voters, they were the citizens, and, of course, they were qualified, because they had acted as jurors.

But now an amazing thing happens. Judge Knox, under his supervision, under his initiative, starts something new. Not only do they put in the select (1265) names, but then they start a process of extracting from the barrel any possible cross-section of the people that they had obtained in the prior years when they were using the registry lists.

Now, that part of the exhibit you will find starting out with this, that the court started to engage itself in what was called a program of requalifying all jurors whose names were obtained prior to the inauguration of the new questionnaire some four or five years ago, and no old name is placed in the wheel unless the juror has been requalified since that time.

Now, what is the necessity of requalifying all these people in a group? What is the reason for that? Why not just leave the names in and as they are called, if a man has lost his qualifications, for example if he has developed some physical inability, some infirmity, so that he can't hear, can't sit as a juror, or maybe he is over 70 years of age by this time so he ought not to serve—all those things will come out as each man is called.

But, no, that wasn't good enough—

The Court: May I ask you a question?

Mr. Gladstein: Yes, certainly.

The Court: I have before me these sections that you refer to of Title 28 of the United States Code.

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(1266) Mr. Gladstein: Oh yes.

The Court: And I am wondering as between the judges on the one hand and the jury commissioner and the clerk or his deputy on the other hand, what are the respective duties imposed by statute in the selection of those to be put into barrel, as you called it? Would you mind dwelling on that for a moment so that I might see what your contention is as to the division of those functions; because as I read the section it seems to me very clear that there are certain things to be done by the jury commissioner and the clerk or his deputy, and certain rather limited things that are done by a judge; and if the things are done erroneously by the clerk, that is going to be an issue. If they are done erroneously by a judge, that is another question. But the separation of the two and your comments on that will be helpful to me.

Mr. Gladstein: Well, without advising your Honor at this moment—

The Court: All right, if you are not going to—

Mr. Gladstein: But I am going to answer your question, Judge, although whenever I ask you a question you either don't answer or Mr. McGohey gets up and objects.

The Court: There is a slight difference in our (1267) positions, Mr. Gladstein.

Mr. Gladstein: Oh, I certainly agree that there is a difference between us, your Honor. I am perfectly happy to answer your question, but the minute I start to answer it your Honor assumes I am going not to, but I was going to.

My answer is this, that without at the present moment indicating my personal preference—and on this I may differ with attorneys who represent other defendants in this case—and I have one of several possible theories of law on this, and I will be glad to enumerate at least two of them.

The Court: Well, if you are all going to take different positions, don't tell me any. I will wait until you take them later on. I thought there would be unanimity of view, and that you really acted as the spokesman for all; but if that is not so, just drop it there, and then I will hear all the respective views seriatim later on.

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Mr. Gladstein: I think that would be better, because let us have it plain now, your Honor, that no one of us speaks for all the defendants, either now or at any time in this case. I represent two people, and, as your Honor knows, there is nothing easier than to find some disagreement developing among five (1268) lawyers; and so it is entirely—I just want you to know that there are going to be questions of law upon which certainly we are not necessarily going to be in agreement.

But here I would like to say in response to your Honor's question that there are at least two theories on either of which, however, this jury system in the Southern District of New York is bad. One of them is that to which Judge Pierson Hall referred in his opinion in the Fishermen's Union case, and that is that it is not the right function or duty of the judges of the court to interfere in any manner whatsoever with those duties imposed by statute upon the clerk and the jury commissioner in respect of the selection of jurors; and hence if that doctrine be correct, the intervention by Judge Knox about ten years ago and his insistence upon and achievement of the revamping, as it is here called, of the jury system, was a violation of law both on his part and upon the part of the jury commissioner and clerk who suffered it to be done, though I appreciate the deference which they would naturally want to pay to the Chief Judge. But far more important and far more obligatory upon them than the deference to a judge is the command of the statute and the respect (1269) of the statute and their compliance with it.

The Court: So on that horn of the dilemma there is a double error?

Mr. Gladstein: Exactly, because if you took the other position and you said, well, notwithstanding the command of the statute, to some extent there must be leeway, and perhaps there is some implication in the statute to the effect that a judge of the court ought to take some interest in how the jury system operates in his court; he ought, for example, after appointed to the bench and before the expiration of a year and a half know something about how jurors are chosen—if you take that attitude, then the command is upon the judge to see to it that the clerk and the

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commissioner follow, live up to and honor the precepts laid down by the highest court in our country that the method used be such as to insure a democratically chosen, an impartial, a neutral jury system that does not discriminate against any class or group upon the basis of race or color or sex or geographical location or economic status or social status or political preference.

The Court: So on the first one there is more than a double error. There is an error on the part of the judge who advises and consults with the (1270) clerk; there is an error on the part of the clerk, and there is an error on the part of all the judges who do nothing?

Mr. Gladstein: I agree. That is exactly correct.

The Court: Well, that is a pretty comprehensive group of errors.

Mr. Gladstein: That is right, any one of which in my judgment—and I urge it upon the Court—is sufficient in and of itself to place the stamp of illegality and unconstitutionality upon the system of jury selection in this court, and thereby serve as the basis for voiding the indictments against these 11 defendants.

And as I said yesterday, if one is not enough, there are so many that finally one is forced to ask how many violations of law must be established before a thing as illegal as this will be suffered no longer to continue.

The Court: You remember what I asked you. Do you really think you have given me an answer?

Mr. Gladstein: To the question as—

The Court: What are the duties of the jury commissioner or the clerk or his deputy on the one (1271) hand, and what are the duties of the judge under the statute on the other? Now, you may think that you may have given me a very clear exposition of your notion of those duties, but, frankly, I have not heard you say a word about it.

What is it that the jury commissioner, the clerk or his deputy, are to do under the statute on the one hand? And what is it that a judge or judges are to do on the other? And I am referring to the statute to get your interpretation of that.

Mr. Gladstein: Wouldn't it be better to give the Supreme Court's interpretation of that?

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The Court: I suppose so.

Mr. Gladstein: Wouldn't that be more authoritative than mine?

The Court: Well, I don't know how the Supreme Court could know your theory of the matter, but perhaps they do.

Mr. Gladstein: Well, the Supreme Court in the Glasser case laid it down this way: They said regarding the selection of jurors, they said:

“Jurors in a Federal court are to have the qualifications of those in the highest court of the state and they are to be selected by the clerk of the court and a jury commissioner,”

(1272) and they cite the relevant statutes.

“This duty of selection may not be delegated, and its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself requires that the jury be a body truly representative of the community and not the organ of any special group or class.”

The Court: From page of what volume are you reading?

Mr. Gladstein: This is 315 United States Reports. I started to read from the bottom of page 85, beginning with the last paragraph. Does your Honor have the page?

The Court: Oh yes.

Mr. Gladstein: You are familiar with it?

The Court: I think perhaps we had better just drop that. I wanted to get your theory of the difference, but it is quite evident to me that that theory will evolve itself if I listen to what you are about to develop in your opening statement.

Mr. Gladstein: All right.

Now, I had reached the point in the description of the setting up of this jury system where I had pointed out to your Honor—and we will prove this happened— (1273) that then they began a system of so-called requalifying of jurors who in prior years had been obtained from the registry lists.

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Now, there were hundreds upon hundreds of names of qualified jurors, citizens of the United States, residents of Manhattan, Bronx and whatever other areas are embraced within the Southern District of New York who had actually qualified and served as jurors. Their names were in the barrel.

Now, here is what happened: something new was devised by Judge Knox, the clerk and the commissioner. They started a system of requalifying under which they sent to all of those jurors who had been selected from the registry list of voters notices to come in and requalify. Why? For this reason: they wanted, as they say, to weed out what they called the unfit jurors.

Well now, they had no more right to do that than I have as a private citizen. A juror, a person who has qualified by law to be and who has served as a juror in this court, cannot be asked to come in and, so-called, requalify as to whether he is fit or unfit. By what standards is it to be determined? The clerk's standards? The jury commissioner's standards? Who determines whether a man is unfit? Where does it (1274) say in the law how you determine if a person is unfit?

For example, suppose I had been chosen from the registry lists of voters? Supposing I had been a resident of Manhattan in 1935? I had come down and I qualified. I had all the legal qualifications, and I had been accepted, and I had served as a juror. I—

The Court: Have you ever tried a case before one of these jurors that was this way all the time (indicating), indicating that he did not hear?

Mr. Gladstein: Yes?

The Court: I don't suppose it would be fitting if he had served once to inquire as to whether he was a suitable juror to serve again?

Mr. Gladstein: Is your Honor suggesting that what they had in mind in this program was to determine who had suddenly acquired a state of deafness?

The Court: I am suggesting that it is perfectly proper, obviously proper to inquire as to whether jurors who have already qualified are fit to serve. I do not think the matter is even arguable.

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Mr. Gladstein: Now, your Honor, this is what was intended, and this is what was done. Having resorted to the select sources, they now wanted to get rid of perfectly fit, entirely qualified jurors who had been (1275) selected from the community at large.

The Court: That is what you are going to prove?

Mr. Gladstein: Yes, and we are going to prove—

The Court: I wish you would get down to it. I really do.

Mr. Gladstein: But your Honor has accorded me the opportunity of going into the opening statement, and things must go in an orderly process.

The Court: In extenso? All right.

Mr. Gladstein: And then what they did—and I assure your Honor that the proof is not going to show that thousands of people were suddenly discovered to have been stricken with a case of deafness. I assure your Honor that the evidence when it gets into the record will show that when a man lost his qualifications because he was over 70, the record will attest to that fact. But there were other things that were used as standards. Those things were not things that anybody had to use as standards.

Those things were what? Those things were related to the very notion of resorting in the first instance to the select sources, the Social Register, and the Directory of Directors, to the executives of the city. Concomitant with that was the notion of excluding, of throwing out of the barrel the names of (1276) those who did not belong in the kind of class that Judge Knox and his two minions decided to mainly rely upon.

And the evidence is this, your Honor; if it was just a question of a man getting a case of deafness, I suppose that, No. 1, whenever his name might be put on a panel, and he be called and summoned; whenever he came into court, if it became clear that the man was deaf, by mutual agreement both sides would agree that the man should be excused; or the court might even say at that point, "It appears that you probably ought not to serve as a juror any more because you don't have the physical capacity."

It wasn't necessary to have a whole process of re-qualification of hundreds upon hundreds of names to find out who had bad hearing, your Honor. The fact is this—

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The Court: It is like with automobile accidents. There is no use having them requalify for a driver's license? That is, wait until they have an accident?

Mr. Gladstein: You think it is an accident? It is not a question of an accident. What great harm is occasioned by the fact that when you summon 400 persons to serve on a jury you might find one or two who have become infirm? But that is not the question.

The Court: I say, I rule now that the process (1277) of re-examining for their fitness is perfectly proper, and I will not consider that mere fact of re-examination as indicating anything wrong whatever.

Mr. Gladstein: Not that mere fact. But there is more related to it. We will show you—

The Court: I think too, Mr. Gladstein, that it would be far better, rather than to extend this opening statement unduly, when I think I understand perfectly what you want to prove, to go ahead and call your witnesses and start proving it. Now, I am not going to stop you, because if I do you will think it is probably curtailing something very interesting and important; but I do think it is fairly obvious that opening statements serve only the preliminary purpose of informing the Court as to the points to be made, and I have heard that so many times that I really think I have got the points.

Mr. Gladstein: Let me conclude as to the question of requalification by saying this: we are going to prove, your Honor, we are going to offer evidence to show that the purpose of that process of requalification was to toss out of the barrel the names of people who had been democratically selected, even though those persons were fully qualified and fully able to continue to serve as jurors, and they were weeded out by the hundreds. And the exhibit itself (1278) shows that that was the intention and the purpose, and the records in the clerk's office will substantiate that statement. And then what you had, therefore, as a result of these two aspects of this system was that you created a main group, a main body of names, some 9000 or thereabouts, or some 10,000 or thereabouts—the figures may vary between nine and eleven thousand—which includes active cards or names in a barrel of both grand jurors and petit jurors.

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And from then on what happened was that all jurors were obtained from that select group or main body of names.

After that was completed, about 1942 or 1943—your Honor will recall we were in the war then—there was no effort to increase, to make representative or democratic this system of jury selection. It was impossible to do so at that point in any case.

And so we will show that for a number of years that group of names remained static, changed only to this extent, that whenever it was found that somebody removed from the jurisdiction or had died, a replenishment occurred. Only to that extent was there any change. We will prove that that is so.

Now, during that period whole classes and groups (1279) of people in this city were excluded. We will show that certain districts, certain areas in this Southern District were almost never found to be selected as a place from where a juror could come.

The Court: I could almost tell you the districts that you have in mind. You have been over it and over it; I have read the papers; I know just what it is you are talking about. Why don't you get busy and give me the proof? You go on as though I had never heard of it before.

Mr. Gladstein: Now, let me talk for a moment then of—I think perhaps it would be better if your Honor would permit—I have to pass to something else—

The Court: If your colleagues have something to say, you must be considerate of them.

Mr. Gladstein: I was going to say that I have another point I want to discuss that is not in context with the one that I have been discussing, and I would suggest that perhaps your Honor hear from one of the other attorneys, and I will conclude on this other point which is not related to what I have been saying.

The Court: And that will give you a little chance to rest up.

Go ahead, let us hear from the next man.

Mr. Crockett: If the Court please, perhaps it (1280) would be appropriate for me to begin my statement in connection with this challenge by expressing, shall I say, my

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regret over my emotional outburst yesterday. I offer no apologies, of course—

The Court: What was that motion? I don't remember your making any motion.

Mr. Crockett: I did not refer to a motion, your Honor. I said, to express my regrets because of my emotional outburst yesterday. I was about to state that I offer no apologies for it, and I am satisfied your Honor does not expect any apologies. However, I do regret—

The Court: Well, I think if counsel can avoid weeping in the courtroom it is generally better.

Mr. Crockett: I agree, your Honor. But, on the other hand, when you are confronted with a situation where the Court states that if there is any indication of racial discrimination he certainly will be glad to go into the matter, and then the United States Attorney gets up and in a rather technical manner tries to give the Court some basis for not inquiring into the matter, it seems to me that that is something which is superimposed upon year after year of subtle discrimination, and it is bound to call forth some emotional expression.

The Court: You certainly wept, and wept profusely (1281) and plainly in the sight of all, and, as you say, you think you probably will not do it again.

Mr. Crockett: No, I make no such statement, your Honor.

The Court: What is that?

Mr. Crockett: I do not say that I probably will not do it again.

The Court: Well, then, if you feel like doing it again, or your emotions overcome you, you will do it again. I don't make any objection to it. I just suggest that generally speaking it is better for counsel to refrain from weeping in the courtroom. But that is a matter which sometimes is beyond one's control.

Mr. Crockett: Thank you, your Honor. I appreciate your permission for me to give vent to my emotions whenever I feel inclined to do so.

The Court: In moderation.

Mr. Crockett: In moderation, of course.

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I would like very much to address myself to that portion of this challenge which goes to the matter of the exclusion of Negroes from jury service here in the Southern District of New York. I want to deal primarily with the nature of the proof that we shall present, what that proof will indicate, and just how important the whole subject will appear is (1282) bound to appear to this Court in view of the nature of the proof that we shall present. Because it occurs to me that whoever concocted this jury system, and whoever operates this jury system has forgotten what to me is a very important fact, and that is that they have completely ignored the feelings as well as the legal rights of the 15,000,000 Negroes in this entire country.

I wonder if your Honor realizes that that 15 million Negroes represents twice the whole population of Greece, half as many as the population of Spain, and at least as many as the population of Argentina or the whole of Scandinavia, Norway—

The Court: Where are these 15 million Negroes?

Mr. Crockett: They are scattered all over this country.

The Court: That is, the United States?

Mr. Crockett: Yes, but they have a direct interest in what happens to other Negroes here in the Southern District of New York.

Now, any person of any mind that is capable of devising and implementing a system which operation will abridge the constitutional rights of so large a portion of our population can hardly be trusted with the task of insuring in the first place a fair trial for anyone. And yet the initial step in the guaranteeing (1283) of a fair trial occurs at the time the 12 men are selected who will occupy those chairs.

We shall present evidence along with other testimony that will show that right here in the Southern District of New York you have residing approximately 300,000 Negroes who comprise better than 15 per cent of the total population of this district.

Our evidence will also show that included in those 300,000 Negroes are thousands and thousands of qualified jurors who have been excluded from any consideration by the jury commissioner solely because of their race.

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As a matter of fact, we have made an analysis of 28 sample panels, extending back over a period of 10 years, and covering more than 7000 jurors, and we have found and will show that less than 3 per cent of those 7000 were selected from the area, the geographical area which includes Harlem.

As a matter of fact, we will show that it is customary in deference to the statutory requirement that there be no geographical distribution to occasionally dip into that particular congressional district, and pick out one or two names. But while the pins on the map might indicate they come from Harlem, as a matter of fact, they come from that eastern section of (1284) Harlem which is inhabited to a large extent by members of the white race and not by the Negro race.

We shall not, of course, attempt to dispute the fact that now and then you do come up with a Negro on the jury. But we shall show that so far as the proportional representation of Negroes are concerned, it certainly has not measured up to the constitutional requirements.

Now, this exclusion of Negroes in Harlem assumes a particular significance, and it is one that I would like to call your Honor's attention to because your Honor will recall that the other day I suggested that in passing upon this system it might be most embarrassing for your Honor.

Your Honor, of course, I am aware has no prejudices whatever; I am fairly certain of that; and yet I may—

The Court: Well, I don't feel any embarrassment about it either.

Mr. Crockett: I don't, your Honor. And yet I may, before I finish proving the case of racial exclusion, be compelled to call to the witness stand each of the judges of the Southern District of New York, including your Honor, because this question of racial (1285) discrimination—

The Court: Well, that has been done before.

Mr. Crockett: —because this question of racial discrimination, unlike the other types of discrimination is one upon which you can get visible evidence. People see Negroes when they don't see others. And the mere fact that there have been such a precious few of them makes them stand out with particular significance. So I have no

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doubt that some of the judges of the Southern District of New York might very well constitute very good witnesses on that particular point.

The Court: Now, incidentally, I think I would like to have a little memorandum from either side giving me the authorities on the question of the competency of a judge to testify in the proceeding over which he is presiding. Now that you have told me that you are going to call me as a witness—and I do not have as much time as I might to look up all these propositions of law; I have been working pretty busily at it; but I think I would appreciate a little memorandum on that, because the authorities exist, and I would like to have them before me before the time comes so that I can make a prompt ruling on the subject when you seek to put me on the stand to (1286) testify in this proceeding despite my statement that I knew nothing about it.

Mr. Crockett: I shall be glad to supply the Court with that memorandum.

Now, further developing this argument concerning the importance of this particular type of exclusion, I would like to suggest that your Honor make a comparison between what it means to exclude this large body of American citizens, because the 300,000 Negroes who have been excluded represent a total population that is larger than the Negro population in all of our 48 States with the exception of 15 of them. So the legal question at least that is suggested is whether or not it would be proper for any one of these 33 States to in effect pass a law excluding from jury service all of the Negroes within the jurisdiction of that particular State.

(1287) The Court: Now Mr. Crockett,—

Mr. Crockett: Because the effect—

The Court: Isn't it a fact that there is a statute of the United States that specifically forbids exclusion from jury service because of race or color?

Mr. Crockett: Your Honor is eminently correct.

The Court: Well, that being so—

Mr. Crockett: And it is because of the very violation of that statute—

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The Court: That is it. Why do you have to go into the 48 States and all the other statutes? We have got the statute that forbids this very thing. So that the foundation is there for proof when you come to show that it was done.

Mr. Crockett: Your Honor, I am perfectly aware of the fact that—

The Court: Perhaps it is better for you to go on in your own way and elaborate. I will permit you to do it.

Mr. Crockett: Well, no. I certainly do want your Honor to understand that I am aware of the existence of the statute. As a matter of fact, I think it far more important, though—

The Court: Tell me about the other statutes.

(1288) Mr. Crockett: I think it far more important, though, that we not only have a statute, but that there is implied in the Federal Constitution, which supersedes the statute, the fact that there shall be no such discrimination because of race, creed or color. And what is so damnable about this whole thing is that in direct disregard of both the Constitution and the statute the clerk and the jury commissioner here in the Southern District of New York both have violated the Constitution and the statute, and superimposed upon that is the fact that all of the judges here in the Southern District of New York, who we must understand have supervisory jurisdiction over every one of the officers in this court, have done absolutely nothing about this continuous violation.

I mentioned about the importance of these 300,000 people who have been excluded. I want to give another variation of that kind of importance. Today we are all conscious of the position of our country as one of the chief exponents of democracy. And yet we must understand that even though we are a chief exponent of democracy we do have a lot of colonial peoples. I found it quite interesting and I think your Honor will find it quite interesting when I tell your Honor that on these figures these 300,000 black people up here in Harlem represent (1289) more than the combined population, for example, of Alaska, of Samoa, of Guam, and you can also throw in all of the Negroes in the District of Columbia. Now, do you see how significant it is that we have here—

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The Court: Even if it were less so, the illegality which you claim would still be interposed. Now, Mr. Crockett, I think that there is no use in counsel reiterating. You know that you do not prove facts by mere assertion of counsel. It all depends on what the proof is. But I think I understand your claim that Negroes have been deliberately excluded. And I say, let us see whether they were or whether they were not. But if you prefer to pursue the subject you will do so after a short recess.

* * *

(Short recess.)

* * *

Mr. McGohey: If your Honor please, in view of the suggestion which has been made in argument that your Honor as well as other judges of the court might be called as witnesses here, it seems to me, while I don't want to commit myself now as to what the law is on that question of calling the judge who is presiding at the hearing, it may be that the law is that the judge presiding if (1290) called as a witness would thereafter be disqualified at least in that proceeding, which would mean that if that be the law and your Honor were called here, that then your Honor would be disqualified from continuing this inquiry into the constitution of the jury.

In order that time be not wasted I suggest that we ought to be informed now as to whether or not your Honor is going to be called. And if that be so I think we ought to as speedily as possible determine whether or not that would disqualify you from continuing with it so that then your Honor might stop at this point. Otherwise, what may happen is that if your Honor continues in the proceeding up to the point where you would be called maybe as the last witness and would thereafter be disqualified, it would mean that a new judge would have to come in and we would have to go over the whole proceeding all over again.

The Court: Well, it would be an extraordinary thing if a maneuver of that kind would automatically procure a delay and disqualify the judge. I can't persuade myself that that is going to be the law. At the moment I can't conceive of anything in reference to this matter con-

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cerning which I could give competent and relevant testimony, and I am inclined to think you will find the cases hold that where such is the case, and it is for the (1291) judge to say that, not for counsel, that despite the desire to call the judge and have him testify, it will not be done. But I would rather refresh my recollection as to what the authorities hold, and I shall try to do that promptly and take appropriate action. If it should be the law, as I don't think it is, counsel who have repeatedly desired delay for various stated reasons, could procure that delay by merely asking the judge to be sworn. But we will see about that, and I will bear in mind what you have said and attempt to give that prompt consideration.

Now I think it is appropriate for the defense counsel to indicate what it is that they consider I can competently testify to in this matter.

Mr. Isserman: May I be heard for a moment or two, your Honor, on that point?

The Court: Yes, you may.

Mr. McCabe: Before conferring I would like—

The Court: Whichever one of you desires to address me first may do so.

Mr. McCabe: I should like to go on record, your Honor, as taking exception to your Honor's implied reference to the consideration of calling your Honor as a witness as a maneuver used in connection with the delay.

The Court: I say it could be. I did not say (1292) that it was being used here for that purpose. One of the things that seems so difficult for counsel to understand is that whenever you are discussing a proposition of law it is immediately inferred that you are charging somebody in the particular case. I say, if that were the law; as I indicated, I didn't think it was the law and one of the reasons I didn't think it was the law was that it would be a very readily available maneuver to automatically procure delay any time anybody wanted delay. Now, if you think that I have been referring to you or your colleagues, I say I am not. But I do also say that it seems a curious thing to me that such could be the law. But I do not pretend to know all the law. I like to look things up before I rule and find out what the law is, which I think it is my duty to

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do, and that is precisely what I am going to do, and you may recall it is what I indicated earlier this morning that I wanted to do—by asking counsel to submit memoranda of law to me.

Now what is it that you propose to prove by me?

Mr. McCabe: I think that is a matter which is inappropriate to discuss at this time, your Honor.

The Court: You would all rather tell me later?

Mr. Gladstein: On the witness stand, your Honor.

Mr. Crockett: Your Honor will recall that in my statement I suggested that it might be necessary before (1293) I establish the question of racial discrimination to call your Honor as a witness. I am not prepared at this time to state first whether or not it will be necessary to call your Honor, or secondly, for what purpose I will be calling your Honor; that is, what particular bit of evidence I shall endeavor to get from your Honor in the event it is necessary to call you.

Now I think under those circumstances my clients certainly cannot be compelled to commit themselves on the record at this time that they will call your Honor.

The Court: I now address myself to Mr. McCabe. What is it that you desire to establish through my testimony?

Mr. McCabe: That is a matter which I must respectfully decline to answer at this time, your Honor. I haven't even decided—

The Court: That is right.

Mr. McCabe: I haven't even decided that I should attempt to establish anything. I rose to make certain that no one would gather from your Honor's remarks that our declared intention of considering calling your Honor was at all in the nature of a maneuver or for any other purpose than to add light to the situation as we felt. I didn't like it, the remark, in conjunction with the word "delay."

I want to say that we have never sought delay in this case as delay. We sought a postponement of the (1294) case for considerations which seem very persuasive and legitimate to us. And that is a very different thing in my mind from seeking to delay a case.

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The Court: Mr. Sacher, what is it that you will desire to establish by my testimony?

Mr. Sacher: I too, your Honor, must respectfully decline to have your Honor ask that question, any more than any other witness might appropriately ask what I am going to ask him and whether I will call him. I might, though, point out that the dilemma in which the Court and the prosecution now finds itself might completely have been avoided had the motions which we made for the invitation of another judge from outside to come in been granted.

The Court: Mr. Gladstein, what is it that you desire to establish by my testimony?

Mr. Gladstein: Your Honor, I think I have made it clear what my position is on that question. I adopt the same answer that has been given, and I remind your Honor in connection with your statement about the maneuver, which you have now explained did not intend to apply to us, that it was asserted at the outset in connection with our motion here for an outside judge to hear this matter of the challenge, it was asserted by us that it was inappropriate, improper for anybody who sits as a judge in this court to pass on this challenge.

(1295) The Court: Mr. Isserman, what is it that you desire to establish by my testimony?

Mr. Isserman: Well, if the Court please, the Court is going on an assumption which is not borne out by the present state of the record. I have not said that I desire to call your Honor as a witness. However, in all frankness, I should say that in my consideration of the evidence which must be adduced on this issue that the possibility of calling your Honor has come up. Whether that possibility will ripen into actuality will depend upon the proof and the admissions and the evidence which we will get from other witnesses including officials connected with this court.

And at this point it is not possible for me to state (a) that I will call your Honor, and (b) on what specific issue will your Honor's testimony be necessary in connection with the development of a positive point or the refutation of the statement of some official.

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The Court: Are there any other counsel representing the defendants other than the five lawyers that I have just addressed myself to?

Mr. Gladstein: The five represent among them all of the eleven defendants.

The Court: I intend to make my inquiry comprehensive so that if there be other counsel here representing (1296) any of the defendants, I address myself to them and ask them to arise and indicate to me the subject on which they would seek to interrogate me, if there be any such subjects.

(No response.)

The Court: And I gather by not hearing any response to that, that there are no other lawyers here who can shed any light on the subject.

Now we will go ahead from there.

Mr. Crockett: If your Honor please, at the recess I was in the process of making my opening statement. Your Honor's frequent interruptions, which I believe were very proper and his questions have satisfied me that he has a grasp of what I was about to say, and I am content to rest on that assumption. It is, however, an assumption. I would like therefore to adopt as the remainder of my opening statement the statement previously made by Mr. Gladstein.

Mr. Gladstein: Your Honor, I have asked Mr. Sacher to permit me to ask the Court a question before he addresses the Court on this matter.

It is my understanding that the members of the petit jury panel are presently in the courthouse, in a room provided for them which is known as the jury pool? Am I right about that?

(1297) The Court: I don't know.

Mr. Gladstein: Am I correct about that, Mr. McGohey?

Mr. McGohey: I don't know, Mr. Gladstein. I don't know where they are.

Mr. Gladstein: Well, does the clerk know?

The Court: Do you have some desire to have the jurors put in some place which you will designate?

Mr. Gladstein: No, your Honor, no. I simply want to know if they are available here in the courthouse.

The Court: Well, I don't know.

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Mr. Gladstein: Well,—

The Court: Do you want to call the jurors too as witnesses?

Mr. Gladstein: My understanding was that they were summoned to be here at ten o'clock this morning. Am I right about that?

The Court: I am sure I don't know.

Mr. Gladstein: Well, your Honor—

The Court: Is there some point about this?

Mr. Gladstein: Yes. I desire—

The Court: What is the point?

Mr. Gladstein: I desire to call jurors as witnesses when we reach the point of putting on testimony, and I wanted to suggest that I noticed from the press the other (1298) day that your Honor had excused the jury for a day or something like that.

The Court: I rather thought that the thing might be a little prolonged.

Mr. Gladstein: Well, whatever the motivation was, I noticed that you had excused the jury. And that is why I questioned you whether they are here today. They haven't been excused for today, have they?

The Court: I don't know.

Mr. Gladstein: Well, has your Honor excused them?

The Court: I haven't passed on any jurors being here today at all. I am not sure that they are here. But I know this, that until we make some progress with the evidence so that the question becomes a material one, I am not going to go and do a lot of things because you tell me to do it.

Mr. Gladstein: Well, I am perfectly willing to subpoena them, your Honor, except that it seems so useless to do so if they are, as I think they are, here in the courthouse. And I simply wanted to—

The Court: We will meet that when we come to it.

Mr. Gladstein: Well, I wanted to make sure that the jurors were advised to be here. I understand that they are here. Is that right, Mr. McGohey?

Mr. McGohey: Mr. Gladstein, I said I don't (1299) know. I don't inquire where the jury is, your Honor, until such time as they are brought in and put in the courtroom.

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The Court: Yes. Let us get through with the rest of the openings.

Mr. Sacher: If the Court please, I just wish to address myself very briefly to one or two legal questions that may arise in the course of the proceedings and which it may be well perhaps to invite your Honor's attention to at the present time, so that if you have any questions in your mind about them you may research them before the thing takes place, so we need not interrupt the proceedings but expedite them.

And perhaps the first thing to point out to your Honor, in view of the observations you have made this morning as to the time element concerning the period which may be covered by our evidence, I should like to ask your Honor to examine the case of Patton vs. Mississippi.

The Court: Just a second. Yes.

Mr. Sacher: I have it here in the advanced sheets of the Lawyers Edition. It is 1947, decided December 8, 1947, 92 Lawyers Edition No. 4.

The Court: Page 4?

Mr. Sacher: It is 164. That is, it is volume 92, No. 4 advanced sheet, page 164 in the advanced sheet.

(1300) In that case the Supreme Court held that it was permissible to go back for a period of 30 years to show the system.

The next case in connection with which I would like your Honor to give consideration to the matter is that of Thiel vs. Southern Pacific, which appears in volume 90 of Lawyers Edition. These are now in the bound volumes, so that your Honor will have no difficulty in finding it there. The reason I refer, your Honor—

The Court: What is the page number?

Mr. Sacher: Well, in the advanced sheet it is 922.

The Court: 922?

Mr. Sacher: Yes. Volume—

The Court: 90 Lawyers Edition, page 922.

Mr. Sacher: Yes. Now that probably won't be the page in the bound volume, your Honor. That is volume 90, No. 15, page 922.

Mr. McGohey: Pardon me. I may be able to be of help there, your Honor.

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The U. S. citation of Patton vs. Mississippi is 332 U. S. 463.

And what was the second case?

Mr. McCabe: Thiel case, your Honor.

(1301) Mr. McGohey: The Thiel case is 328 U. S. 217.

The Court: All right.

Mr. Sacher: Now on the question that Mr. Gladstein just raised I would like your Honor to give consideration to the famous Fay case, and the reason I say that is that your Honor will undoubtedly recall that one of the criticisms made of the presentation by the defense in that case on the question of occupational exclusion was that there was not a sufficient definition of the occupational qualifications of the jurors in that case.

The Court: I am pretty familiar with the case and I am aware of the fact—

Mr. Sacher: I am pointing it out—

The Court: —that the contentions that I advanced as a lawyer were rejected by the Supreme Court.

Mr. Sacher: —for the reasons indicated in that case, and I hope your Honor has no objection to the fact that we try to profit from the past.

The Court: Oh, no. And if the thought has entered your mind that I took any exception to your referring to the case and to my participation in it, that impression is quite lacking in justification.

Mr. Sacher: I should just like to add one thing, one phase of the case in which I intend to participate, and that is that phase of it which will (1302) demonstrate that the problem of discrimination against the negro people in this country is a problem not limited to the South alone but that in the very administration of this jury system here we in the North still have to learn how to extend freedom and equality of opportunity in all phases of civic life to our negro brothers and sisters in this city.

Mr. Isserman: If the Court please, in respect to the opening, I desire at this time merely to adopt all the allegations in the challenge which is before your Honor and the points made by my colleagues representing the other defendants. I would, however, raise one point at this time which happened while I was out of the courtroom this morn-

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ing attending some matter in connection with what I thought would be presented this morning to your Honor, and I was delayed a few minutes, and that is this:

I understand that your Honor has reserved ruling on the motion of Mr. McGohey with respect to the grand jury. I had prepared to state for the record my objections to that motion. Do I understand that my right to do that is reserved for some time when the Court will—

The Court: Perhaps you may recall that I requested counsel to submit memoranda to me on that question. Perhaps it is possible for you to put in that memorandum what you desire to press upon my attention on that subject. (1303) Otherwise you had better say now what you desire to say on the subject.

Mr. Isserman: I see. Well, I would like the record to show the reasons I have for objecting to the granting of the motion. I am perfectly content to do it at a later time if time is reserved for that purpose.

The Court: Perhaps I did not speak with sufficient clarity. Having requested counsel to submit memoranda on that subject, I would naturally expect that your objections to the matter would be stated in the memorandum. If, however, you feel that that would unduly restrict you and you desire to say anything on the subject, you must say it now.

Mr. Isserman: The only problem is, your Honor knows, on the memorandum, is that it does not become part of the record. And I would like the record to contain my objections.

The Court: If you desire to have the memorandum marked as an exhibit I shall permit you to do so.

Mr. Isserman: May I have a moment, please?

I would rather, if the Court please, as a memorandum will contain argument and cases, I would rather state my objections without argument at this time if I may.

The Court: You may do so.

Mr. Isserman: And then reserve my argument for (1304) the brief.

The Court: You are not going to reserve any more oral argument on it. You can make whatever argument or statement of points or summary or other matter now, but not later.

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Mr. Isserman: Well, now, your Honor, as I understand it then, your Honor would desire at this time a statement of objections that counsel desires to make and argument on those objections if counsel desires oral argument.

The Court: I permit you and give you leave to make such argument now if you wish. I will not hear oral argument on the subject later.

Mr. Isserman: If the Court please, under those circumstances I would like now, referring to Mr. McGohey's motion to strike from the challenge those matters which relate to the grand jury, to state my objections on behalf of the clients whom I represent.

My grounds are as follows: 1. The present challenge before the Court for consideration is not co-extensive with the challenge made before Judge Hulbert as contained in the notice dated September 28th and supported by the affidavit of William Z. Foster of that date on file in this proceeding, in that (1305) (a) The entire jury list and system of selection was not challenged at that time;

(b) Certain exclusions contained in the present challenge were not raised on the prior challenge; for example, the exclusion of Jews and other minority groups, of women, the exclusions based on geographical considerations and the exclusions because of political affiliation.

(c) The specific ground that the grand jury was not truly representative of a cross-section of the community was not urged.

(d) The interjection of outside organizations in the selection of grand jurors, such as the Grand Jury Association, was not made.

The second ground is that material facts necessary to support the challenge were not placed before Judge Hulbert either as to the precise issues then before him, and (b) as to matters included in the present challenge.

(f) Judge Hulbert had before him and in his decision relied upon statements of Government officials which were untrue, including the following: Affidavit of William V. Connell, clerk of this court, verified October 5, 1948; affidavit

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of Joseph F. McKenzie, deputy clerk, verified on October 6, 1948, in which affidavits both officials stated that they "select names at random from lists of registered voters" in carrying out their duties and that in no way do the lists from which they draw indicate political affiliation, race, color, creed or economic status.

(1306) The brief that Mr. McGohey filed before Judge Hulbert, on page 6—which was signed by him and five assistants—this brief states categorically that "voting lists which contain no hint of a person's political affiliation, race, creed or color are used exclusively as a source of names."

The next ground is that these facts, which our challenge indicates are untrue, creates special circumstances for further consideration of this matter by this Court at this time.

My next ground, the ground No. 5, is that the objection as made in the present challenge was not available to defendants when the challenge was argued before Judge Hulbert. They had no knowledge of the existence of the system of arbitrary inclusions and exclusions except the analysis of the current grand jury which indicated, as set forth in the Foster affidavit, at least a *prima facie* improper composition.

In connection with this point we are prepared to show—and my reason for being late was because of my effort to obtain the affidavit which would show it—that inquiry made by one of the attorneys for the defendants prior to the Judge Hulbert argument from the clerk of this court was parallel to the affidavits filed by the clerk indicating a random selection from voting (1307) lists; and with further emphasis on the fact that the clerk's office was engaged in an effort to obtain a proper geographic distribution.

This inquiry, plus the clerk's affidavit, served to mislead defense counsel in seeking the source and system behind the apparent discrimination indicated by the composition of the panel.

My next ground is—ground 6—that the present challenge and affidavit show the discovery of the source which led

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to the development of the evidence now ready to be presented to this Court, and which evidence was not available to the defendants on a prior occasion. That includes the Toland Report, which again was prima facie indication of a probable use of an improper system. The affidavit of the attorneys annexed to the challenge before your Honor does not rely solely on the Toland Report as the evidence but as the source which indicated the probable existence of the systematic inclusions and exclusions which were unconstitutional and illegal.

It was only after that report was obtained that it was possible to make the studies which indicated the inclusions and exclusions complained of. That report also for the first time gave a clue to the fact that (1308) a private organization, the Federal Grand Jury Association, had interjected itself in the selection of not only grand jurors but petit jurors as well, all of which will be established.

My next ground of objection is that the Toland Report is not an official document of the nature which would charge the defendants with knowledge of it by the mere fact of its existence in the Administrative Office of the United States Courts.

My next ground is that the November challenge which was withdrawn, filed before your Honor, though not complete because the necessary work and study had not been completed, for the first time did challenge the entire panel, venire and jury list, which challenge is broad enough to embrace the grand jury because the grand jury is drawn from that jury list.

My next ground is that that challenge raises constitutional grounds of invalidity, and that constitutional grounds may be raised at any time when going to the validity of the indictment.

The Court: Before you go on, that reference to the challenge last November by an examination of the challenge itself and the colloquy which took place, appearing on pages 658 to 660 of the record, indicates clearly to me that it was in no manner whatever (1309) addressed to the grand jury, nor was it understood by counsel as referring to the grand jury but solely to a challenge to those of the petit jurors and the array and the venire that had to do with the trial.

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Mr. Isserman: The point we make is that that challenge which we are prepared to show was prepared in view of an impending trial and before counsels' investigation was complete did challenge the jury list, and the jury list is a list from which the grand jurors as well as petit jurors are taken.

The next point is that this Court has ample jurisdiction to consider this matter in its entirety, having been assigned to this case for all purposes, as we believe, some time in the month of November.

My next ground is that ample cause for the present intervention by this Court appears in the challenge now before the Court and in the affidavit filed in support of it.

My next ground is that the Perlman letter which has been referred to, which was presented to the United States Supreme Court, estops the U. S. Attorney from making the present objection.

My next ground is that the Court's failure to grant the relief requested at this time and to consider fully every aspect of the challenge, including the (1310) challenge to the grand jury, and the challenge to the validity of the indictment, is a violation of due process and denies defendants' rights guaranteed to them under the Fifth and Sixth Amendments to the United States Constitution.

If the Court please, there is a final and additional ground to the effect that the invalidity complained of in the challenge in respect to the grand jury is one that goes to the administration of justice and is one that affects public policy, and is the type of objection which should be considered by a court whenever it is raised.

The Court: Have you got that copy of the Solicitor General's statement that Mr. Sacher was reading from yesterday? I would like to read that. Would you pause, Mr. Isserman, until I glance at that?

Mr. Isserman: If the Court please, for this purpose—

The Court: Oh, wait a minute, I have got it right before me here.

Mr. Isserman: If the Court please, in connection with the consideration of these grounds I would like to offer as an exhibit—

The Court: Would you mind waiting just a moment with that?

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(1311) Mr. Isserman: I was going to refer to that letter, but I will certainly wait.

The Court: Yes.

It seems to me that that statement of the Solicitor General indicates very plainly that what he had in mind when he represented to the United States Supreme Court was the renewal at the trial of the challenge that had been made and withdrawn, which, as I have stated, appears on its face and in the colloquy which led to the correction made by me above referred to, related solely to the jurors to be called at the trial as talesmen and the panel as a whole in so far only as it related to those jurors. I make that not for the purpose of further discussion, unless it seems absolutely necessary, but as a ruling.

Mr. Isserman: If the Court please—and again I suggest that the ruling should be reserved until the matters which the Court will consider on that point are made.

I would like to offer in connection with that ruling, if your Honor will withhold it for at least a few moments, the Perlman letter as an exhibit together with a copy of the petition, motion for leave to file and petition for the exercise of the Supreme Court's (1312) jurisdiction which was before the Court and to which the Solicitor General addressed himself.

I ask, therefore, at this time that the Perlman letter be marked as an exhibit in connection with this motion, and that a copy of the petition which was before the Supreme Court and to which Mr. Perlman addressed himself be also marked.

* * *

Mr. McGohey: May the record show, your Honor, that there is no objection from the Government.

* * *

Mr. Isserman: Your Honor, I believe the understanding is that the Perlman letter is being offered without the ink or pencil notations on.

The Court: Very well. I suppose they will be called Challenge Exhibits 1 and 2.

(Marked Challenge Exhibits 1 and 2.)

Mr. Isserman: If the Court please, I do not (1313) know the position of other counsel in respect to your Hon-

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or's announced ruling on the Perlman letter, but I happen to know that at least one of the counsel desires to make some argument on that point when he will be arguing.

However, at this time what I would like to do—

The Court: You mean if he desires to take exception to my ruling, because if he does I say now that he and you and all the others, jointly and severally, and seriatim et singularum are allowed an exception.

Mr. Isserman: Well, I would like to take another exception, and that is this, your Honor—to your Honor's ruling before your Honor has heard the matter fully.

The Court: Well, I can read, you know, and I have heard considerable argument on that point, and the challenge shows on its face what it is; the colloquy that I read in the minutes shows on its face what it is, and the letter from the Solicitor General is in my judgment rather plain. However, you are all entitled to and have now been given an exception to that ruling.

Mr. Isserman: But I also am noting an exception to your Honor's ruling without having heard the argument.

The Court: Well, I think I did hear quite a (1314) little argument.

Mr. Isserman: Well, you may have heard quite a little but I know I had not finished, and I know other counsel had not finished.

Now, if the Court please—

The Court: Well, perhaps we would do better to reopen that and you may now present the supplemental argument that you desire to make on that point and we will see how good it is.

Mr. Isserman: If the Court please, on that point Mr. Sacher will argue when it is his turn.

The Court: But you had some argument to make.

Mr. Isserman: I will adopt the argument that Mr. Sacher makes on that point.

The Court: That is what you meant?

Mr. Isserman: That is what I mean now, and I mean that my argument as made through Mr. Sacher on this point should be considered by the Court before it makes its ruling.

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The Court: I shall consider that.

Mr. Isserman: Now, if the Court please, I shall not argue at length—

The Court: Well, I would like to hear that now.

(1315) Mr. Isserman: You would like to hear that now?

The Court: Yes indeed. This was something very important you wanted to say, but it turns out now it is not so important, and you would like to adopt Mr. Sacher's argument.

Mr. Isserman: I would like to object to your Honor's remark.

The Court: You have your exception.

Mr. Sacher: Your Honor, I would like an opportunity to present my argument in my own way and in my own order, if you don't mind.

The Court: Yes, but you are going to do it now.

Mr. Sacher: That does not accord with what I would like to do. Mr. Isserman is not through, and there is no reason why he should be interrupted by a presentation of mine. You have asked for orderly procedure, and now that we are giving you orderly procedure you don't want it.

The Court: There is a very good reason. Because I so direct.

You will proceed with the argument on the question of your supplemental discussion about the effect of the Solicitor General's letter.

Mr. Isserman: And the balance of my argument is (1316) reserved?

The Court: You may resume later.

Mr. Isserman: Thank you.

Mr. Sacher: May I trouble the clerk to be kind enough to hand me the Perlman letter?

The Court: Certainly. And here is the challenge, so you may have that all before you now.

Mr. Sacher: That I don't need because that was not before the Supreme Court of the United States. That is what is important. That is what is important. I would like your Honor, if you care to, to take a look at an exhibit which was offered to you which you have not even looked at yet, and you don't know what is in it.

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The Court: I will be glad to do so.

Mr. Sacher: Then may I ask your Honor then to read this exhibit while I talk to you?

The Court: You may, and I shall do so.

Mr. Sacher: All right, thank you.

The Court: To the best of my ability.

Mr. Sacher: I think my colleague, Mr. Isserman, suggests that you read very well, and perhaps after you read it it will not be necessary for me to say as much about it as I might otherwise.

The Court: No, we are going to hear your argument, Mr. Sacher, now.

(1317) Mr. Sacher: Well, if you wish to lacerate yourself, your Honor, you must assume the responsibility for the laceration.

The Court: I do not consider it lacerating myself. As I said before, I enjoy this sort of thing.

You go ahead and make the argument.

Mr. Sacher: Now, your Honor, you will observe that the petition which you have is entitled "Motion for leave to file a petition for the exercise by this court of its supervisory authority over the district court for the Southern District of New York to void indictments and quash venire of petit jurors, for a rule to show cause why mandamus and prohibition should not issue, for rule absolute and for stay."

I call your attention to page 2, your Honor, which is entitled "Statement of matter involved" and it reads as follows:

"The petitioners invoke the supervisory powers of this Honorable Court to void the indictments and to quash the venire of petit jurors herein referred to.

"Petitioners were indicted by a grand jury which was constituted and face trials before a petit jury to be selected from a venire which was drawn"—

(1318) you notice that, your Honor, grand jury, petit jury—

"under a system planned and operated by the judges, jury commissioner and jury clerk of the District Court for the Southern District of New York

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whereby the rich, the propertied and the well to do are deliberately, purposefully," etc., "included, and Negroes, trade unionists, manual workers," etc., "are deliberately, purposefully," etc., "excluded."

Now, all that the Solicitor General was talking about in this letter were two things: the first thing he spoke about in the first and second paragraphs of his letter dealt with our petition for a writ of certiorari directed to the C. C. A. in connection with their denial of our petition for mandamus in regard to the affidavit of prejudice which we had filed.

The second part of his letter is devoted exclusively to this petition, and what he says to this Court is: "I ask your Honors respectfully not to inject yourselves into this matter because that subject matter will be acted upon by the District Court."

The Solicitor General does not say anything about a challenge to the array of the petit jury exclusively. He did not say, "Your Honors, what they will get in the court below is a hearing only on the petit jury." On the contrary. What this Solicitor (1319) General said was, and must have been construed by the Court to mean, because they did not have page 656 from which your Honor was reading; they had two pieces of paper; they had the petition for the writ of certiorari and they had this petition invoking their original supervisory power. And in regard to the second piece of paper he said, "There is no need for you to butt in"—he virtually said as much—"Don't inject yourselves because the court below has agreed to hear all of that on January 17."

And I say to your Honor if you are to place a proper interpretation on the Solicitor General's letter you must read it not in the context of what happened up here in New York but in the context of what was before the Supreme Court in Washington, D. C. on January 10th when he sent that letter. And I challenge anyone to say with any pretense at seriousness that a Chief Justice of the United States who had only two pieces of paper before him would have construed this letter to be applicable to any paper other than the two pieces that were before him. That is it.

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The Court: I adhere to my ruling.

Mr. Sacher: Now, that is not all of my argument. You see, you have truncated—

The Court: Oh, you have some more argument?

(1320) Mr. Sacher: I have legal argument for you. If you would like to hear that I will give it to your Honor now—

The Court: Well, I think this is about all the argument I am going to hear—

Mr. Sacher: No, I want to give you a Supreme Court decision. You have got no decision from Mr. McGohey in support of his motion. I will give you one that I think knocks it on the head.

The Court: That is one of the things, Mr. Sacher, that you will have to put in the memorandum addressed to the motion as a whole.

Mr. Sacher: But I want to show you where the Supreme Court of the United States held in the Glasser case where a motion was made to quash an indictment on the ground of the illegal composition of the grand jury, and that motion was denied, and that a motion was made after trial and conviction to set aside the conviction on the ground that the grand jury was unconstitutional or illegally composed, the Supreme Court of the United States said it was not only right but it was the duty of the Court to act upon that thing at that late date.

If that is the case why can't we come in before any attempted conviction to demonstrate the (1321) very things that the Supreme Court said the Court would have to take even after conviction, notwithstanding that as in this case a timely motion made for the dismissal of the indictment, predicated upon the unconstitutional composition of the jury, was, in the first instance, denied, just the way it was denied here by Judge Hulbert on affidavits. That is the law of the case that should be in this case.

The Court: Well, I think what you wanted to say you have said, and you need not now put it in the memorandum.

Now we will resume Mr. Isserman's argument.

Mr. Isserman: If the Court please, in view of the fact that a memorandum will be filed I will not exhaustively argue each one of the points which I have raised before,

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your Honor. However, there are certain ones which I think will—certain discussion of certain ones will be of benefit to the Court in making its decision.

In the first instance a good deal of stress has been laid by Mr. McGohey—and I don't think I am misconstruing the record when I say that the Court has already seemed to have adopted that position—that the report sent out by the Administrative Office of the United States Courts in Washington is a public (1322) document—

The Court: I did not so rule.

Mr. Isserman (Continuing): —in the sense that the defendants were charged with having knowledge of it by the fact that it was in existence. If your Honor has not so ruled, at least your Honor has indicated support for that position.

We would like to stress to the Court that this report was an inter-court communication; that it was not for the public; that it was prepared initially at the request of a district court for information from the clerk of the office of the Administrative Office of the United States Courts, and, secondly, after it had been prepared for the specific purpose, it was sent out to district court and circuit court judges. It formed no part of any official report of the Administrative Office of the United States Courts which, by statute, was required to be noted publicly in the Federal Register or elsewhere, or which was available to the public. That memorandum is purely an inter-office memorandum, and as such was not at all chargeable to the defendants.

I call your Honor's attention to the case of Kiyochi Fujinkawa and others vs. The Sunrise Soda Water Works Company and others in 158 Fed. (2d), page 490, (1323) in which on appeal there was an effort to introduce a letter written by the Secretary of the Treasury directing subordinates not to license Japanese banks.

At page 493 of that opinion the Court said:

“Appellants ask us to take judicial notice of a confidential circular of December 9, 1941, written by the Secretary of the Treasury to guide his subordinates stating that such subordinates should not license any Japanese banks. Congress has limited

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executive orders so affecting banks and other non-official persons of which we may take judicial notice to those published in the Federal Register.”

I wish, your Honor, for you to take judicial notice of the fact now that the particular report in question was never published in a Federal Register.

In the case of the United States on Relation of Brown, O.P.A. Administrator, 140 Fed. (2d), 136, the Court took judicial notice of a regulation of the OPA, and the Court said this:

“Aside from the statutory provision providing that the notice be official, the rule seems to be well settled, as stated in 20 American Jurisprudence 67 and 68, the courts all take judicial notice of the official acts of the heads of executive departments of the Federal (1324) Government of public notoriety or general public interest, not of departmental acts having no such character.”

It certainly would be stretching the conception of public notoriety or general public interest which would say that a communication sent out by the Administrative Office of the United States Courts from Washington to lic documents beyond any case or decision heretofore to judges throughout the country was the kind of document of charge the defendants or their counsel in this case with notice of the existence of the document.

Now, as against the legal situation, the uncontradicted evidence before your Honor is, as contained in the affidavits of defense counsel, that through diligent inquiry on or about November 1st, 1948, their attention was called to this document, and that this document gave them the clue from which they developed the evidence which is before the Court now.

I have noted in one of my objections—

The Court: You mean the evidence that is going to be before me?

Mr. Isserman: No, I am saying—if the Court please, I am referring to the statement made by counsel in the affidavit annexed to the challenge which is evidence before your Honor of the facts relating to (1325) the work of counsel and the fact that counsel received this information on or about November 1st.

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The Court: I see.

Mr. Isserman: And that is undenied.

The Court: I see.

Mr. Isserman: Now, I say that this has peculiar significance in the fact, as stated in one of the formal grounds, that counsel for the defendants in this case were misled in their inquiring in respect to the grand jury by the—

The Court: You just said that a little while ago.

Mr. Isserman: What?

The Court: You just said that a little while ago.

Mr. Isserman: Yes. I now want to argue that.

The Court: Don't you think it is a good idea if we all go to lunch now and let this argument rest as it is?

Mr. Isserman: Until I return, your Honor?

The Court: Well, I was hopeful that you would say that you might let it rest as it is, but if you prefer we will go on this afternoon.

Mr. Isserman: Well, your Honor, I don't understand your Honor's remark, frankly. I have stated a (1326) series of legal objections and I now desire to argue and prove them.

The Court: Well, I am going to let you.

Mr. Isserman: And your Honor seems to take the position that no matter what is said your Honor's mind is made up. It certainly seems that way from this side of the bench.

The Court: Well, I reserved decision on this motion. I asked counsel to submit memoranda to me; and, frankly, I am a little surprised that you want to do all this arguing which could so readily follow the customary practice of being included in a memorandum. And I told you that if you wanted it part of the record we could mark the memorandum as an exhibit.

Now don't you think perhaps it would be well for you to put the remainder of your argument in a memorandum?

Mr. Isserman: I will certainly consider that between now and two o'clock, but there is one problem, as your Honor knows, when you are in the courtroom all day long, it is hard to prepare a memorandum. And it is quite customary in the courtroom procedure, while the procedure is going on, to make motions orally, as Mr. McGohey did yesterday, to state our objections orally, (1326-A) as we

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did, and to argue our case rather than take time in an office to prepare.

The Court: Well, I propose, just to see how much there is in it, to permit you to go on this afternoon just as long as you desire to continue, and with that understanding we will now recess until 2.30.

(Recess to 2.30 p. m.)

(1327)

AFTERNOON SESSION

* * *

Mr. Isserman: If the Court please, it is not my intention to argue at length each of the points which I have previously put on record objecting to the granting of the motion of the U. S. Attorney. From a consideration of those points which will be developed in the memorandum which will be submitted to your Honor there are certain basic conclusions which I would like to advert to very (1328) briefly.

The first is that on a consideration of the state of the record and of the court rules as well as of the law there can be no question that the defendants who I represent have the right at this time to have the legal and constitutional issues raised in respect to the grand jury tried by this court on this challenge.

The second—

The Court: Now if you mean by that that you have the right to have it noted on the record that you have pressed the point before Judge Hulbert so that in the event of review by the Supreme Court it would definitely appear in the record that the constitutional questions have been raised, I agree with you. As to your right to have the motion as made denied, I am fairly clear in my own mind that it is something which at best rests in my discretion. I may, however, be wrong about that, but I want you to understand that I do not dispute the fact that you should have it appear on the record that you have made the motion before Judge Hulbert, that it was denied, that it was made on constitutional grounds specifying the Articles of the Constitution in question, and that you have again presented the question, which, of course, fully ap-

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pears on the record from not only the papers filed but the arguments made.

(1329) Mr. Isserman: I cannot accept your Honor's formulation that we have again presented the question. Your Honor will remember that in the first point which I made I said that the challenge being made now before this Court is not co-extensive with the challenge made before Judge Hulbert; and I consider it as a separate independent challenge which in this proceeding before your Honor at this time we have a right to make and a constitutional right to have tried out here.

The second conclusion drawn from the points which I have presented is that this Court has the legal power, the legal power to entertain the challenge at this time. That power is derived from a number of sources which will be detailed in a memorandum and which are reflected in the points that I have made.

The third conclusion which will be developed in our memorandum from the points made here today is that this Court has the obligation as well as the power to hear and determine the challenge to the validity of the grand jury in this proceeding, and that in any event, without departing one bit from the allegation that this Court has the obligation, that in any event it has a discretionary power as well to consider this matter.

The Court: I may say that the argument that has been made which has impressed me the most is that (1330-1-2) as a fundamental matter of the administration of justice the question is one which should be fully inquired into. I know you have made a great variety of other points, but it is that one which has given me pause and it has led me to give it further consideration and to ask for the memorandum.

Mr. Isserman: The next conclusion which will be developed in our memorandum is that this discretionary power, although we say the Court has the obligation as well as a discretionary power, in this case must be exercised, and this is the kind of case that the failure to exercise the discretionary power would amount to such an abuse of discretion as to invade the constitutional rights of the defendants whom I represent. And the Court is familiar with that line of cases which holds that there is—

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The Court: I am not so sure about that. I have a smattering of law but I do not pretend to know all these lines of cases. That is what I wanted the memorandum for.

(1333) Mr. Isserman: That is precisely what I was going to get to. I was going to say that the Court is undoubtedly familiar in general with the line of cases, and we will be very precise and particular in the memorandum, which hold that in certain situations an abuse of discretion can ripen into a constitutional violation, and we say this is precisely that kind of a case.

Now, one persuasive reason your Honor has mentioned, and that is that the question as it has been raised goes to the administration of justice, and that is precisely why I have wondered, ever since Mr. McGohey made his motion that he would rely upon what I consider as a strained and narrow legalism to cut off the kind of inquiry into the grand jury system which the defendants are asking not in behalf of the public, but in behalf of themselves, but necessarily in pursuit of their own constitutional right, and having called this to the attention of the Court, the other question of public justice and of the administration of the court is bound up with the first question; and we say, therefore, it comes as a matter of surprise that a motion of this kind, even though it were technically correct—and it is not—should be made in this case at this time in this proceeding.

(1334) The Court: But Mr. Isserman, Mr. McGohey is a lawyer representing a client here, namely, the United States Government, just as you and your colleagues represent the defendants. Since the point has been conclusively determined or has been raised by the defendants, I should regard it, namely as his duty representing the Government to urge those grounds upon the Court. I do not see any occasion for surprise if a lawyer raises a perfectly reasonable and legitimate legal point, whether he is raising it on behalf of the prosecution or on behalf of the defense.

Mr. Isserman: If the Court please, another point which now suggests itself that we should develop in our memorandum is the fact that Mr. McGohey is not just like a lawyer representing a client. By the very fact that the

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client is the United States Government, then in that capacity he is representative of the people, including the defendants, to see that substantial and constitutional justice is rendered, and not to take the kind of narrow position which throws doubt on the impartiality of this trial and casts a shadow over it which renders the course of justice difficult if not impossible.

I would just like to quote one paragraph on that subject from the Viereck case. Your Honor (1335) will remember that case of the Nazi propagandist who was sentenced to prison, and I believe the Supreme Court reversed his conviction.

The Court: Wasn't that the one Mr. Sacher read from the other day?

Mr. Crockett: That is the one I read from, your Honor.

The Court: Yes, I thought I remembered something to that effect, but you may read it again.

Mr. Isserman: And the point I make and the quote I would like to read at this time is this, that "The United States Attorney is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interests therefore in a criminal prosecution is not that it shall win a case but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law the two-fold aim of which is that the guilty shall not escape or the innocent suffer."

Now, in our memorandum we will develop a series of cases and point to your Honor the special duty that we conceive, that I conceive is upon the U. S. Attorney in a situation of this kind when the very foundation of the grand jury system is being (1336) challenged.

Now, it doesn't stop with the District Attorney; and I was very glad to hear the Court say that the Court is interested in this question of the administration of justice—

The Court: I am interested in all these questions.

Mr. Isserman: But I say that your Honor has just remarked that he is interested in that particular point which goes to the administration of justice.

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The Court: You may be sure, Mr. Isserman, that every question that is raised is going to be carefully considered by me on the merits. I intend to study whatever is submitted to me, and listen to the arguments that are made, and to do my very best to make my determination a thoroughly just one in accordance with the law and not in accordance with the law as I may guess it to be, but the law as I find it to be after thorough consideration and study.

Mr. Isserman: Yesterday afternoon at about 3:30, as my rough notes here show—and sometimes I can't read my own writing, and I have not been able to check this with the record—I took down this statement of your Honor with respect to the question of discrimination: "Any discrimination would shock me." That was in (1337) reference to the jury system. Now I want to use that statement as my premise. If that is so, your Honor, your Honor himself has indicated the need for exercising—if your Honor believes he has only discretion—of exercising that discretion so that the serious documented charge of discrimination confirmed by the affidavits of trial counsel here, be given a full and complete airing and not be brushed aside because when they appeared before Judge Hulbert they did not have all the facts.

I do not know if I can urge that strongly enough, but I say your Honor's observation is in itself the weapon by which any technicality that is raised by the prosecution in this case should be swept away, and the use of that discretion would certainly rest in your Honor—we think it is more than that; it is an obligation—should be utilized to eliminate the possibility even of discrimination in this proceeding. It would really be a shocking thing indeed if proof were adduced on discrimination in the petit jury, and it would not be allowed on the grand jury, and it established that the defendants would publicly be forced to trial on a void indictment, on an indictment unconstitutional because it was not founded, it was not brought by a grand jury truly representative of a cross-section of the community but, as we have said (1338) before, by the members of a rich man's club.

Now, in connection with the placing before your Honor every fact that your Honor should have to make this

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determination: I ask leave to file an affidavit or two affidavits which will disclose to the Court the representations made by the clerk of this court to counsel in this case—counsel I think not now present here but counsel in this case—concerning how the jury system was operated by the clerk. I have said—

The Court: The name of that lawyer appears in the affidavit, doubtless?

Mr. Isserman: Well, it is Mr. Freedman. There is no secret about it. I ask leave to file his affidavit. He had some conference, he has informed me, before the argument before Judge Hulbert and received information from the clerk. On the basis of that information counsel took certain positions—

The Court: Without your going into that further I now grant you leave to file the two affidavits, and should you upon deliberation decide that you desire to file additional affidavits, I will give you leave to file them provided only that they are filed before we commence to take testimony on the issue of the constitution of the jury.

Mr. Isserman: I will do that, provided—yes, (1339) I understand your Honor's suggestion. We will act upon it.

Now, one thing more, your Honor, and I think my colleagues can take over. Your Honor has said something—oh, just one other thing: on the question which we raise—and your Honor will notice in the point I have made that we raise a constitutional issue under the Fifth and Sixth Amendments, the issue of due process and the issue of an impartial jury, a fair trial before an impartial jury—on that question, under the cases which will be contained in our memorandum we have a right to bring to the Court the factual issues upon which we base our claim of constitutional right. We have a right to bring it before this Court, and the Supreme Court is interested in reviewing facts in that kind of circumstance.

Now, some of the evidence which we will introduce which is mentioned in our challenge goes to another point which I have made, and that is the evidence which we will introduce which will show that the voting lists were not used exclusively in this district in the drawing of juries, petit or grand.

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Now, that certainly has significance, your Honor, in view of the point which I have made that the affidavits of the clerk, Mr. Connell, and the deputy (1340) clerk, Mr. McKenzie, are unequivocal in their statement before Judge Hulbert that the jury lists were used, and Mr. McGohey in his representation to Judge Hulbert said—I am sorry—the voting lists were exclusively used in making up the jury lists—that Mr. McGohey in his memorandum to Judge Hulbert said emphatically that they were used exclusively.

Now, if we show that they were not, then we are in the same position, if your Honor will recall the Mooney case which went to the Supreme Court on this particular phase, I think in *Mooney v. Holohan*, which will be mentioned in our brief, that where state officials are connected with the presentation of perjured testimony, of false testimony, that after the proceeding is over or at any time relief will be granted in those special circumstances.

And we say that before your Honor rules on that issue that we want the opportunity and off here to produce the evidence which will show that the statements in those two affidavits by the clerk and deputy clerk of this court, and by Mr. McGohey in his brief, were untrue; they were material, they were relevant, and undoubtedly contributed to the decision which Judge Hulbert made.

(1341) And still one more point, your Honor, and I will desist: your Honor may be familiar with the case of *Roberts vs. U. S.* in 158 Fed. (2d), 150, in which three years after a conviction, the trial was over, the man was imprisoned, Roberts filed a petition coram nobis in the district court saying that at the time when he waived counsel and pleaded guilty to the charge and was sentenced, that he was insane. The district court refused to hear the matter. The circuit court on appeal ordered the district court to go into the merits of the application, and the ruling in that case is significant here not because of any insanity, your Honor, but it is significant here because the ruling was that where material facts relevant to the invalidity of a particular situation were not adduced in the court below, that under certain circumstances those facts even after conviction and after time to appeal has expired, in order to do justice shall be presented.

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Now, we are not coming here after the fact. We are coming here before a jury is in that box. We are coming here in a position in which no injury has been done by the fact that the challenge before Judge Hulbert was not as extensive as the challenge before you now, and we say that under those circumstances (1342) the material and relevant facts contained in our affidavit in support of our challenge, which were not presented to Judge Hulbert, should be placed on this record and should be considered by your Honor.

You will remember Mr. McGohey in reading from the Hulbert decision said Judge Hulbert underlined the word "facts" when he said no facts were presented. Now we have the facts. Counsel has sworn that these facts were not available at the time of the presentation of this matter to Judge Hulbert, and we say, therefore, this is the time, not next year, not on appeal, not any other time, but this is the time to explore this challenge seriously made, amply documented, and in our opinion conclusively supported by the facts we can adduce.

The Court: Did you understand, Mr. Isserman, that I had ruled that I would take the proof, that I had reserved decision on Mr. McGohey's motion, and will decide it later?

Mr. Isserman: I understand that, your Honor, and I am very pleased to see that the case is progressing in a direction where in our opinion the entire challenge, including the challenge of the grand jury, will ultimately be heard and be considered by your Honor.

(1343) The Court: Well, you were arguing that I should take the proof as though I had still left that matter open, and I ruled this morning that I would take the proof but I reserved decision on the motion.

Mr. Isserman: Oh.

The Court: I did that because I was in doubt and I desired to make my decision with as much enlightenment on the subject as I could get and after mature deliberation.

Mr. Isserman: I might recall to your Honor that I was not in the courtroom when the ruling was made, and I am very pleased now to understand it in the way your Honor has projected it.

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Now one more point and that is this: Your Honor said something yesterday, and it may be that your Honor's ruling on the taking of evidence has obviated the need for my saying what I say now, but your Honor has indicated or made some suggestion that a motion for reconsideration had not, or reargument had not been filed before Judge Hulbert. We take the position now, or at least I take the position for my clients that this Court now has plenary jurisdiction over every issue in this case, and that should your Honor deem it necessary to have before you a formal motion for reconsideration other and separate from the challenge I now ask that the challenge (1344) which has been filed on behalf of my defendants also be considered as a motion to reconsider, should that be necessary.

The Court: Well, I had really intended to take that position even though you had not said that. It seemed to me that the fair thing to do would be to regard all that has been said here as in effect a motion before me for such reconsideration, and it is with that in mind that I reserve decision and will take proof.

Mr. Crockett: If your Honor please, by way of argument on this motion I merely want on behalf of my client to join in the objections stated by Mr. Isserman at the beginning of his statement and also in the argument and in the motions which he offered at the conclusion of his argument.

Mr. McCabe: I should like to join in Mr. Crockett's motion. The only point I had possibly to add that has been puzzling me in Mr. McGohey's attitude is, just what his object was. Either the set-up for the selection of the panel here is legal or it is not legal.

The Court: Well, his position is, he claims that the question of the challenge in so far as it relates to the grand jury is determined and out and over with. And if I rule in his favor, that is the way it is going (1345) to be.

Mr. McCabe: But surely, your Honor, is it the position of the United States Attorney, in seeking to preserve some—well, they shouldn't be called benefits—of the actions of a grand jury chosen from an illegal panel, if it is decided that the panel is illegal and that from that tainted panel there cannot be drawn a jury, a petit jury, or does

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he want to present to some other jury free of those infirmities a bill of indictment, which certainly bears all the taint and contamination which inheres to anything emanating from and anybody chosen from that panel which was illegally selected.

Mr. Sacher: May it be understood, your Honor, that when these motions are made that they are adopted by the other counsel, so that we need not take—

The Court: That is what I said the other day.

Mr. Sacher: Fine.

The Court: And I think in the course of time that you gentlemen are all going to say that that is the sensible thing to do. I have got the record so clear on the subject that every one of you is protected, not only on motions but rulings on evidence and every other adverse ruling that is made, so that you need not get up and say so each time. But, as I said before, (1346) if you desire to do it I will not preclude you from doing it.

* * *

(1347) The Court: I would like to straighten out this matter of whether or not you intend to call me. I simply cannot imagine anything that I could testify to that is relevant to the matter. But as Mr. McGohey has pointed out, if there is going to be that question raised it ought to be raised in limen and disposed of.

Now, you have had time to think about it since I inquired of you this morning, and I think it is only fair that you should give some indication to me now as to what your wishes are.

Mr. Gladstein: I haven't actually thought about that, your Honor, I have been so busy with other matters, but I would be prepared to give an answer to it tomorrow morning.

The Court: Well, I think it is only fair for me to rule that if that is going to come up, it must come up at the very beginning and be disposed of then. I think that is only reasonable and fair. And so I will expect you to take whatever position you are going to take on that the first thing tomorrow morning.

Very well.

* * *

(1352) (Adjourned to January 21, 1949, at 10.30 a. m.)

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(1353)

New York, January 21, 1949;
10.30 a. m.

* * *

Mr. McGohey: If it please the Court, I understood the Court to suggest yesterday that this morning you desired a memorandum of law on the question of the effect of calling the judge presiding at the proceedings as a witness in the proceedings. I have a short memorandum of law that I desire to hand to the Court, and I have a copy for counsel (handing).

The Court: Have the defendants any authorities to submit? I have made a little research of my own and have rather confirmed the views that I arrived at in the exercise of general principles, yesterday, but I will be very glad to get any memorandum from the defendants, but I do not think I need any more discussion.

Mr. Sacher: I should say, your Honor, that the authorities cited in the United States Attorney's brief are (1354) substantial the authorities that our own research disclosed during the night.

The Court: It is sufficiently plain to me that I may not testify as a witness in a case over which I preside as judge, and I shall not do that.

Now, the question is whether or not the defendants intend to attempt to call me as a witness. On that subject I interrogated each counsel yesterday and received answers that I consider quite unsatisfactory. My disposition is to rule now that I know nothing about the matter, had no contact with the selection of juries or the jury system in any manner, shape or form, and that I simply will not testify. But I shall listen to anything the defense has to suggest on that subject.

Mr. Sacher: Speaking for my clients, your Honor, I should like to make this observation, that pursuant to your Honor's request all counsel, of course, gave the matter grave and serious consideration. I think it is fair to say that the feeling is that it would be a matter of—it would be with great reluctance that we would contemplate the calling of your Honor to the stand. We are, however, confronted with unknowables at the present time—

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The Court: Well, you would have to make up your mind now whether you want to take the position that you desire to call me or whether you do not, because I will (1355) entertain no such application after the first witness is sworn.

Mr. Sacher: Well, your Honor, speaking for myself I can only say that inasmuch as such a choice as your Honor requires me to make is one that I can only make knowingly, and since I do not at the present time have within my command the facts on which such a choice would have to be made, I must respectfully decline to make that choice now; and that is said not with any view to maneuvering here. We are saying it because we genuinely, at least speaking for myself, do not know at this time what the record may reveal.

I think it is important to bear this in mind, that the theory on which the petition was filed with the Supreme Court seeking to invoke its supervisory power was predicated on the thesis that all the judges of the Southern District had in some manner or other participated in the administration of the method of selection of juries.

The Court: Now, you see that that is not the case. I have not participated.

Mr. Sacher: Well, may I say this, your Honor, that the question of what will constitute participation is something that we are not informed of right now. In other words, the point is that participation may (1356) consist of a variety of facts and circumstances, and while it may be that your Honor played no part in the origination of the methods used in the past decade in the—

The Court: And I have had nothing to do with it since.

Mr. Sacher: You see, your Honor, I am not facetious about this, but even a so-called lack of participation might legally, despite its paradoxical aspect, be regarded as participation, you see.

The Court: Well, you have it on the record now that I have had nothing to do with it, have not participated in it at all.

What more do you want?

Mr. Sacher: Well, your Honor, as I say, fundamentally the question is one of what constitutes participation—

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The Court: Well, let us not argue about it any more. Let me hear from each of the other defendants so that we will have the position of each made plain. I understand your position now.

Mr. Sacher: I would just like to add this, that our notion is not—I should like to make this clear—speaking, again, for myself; my colleagues will, of course, speak for themselves—I would not regard your Honor's (1357) participation as a witness in this proceeding, qua witness, as a disqualifying factor.

The Court: I would.

Mr. Sacher: What is that, your Honor?

The Court: I would. I think if I am sworn as a witness I think I am automatically disqualified, and I have no intention of being sworn as a witness in a case about which I know nothing.

Mr. Sacher: All I want to make clear to your Honor is that so far as I am concerned, I am quite willing that swearing you in and having your testimony as a witness will not be regarded by me as a disqualifying factor except to the extent that the testimony might disclose—and when I say “testimony” I mean not only your Honor's testimony but the testimony and evidence produced in the proceeding—

The Court: I do not think that is a question in which any waiver by counsel is contained. If I take the witness stand, in my own view of the law, I become automatically disqualified. You might, and your colleagues might, for one reason or another, say that you are very glad to have me do it, but the effect will be the same, and I do not intend to do it.

(1358) Mr. Sacher: All I can say to your Honor is that to the extent of the power that the defendants and I as their counsel have to waive the disqualification of your Honor solely on the basis of testifying we are willing to do so, and if your Honor says it can't be done then I most regretfully say that that is the extent to which I can go along.

The Court: Now let me hear from each of the others *seriatim et singularum*.

Mr. McCabe: On behalf of the defendants Dennis and Winston, your Honor, I say to your Honor that I simply

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cannot conscientiously foreclose myself by any action of mine from exercising what I might consider the duty and the right to call your Honor as a witness if facts are developed through previous inquiry or through the preliminary inquiry which would lead me to feel that your Honor should, despite your Honor's statement, which of course I accept as the fact, that your Honor never actively participated in the conduct of the selection of the panel which we are attacking. I say that very often acquiescence may be the most direct and most forceful sort of action. So for that reason I am not prepared now to say that I shall not call your Honor, I am not prepared to say that I shall find it necessary. I simply say that so far (1359) as is in my power, your Honor has indicated that your Honor will exercise your own judgment and power to foreclose me if I didn't state now that—

The Court: I say now I will not be a witness.

Mr. McCabe: Then I have said all I can say, your Honor, and any action I may take in the future will have to be a matter of record to be passed on.

Mr. Crockett: If the Court please, I am unable to state at this time whether or not I shall have occasion to call your Honor as a witness. I am persuaded however that the mere fact that your Honor states that he will not be a witness, under my view of the law is not conclusive. I think the question will properly be presented to your Honor when and in the event I decide to call your Honor as a witness on behalf of my defendants.

Mr. Gladstein: Your Honor, I must say that inherent in the very nature of the moving papers that we filed is the distinct possibility that your Honor should be a witness in this case.

The Court: With respect to what?

Mr. Gladstein: With respect to the jury system or the administration of the system of justice in this court from the time it was developed by Judge Knox about ten years ago until the present date. And may I explain that, Judge?

(1360) The Court: Well, if you claim that there is some law that makes it essential that a judge immediately upon being sworn in must busy himself about this subject, then you have the fact to be that I did not busy myself

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about it. I had plenty else to do. Nobody suggested that I inquire into it, it never occurred to me to inquire into it; I had no reason to suppose there was anything the matter with the administration of the jury system, and I have had nothing to do with it.

Mr. Gladstein: Well now, your Honor will certainly recognize that we do have a right to establish by proof, by evidence, the assertions that are contained in our challenge. Those assertions embrace a period of approximately ten years, roughly 1938 or 1939 to the present date.

Now your Honor has been sitting on the bench here for which, of necessity, your Honor has been an integral part of the functioning of the entire system including that which involves the selection of jurors. Your Honor of necessity in carrying out his official duties and functions has participated in conferences with other judges and has had some connections or relations with the operation of the jury system.

The Court: That I say has not happened. (1361) I have had no conferences with any of the other judges or with any of the clerks or with anyone else on the subject. I have had absolutely nothing to do with it.

Mr. Gladstein: But your Honor raised this question, you asked whether it was the viewpoint of anyone that upon being sworn into office it became your obligation to interest yourself in the manner in which the jury system—

The Court: That you don't need any testimony about. If that is so, it is so.

Mr. Gladstein: Well, on that my answer is distinctly yes, that I think it is the obligation not only of the judges of the United States courts to refrain from initiating procedures in connection with a jury system that are illegal, but likewise that it is an obligation upon the judges affirmatively to interest themselves in correcting any possible evidence or existence of impropriety, illegality or corruption in the administration of the jury system.

And your Honor himself raised the question a day or two ago—you remember this, Judge—as to whether I felt that there was some obligation upon the judges, and I mentioned at that time that it seemed to me that, regardless of the state of the law, whether there was an (1362)

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obligation upon the judge to involve himself in a supervision of the jury system or whether the obligation was to the contrary—that is to say, that he was to refrain from interfering in any manner whatever with the performance of the duties of the clerk or jury commissioner; in either event what has happened in this district is wrong and that the system in effect is impaled on the horns of a dilemma.

But my own view of it is that it is really the duty of a judge to inquire, to interest himself in the system of justice over which he presides or of which he is a part, and that the discharge of that duty requires him to take affirmative steps to correct what he finds to be wrong. And I say that while personally I would prefer—I would prefer—not to embarrass the judge who presides over a trial by calling him as a witness—

The Court: Well, it isn't easy to embarrass me. As I said a little while ago, I am not over-sensitive. It isn't a question of embarrassment. But get ahead now and tell me what your position is without too much circumlocution, and then we will hear from Mr. Isserman.

Mr. Gladstein: I desire the record to show that by reason of the inherent character of the challenge (1363) filed here and by reason of the impossibility of knowing in advance—and your Honor must know this as a practicing attorney of many years—of knowing in advance just what witnesses, potential witnesses on the fringes of his case may or may not have to be called, I wish the record to show that I reserve my right to ask your Honor to take the stand as a witness, and to advise your Honor that there is a possibility that I may wish your Honor to sit as a witness in this proceeding on this challenge. And therefore suggest to your Honor that in view of that distinct possibility, in view of the fact that your Honor has expressed himself very decisively against taking the witness stand in any proceeding in which your Honor presides over, I would suggest that—

The Court: You can double that.

Mr. Gladstein: I suggest that your Honor ask some other judge outside this district to preside over this portion, that is, this challenge.

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The Court: Well you know, Mr. Gladstein, you have been trying, and your colleagues, to get me out of this case for a long time on various grounds. Now I have seen no merit in those grounds and I see no merit in this one. Now it may be that repeating it a little bit will serve to make the record clear, and I don't mind your doing it, but I do think it is fairly clear that you (1364) would rather have me out of the case.

Mr. Gladstein: Well, your Honor, that is not the question we are discussing.

The Court: Well, all right.

Mr. Gladstein: We are discussing the propriety of your Honor's sitting—presiding over a matter in which counsel advise you that it is possible that they may desire to have your testimony, and that that statement of counsel on its face is valid, sincere and has merit by reason of the fact that the moving papers which challenge the entire system of the administration of justice in this court distinctly raised the possibility of the necessity of calling all of the judges, including your Honor, who preside, who function in this court. And it is not a question of trying to get you out of the case. It is a question of whether it is appropriate for a judge to preside over a case in which he is advised that he may be called as a witness on a matter of such importance. This is not a question of whether you witnessed an accident on a street corner. This is a question that goes to the very heart of the whole system of justice in this court.

The Court: Now why don't you give Mr. Isserman a chance?

Mr. Isserman: If the Court please, I certainly (1365) have no control over your Honor's statement of position which your Honor has elevated I believe to the strength and dignity of a ruling, but I do have a right to object to that ruling. And I object to that ruling because it is prematurely made and because it is clearly within the ambit of the issues before your Honor on this challenge, as indicated by the papers now before you, that the possibility at least, and I certainly would say it is clear indeed to me, that the possibility at least of your being a witness in this case is there.

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The Court: That possibility is gone.

Mr. Isserman: Now your Honor's ruling apparently is the reason why your Honor states that possibility is gone. But the possibility is not gone, your Honor, that my client may require you as a witness. I desire the record to note that. And because I am obliged to represent my client I cannot now waive any right which he may have or any witness that he may need.

And therefore in objecting I wish to note the possibility of calling you as a witness and at the same time stating that if we arrive at that stage or that I do, it will only be after a very careful consideration of the evidence up to that point.

The Court: Now you may call your first witness.

* * *

(1367) Mr. Gladstein: I will call Mr. Herbert Allen.

HERBERT ALLEN, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Gladstein:

Q. Mr. Allen, would you be good enough to state your address, your residence? A. My home address is 461-14 Fieldston Road, Fieldston or Riverdale, New York.

Q. How long have you resided there, sir? A. Since 1943.

Q. What is your business? A. Investment banker.

Q. How long have you been an investment banker? A. Since 1928.

Q. Where is your place of business located? A. 30 Broad Street.

Q. What is the name of the company? A. Allen & Company.

Q. That is your name, is it? A. That is correct.

Q. Are you the owner or proprietor of that business? A. I am a partner.

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(1368) Q. You are a partner. With whom, please?
A. Charles Allen, Jr., Herbert Allen—Harold Allen, my brother, Samuel Elgort.

Q. I did not hear the last name. A. Samuel Elgort, E-l-g-o-r-t. And Rita Allen, special partner.

Q. Now when did you first qualify to serve as a juror in this court? A. I don't know when the notice, the first notice came to me. It may have been months ago. I haven't any idea.

Q. I mean the very first time that you were asked to serve. How many years ago, roughly? A. Oh, only when this last—first notice was sent out, long before this.

Q. Well, did you receive a questionnaire to come down and qualify? A. I did.

Q. When was that, roughly? A. It was within the last two or three weeks, last two weeks.

Q. That is the first time that you have been a juror, is that sir, sir? A. That is correct.

The Court: He says he has not been one at all yet.

The Witness: I am not one.

Q. Well, I mean, the first time you have ever been qualified in this district to serve as a potential juror, is that so? A. Well, I don't know what the term is. I haven't qualified because I am not serving.

(1369) Q. I understand that. Your name—you know that your name was on the panel for January 17, 1949, isn't that so? A. That is correct.

The Court: All he said so far is he got the notice two or three weeks ago.

Mr. Gladstein: I heard that, your Honor.

Q. Now, when you received the notice you went to the office of the clerk of this court, I take it, did you not? A. That is correct.

Q. And you were given a questionnaire to fill out, is that right? A. I was not given any questionnaire—

The Court: Why don't you ask him what happened?

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A. (Continued) On the back of my jury notice there was just my name to be filled out and a few other incidentals. That is the only paper I ever had. I had no questionnaire at any time.

Q. No questionnaire at any time? A. No.

Q. Would you describe again in somewhat more detail what it was that you were given or signed, if anything?

A. A notice to appear in court on January 17th, I believe, which I termed a formal notice, and on the back I just had to fill out my name and, if I remember correctly, my name, my home address, and business and telephone number. Nothing else.

Q. And you did that, I take it? A. I did that.

(1370) Q. That is all that happened? A. That is all I did.

Q. Did you bring that into the office of the clerk? A. I was on a line with many other people, yes.

Q. And you simply handed that to him, is that right?

A. Simply handed it to him.

Q. That was all of the process of qualifying you, is that correct? A. That is all that I know before or after, yes, until last night.

The Court: When you say before qualifying, that seems to assume that he has qualified.

The Witness: I have not qualified.

Mr. Gladstein: Well, now, I will ask the United States Attorney to agree that the name of Mr. Herbert Allen is on the petit jury panel for January 17, 1949.

Will you agree to that, Mr. McGohey?

Mr. McGohey: Yes, I will agree to that, your Honor.

Mr. Gladstein: All right. And will you further agree that the preamble to that list states that this panel, in substance and effect, includes the names of persons drawn by the clerk on the 17th of November 1948 in conformity with the statute in such case made and provided in the order of the Court?

Mr. McGohey: Yes, I will agree that that language is in the preamble.

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(1371) I suggest, your Honor, that there seems to be a conflict about what “qualification” is.

The Court: I did not hear any conflict at all. The man was called and testified he got a notice, and he did not qualify as a juror, and he is out. That is the end of it.

What is the next witness?

Mr. Gladstein: I don’t understand your Honor’s statement. What do you mean he is out?

The Court: Well, he is through as a witness, apparently.

Mr. Gladstein: No, I have some further questions.

The Court: I have not heard anything that bears on the case here. Perhaps you think there is extreme significance to the fact that he did not qualify. If so perhaps you would want to bring out why he did not qualify. I don’t know.

Mr. Gladstein: I probably have that in mind, but I would like to pursue a little further the circumstances concerning Mr.—

The Court: I thought when you sat down you were through with the witness. Excuse me.

Mr. Gladstein: No. When Mr. McGohey rose I sat down.

May it be understood that at times I may sit down (1372) while I am asking questions?

The Court: Oh, yes. I see no great impropriety in your doing that. If you are fatigued I might permit you to ask questions from your chair.

By Mr. Gladstein:

Q. Mr. Allen, isn’t it true that when you came to the clerk’s office you were given a printed form or questionnaire in which a number of questions were asked you with respect to your residence, your place of birth, the status of your citizenship, whether you had \$250 property qualifications that you could discharge, and so on? A. It is untrue. To the best of my knowledge it is wholly untrue. There was on the back of the questionnaire—I can’t remember everything—I think everybody in the line had the same piece of paper that I did.

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Q. Did you ever swear to anything? A. Have I sworn?

Q. I mean in connection with this information that you have been telling us about, regarding your potential service on the jury? A. I have never been in court before this case to the best of my knowledge—possibly once—but the only thing I know about this case is that I was given one piece of paper which I believe I received at home or my office, I don't know—I have a very large business, and I am very busy in charity and other organizations, so I don't pay too much attention to these things. My (1373) lawyer does.

By the Court:

Q. Do you know why you were not qualified? A. Why I was not qualified? Yes. I didn't want to qualify, your Honor, because of my wife's illness.

By Mr. Gladstein:

Q. Mr. Allen, will you please be good enough to—

The Court: The witness came here and said his wife was ill and didn't want to serve, and that is the end of it.

Mr. Gladstein: His name is on the panel as being called in accordance with law, your Honor.

The Court: Maybe there is something very important and interesting here. I will listen intently.

Mr. Gladstein: I think there is.

The Witness: If there was anything on the back—

The Court: You just wait until he asks a question.

Q. Mr. Allen—

Mr. McGohey: May I interrupt for just a moment? Your Honor, I think what is confusing the witness is that counsel is talking about one thing and the witness appears to be thinking about something else. Counsel seems to be talking about qualification at the time he got his initial notice to come

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down to ascertain whether he could be a juror, and the witness seems to be thinking about the (1374) time when he was called to serve as a juror and got excused from service.

The Witness: That is what I am referring to.

The Court: Yes.

The Witness: I thought you were referring to last week.

By Mr. Gladstein:

Q. Mr. Allen, I asked you when you first came down to the office— A. Oh, yes, that is true. Many, many months ago. I don't know when it was. That is absolutely true. I thought you were making reference to last week. I beg your pardon.

Q. How many months or years ago? A. Whenever it was, yes, they asked me—I believe—I can't remember back that far.

Q. Was it eight years ago or ten years ago or six years ago? A. I imagine it was within the last year; but you asked me a question whether or not—whether they asked me whether I own property. I don't remember that.

Q. I am asking you when in your best judgment— A. Within the past year.

Q. Your best recollection is that during the past year you were called for the first time to come down and qualify as a juror, is that what you say? A. I would say so.

(1375) Q. On that occasion did you come to the office of the clerk of this court? A. I believe so.

Q. Did you fill out a questionnaire? A. Yes, I did.

Q. Did you provide answers in that questionnaire? A. I certainly did.

Q. Did you swear to the truth of the answers? A. I did.

Q. And were the answers true? A. It had to be true if I swore to it.

Q. Well, were they true, sir? A. They were true.

Q. Now, did anything on the occasion of your qualifying, that occasion approximately a year ago or less, did anything occur in connection with that process other than your filling

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out of the questionnaire and your taking an oath as to the truth of the answer? A. To the best of my knowledge, no.

Q. There was no conversation of any import whatever between you and any of the deputy clerks or the clerk himself? A. Very definitely no.

Q. Now, since qualifying how many times have you ever been notified to come down and serve? A. I may have been notified once. I truthfully don't remember.

Q. Once prior to this time? A. That may have been. I would not say that I have but I may have been. I believe I was.

(1376) Q. On that occasion you did not serve, is that your testimony? A. That is correct.

Q. But you were notified that your name had been drawn, and you were on a jury panel list; is that correct? A. I believe that is so.

Q. Do you recall how long ago that was? A. No, it would have to be within the past year.

Q. Well, can you fix it a little more definitely? A. I am sorry, but I could not.

Q. Well, then, as I understand the picture, Mr. Allen, it is a little less than a year ago that you first qualified as a potential juror, and during that period of a little less than a year you have twice been placed on jury panels, including the present time; is that right, sir? A. That is correct, that is correct, but when I say I believe I was called once before during the year, I am not certain. I am fairly certain that is so.

Q. Do you own the home in which you reside? A. I most certainly do.

Q. I beg your pardon? A. I most certainly do.

The Court: Mr. Gladstein, from the fact that you resume your seat and continue questioning in the Philadelphia manner I wonder if I am to infer that you feel ill or unable to pursue the regular practice here which is that counsel rise when they interrogate the (1377) witness. If you feel fatigued or ill I shall permit you to question the witness from your chair. Otherwise I think it better to pursue what is the customary practice here,

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You know, in Philadelphia, particularly in the Orphans Court the practice is the reverse. The witness stands up and the lawyer puts his questions in a reclining position in his chair.

Mr. Gladstein: A noble idea.

The Court: And they have various methods, but I think that it generally conforms more with the dignity of the court to have a consistent practice in each court so that the procedure may be uniform.

Mr. Gladstein: Very well, your Honor. I was thinking of my comfort when I sat down. I will set that aside.

The Court: It really does not look very well to those who are accustomed here to see the lawyers rise when they have something to say. But, as I said before, if there is some special reason, such as fatigue or illness, I would be disposed to permit you to do otherwise.

Mr. Gladstein: Being a conformist I will be very happy to comply with the rules of this court, although I confess it gets a little difficult, because in other courts I have been in they won't let a lawyer stand up. He has to sit down.

(1378) The Court: Well, I don't know just what the lawyer did in those cases that made it necessary for him to remain seated, but, anyway, we had better get on.

By Mr. Gladstein:

Q. Mr. Allen, what is in round figures the assessed valuation of the home in which you live? A. Do I have to answer that, your Honor?

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

(Question read.)

The Court: I will sustain the objection.

Mr. Gladstein: May I be heard before your Honor sustains the objection?

The Court: Certainly you may be heard. I think it is entirely proper to ask him whether he

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owned property considerably in excess of the required amount. I would not permit inquiry of a person summoned as a juror or questioned to see whether he was qualified, as to what his property is; and you start with his house, and then you would get into his safe deposit box and how much money he has got in his pocket, and so on and so forth, and I just won't permit that.

Mr. Gladstein: I think your Honor has perhaps forgotten—perhaps not—the charge contained and the allegations contained in our moving papers, and the assertions we make as to the nature of the composition (1379) of juries obtained through the system of selection administered in this court; and one method of proof and a method of primary proof, the best possible evidence, is to obtain from the potential juror himself, the person on the list, that evidence to which Mr. Justice Jackson addressed himself when he was discussing the failures or the loopholes or omissions of proof in the Fay case, with which your Honor is familiar. I now submit, Judge—

The Court: Let me see the part of Mr. Justice Jackson's opinion that you are referring to. Have you got the volume here?

Mr. Gladstein: I have only the advance opinions.

Mr. McGohey: We have the volume.

The Court: The advance opinions have the same page numbers as the bound volumes. What page are you reading from?

Mr. Gladstein: I had not been, but I will read from page 1524.

The Court: I guess that is it. I guess that must be the Lawyers Edition, and I have the Official Edition here. You read and I will follow without taking the trouble to get the Lawyers Edition down. Read me the part.

Mr. Gladstein: Now, in that portion of the opinion Mr. Justice Jackson says this. He says:

(1380) "The proof that laborers and such were excluded consists of a tabulation of occupa-

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tions as listed in the questionnaires filed with the clerk. The table received in evidence is set out in the margin. It is said in criticism of this list that it shows the industry in which these persons work rather than whether they are laborers or craftsmen. That is, mechanics may be and probably are also laborers. Bankers may be clerks. Certainly the tabulation does not show the relation of these jurors to the industry in which they were classified, as, for example, whether they were owners or financially interested or merely employees.”

Now, what Mr. Justice Jackson is saying there is this—

The Court: Well, I think I have followed it sufficiently to adhere to my ruling, and the objection is sustained.

Would you like to argue a little more?

Mr. Gladstein: I think so, and I think other counsel have a real interest in presenting argument to your Honor on this matter.

The Court: I will listen to them.

Mr. Sacher: If the Court please, I think one thing solely has to be borne in mind, and that is this, (1381) that in all of our questioning we are going to address ourselves to proving the inclusions and exclusions enumerated in our papers. One of the basic charges made in our challenge is that systematically there have been chosen the rich, the propertied and the well to do, and that both the grand jury and the petit jurors have been made the organs of a specific class, namely, the rich, the propertied and the well to do; and the question that Mr. Gladstein has put is directed to the establishment of that proposition in regard to this gentleman on the stand. In other words, the purpose is to establish that he is among the rich, the propertied and the well to do.

The Court: Would your colleagues like to address me on the subject?

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Mr. McCabe: I would like to call attention to one fact, your Honor: Your Honor seemed to fear that we were going into minute detail of the amount—

The Court: No. I say it is not relevant or competent to show exactly how much money the man has, what property he has. I think it is sufficiently disclosed for your purposes in the testimony already given.

Now, I am not going to keep explaining my rulings, and I am only listening to the argument that is made here in this preliminary stage, but as this question may be presented again and again, I hope counsel will not assume (1382) that I am going to listen to each lawyer on each objection, however repetitious, throughout the whole proceeding.

Mr. McCabe: You see, your Honor, you there again used the word “exact.” We are not trying to ascertain the exact financial status. We are trying to fix upon the record the general classification. Now, the assessed valuation of a man’s house I believe is in New York and other places a matter of public record. What we are interested in is knowing not whether he lives in a home assessed for \$32,380, but whether it is in the class of a \$10,000 home, a \$60,000 home, or a \$50,000 home.

The Court: He may be a mechanic, for all we know—

Mr. Sacher: He says he is a banker.

The Court: —but he does not look like one.

Mr. McCabe: But the record might show he did not look like a banker, your Honor, but I think he looks like a banker and talks like a banker.

The Court: Well, it is hard for me to distinguish the bankers in the subway, I will say that. But I have sustained the objection.

Now, if there is some legal argument that any of you want to present that is not just a repetition of what has already been said, I will listen to it, but I honestly (1383) think that we have just about squeezed that question dry.

Mr. McCabe: Am I to assume from your Honor’s indicating that you are going to cut off further

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questioning along these lines, that your Honor has concluded to his own satisfaction that Mr. Allen does fall within the class which we have described as the rich, the propertied and the well to do?

The Court: I do not choose to answer that question, one of my reasons being that I think counsel has inadvertently dropped into the habit of catechizing the Court and asking questions of the Court which seem to me I don't want to over-encourage. I ruled on the objection, and I think what I have already said has been a sufficient indication of my disposition of the matter and my reasons.

Mr. McCabe: Now, your Honor, while I am on my feet, as they say over in Philadelphia, the records, our typewritten records will frequently show "Sit down, sit down, sit down" at regular intervals in the record where the Court is criticizing—

The Court: I have not told any of you lawyers to sit down.

Mr. McCabe: No. I say the records in Philadelphia will show that constantly; so if I inadvertently start to question a witness while I am on my feet, I trust (1384) you will believe it is perhaps a nostalgic feeling that will make me feel so much at home, or that I am apt to fall into the bucolic ways of Philadelphia.

The Court: You have been doing pretty well. I particularly liked your quotation from Virgil the other day.

Mr. McCabe: Well, I did. I got the old books out again, but I won't burden the Court or the stenographer.

The Court: You were right about it. I was a little doubtful about the exact words. The metre did not quite seem to fit in. I thought maybe you had a word wrong. But, anyway, go ahead.

By Mr. McCabe:

Q. Mr. Allen, you stated you were a partner with Charles Allen, Jr.—

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Mr. Gladstein: Your Honor, I had not finished my questioning.

Mr. McCabe: I will yield.

Mr. Isserman: If the Court please, I want to state an objection for the record, if I may.

I wish to object first to your Honor's ruling without hearing argument on the question of the objection which, in this case, was made by the witness.

The Court: I am hearing argument. What is this I have been listening to?

(1385) Mr. Isserman: If the Court please, I would like to state my position. I have not said a word to your Honor on this point.

The Court: All right.

Mr. Isserman: Secondly, I wish to call to your Honor's attention that if your Honor will rule on questions put by one counsel without giving other counsel a chance to state his position, then other counsel will ask the same question on behalf of his defendants and then argue his point.

Now, I object to your Honor ruling before defendants in this court are heard. And that is precisely what your Honor has done. And your Honor cannot take the position that an objection ruled upon by your Honor on a question put by one counsel is binding on other counsel unless other counsel are heard.

Now, I think your Honor's ruling was made hastily; I think there is important argument to be had on it, and if your Honor is willing to hear me now I will go into it, and, if not, I will do it when it comes my turn to question.

(1386) The Court: You may argue now in extenso.

Mr. Isserman: I ask first before I argue that your Honor withdraw your ruling.

The Court: The motion is denied.

Mr. Isserman: I take exception to that.

Now, if the Court please, this questioning and other questions like that are designed not merely to

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bring out the occupational status of the witness, which, from your Honor's remark, seems to be the basis of your Honor's ruling. The purpose of this and similar questions to be asked of this witness, and which I would put to this witness, or my colleagues would put and I would adopt, would be to establish the economic status of the witness to indicate that the inclusions improperly made in the selection and establishment of the jury list in the Southern District of New York are inclusions which are deliberately and systematically selected from those persons in a community of wealth and property, of extreme wealth and property, of an economic status which is different from the economic status of manual workers and other residents of the community, and that an excessive number have been deliberately and systematically—an excessive number of that class have been deliberately and systematically—an excessive number of that class have been deliberately and systematically selected for inclusion on the juries.

(1387) Now, without being able to obtain from this witness evidence as to his economic standing, which is the best evidence of that standing, your Honor is ruling in effect that it is improper in this court to establish the economic status of a person called for jury service. And we say if you do not allow us to establish that economic status you are denying us due process of law, in that you are not allowing us to show that the jury list established in this court from which grand and petit jurors are drawn, are not truly representative of a cross-section of the community. In making that determination it is necessary to place before the Court the economic status of the witness.

Now, the Court has said something about the question of not getting the exact financial status. The Court seemed to be satisfied by the fact that the witness owned a home in Riverdale or Fieldston, that that indicated from the Court's satisfaction his economic status. It does not indicate that status

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to the extent that the defendants have to establish it under the law.

Now, we are perfectly willing to work out a range either of income or property ownings, establish a system of brackets under the supervision of this Court which would not lead to an individual detailing (1388) of the money that a man has in a bank or a safe deposit vault or invested in his business or in his home, so that the economic status can be established by reference to a range. If that can be worked out by stipulation with Mr. McGohey we are willing to do it, or, at least, on behalf of my clients I am willing to do it; but if this Court will not allow a determination of economic status from the source which is the best evidence, then your Honor is denying us our rights in this proceeding without due process of law.

Mr. Sacher: May I make one observation, your Honor?

The Court: You may argue in extenso.

Mr. Sacher: Well, it is not a question of arguing in extenso. I think what is being discussed here now will really determine the extent to which the inquiry will be conducted.

I heard your Honor say a few minutes ago that the witness did not look like a banker.

The Court: No, I said he did not look like a mechanic.

Mr. Sacher: Oh, I beg your pardon. All right.

Now, the point I want to get at is this, that what the decisions of the Supreme Court are concerned with are not the appearances, for I have seen many (1389) workers and mechanics who look a darn sight more handsome and more personable and pleasant than a lot of fat bankers.

The Court: Well, we won't go into the question of how good-looking everybody is. We might not come out so well on that.

Mr. Sacher: That may be. But I am not interested in that now. I want to stick to the facts of

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the case and the law of the case; and what I am saying to your Honor is the following, that the Supreme Court of the United States in the Ballard case and particularly in the Glasser case said in so many words that the grand and petit juries of our country may not be made the organs of special economic, social, etc., classes.

We have announced that our purpose here is to establish beyond all reasonable doubt that these grand and petit juries in this district are organs of certain economic, social classes. We are concerned with demonstrating that this witness falls within a certain economic class. If you bar questions which are concerned with demonstrating the category of class into which he falls, then I say to your Honor that what is happening here is that the foundation for the establishment of the challenge will have been removed. And I therefore would respectfully urge upon your Honor that what we do here is to allow the question (1390) to proceed, because, after all is said and done, the inquiry as to what the man owns, as to what he has, as to what his income is, as to what the value of his house is, as to what he earns per week or what he reaps in profits and dividends and unearned increment, so to speak—all that has probative value in establishing his economic status. And I therefore submit that since that is the best evidence—

The Court: That is just what you are not going to do, however.

Mr. Sacher: What is that, your Honor?

The Court: That is just what you are not going to do, however.

Mr. Sacher: Well, let me make one thing clear: your Honor said that you were going to conduct a hearing, and I tell you now if what you are going to do is to prevent us from asking these questions and proving the fact, then this hearing is no hearing; it is just a sham and a pretense designed to prevent the establishment of those facts which will

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prove that the system is precisely what we say it is.

Mr. Gladstein: I desire to resume my questioning, your Honor, and I will say preliminarily only this. Yesterday you pleaded with us in open court for evidence. (1391) Now we seek to introduce evidence—

The Court: I pleaded with you?

Mr. Gladstein: —now we seek to introduce evidence—

The Court: Mr. Gladstein, I pleaded with you?

Mr. Gladstein: Let me modify the remark.

The Court: I don't understand that remark.

Mr. Gladstein: Let me modify that remark by saying that your Honor asked that evidence be offered.

The Court: I don't plead with defense counsel. They plead before me.

Mr. Gladstein: We are simply asking this Court to permit us to introduce evidence which you called for yesterday, which you asked us to produce, which we are ready to produce.

Now I will resume the question:

By Mr. Gladstein:

Q. Mr. Allen, do you own real property in addition to your home? A. I have interest in—my firm has an interest in real property, yes.

Q. And you have an interest in real property by virtue of your interest in the firm, is that right, sir? A. That is right, either by direct or indirect ownership.

Q. How extensive is that property holding, please? (1392) A. Well, a good deal of it has not any valuation. I can't tell you what the value of it is.

Q. What kind of property is it? A. Various properties. We have an interest in an office building in New York City.

Q. Located where, please? A. 295 Madison Avenue.

Q. All right. What kind of interest does your firm or do you directly or indirectly have in that office building?

A. I would not divulge that to anyone but the Securities

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and Exchange Commission or the National Association of Security Dealers.

Q. You refuse to answer the question? A. Yes, I refuse.

The Court: You state you are disinclined—

The Witness: Yes.

The Court: —unless directed by the Court?

The Witness: Unless directed by the Court.

The Court: And I will say that I will not direct him to answer.

Mr. Gladstein: May the record show that I ask the Court to direct the witness to answer.

The Court: I refuse to direct him. Indeed, I will rule that the question is not proper.

Mr. Isserman: I would like to object to the Court's ruling on the ground that the Court's refusal to direct this witness to answer prevents the (1393) establishment of the grounds contained in our challenge that a special and specific economic class of the rich, propertied and well-to-do have been unduly favored in the inclusion in the grand jury system and petit jury system of New York, and on the jury list which has been established from which grand juries and petit juries are drawn, and that his answer, together with other answers from this witness, and other evidence to be established, would establish the pattern of discrimination set forth in our challenge.

The Court: Now I will hear the rest of the arguments of counsel seriatim after a short recess.

(Short recess.)

By Mr. Gladstein:

Q. Mr. Allen, you mentioned an office building in which you have an interest. Will you proceed to state what other real property you hold interest in? A. North Kansas City Development Company.

Q. What is the nature of that generally? A. One of the largest industrial areas in the Middlewest.

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Q. What is your interest in that company? A. Oh, I have a stock ownership.

Q. Do you care to state the extent of your stock ownership? I will ask you for that, please. (1394) A. I don't believe I could; I can't remember it offhand.

Q. Is it substantial? A. Well, it was a venture capital proposition so that there are no returns on it at present, I don't believe, if that will answer it. It was done for the betterment of the community at the time.

Q. What other interests do you hold, property interests, real property? A. I don't know whether or not my firm has concluded a deal in Beverly Hills, California. There may or may not be a real estate deal concluded there in which we have an interest; it is not only Allen & Company, it is other people.

Q. Other companies, other investment bankers? A. Investment bankers and individuals.

Q. How large a deal are you talking about? A. That would be a ten million dollar deal.

Q. What is the nature of the interest of yourself or your firm in that deal? A. I don't have any of the details because as I say I am not sure whether that has been concluded.

Q. Well, can you indicate to some extent? A. Well, if we go in it, from 25 to 50 per cent, 100 per cent.

Q. I beg your pardon? A. 25, 50, 100 per cent. (1395) It all depends.

Q. So that the interest of your firm may vary between 25 to 100 per cent of that deal, is that right, sir? A. That is correct; or that is what any deal is.

Q. What other real property do you personally or indirectly through your firm hold interest in? A. Real estate properties?

Q. Yes, sir. A. Oh, I don't know.

Q. You have so much that you can't remember, sir?

Mr. McGohey: I object to the question.

The Court: Sustained.

Q. Well, will you try and think about it for a moment, reflect on it and answer the question? A. I don't think there are any other real estate propositions.

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Q. All right. Now with respect to your own property holdings either directly owned by you or through your firm, do you have possession or ownership of securities of any kind? A. Very definitely, yes.

Q. That is, stocks? A. Stocks and bonds.

Q. Bonds. Any other form of investments? A. No.

Q. And what is the extent of ownership of stocks by yourself personally?

Mr. McGohey: Your Honor please, unless the witness wishes to answer that, I object to it, unless (1396) he has a point of insisting on answering it.

The Court: Objection sustained.

Mr. Gladstein: May the record show, however, my exception to the ruling and also a further question on that subject to the witness.

Q. I ask you now, Mr. Allen, what is the value of the stocks which you personally own?

Mr. McGohey: I object to that, your Honor.

The Court: Sustained.

Q. What is the value of any stocks which you own indirectly by virtue of your interest in your firm?

Mr. McGohey: I object.

The Court: Sustained.

Q. What is the value of any bonds, of all the bonds that you own either directly or indirectly through your firm?

Mr. McGohey: Objection.

The Court: Sustained.

Q. I want to ask you if it is not true that the assessed valuation of your home is a matter of public record? A. It probably is.

Q. Then is there any reason why, if it is a matter of public record, you won't answer the question that I put to you about that?

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Mr. McGohey: Objection.
 (1397) The Court: Sustained.

Q. What is the value, the reasonable market value of your home?

Mr. McGohey: Objection.
 The Court: Sustained.

Q. Would you describe generally the character of your home, how big it is?

Mr. McGohey: Objection.
 The Court: Sustained.

Q. Will you describe the size of the lot on which your home is located?

Mr. McGohey: Objection.
 The Court: Sustained.

Q. Is your home located in a restricted area?

Mr. McGohey: Objection.
 The Court: Sustained.

Q. Is your home located in an area which restrictive covenants are in force by reason of which only members of the so-called Caucasian race may occupy property in that area?

The Witness: I would like to answer that, your Honor.

The Court: Well, if you are particularly anxious to, you may do so.

A. There is no restriction to the best of my (1398) knowledge as to race, creed or color in the neighborhood in which I am.

Q. Would you describe generally the character of that neighborhood, please?

Mr. McGohey: Objection, your Honor.
 The Court: Sustained.

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Mr. Gladstein: Well now, of course, your Honor must recognize that one form of a restrictive covenant is one that does not have to be put in writing, one that is just as effective in excluding where it is desired to exclude on the grounds of race, creed or color.

The Court: He didn't do any excluding.

Mr. Gladstein: I beg your pardon?

The Court: You may argue in extenso.

Mr. Gladstein: Thank you. One form of restrictive covenant is the fact that the homes in a particular area are so expensive that they are made absolutely impossible for members of various races to obtain. And I want to ask this witness again, ask your Honor to reconsider the ruling you have made as to the nature and description and character of the home in which he resides.

The Court: I have reconsidered it and I adhere to my previous ruling.

Q. Does your home have grounds surrounding it?

(1399) Mr. McGohey: Objection.

The Court: Sustained.

Q. Does the property in which you live have only a home for yourself or does it include—yourself and family—or does it include other houses on it for attendants or for servants?

Mr. McGohey: Objection.

The Court: Sustained.

Q. You mentioned that you are a partner in your firm. Are you the senior partner? A. I am not.

Q. What is the nature of your interest in the firm?

Mr. McGohey: Objection.

The Court: Sustained.

Q. What is the extent of your interest?

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Mr. McGohey: Objection.
The Court: Sustained.

Q. Are the other persons who are partners with you in that firm and whom you named using the name Allen, are they members of your immediate family or related to you?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Is your wife a partner in that firm?

Mr. McGohey: Objection.
The Court: Sustained.

(1400) Q. Would you be good enough to identify each of the persons whom you have named as your partners in respect of any relationship they bear to you?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Do any of the partners in your firm reside with you?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Do you have employes in your firm? A. Yes.

Q. How many, sir? A. I would say between 70 and 80. I am not certain of that figure.

Q. What was, in round figures, your income last year, sir?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Was your income last year above \$50,000?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Was your income last year above \$40,000?

Mr. McGohey: Objection.
The Court: Sustained.

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Q. Was your income last year above \$30,000?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Was your income last year less than \$30,000 a year?

(1401) Mr. McGohey: Objection.

The Court: Sustained.

Q. Apart from the question of your earnings last year, I will ask you whether you receive a stated salary in your firm or whether you simply share in profits?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Do you receive a stated salary?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Are you a director of any corporation?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Will you state whether your over-all income for last year, inclusive of earnings from your business, increment from your securities and other possessions, exceeds \$100,000?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Will you state whether it exceeds \$500,000?

Mr. McGohey: Objection.

The Court: Sustained.

Q. I will ask you if your net worth generally is \$1,000,000?

Mr. McGohey: Objection.

(1402) The Court: Sustained.

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Q. What is your public political party registration? What was it this last time?

Mr. McGohey: Objection, unless the witness wants to answer that.

The Court: How has that any bearing on the case, Mr. Gladstein?

Mr. Gladstein: Your Honor, we have charged that one of the grounds upon which discrimination has been practiced is for political reasons.

The Court: That might have to do with the testimony of the person who made the selection. But how can the political affiliations, if any, of a man who is called as a juror show that he was selected by reason of such affiliations?

Mr. Gladstein: Very simple. Just as it was argued in the Fay case and as has been held in cases I am willing to submit to your Honor—

The Court: I don't remember any such argument as that in the Fay case.

Mr. Gladstein: The fact that the composition of a jury panel, of several jury panels over a period of years demonstrates a pattern of particular exclusions or inclusions or the overloading of a jury with persons of particular political preference or persons of particular (1403) social or economic status, is itself evidence of the intention to systematically discriminate and has been so accepted by the courts. And upon that basis we have the right to inquire as to the open political party preference expressed by this witness when he last registered.

Now in that connection I want to say, not only on the question of political party registration—

The Court: Let us stick to that for the moment. I want to keep my mind clearly on the one point. And let me hear from Mr. McGohey on this, and then I will bear further from each of you singularum et seriatim.

Yes, Mr. McGohey, what have you to say on this question?

Mr. McGohey: If your Honor please, I don't believe that this prospective juror or any other

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prospective juror that is called for qualification in this court is required or even asked what his political affiliation is.

The Court: I think what I am going to do—

Mr. McGohey: The point—may I finish, your Honor?

The Court: Let me just put this thought in your mind.

Mr. McGohey: Oh, yes, sir.

The Court: I think what I am going to do is, (1404) until I have some evidence to indicate that there was any inquiry on the subject by those who selected the jurors, I shall sustain objections to that question, because it seems to me that if a man or a woman comes in there are certain things that can be observed by just looking at them—certain questions may be asked. Surely their political affiliations will not be in any way manifest. And unless I have some indication that there were questions put to somebody about it or some effort to ascertain a person's politics, it would be—but I will listen to whatever you may care to say.

Mr. McGohey: Your Honor has expressed the thought that I was going to urge.

The Court: Yes, Mr. Sacher, you may address yourself to the subject.

Mr. Sacher: I would like to say the following to your Honor. Section 1864—

The Court: I am familiar with that.

Mr. Sacher: —of the new Federal Code says that the jury commissioner and the clerk—or his deputy shall alternately place one name in the jury box without reference to party affiliations until the box shall contain at least 300 names or some larger number as the court determines.

Now what we aim to prove here is that there (1405) was discrimination among jurors on the basis of political party affiliation. Your Honor, I want to say right here and now that we do not intend to prove, at least I don't intend to prove that the determination or discrimination among prospective

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jurors was made in respect to party affiliation by asking them when they appear as to what their party affiliation was. I say to your Honor that the inquiry and the investigation as to the prospective juror's political party affiliation was ascertained before he was ever called into the office. We say that they were called into the office on the basis of what the deputy clerk and the jury commissioner or the clerk himself ascertained about the person to whom they were sending these questionnaires in regard to their economic status, their political affiliations, whom they knew, where they lived, etc.

And I therefore say to your Honor, suppose we were able to prove that there were called only Republicans on the jury, grand or petit jury, would your Honor say that despite the fact that there was no proof that the clerk had asked a prospective juror what party he—if, I say, he had asked him what party he belonged to—when he selects him he knows he is a Republican, would your Honor say, for instance, that in the City of New York we couldn't prove discrimination (1406) on the basis of political affiliation, party affiliation, by showing that there are so many and so many millions of citizens affiliated with the various political parties and that the jury lists consisted exclusively of the affiliates of one political party? Of course not.

I say therefore to your Honor that one of the decisive questions to be ascertained here and to be proved is that of party affiliation of each and every juror on the jury lists, both petit and grand. And in view of what I have represented to your Honor, that I am quite certain that the question of party affiliation was not put to any prospective juror because the jury clerk and the jury commissioner sent out the questionnaires to prospective jurors on the basis of their pre-discovered party affiliation of such jurors, I therefore say that we have a right to prove and we hereby offer to prove through this witness his party affiliation and all successive jury witnesses their party affiliations for the purpose of establish-

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ing that there is such a political complexion and composition of both the grand and the petit jury lists as to prove beyond all reasonable doubt that selection of prospective jurors was made with regard to political affiliation, and that those not selected were discriminated against because they were not affiliated with the political parties from among (1407) which and from among which exclusively the jury clerk and commissioner qualified prospective jurors.

The Court: I sustain the objection.

Mr. Sacher: I respectfully except.

Mr. Gladstein: May I have the question?

The Court: That was the one about the political affiliation, and I sustain the objection.

Mr. Gladstein: I just wanted, frankly, to see whether it included something else or some other part. That is what I was thinking about. But it is all right.

The Court: The reporter will read—

By Mr. Gladstein:

Q. I will ask you this: Are you a registered voter?

A. I have never been a registered voter.

Q. Now, Mr. Allen— A. Excuse me. When you say registered voter, you mean have I declared myself in either party? Is that the question?

Q. No. I mean whether you have— A. Oh, I certainly have registered.

Q. When is the last time you registered? A. The last presidential election.

Q. Did you declare yourself as to either party? A. I have never declared myself to any party.

Q. Now, state for the record the race to which you belong, please?

(1408) Mr. McGohey: I object to that unless the witness wants to—

The Court: I think that is quite unnecessary. You want it to appear that he is not a Negro. Is that what you mean?