Q. Are you a director of any of those companies? A. I am not.

Q. Are you an officer of any of them? A. I am not.

Q. Are the companies in which you hold stock listed on the New York Stock Exchange?

Mr. McGohey: I object.

The Court: Sustained.

Q. Is your name listed in the Directory of Directors? A. I don't know what it is.

Q. You are a graduate—

* * *

Q. You are a college graduate? A. I am.

Q. What college? A. Princeton.

Q. Is your name listed on the Alumni Directory of Princeton? A. I have not seen the Directory, so I couldn't say.

Q. You were a member of the Federal Grand Jury that returned an indictment against William Z. Foster and eleven other defendants, is that right? A. Correct.

Q. How long have you been qualified as a juror in the Southern District of New York? A. I am not sure exactly, but I believe since 1936 or 1937 along in there.

(1577) Q. That is when you first qualified? A. I believe so. That is when I was first called. I never remember qualifying.

Q. You were called in and filled out a questionnaire? A. I don't recall doing so.

Q. Have you been called back again to fill out a questionnaire since 1936, 1937? A. Not to my knowledge.

Q. On how many federal grand juries have you served in this district? A. One prior to this last one.

Q. When was that? A. I believe in 1940 or thereabouts.

Q. Are you a member of the Federal Grand Jurors Association? A. I am not.

Q. Have you ever been solicited for membership in that association?

Mr. McGohey: I object.

The Court: Sustained.

Q. Have you ever served on a petit jury in the Southern District of New York? A. I have not.

Q. Are you presently employed, Mr. Brush? A. You might call it so, yes.
Q. What firm? A. I am working as treasurer of a church.
Q. Is that your only employment? A. At present.
Q. Your only source of income now is from your (1578) position as treasurer of a church?

Mr. McGohey: I object.
The Court: Sustained.

Q. I will ask you this question, Mr. Brush: Is your income in excess of $10,000 a year?

Mr. McGohey: I object.
The Court: Sustained.

Q. Is your income in excess of $7,500 a year?

Mr. McGohey: I object.
The Court: Sustained.

Q. Is your income in excess of $5,000 a year?

Mr. McGohey: I object.
The Court: Overruled.

Q. Will you answer the question? A. Yes.
Q. It is in excess of $5,000? A. Yes.
Q. From what sources?

Mr. McGohey: I object.
The Court: Sustained.

Q. From real estate?

Mr. McGohey: I object.
The Court: Sustained.

Q. From shares of stocks or bonds?

Mr. McGohey: I object.
The Court: Sustained.
(1579) Didn't we go over that subject the other day, Mr. Crockett?

Mr. Crockett: We did, your Honor. We did it with two or three witnesses, but I am anxious that the record show that each time the question is put that your Honor sustains the objection.

The Court: Then perhaps it is better for you to ask the questions in extenso. You may do so.

Mr. Crockett: Thank you, your Honor.

By Mr. Crockett:

Q. I have one final question to put to you, Mr. Brush. I regret to do so because it injects the element of race, but unfortunately that seems already to have been injected prior to the time we got mixed up in this case—

Mr. McGohey: I object and move to strike that, your Honor.

The Court: Yes. This preliminary every time—it is not evidence, and you might just as well ask him out and out, is he a member of the white race, and we can all see that he is, and then it will all be over with.

Now, are you a member of the white race?

The Witness: Apparently.

(1580) *By Mr. McCabe*:

Q. Mr. Brush, are you a graduate of any other college or university besides Princeton University? A. I am not.

* * *

Cross examination by Mr. McGohey:

Q. Mr. Brush, would you look at this paper just marked Government's Challenge Exhibit I for identification and tell me if that is your signature or a photostat of your signature that appears on that paper? A. It appears to be, sir.

Mr. McGohey: I offer it in evidence (handing to counsel for defendants).

Mr. Crockett: No objection.

(Government's Challenge Exhibit I for identification received in evidence.)

Q. Mr. Brush, at the time you signed that, you signed that down here in the office of the clerk of this court, did you not? A. I have no recollection, but there is my signature, so I don't know whether I did it at home or here or where.

(1581) Q. Having looked at it now, did you? A. It is my signature, but I have no idea where I made it out.

Q. I should like to have you look at it and see the form of the notarization. First, where this is sworn to and a date marked there.

The Court: I guess you signed it down before the clerk out there.

A. Apparently signed it before the clerk.

Q. Now, at that time did the clerk or any official of this court ask you any questions about your race, your religion, your political affiliations, your social affiliations, or your personal financial worth? A. Not that I recall.

* * *

Redirect examination by Mr. Crockett:

Q. Mr. Brush, how long were you a sandpaper manufacturer? A. About from 1919 to 1931 or 1932. 1931 I think would be nearer.

Q. What was the name of the firm? A. There were two firms, Herman Behr & Company in Brooklyn, and the Behr, Manning Company in Troy, New York.

Q. Did you own any interest in either of those firms? A. None.

Q. Were you a member of the board of directors of (1582) either of those firms? A. I was an employee only.

Q. You were an employee? A. An employee.

The Court: "Only," he says.

The Witness: Only.

* * *

(Witness excused.)

* * *

Walter A. Coleman—for Defendants on Challenge—Direct

WALTER A. COLEMAN, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. McCabe:

Q. Mr. Coleman, where do you live? A. I live at 116 East 17th Street, Manhattan.

Q. Did you live at 116 East 17th Street when you were qualified for grand jury service? A. Yes, sir, I did.

(1583) Q. Do you recall how long ago that was that you qualified? A. When I qualified the first time?

Q. Yes. A. Oh, I beg your pardon, I should not have answered that. I thought you meant when I qualified for this past jury. I qualified in the federal court as a trial juror perhaps 40 years ago—I can't give you the exact dates.

Q. As long as 40 years ago? A. Yes, sir.

Q. And have you ever been called upon to requalify? A. To requalify?

Q. Yes. A. No, sir.

Q. How often have you served as a grand juror during those 40 years, Mr. Coleman? A. Well, I have served in both the county and the federal courts. I do not know that I can be very exact about it; I should say perhaps 15 times, I would say, as near as I could figure it.

Q. 15 times altogether? A. Yes.

The Court: As a grand juror?

The Witness: As a grand juror, yes.

The Court: Some of those in New York County grand juries and some of those in the grand juries in this court?

The Witness: Yes.

Q. Have you ever served on a petit jury? (1584) A. Yes, I have.

Q. In this court, the district court? A. Both the federal and the county.

Q. And how many times would you say you had served as a petit juror in the district court, approximately? A. Well, that is a little difficult, I don't know. Perhaps a half dozen times, I don't know.

Q. And in the county court? A. In the county court, about perhaps ten times, I would say.

Q. And you were, I believe, a member of the grand jury which brought in an indictment against William Z. Foster and a number of others? A. Yes, sir.

Q. What is your occupation, Mr. Coleman? A. My recent activities have been connected with aviation, the air cargo business, air cargo transportation.

Q. How long have you been engaged in that business? A. About four years.

Q. And prior to engaging in that business what was your occupation? A. I was with the mill agency business. I was a representative of various mills manufacturing elastic materials, webbing and cordage, tapes, and general narrow fabrics, as they are termed.

Q. Did you have your own business? A. I did. (1585) I had an office as a selling agency; a selling agency, yes, sir.

Q. You had a selling agency? A. Yes. Selling agency for several mills.

Q. You were the delegated agent for a number of mills? A. Yes, the New York agent.

Q. Can you tell me the names of those mills? A. Yes, sir, I can. The Frank Wood Manufacturing Company of Valley Falls, Rhode Island, and J. W. Wood Elastic Web Company of Stoughton, Massachusetts; the Lauchlin Textile Mills of Waterford, New York, and the Fiber Manufacturing Company of Newton, North Carolina.

Q. And where did you carry on your business? A. At 45 East 17th Street; I was there about 30 years.

Q. You had an office establishment there and an office force there? A. Well, I just had a young woman and a boy, that is all.

Q. Now, since your going into the air cargo business where do you carry on your business? A. Well, I am not very active. The company that I was connected with, The Air Cargo Transport Company are now in financial difficulties, and I have not been active to any great extent recently in the business largely because of that and partly because I have not made other connections which are suitable.

(1586) Q. Because you have not made other connections, did I understand you to say? A. I say partly because of the condition of that company I was representing and partly because I have not made any other connections that have been satisfactory.

Q. Now, your residence at 116 East 76th Street—is that a home or apartment? A. Not 76th. 17th Street.

The Court: 17th Street, he said.

Q. 17th Street. Is that a home or an apartment? A. That is not an apartment; it is a refurbished private residence which has been changed to small apartments and rooms.

Q. I see. Do you own that home, by the way? A. I beg your pardon?

Q. Do you own that home where you live? A. No, sir, I do not. I am simply a tenant.

* * *

(Recess to 2:30 p. m.)

AFTERNOON SESSION

(1587) The Court: I notice that the affidavits which were to have been filed have been filed, and I have them here.

* * *

(1588) The Court: While we are waiting for that witness, Mr. Sacher, and I do not mean to interrupt your conference there, but I take it there is no reason why you need continue that now, I think I heard you and some of the other counsel make some statements from time to time to the effect that there were certain authorities that according to your interpretation, make it necessary to call all these jurors. I have looked through those cases as carefully as I could, meaning the Supreme Court cases in particular, and I can't find anything to warrant that statement.

And I wondered if you would be good enough to direct my attention, as I have the books right

here on my desk, to the parts of those decisions which you think make it necessary or proper for you to call all these jurors.

Mr. Sacher: Unfortunately we don't have all of the cases here on which we would rely. But for the moment, if your Honor wishes, I would like to direct (1589) your attention to the Fay case.

The Court: Now just a second.

Yes, I have it.

Mr. Sacher: In the very early section—unfortunately I have here the advance sheet for convenience—

The Court: I know. I think I can find the place after you have given it.

Mr. Sacher: If your Honor will look under headnote 4 I think it is, in which the following statement—

The Court: Footnote 4?

Mr. Sacher: No. It is headnote 4.

The Court: Oh.

Mr. Sacher: I don't know whether you have it in the Official, whether it is numbered that way in the Official Reporter there. But it comes in the third or fourth page, fifth page of the opinion.

The Court: I have headnote 4 before me.

Mr. Sacher: And in the body of the opinion itself, commenting on the tables, the census tables and the D.L.S. tables that were submitted in evidence, the Court says—

The Court: Now, let me find the place. Is it at about the place where the table prepared by the Labor Department appears?

Mr. Sacher: Right. Footnote 14.

> "Where there is enumeration of the grounds (1590) asserted, the allegations of fact upon which defendants ask us to hold these special panels unconstitutional come to three."

The Court: I would like to find the place, Mr. Sacher, and I haven't got it yet.

Mr. McGohey: I think your Honor will find it at page 272, the bottom of that page in the volume your Honor has.

The Court: 272. Where the paragraph starts with the words "The allegations of fact"?

Mr. Sacher: That is correct, your Honor.

The Court: Very good. You may proceed. I have the place.

Mr. Sacher: Your Honor will observe that the allegations come down to three, which are numbered so in the opinion, and then—the first of them being that labor operatives, craftsmen, foremen and service employees are systematically and intentionally and deliberately excluded—then in the discussion the Court says:

> "The proof that laborers and such were excluded consists of a tabulation of occupations as listed in the questionnaires filed with the clerk. The table received in evidence is set out in the margin."

(1591) And that sets forth the classification of the 3000 men and women whose names appear on the blue ribbon panel in that case.

Then the Court adds:

> "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 employes. It does not show absence or exclusion of wage earners or of union members, although none listed themselves as 'laborers,' for several of these classes are obviously of the employe rather than the entrepreneur character."

Now all we are saying is that the passage which I have just read to your Honor indicates a deficiency in the matters that were relied on there. In other words, the Court having said that designations might just as well be those of the industry with which the individual juror was identified rather than his status or relationship to the industry, we have (1592) regarded it as necessary to prove the correctness of the designation on the panel list and the significance of that designation in spelling out the occupational or entrepreneural status of the individual who appears on that list.

The Court: I do not see anything in what you read to warrant the inference that it was a proper procedure to call all of the jurors one after another.

You must realize what is evident to me, that the whole administration of justice here will be paralyzed if this sort of thing is continued. You are now calling from time to time jurors on the panel. If that is to be continued there will be a new panel long before you have ceased to interrogate the jurors on the current panel; and so that will go on, and in the meantime all of those jurors necessary to the administration of justice in the court here will be under subpoena and kept away from their duties. I cannot see how that quotation from Mr. Justice Jackson's opinion in the Fay case can be given the meaning that you ascribe to it.

Mr. Sacher: May I say this, your Honor: what I cited it for was the following proposition, namely, that we regarded that quotation as constituting a challenge, so to speak, to the proof which those (1593) who attack a jury panel must meet.

In other words, where the reliance is placed in part, as it must be in our case, on the occupational income, residential, racial composition of the jury, it is necessary for us to establish those facts.

Now, we cannot, I submit, consistent with the holding in the Fay case claim that a man who appears, for instance, under the heading of textile—we had one witness here already opposite whose

name the word "textile" appeared—and it did not appear whether he was a textile worker or a textile employer. It did turn out upon examination that he was an employer.

Now, we are under obligation, as I see it, to establish the actual composition of the grand jury lists if we are to establish the exclusion of manual workers, of Negroes, of the poor, etc.

Now, I should like to meet what your Honor has said concerning the possible paralysis of the administration of justice. Nothing is further from our minds than that, and as I indicated to you this morning, we have been giving thought in advance of your Honor's announcement of this morning to a formula which might be devised which would be acceptable to the Court and to the United States Attorney whereby perhaps certain stipulations could be prepared which (1594) would set forth in tabular form precisely what we want to prove as fact. In other words, we have not said that we insist upon calling any specific number of people. We had hoped that after we had established, as I think we have, a correspondence between a man's relation to the industry in which he is engaged and the designation which appears opposite his name in the panel list, that perhaps either the Court or the United States Attorney might say enough, let us now sit down and see whether we can't on the basis of a certain sampling plan some procedures whereby we need not call all of the individuals to establish what the defendants wish to establish here. And I simply suggest to your Honor that for the nonce I would appreciate it very much if we could continue with the calling of witnesses for this afternoon, and if your Honor wishes to set a time for a conference when Mr. Gladstein and Mr. Isserman have returned, we will be very happy to take up this matter of trying to work out procedures where on the one hand our rights will be adequately protected, and, on the other, whereby the processes of this challenge can be expedited to a speedy conclusion.

That is our desire in this situation. So that we are not only amenable but we are eager to work (1595) out acceptable procedures which will accomplish that result.

The Court: I take it the quotation from the Fay case is the only one that you had in mind.

Mr. Sacher: Oh no. It is the only one that I had at hand. Frankly, I was not prepared, in view of your Honor's holding of last Thursday, I was not prepared for this, except that this item sticks in my mind. Now during the luncheon recess Mr. Crockett—

The Court: I suppose if I suggested a memorandum that there might be some objection to that.

Mr. Sacher: No, we have no objection. Your Honor, we make a living from memorandums. We have no objection to a judge asking us for a memorandum. All we are seeking is that they do not have any overtones, you see.

The Court: Well, I intend no overtones, nor any undertones, and if there are other cases which you claim contain statements that justify this procedure, I will give you until the opening of court tomorrow to submit a short memorandum directing my attention to these cases.

Mr. Sacher: You are giving us awfully little time because we have got some witnesses whom we have to consult with this very evening.

(1596) The Court: You may eliminate the memorandum then.

Mr. Sacher: What is that, your Honor?

The Court: I say you may eliminate the memorandum then.

Mr. Sacher: No, we will be glad to submit it if you will be good enough to give us a couple of hours more.

The Court: No, eliminate it, because if I suggest it we will only get into a lot of discussion and dispute such as we had this morning over the other memorandum, and I will leave it to you to do as you choose about it.

Mr. Sacher: We will do our best.

Would your Honor be good enough to excuse me? I am going to try to see that we get that memorandum prepared. I would like to go out and see that someone gets to work on it. Mr. Crockett and Mr. McCabe—

The Court: You want a recess?

Mr. Sacher: No, you may go on. I am not suggesting that we stop. I just want to go out and get is going.

The Court: Are the other counsel ready to go ahead in Mr. Sacher's absence?

Mr. Crockett: We are ready, your Honor.

(1597) Mr. McCabe: Yes.

There was a witness on the stand.

WALTER A. COLEMAN, resumed the stand.

* * *

Cross examination by Mr. McGohey:

Q. Mr. Coleman, I ask you to look at this paper which has just been marked Government's Challenge Exhibit J for identification and ask you if that is your signature that appears on the bottom of it? A. Yes, sir, it is.

Mr. McGohey: I offer it in evidence (handing to defense counsel).

(Government's Challenge Exhibit J for identification received in evidence.)

Q. Do you recall, Mr. Coleman, whether you signed that paper down here in the court house? A. I don't recall, Mr. McGohey.

Q. Have you any recollection as to whether you received it by mail, or was it handed to you personally by the clerk? Would you care to look at it and see if that would refresh your recollection? A. I do not know the date as to when it

was. Oh, (1598) March 15, 1937, is that correct as to the date?

Mr. Gordon: No, that is not the date.

The Witness: I am afraid I can't answer as to where I signed it. I believe in Mr. Weiser's office, if I am not mistaken. I am not positive as to that, sir.

Q. This appears to be dated April 26, 1938. Had you served as a juror prior to that time? A. Yes sir, I had in both courts, Mr. McGohey.

Q. By "both courts" you mean the State court as well as the Federal court? A. Yes.

Q. Now, when you came down the first time you qualified as a juror in this court, were you interviewed by the clerk? A. I was interviewed by the clerk. I believe his title was marshal at the time, I am not sure.

Q. You were interviewed by some official down here? A. Oh yes, I did indeed, and gave my record, business or otherwise, whatever questions were asked of me.

Q. And I understand that your recollection is now that you signed this paper, Government's Challenge Exhibit J in the office of Mr. Weiser, the clerk of the court? A. Yes, I am sure I did.

Q. Now, on either of those occasions were you asked by the clerk or by the marshal or by any official of the court any question as to your race, your religion, your political affiliations, your social affiliations or (1599) your financial worth? A. Positively not, sir.

* * *

Redirect examination by Mr. Crockett:

Q. Mr. Coleman, were you asked any questions at all by the clerk? A. Yes, I was. I believe there were questions that pertained to my business and perhaps residential, and so on. If I was a citizen, perhaps, in New York—I have forgotten the detailed questions. Certainly they had nothing to do with race, religion or financial matters.

Q. What were the questions relating to your business? A. Well, as my recollection governs—that is 12 years ago, isn't it—I was questioned as to what my business connections were. Now, when I entered the Federal grand jury, when I was accepted—I had applied. Prior I had served on the County grand jury, prior to my becoming a grand juror in the Federal court, and I was put on the County grand jury, as I say, some years before. I think that may have been a little in my favor when I applied, the fact that I was also serving as a grand juror—

The Court: Well, that is speculation.

The Witness: Well, that I don't know, your Honor.

The Court: You just answer questions as (1600) to what you remember.

Q. Mr. Coleman, what do you mean when you say when you applied? A. I don't quite follow you, sir.

Q. You just said that you applied to be put on the jury list. A. I had to sign an application, as I recall it.

Q. You made out an application? A. That is my recollection of it.

Q. How did you get that application? A. At the clerk's office, I believe.

Q. I see. That is all.

The Court: You mean when you went down there you signed some such paper as you have been shown here?

The Witness: Yes.

The Court: That is what you call the application?

The Witness: Yes, exactly.

By Mr. Crockett:

Q. How did you happen to come to the clerk's office? A. How did I happen to come to the clerk's office?

Q. Yes, at the time you first qualified. A. Well, I felt that in view of the fact that I had been serving on the

grand jury in the County court, I felt that it would equalize itself if I became a grand juror in the Federal court as well. I didn't like the idea of being a trial juror in one court and a grand juror in the other, and I simply explained that to Mr. Weiser, or whoever (1601) it may have been. I believe it was Mr. Weiser—

Q. You told him you wanted to be a grand juror? A. —and that was one of my reasons, and he asked me why I wanted to be a grand juror, and I said I think it is rather in the nature of a promotion, you might say, like going from primary into a higher grade, so to speak.

* * *

(Witness excused.)

* * *

GEORGE T. HODELL, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Crockett:

Q. Mr. Hodell, do you reside at 43 North Drive, Dobbs Ferry, New York? A. That is correct.

Q. And how long have you lived at that address? A. About 10 years.

Q. Is that a private dwelling or an apartment house? A. A private dwelling.

Q. Are you the owner of the dwelling? A. That is (1602) right.

Q. What is your occupation, Mr. Hodell? A. I am in personnel work. My title is personnel assistant, which is directly under the personnel director.

Q. With what company? A. The Mutual Life Insurance Company.

Q. How many employees are there with the company?

Mr. McGohey: Oh, I object, your Honor.

The Court: Sustained.

Q. How many employes do you have under you, Mr. Hodell? A. Approximately seven. It varies.

Q. Are you the first assistant? A. There are four assistants.

Q. All of you have equal rating? A. That is correct.

Q. What are your duties? A. My specific duties at present are to control the personnel records of all the employees and also the employee benefits.

Q. In other words, the employe benefit plan is under your supervision? A. I—

Mr. McGohey: I do not think that that is the answer.

Mr. Crockett: I am asking the question.

The Court: What is the question? As to whether the whole plan is under his supervision? Is that it?

Mr. Crockett: That was the question, your Honor.

(1603) The Court: You may answer.

A. Well, I actually supervise the plan which has already been established, the plan as well as retirement plans.

Q. But you supervise the operation of the plan? A. That is correct.

Q. Are you paid by the week or the month or the day?

Mr. McGohey: I object.

The Court: Sustained.

Q. Do you receive any bonuses from the company?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Do you receive any other income from the company other than your wages?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Mr. Hodell, do you own any real estate?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Crockett: I might remind the Court that that specific question has been allowed on several previous occasions. Since the prosecutor did not give the reasons for his objection I would like the Court to at least indicate for the record why the objection was sustained.

The Court: I will let the ruling stand.

(1604) Q. When did you first qualify for jury duty, Mr. Hodell, in the district court here? A. I think it was about eight years ago. That is to the best of my recollection.

Q. And you are a member of the grand jury panel that returned the indictment in the case of William Z. Foster and 11 other defendants, is that right? A. That is correct.

Q. How many time previous to that time had you served as a grand juror in this court? A. Once.

Q. Was that the first time? A. No, once before that.

Q. Do you recall when that was? A. I believe it was 1944.

Q. At the time you qualified you filled out a questionnaire, is that right? A. Yes.

Q. Did you have any conversation with the clerk at the time? A. None to my recollection except—

Q. Did you specify that you wanted to be on the grand jury—

The Court: Wait. He has not finished the answer. Except what—

A. (Continuing) —except that they probably handed me the form and said fill this out. That is the only conversation I can recall.

Q. No questions were asked you by the clerk? (1605) A. None other than that.

Q. Did you at that time express any preference for grand jury duty or petit jury duty? A. I don't think it was put that way.

Q. How was it put? A. I believe I was told to fill out the form, which I did.

Q. And that is all? A. That is as I recall it.

Q. Now, have you ever served on a petit jury in this court? A. In this court?

Q. In the district court here, Federal district court. A. No.

Q. Have you even been asked to come in and requalify for jury duty? A. If you mean by qualify, another registration—I have not been asked to come in.

Q. You have not been asked? A. I have not been asked to come in for requalification. I have been asked to come in for the two times I have served.

Q. Now, there is one final question I must put to you, Mr. Hodell, because of the nature of the issues in this case which involves the question of discrimination against Negroes, among others, and that question is whether or not you are a member of the so-called white race. A. Yes.

* * *

(1606) *By Mr. McCabe*:

Q. Mr. Hodell, I believe you said that there were four personnel assistants. You are one of four personnel assistants of the Mutual Life Insurance Company? A. That is correct.

Q. Is that correct? A. Yes.

Q. Do you have any special district assigned to you?

Mr. McGohey: I object, your Honor, on the ground that it is irrelevant.

The Court: Sustained.

Mr. McCabe: I am simply trying to particularize a little bit the nature of his business and the extent of his contacts with the personnel.

The Court: What are you waiting for?

Mr. McCabe: I did not know your Honor had ruled.

The Court: I sustain the objection. I am following the case all right, don't you worry about that.

Mr. McCabe: That is all.

By Mr. Sacher:

Q. The company by which you are engaged or employed as personnel assistant is the Mutual Life Insurance Company of New York, is it? A. That is correct.

Q. By the way, Mr. Hodell, the jury on which you sat which returned the indictments against these (1607) defendants sat for a considerable period of time, isn't that right? A. That is correct.

Q. And can you tell us about how much of your working time was lost by your attendance to your grand jury duties?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: I would like to be heard a moment, your Honor.

The Court: You may tell me all the reasons you can think of why the question is proper.

Mr. Sacher: I do not like to bring in that refrain of your ruling before you hear, but it is sort of like Alice in Wonderland, sentence first and verdict after.

The Court: It may seem so to you, Mr. Sacher—

Mr. Sacher: If the appearance does not correspond to the reality, your Honor, I will make no point of it.

The Court: I am ruling just as I do in other cases. I feel the question is rather plain, but I will hear the argument.

Mr. Sacher: Well, I would like to explain to your Honor why I put this question: I maintain that we have a right to show that large companies, large (1608) corporations subsidize certain of their officers and employes in the functioning as grand jurors, etc., and I want to prove that all of the days and weeks and months that this man sat on the grand jury he was paid by the Mutual Life Insurance Company.

In other words, we have private organizations paying for the performance of these functions here,

and thereby they dominate and control the grand jury system here.

Now, that is the purpose of the question, and I submit that under the challenge stated here, that is perfectly proper and within the scope of the challenge.

We are complaining precisely that the grand jury consists of and is controlled and dominated by the rich, the propertied and well-to-do, including big corporations and big business organizations, and that is what I want to develop through this line of questioning.

Mr. McGohey: Will your Honor hear me briefly on that very point, sir?

The Court: Very briefly.

Mr. McGohey: Almost precisely that argument was made in the case of Frazer vs. The United States, which was decided only last December, with Mr. Justice Rutledge writing the opinion.

The Court: Yes, I have a copy of it right here.

(1609) Mr. McGohey: It was their claim that by reason of the method of jury selection in the District of Columbia there was brought about a system whereby only employes of the Government served upon juries, and in this opinion of the Court written by Mr. Justice Rutledge, who I think we will all agree is not known as an ultra-conservative judge, held that that argument was no valid argument against the constitutional character of the jury in the District of Columbia.

* * *

Mr. Sacher: But it is necessary to express correctly what the decision holds, and what the decision said was, the fact that the Government pays its own employes, whether in the performance of their original duties or in connection with their jury service, is irrelevant. Here we claim that private companies and private corporations are paying for the services rendered on their juries. Our contention here is that these juries are the organs of certain eco-

nomic and social groups within the community, and we say (1610) that when we prove, or are permitted to prove that this witness was paid for his time for serving here by a private company, that to that extent there is a tendency in that evidence to establish the proposition that we assert, namely, that the grand juries here are the organs of a special economic and social class within the community; and to that extent violate both the constitutional provisions as well as the proper administration of justice through impartial juries which represent a fair cross-section of the community.

(1611) The Court: Are there other counsel for other defendants who desire to be heard?

Mr. McCabe: I would like to add this, your Honor: that very often, the president or vice-president of a big corporation can't take time off from either his duties or his vacations to see that the grand jury is run in accordance with the domination which they have exercised over it. And therefore, certain clerks, certain minor officers or certain trusted employees are in effect designated to act upon the grand jury. And we claim that when they are so acting they are acting not in the performance of their duties as grand jurors but really as employees of their corporation.

Mr. Crockett: I have only one word to add, your Honor. I think by referring to Exhibit C which is attached to our challenge, which is the Toland letter, the Court will find some indication in there that it is the general practice in this district to make arrangements with such large corporations as Consolidated Edison and several others whereby it is understood and agreed that whenever any of their employees are called for jury duty here in this district they shall nevertheless continue to receive their compensation.

(1612) Now the same case that Mr. McGohey mentioned, the Fraser case, pointed up that very problem, the propriety of some outside person, outside corporation, and in that case it was the United

States Government; and so obviously the Supreme Court was saying: It doesn't make any difference whether it comes out of one pocket or comes out of the other pocket, it is the Government that is paying for the service. But here where you have an arrangement worked out between corporations so that they in turn subsidize jury service, then I think it should be proper for us to show as a material element of proof here that not only this witness but other witnesses whom we will call suffer no loss whatever by virtue of having to serve on the jury. And it perhaps might follow from that that because of the category of individuals suffering no loss, the tendency is to favor them for jury duty rather than to favor the manual workers who are not being subsidized in that manner.

The Court: I take it that the objections are intended to be taken as an application for reconsideration of my ruling.

Mr. Crockett: That is right, your Honor.

(1613) The Court: I have reconsidered it and I adhere to my ruling. The objection is sustained.

* * *

Cross examination by Mr. McGohey:

Q. Mr. Hodell, I ask you to look at this paper just marked Government's Challenge Exhibit K for identification and tell me if that is a photostat of your signature that appears there in the lower righthand side? A. It is.

Q. Did you sign the original of that on the date that it bears? A. Yes.

Mr. McGohey: I offer it in evidence.

Mr. Crockett: No objection.

(Government's Challenge Exhibit K for identification received in evidence.)

Q. Mr. Hodell, at the time you signed that Exhibit K, (1614) Challenge Exhibit K, you signed that here in the office of the clerk, did you not? A. Yes, I did.

Q. At that time were you asked by the clerk or by any other official of this court any question with respect to your race, your religion, your political affiliations, your social connections, or your financial worth? A. I was asked no questions that don't appear on that form. I am quite sure that it doesn't appear on that form.

Q. Were you asked by the clerk as to how you were paid, whether by the hour, the day, the week, the month or the year?

Mr. Crockett: I object, your Honor.

The Court: Yes. I sustain the objection. I sustained an objection to a similar question by defense. And there was no inquiry—

Mr. McGohey: I withdraw the question.

* * *

(Witness excused.)

ANDREW J. COAKLEY, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. McCabe:

Q. Mr. Coakley, you live at 325 East 79th Street? (1615) A. That is right.

Q. How long have you lived there? A. Oh, about ten years, I should say.

Q. You are a member of the grand jury which just concluded its work; you have been? A. Yes.

Q. You were a member of the grand jury which brought in the indictment against William Z. Foster and others? A. Yes.

Q. Do you recall how long it is since you qualified for grand jury service? A. I don't. Quite some time ago.

Q. Was it shortly after you came over to New York? A. What do you mean?

Q. How long have you lived in New York? A. Oh, since —40 years.

Q. 40 years? A. 40 years.

Q. I had the idea that you lived in Philadelphia one time. A. I did at one time.

Q. You were out in West Philadelphia, weren't you? A. Yes.

Q. It seemed to me that you and I had known each other 40 years ago, or maybe it goes back a little longer than that. A. It cost you money to see me then, didn't it?

(1616) Q. What? A. It cost you money to see me then.

Mr. McGohey: If we are getting to the point that Mr. Coakley at one time pitched for the Philadelphia Athletics, the Government will concede it. And we will add that he pitched well.

The Court: The Court welcomes this interlude.

Mr. McCabe: I was just trying to get my own recollection straightened out.

The Court: Your recollection is doing all right.

Q. Your present occupation, Mr. Coakley? A. I am baseball coach at Columbia University.

Q. And have been for a number of years? A. Yes.

Q. Do you have any other occupation? A. Yes. Life insurance.

Q. Connected with what company? A. Provident Mutual.

Q. What is the nature of your occupation? A. Salesman.

Q. This 325 East 79th Street, I take it, is an apartment house? A. Yes.

Q. And am I correct in assuming that you are not the owner of the apartment house? A. No.

The Court: When you say "No," that is a little equivocal. You mean to say, I take it, that (1617) it is correct to say that you are not the owner of the apartment house.

The Witness: Yes.

The Court: You see, when he says "Do you mean to say" and you say "No" that means just the opposite to what you meant. You have to watch him.

Mr. McCabe: I don't think you have to "watch him," anybody, about trying to distort any answers I get from any witnesses.

The Court: I had no such intention as that. I don't like to go through a long trial without any moments of relieving the tension, and I meant nothing such as you inferred from the comment.

By Mr. McCabe:

Q. Mr. Coakley, was your service on this grand jury your first service as a grand juror? A. Oh, no, I have served before.

Q. Do you recall how many times you served before? A. You mean on the federal grand jury?

Q. Yes. A. I believe once before, several years ago.

Q. Have you served on the petit jury in the district court? A. Oh, yes, several times.

Q. Do you recall how many times that has been, and when was the last time? A. Oh, probably, possibly five or six years ago. I don't know how many times. (1618) Quite often.

Q. Have you served in the county courts also? A. I believe so.

Q. Mr. Coakley, as the question of discrimination against negroes has been raised here I want to ask you: You are a member of the white race, so-called? A. Yes.

* * *

By Mr. Crockett:

Q. You indicated that you had served on both the petit jury and grand juries here in the district court. Will you tell me if you have served on a petit jury subsequent to the time that you first served on a grand jury in this court? A. I might have.

Q. Do you recall when you first served on a grand jury? A. No, I don't. Possibly four or five years ago. I really don't recall.

Q. What are your duties as salesman for the Provident Insurance Company? What kind of salesman? A. Solicitor of life insurance.

* * *

(1619) *Cross examination by Mr. McGohey:*

Q. Mr. Coakley, I show you this paper just marked Government's Challenge Exhibit L for identification—it is a photostat—and I ask you if that is a photostat of your signature down there in the lower righthand corner? A. Yes, it is.

Q. Did you affix your name to it about the date that appears there on the form? A. I can't make out the date.

Q. It looks like 1936 to me; I don't know. Well, regardless of the date, that is your signature? A. It is my signature.

The Court: Yes; whenever it was you signed it down in the clerk's office.

The Witness: Yes.

Mr. McGohey: I offer it in evidence.

(Government's Challenge Exhibit L for identification received in evidence.)

Q. Mr. Coakley, at the time you signed that, the signing occurred in the office of the clerk, did it not, here in the courthouse? A. As I recall it.

Q. At that time were you asked by the clerk or by any other official any questions with respect to your race, religion, political affiliations, social affiliations or financial worth? A. I don't recall it.

* * *

(1620) (Witness excused.)

JAMES CHESTER JOHNSON, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Sacher:

Q. Mr. Johnson, where do you reside, please? A. Bronxville, New York.

Q. You live at 949 Palmer Road? A. Yes, sir.

Q. Is the house you occupy your own house? A. It is an apartment house, sir.

Q. What is your business or occupation, Mr. Johnson? A. Customer's representative.

Q. Will you explain for the record what kind of customers you are talking about and what you mean by the representation you give those customers? A. Servicing investment accounts or the possibility of new investments in securities.

Q. And will you tell us whether you perform those duties here in the Borough of Manhattan? A. Yes, sir.

Q. Is it in the lower part of the city where you work? A. Yes, sir.

Q. Will you tell the Court what the address is (1621) of the building in which you perform those services? A. 14 Wall Street.

(Laughter in the courtroom.)

Mr. Sacher To the Court): Comic relief!

Q. With what firm are you identified?

The Court: I noticed you had to laugh yourself, Mr. Sacher.

Q. What is the name of the firm with which you are identified? A. Orvis Brothers & Company, O-r-v-i-s Brothers & Company.

Q. Is that a partnership? A. Yes, sir.

Q. Is it a limited partnership or a general partnership? A. I think general.

Q. Are you paid on a monthly or weekly basis? A. Monthly basis.

Q. Do you have an interest in the concern? A. No, sir.

Q. Do you share in the profits? A. No, sir.

Q. Do you receive any bonuses from time to time? A. No, sir.

Q. Not even at Christmas? A. No, sir.

Q. Heartless down in Wall Street, aren't they? A. Scotch firm.

Q. Scotch firm. Now, Mr. Johson, you were a member of this grand jury which returned the indictment against William Z. Foster and eleven others, is that right? (1622) A. Yes.

Q. And when did you first become active on grand juries in the Southern District of New York, Mr. Johnson?

Mr. McGohey: I object to the form of the question, your Honor—when he became active on grand juries.

The Court: Sustained.

Q. When did you first serve on a grand jury in the Southern District of New York? A. This was my first experience.

Q. Did you receive a questionnaire from the clerk of this court prior to appearing on the grand jury here? A. No, not to my knowledge. Questionnaire? No, sir, not to my knowledge.

Mr. Sacher: Mr. McGohey, may I ask you if you have such a questionnaire?

The Court: He probably means, did he get it—

Mr. Sacher: I am not going to make a big production of this. That is not my purpose.

Q. I show you this paper, Mr. Johnson, and ask you whether this is your signature at the bottom of it? A. Yes, sir. That so resembles it. I remember this now.

Mr. Sacher: I offer it in evidence.

Mr. McGohey: No objection.

(1623) (Marked Defendants' Challenge Exhibit 3.)

Q. Now, Mr. Johnson, do you recall the occasion on which you appeared in the office of the clerk to sign this Defendants' Challenge Exhibit No. 3 which I just showed you? A. Now, I don't get that, I am sorry.

Q. That is all right. Do you recall the occasion when you appeared in the clerk's office in this building to sign

this paper which I have shown you? A. No, sir, I don't. I would have thought I signed it up in the jurors' room, grand jurors' room, but I don't recall, no, sir.

Q. I notice the date on this is January 12, 1942. Now, that is just about seven years ago. A. Yes, sir.

Q. And I notice that at the bottom of this paper underneath your signature appears the words "grand jury." Do you notice that? A. Yes, sir.

Q. At the time you signed this Defendants' Challenge Exhibit 3 did you indicate any preference as to whether you wanted to be a grand juror or petit juror? A. Well, I don't—not to my knowledge, no, sir; I don't recall that.

Q. Now on the exhibit here you described the nature of your business as customers' broker. Is that right? A. Yes, sir.

Q. Now, is that the correct designation? A. It was (1624) in 1942; it isn't today.

Q. May I ask you whether your present status is higher or lower than what it was in January 1942? A. Neither one.

Mr. McGohey: I object, your Honor.

The Witness: Neither one.

Q. Is it simply a change of duties; is that it? A. No, sir; change of name. The duties—

Q. Change of name, with the same duties? A. The duties are identical. But they call them now registered representatives. That is the only difference, sir.

Q. You mean you are registered with the SEC, Securities and Exchange Commission? A. Well, I think so. That is my understanding. They used to call us customers' brokers. Now they call us registered representatives. Just why, I really don't know. The duties are the same, sir.

Q. It isn't all persons who are employed by your firm that have to register with the Securities and Exchange Commission; is that right? A. I think only those who service customers' accounts.

Q. That is, those who perform some fiduciary function; is that right? A. Well, in an advisory capacity, yes, sir.

In other words, I don't think a bookkeeper (1625) has to register. But—

Q. That is right. A. That is my impression.

Q. Now, Mr. Johnson, do you earn more than $20,000 a year?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: He looks as if he does, your Honor. And I don't know why—

Mr. McGohey: I move to strike that, your Honor.

The Court: Strike it out. You know, the other day we had some personal remarks by you, Mr. Sacher, and I made a response that was not understood by everybody. I think personal remarks are in decidedly bad taste.

Mr. Sacher: I shall desist from them because I always want to conform to good taste.

The Court: And, what is more so, in the courtroom.

Mr. Sacher: I shall desist from them.

The Court: I intended by my comment the other day to say how you and I might suffer in an inquiry into good looks.

Mr. Sacher: Oh, no; you didn't say in regard to your looks, but mine. And certainly I have no Hollywood aspirations. I wasn't bothered—

The Court: I intended that as—

(1626) Mr. Sacher: No. You will see the record says, "you."

The Court: The record may say whatever appears. But what I said when you made your remark about the bankers, and so on, or fat pigs or something like that, I said, if good looks were inquired into you and I, or we, might not do so well. Indicating and attempting to indicate to you in a delicate way that personal comments are not in good taste. Now, of course, some people take suggestions easier than others. And I merely repeat the suggestion now in somewhat more pointed language.

James Chester Johnson—for Defendants on Challenge—Cross

By Mr. Sacher:

Q. Mr. Johnson, by virtue of the charge made by the defendants in this case that there has been systematic discrimination against negroes in the capacity of both grand and petit jurors, I ask you to state for the record whether or not you are a member of the white or Caucasian race? A. To the best of my knowledge, white.

* * *

Cross examination by Mr. McGohey:

Q. Mr. Johnson, I notice that in answer to question 16 on this paper, Defendants' Challenge Exhibit 3, you make two answers—the question reads: "Are you legally entitled to exemption from jury duty?" and there appears the answer, "Yes." And then, "If so, do you waive such exemption?" (1627) and the word "No" appears.

Did you write those two words "Yes" and "No"? A. Yes, sir; it looks like my writing.

Q. Did you have any conversation with the clerk about what the disqualification was? A. I think I asked him whether or not being a member of the bar of New York State I was exempt from jury duty. That is my recollection.

Q. You stated to him that you were a member of the bar? A. Yes, sir; I have practiced law in New York State.

Q. And then you said that you did not want to claim that exemption? A. That is my impression. Yes. I can't remember that far back.

Q. Now, at the time you signed that were you asked by the clerk or by any other official of the court any questions as to your race, religion, political affiliations, social affiliations or your financial worth?

Mr. Crockett: I object to the last part of that question, your Honor, the part having to do with financial—

Mr. McGohey: Worth.

Mr. Crockett (Continuing). Financial status or financial worth.

The Court: Objection overruled.
Mr. McGohey: May we have the answer?

(1627-A) A. Was I asked—

Q. Were you asked any questions about those things? A. No, sir. By the clerk? No, sir.

* * *

(Short recess.)

(1628) The Court: Now, I found that place in the record here, and it is just what I said. It begins at the bottom of page 1388 and reads as follows:

"Mr. Sacher: 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 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."

And there it rested. You know, we are not using the newspapers as the record of this case but the minutes prepared by the reporters.

Now let us get on.

EUSTACE GEORGE SINCERBEAUX, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Crockett:

Q. Mr. Sincerbeaux, do you reside at 56 Albert Place, New Rochelle, New York? A. 36 Albert Place.

Q. 36. Is that a private residence or an apartment? A. That is right.

(1629) Q. Private residence? A. Private.

Q. Are you the owner? A. No. My wife is.

Q. Are you the same Sincerbeaux who is a trustee of the Greenwich Savings Bank? A. No, sir.

Q. Different person? A. That is right.

* * *

Q. Are you related to that Sincerbeaux? A. I believe I am, if it is the one I think it is. It is a cousin.

Q. What is your occupation? A. I am a supervisor of the Western Union Telegraph Company.

Q. How many employes do you have under your supervision? A. About 20.

Q. What are your duties as supervisor? A. General office work, personnel work, miscellaneous work of various sorts.

Q. How long have you been employed by Western Union? A. 31 years.

Q. When did you first qualify as a juror here in the Southern District of New York, can you remember? A. I believe either five or six years ago, if I am not mistaken.

Q. And you were a member of the recent panel of (1630) grand jurors that returned the indictment against William Z. Foster and some other defendants, is that right? A. That is correct.

Q. Had you previously served on any grand jury in the district court here prior to that time? A. Yes, I have.

Q. When was that? A. About three years ago.

Q. Now, have you at any time served as a grand juror in this court other than the two times you mentioned? A. I have not.

Q. There is one question I should like to put to you, Mr. Sincerbeaux, because of the nature of the issues in this case. We are contending that there has been systematic exclusion of Negroes and other groups from jury service. It is necessary therefore to have the record indicate what your race is. You are a member of the white race, is that right? A. I believe I am.

* * *

Mr. Sacher: If your Honor please, just so that we have the record straight, I would not particularly in the case of this witness but in the case of wit-

nesses generally like to interrogate them as to how much above $5000 their annual income is. I understand your Honor has ruled that you will use $5000 as the only permissible figure for—

(1631) The Court: I have not so ruled. I rule that a person getting over $5000 a year was not a poor man.

Mr. Sacher: You then, I take it, regard that conclusion of yours as one which won't recognize the degrees of wealth and power, and it seems to me—

The Court: Mr. Sacher, I prefer to make general rulings, nor do I think it proper—at least I think it not necessary here—to explain the reasons for my rulings. I think it is better if I rule on the questions as they come up.

Mr. Sacher: I merely raise this, your Honor, so that you won't think that we have violated what some courts take umbrage at, namely, the pressing of a question which the Court has ruled it will not permit.

The Court: I think if you keep asking the witnesses whether they have incomes of over a hundred thousand or over fifty thousand, over twenty thousand or over ten thousand, and so on, you may be pretty sure that I am going to sustain objections if objections are made.

Mr. Sacher: Well, what I wish to understand is that we have the record clear that we have wanted to and will want to interrogate on precisely that kind of question—

The Court: Well, we have so much iteration. (1632) I have said before, and I say now that the question before me is the alleged deliberate exclusion of certain classes and certain races, and so on, as part of a deliberate and purposeful discrimination. Now, I make my rulings having that in mind.

Mr. Sacher: I just would like to say this and let it lie, so to speak, that in addition to all of that, we have also charged in so many words that the juries are the organ of a special economic and social class.

The Court: Well, I have ruled on the questions that you thought showed that, and that may be deemed an indication by me that I do not think answers to those questions would tend to prove what you claim the answers would prove.

* * *

Cross examination by Mr. McGohey:

Q. Mr. Sincerbeaux, I show this paper which is marked Government's Challenge Exhibit M for identification. It is a photostat, and I ask you if that is a photostat of your signature down there in the lower lefthand (1633) side? A. It is.

Q. Did you sign that questionnaire here in the court house on the date of the questionnaire? I think you will find it down in the lower lefthand corner. A. Yes, I did.

Mr. McGohey: I offer it in evidence.
Mr. Crockett: No objection.

(Government's Challenge Exhibit M for identification received in evidence.)

Q. Question No. 16, Mr. Sincerbeaux, is—and I am quoting from the exhibit— "Are you legally entitled to exemption from jury duty?" and there appears after that in printed characters the word "No." Question No. 16. A. That is correct.

Q. At the time you signed that question did you have any conversation with the clerk as to what was or was not the legal exemption from jury duty? A. The question as far as I know was never raised.

Q. You did not ask him about it? A. I did not ask him.

* * *

(1634) Q. At the time you went down and signed that before the clerk did the clerk or any other official ask you any question with respect to your race, your religion, your political affiliations, your social connections or your financial worth? A. None.

* * *

(Witness excused.)

* * *

ADELAIDE E. LOWE, a witness called on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Sacher:

Q. Is it Miss Lowe? A. Mrs. Lowe.

Q. I notice, Mrs. Lowe, that you reside at 14 West 86th Street, is that right? A. No, you have got the wrong address.

Q. What is the address? A. 114 West 86th.

Q. And are you engaged in any business? A. I am.

Q. What business are you engaged in? A. I am with a publishing company, the Judea Publishing Company.

Q. And in what capacity are you engaged with that company? A. Special editions editor.

Q. And is that in the nature of a supervisory job? A. (1635) No, it is not.

Q. Are you paid by the month? A. I am not.

Q. In what manner are you paid? At what intervals? A. Only on royalties.

Q. You get a percentage of royalties, is that it? A. I get royalties.

Q. For the editorial work you do, is that it? A. That is right.

Q. Was this the first grand jury service experience that you have had? A. It has not been.

Q. You sat on the grand jury which returned indictments against William Z. Foster and 11 others, is that right? A. I did.

Q. And had you served as a grand juror before that? A. Yes, on many occasions.

Q. How many occasions would you say, Mrs. Lowe? A. Well, to my knowledge—I might be wrong, but that can be checked upstairs—four or five times.

Q. Within what period of time? A. Pardon me?

Q. Within what period of time? A. Well, since women are permitted to serve on juries.

Q. Mrs. Lowe, in this case the defense has made the charge that there is systematic discrimination against Negroes and women in the matter of jury service. A. I beg your pardon, I couldn't get what you said, sir.

(1636) Q. I said that in this case the defense has charged that there is systematic discrimination against Negro men and women in the manner of jury service, and I therefore ask you if you are a member of the white or Caucasian race? A. I don't know just exactly what you mean by that.

Q. Well, are you a Negro? A. Well, you can see I am not.

Q. You are white, is that your answer? A. I am.

Mr. Sacher: That is all. Thank you.

By Mr. McCabe:

Q. Mrs. Lowe, when did you qualify for service on the jury in the Southern District of New York? A. I don't remember, but that is a matter of record upstairs.

Q. Did you volunteer for service? A. Under the State law I had to volunteer.

Q. And you did volunteer? A. I did.

* * *

By Mr. Crockett:

Q. One other question, Mrs. Lowe. Are you talking about your service on the State juries or the Federal court juries? A. I believe the gentleman asked me whether I served on a Federal grand jury. I believe it was that, I am not sure.

Q. And that is what you had reference to? (1637) A. When I said four or five times?

Q. Yes. A. Yes, that is what I had reference to.

* * *

Cross examination by Mr. McGohey:

Q. Mrs. Lowe, I show you this paper which has just been marked Government's Challenge Exhibit N for identification, and ask you if you signed that paper on or about the date that appears thereon? A. Yes, sir, that is my signature under my maiden name. That is right.

Q. Will you state what your maiden name was? A. Adelaide Gloria Ettenson.

Mr. McGohey: I offer this in evidence (handing to defense counsel).

* * *

Q. At the time you signed that questionnaire which (1638) has just gone into evidence as Government's Challenge Exhibit N, you signed that in the office of the clerk, did you not, Mrs. Lowe? A. That is right, Mr. McGohey.

Q. And at that time did the clerk or any other official of this court ask you any question as to your race or your religion or your political affiliations or your social connections or your financial worth? A. No, sir, they did not. That is what surprised me with the question before, sir.

Mr. McGohey: I have no more questions.

(Government's Challenge Exhibit N for identification received in evidence.)

Redirect examination by Mr. Sacher:

Q. Mrs. Lowe, I notice from your questionnaire that at the time you signed that statement you stated as your occupation that you were the manager of a brokerage house, is that right? A. That was a great many years ago, that is right.

Q. What is that? A. That was several years ago. That was right at the time—

Q. That was at the time you signed that paper, wasn't it? A. That is right—no, I wasn't employed at the time I signed that paper.

Q. Well, is it true that on this paper you wrote in the words "Manager of Brokerage House" opposite the word (1639) "Occupation"? A. That was true.

Q. All right. Now, will you tell us what brokerage house you had been the manager of? A. I had been with Woodworth, Lonsbury & Company at 52 Broadway in charge of the women customer's office as manager.

Q. How far is that from Wall Street? A. Well, I don't know.

Q. You don't know? A. I have never—

Q. You worked there and you don't know? A. Wait a minute. Just a minute. I don't know because I have not been there in many years and I couldn't tell you today.

The Court: You need not concern yourself about that. We can easily find out.

Q. Now, you said you had a private interview concerning your service on the grand jury? A. I don't know what you mean by that.

* * *

(Witness excused.)

(1640) PAULINE G. CHARAL, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Sacher:

Q. Mrs. Charal, you were a member, were you not, of the grand jury which returned indictments against William Z. Foster and 11 others? A. Yes, sir.

Q. Did you have prior grand jury service? A. I did.

Q. How many times have you served on the grand jury in the last ten years? A. Twice.

Q. In this case the defendants are charging that Negro men and women are systematically excluded from jury service, and I therefore ask you whether you are a member of the white or Caucasian race? A. I don't understand.

Q. Are you white or are you Negro? A. I am white.

* * *

(1641) *Cross examination by Mr. McGohey:*

Q. Mrs. Charal, I show you this paper that has just been marked Government's Challenge Exhibit O for identification. It is a photostat of the original record. I ask you if that is a photostat of your signature on the lower righthand corner of the paper? A. Yes, sir.

Q. And did you sign that paper on or about the date that appears over on the lower righthand side? A. Yes, sir.

Mr. McGohey: I offer it in evidence.

(Government's Challenge Exhibit O for identification received in evidence.)

Q. Mrs. Charal, at the time you signed this you signed before the clerk in the office of this building, did you not? A. Yes, sir.

Q. At that time were you asked by the clerk or by any official of the court any question with respect to your race, your religion, your political affiliations, your social connections or your financial worth? A. No, sir.

* * *

Redirect examination by Mr. McCabe:

Q. Is it 175 West 93rd Street, Mrs. Charal? (1642) A. Right.

Q. And did you volunteer to serve as a juror? A. I did.

* * *

(Witness excused.)

* * *

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

Direct examination by Mr. Crockett:

Q. Mr. Watkins, where you reside? A. In New Rochelle, New York.

Q. What is the address? A. 97 Broadview Avenue.

The Court: 97 What?

The Witness: Broadview Avenue.

Q. Is that a private dwelling or an apartment house? A. Private dwelling.

Q. You are the owner? A. My wife is the owner.

Q. What is your profession, Mr. Watkins? A. Broker.

Q. Are you also an accountant? A. Yes.

Q. How long have you been an accountant? A. Well, a good part of my business career, I guess; quite a number of years.

(1643) Q. How long have you been a broker? A. 21.

Q. Since 1921? A. No, 21 years.

Q. With what firm are you connected, if any, Mr. Watkins? A. Shields & Company.

Q. Is that a brokerage house? A. A brokerage house, investment bankers.

Q. Investment bankers? A. Yes.

Q. What do you mean by investment bankers? A. Well, there is one term, investment bankers; that is, dealers in securities, and brokers.

Q. What is the address of Shields & Company? A. 44 Wall Street.

Mr. Sacher: I didn't hear that.

The Witness: 44 Wall Street.

Q. Have you any interest in the firm? A. Yes.

Q. What is the nature of your interest? A. Partnership.

Q. You are one of the partners? A. That is right.

Q. Now, when did you first qualify for jury duty here in the Southern District of New York, Mr. Watkins? A. Well, it must be some 30 years ago, I guess.

Q. Have you ever been called in to requalify? A. No.

Q. You were a member of the grand jury that returned the indictment against William Z. Foster and others, is that right? A. Yes.

Q. Had you previously served on any grand jury in the (1644) district court here? A. Oh, I say for the past 30 years off and on.

Q. Approximately how many times have you served as a grand juror in the past 30 years? A. Well, I would say perhaps every two or three-year period.

Q. Have you ever served as a petit juror? A. No.

Q. There is one question which I am required to ask, Mr. Watkins, because of the nature of the issues in this case, one issue being whether or not there has been systematic exclusion of Negroes from jury duty. It is necessary that the record indicate what race you belong to. Will you state for the record your race? A. Well, what do you mean by that?

Q. Are you white or— A. Yes, white.

* * *

Cross examination by Mr. McGohey:

Q. Mr. Watkins, in answer to a question from Mr. Crockett you said that you had never been called in to be requalified. Do you recall whether you ever received any notice with a questionnaire in it asking you to (1645) fill it out for requalification purposes? A. I don't recall any such questionnaire.

Q. Well, I show you Government's Challenge Exhibit P for identification and ask you to look at it, and ask you if that refreshes your recollection? A. That is my signature.

The Court: Well, I guess you went down and requalified.

Q. Will you look at the paper attached to it also, Mr. Watkins. A. It is a qualification. It says so.

Q. Well, does that refresh your recollection? A. Well, I don't recall the incident but it must have been because it is my signature.

Q. In any event, that is your signature? A. That is my signature.

Q. And you signed it? A. That is my handwriting.

Q. And you signed it on the date that appears there, 1940? A. Yes, that is right.

Mr. McGohey: Now I offer it in evidence.

The Court: What is the date of that requalification, Mr. McGohey?

* * *

Mr. McGohey: July 18, 1940.

* * *

(1646) Mr. McGohey: I offer it in evidence. (Handing to defense counsel.)

* * *

(Government's Challenge Exhibit P for identification received in evidence.)

* * *

By Mr. McGohey:

Q. Mr. Watkins, you testified that you had qualified originally for jury duty about some 30 odd years ago, is that right? A. About that time.

Q. At any time, about that time or at any time subsequent did any clerk, the jury clerk or any official of this Court, ever ask you in connection with your service as a juror any questions with respect to your race, religion, your political affiliations, your social affiliations or your financial worth? A. I don't recall any such question.

* * *

(1647) (Witness excused.)

DONALD C. WEBSTER, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. McCabe:

Q. Where do you live, Mr. Webster? A. 9 East 96th Street.

Q. Is that a private dwelling house or an apartment? A. That is an apartment.

Q. Do you have any other residence? A. No, I do not.

Q. No summer residence? A. No.

Q. Have you had a summer home up to recently? A. Well, not of my own, no.

Q. Did you have one of anyone else's?

Mr. McGohey: I object to it.

The Court: Sustained.

Q. What is your occupation, Mr. Webster? A. I am a salesman.

Q. And what business? A. The Universal Atlas Cement Company.

Q. Universal Atlas Cement Company? A. That is correct.

Q. And where is their place of business? (1648) A. 135 East 42nd Street. That is the Chrysler Building.

Q. And for how long have you been in their employ? A. 12 years, I think.

Q. And just what is the nature of your work which you do as a salesman? A. I solicit cement orders.

Q. You solicit cement orders from contractors for building operations? A. That is correct.

Q. And do you also solicit orders from municipalities who are contemplating improvements?

Mr. McGohey: I object to that, your Honor—I withdraw the objection.

A. No.

The Court: It seems to me it just supplements the other question.

Q. Now, Mr. Webster, do you recall when you qualified for service on the grand jury? A. I think it is about 10 years ago.

Q. And since you qualified approximately 10 years ago have you been called for service— A. Three times on a Federal jury.

Q. Do you recall when the last time was prior to your service in this recently dissolved grand jury? A. No, I can't. I can recall the case but I can't recall the date.

Q. You did serve, did you not, on the grand jury (1649) which brought in the indictment against William Z. Foster and others? A. I certainly did.

Q. Have you served on a petit jury in the district court? A. Now you will have to explain that to me. I am not familiar with that.

Q. Let us say a trial jury. A. Well, I served on a murder case, if that is what you are getting at.

Q. Yes. A. That is the only thing I can think of.

Q. Was that in the district court, the Federal court, or was that in the County court? A. Well now, I can't say. I think it was somewhere in this neighborhood but I couldn't say, I don't recall. I would not be a bit surprised if it was right in this building.

The Court: Well, I would.

Q. Mr. Webster, are you a graduate of any university? A. No, sir, I am not.

Q. Your name does appear in the Social Register, I believe? A. It does.

Mr. McCabe: I think I have no further questions, Mr. Webster—

Q. Oh, by the way, I forgot one question which is necessary for us to have on the record. You are a member of the white race, are you? A. Yes.

The Court: I would like to know what that case (1650) was that you lawyers say requires you to go through that rigmarole. Maybe it is some case in the South where they have some special statute as to the amount of blood a person must have to be classified as of the Negro race. Maybe it is something like that. It seems silly here, it really does. Why don't you just—

Mr. McCabe: On the other hand it is very serious. It goes to the heart of our allegations in this case, your Honor.

The Court: All right then, I will permit it, but it does sound silly.

* * *

Donald C. Webster—for Defendants on Challenge—Cross Redirect

Cross examination by Mr. McGohey:

Q. Mr. Webster, I show you this paper which is marked Government's Challenge Exhibit Q for identification and ask you if that is your signature on the lower righthand side, or a photostat of your signature? A. That is correct.

Q. And did you sign that paper on or about the date that it bears? A. I presume I did, yes, sir.

Mr. McGohey: I offer it in evidence.

(1651) (Government's Challenge Exhibit Q for identification received in evidence.)

* * *

Q. Mr. Webster, did you sign that paper here in the office of the clerk in this building? A. I believe I did, yes.

Q. At the time you filled out that paper and signed it, did the clerk or any official of this court ask you any question as to your race, your religion, your political affiliations, your social affiliations, or your financial worth? A. Not that I remember. I would say no.

* * *

Redirect examination by Mr. Sacher:

Q. I have just one question: were you in the Social Register at the time you signed that paper? A. Yes, sir, I was.

* * *

(Witness excused.)

* * *

(1652) (Adjourned to January 27, 1949, at 10:30 a. m.)

(1653) New York, January 27, 1949;
10:30 a. m.

Mr. McGohey: Your Honor, before we start the proceedings this morning, may the record show whether or not all defendants and counsel are present in court?

The Court: Yes. Are any of the defendants missing?

Mr. Sacher: Defendants are all here, I believe.

The Court: And as to Mr. Gladstein, I got a telegram from him indicating that his plane had been grounded and that he is on his way back from Chicago by train. And I gather that the proceedings here today will go on with the same understanding that we had yesterday.

CARL M. SPERO, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

The Court: Now I have two motions pending undetermined which I held over until this morning so that an opportunity might be afforded if desired to Mr. Isserman and Mr. Gladstein to make such argument (1654) as they desired. Perhaps I had better just hold those over until Mr. Gladstein's return.

Direct examination by Mr. Sacher:

Q. Mr. Spero, where do you reside? A. 139 East 94th Street, Manhattan.

Q. What is your occupation or business? A. I am in the insurance business.

Q. Are you an owner of the firm in which you are engaged? A. I am a small stockholder.

Q. What is the name of the firm? A. Spero & Whitelaw Company, Incorporated.

Q. What kind of insurance business is that? A. All kinds of insurance.

Q. Where is your office located, Mr. Spero? A. 235 Fourth Avenue, Manhattan.

Q. You were a member, were you not, of the grand jury which indicted the defendant William Z. Foster and eleven others? A. I was.

Q. Had you served on a grand jury prior to your service on the grand jury which returned those indictments? A. I had.

Q. How many grand juries did you serve on prior to that time? A. One.

Q. And when was that, Mr. Spero? A. To the best of my recollection it was 1941 or 1942.

(1655) Mr. Sacher: May I ask the District Attorney to be kind enough to let me have Mr. Spero's questionnaire?

(Paper handed to Mr. Sacher.)

* * *

Q. I show you this paper, Mr. Spero, and ask you whether this is a photostatic copy of an instrument which you signed? A. Yes, that is my signature.

Mr. Sacher: I offer it in evidence.
Mr. McGohey: No objection.

* * *

(Marked Defendants' Challenge Exhibit 4 for identification.)

* * *

Q. Did you at any time prior to the signing of this (1656) Defendants' Challenge Exhibit 4 have any conversation of any kind with the clerk of this court or the Jury Commissioner or anyone attached to the court? A. I have been called on petit juries and had served.

Q. No. What I have reference to is, at or about the time that you signed this paper—you may look at it if you wish (handing)—did you have any conversations of any kind with the Jury Commissioner or the jury clerk or any other attache of this court? A. Not to my recollection. I

just had served on a petit jury. And my recollection is that I asked if I could serve on a grand jury, and I went to the office that I was directed to and filled out this form, and that was that.

Q. As a matter of fact, is it not true, Mr. Spero, that at the foot of this Exhibit 4 which I have just shown you appear the words "Petit jury" with an initial under it; is that right? A. Well, I see the "Petit jury" and I see, apparently it looks like an "O.K." next to it. Oh, yes, there is a "G" to the right.

Q. And there is "O.K." also, you see there? A. Well, it appears to be "O.K."

Q. That is "O.K., Petit jury," is that right? A. Yes.

(1657) Q. And it was after you filled out this questionnaire that you applied to someone to permit you to serve on the grand jury, is that correct? A. Oh, no. To the best of my recollection it was the application I filled out to serve on the grand jury.

Q. You say this Defendants' Challenge Exhibit 4 was the one which you filled out in your application to become a member of the grand jury? A. I do not have any recollection of filing any application to be a petit juror. I was just subpoenaed to serve as a juror.

Q. Now, did you ever receive a notice from the clerk of this court to appear before him to qualify for being any kind of a juror, or did you appear on your own initiative and request that you be called as a juror, whether it be a grand juror or a petit juror?

> The Court: I think when he says subpoena he means that notice.
>
> Mr. Sacher: Oh, no, I don't think so. I think he means the notice for actual appearance for service. I do not think he means a notice to qualify.
>
> The Court: Perhaps not. I would make the question not quite so long. It is very confusing.
>
> Mr. Sacher: All right, I will make it shorter.

Q. Do you remember signing, at the time when you signed this paper? A. It is my signature.

(1658) Q. Now, did you sign it as a result of a notice of any kind that you received from this Court? A. No.

Q. In other words, you appeared voluntarily in this matter, is that right? A. That is right.

Q. And it was after you appeared that you signed this paper, is that right? A. Well, I would qualify that by saying I had served as a petit juror.

Q. Yes? A. And subsequent to that service I then volunteered to serve on the grand jury.

Q. Now, I notice that on this Challenge Exhibit 4 there are two words in print, one of which reads "Summoned" and the one underneath which reads "Volunteered" and I notice that there is a check opposite the word "summoned" and not opposite the word "volunteered." Does that change your testimony in any way? A. Not one bit. I was summoned to be a petit juror. I volunteered to be a grand juror.

Q. You were never summoned, then, to be a grand juror, is that right? A. Yes, I was. Subsequent to filing this application I was then summoned to serve on a grand jury.

Q. But you were summoned to serve on a grand jury only after you requested that you be summoned for such service; isn't that right? A. I would say yes.

Q. Are you white or are you negro? A. I am white.

(1659) Mr. Sacher: Your witness.

The Court: Mr. Sacher, is it contended that there is anything wrong in a person requesting to serve as a grand juror or volunteering? I did not notice anything to that effect in your challenge. I wondered what your position was on the matter.

Mr. Sacher: Your Honor, if you don't mind, I would like to postpone my answer to that question because we are laying a foundation for a very serious contention on that basis.

The Court: You mean some new contention that you are formulating now?

Mr. Sacher: No, it is not new; it is implicit and inherent in everything we have charged. This just spells out the charge.

The Court: It does not seem to spell much out to me, but I will take it.

Mr. Isserman: If the Court please, I wasn't here yesterday—

The Court: You may question the witness.

Mr. Isserman: Oh, I thought the District Attorney might want to question.

The Court: No. Each of the counsel for the defendants may pursue such direct examination of the witness as they desire, and then Mr. McGohey follows with (1660) his cross-examination.

Mr. Isserman: I just have one question or two, if I may.

By Mr. Isserman:

Q. Mr. Spero, you are listed as an insurance executive. I do not believe you gave us the title of your firm. A. I gave the title of the firm as Spero, Whitehall Company, Incorporated. We are brokers, insurance brokers.

Q. And what is your position with the firm? A. My position?

Q. Yes. A. I am an officer. I am president of the corporation.

Q. And you are on salary, are you not? A. Pardon?

Q. Are you on salary? A. Yes, I would say that I am on salary but that is not—in addition to being the president of the general brokerage concern I engage in the sale of life insurance. That is where my income comes from. This corporation is a very small one, and cannot afford to pay me very much salary.

Q. And is your income over $5,000 a year?

Mr. McGohey: Objection.

The Court: Overruled.

* * *

(1661) A. Yes.

Q. Is it over ten thousand a year?

Mr. McGohey: Objection.

The Court: Sustained.

* * *

Carl M. Spero—for Defendants on Challenge—Cross
Russell W. Todd—for Defendants on Challenge—Direct

Cross examination by Mr. McGohey:

Q. Mr. Spero, at the time you came down and filled out that application did the clerk or any official of this court ask you any question at all about your race, your religion, your political affiliations, your social affiliations or your financial worth? A. No.

* * *

(Witness excused.)

(1662) RUSSELL W. TODD, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. McCabe:

Q. Mr. Todd, where do you live? A. I live in Bronxville, New York.

Q. And the address in Bronxville? A. 25 Greenfield Avenue.

Q. Is that a private dwelling? A. Yes.

Q. Mr. Todd, do you own that dwelling? A. Yes.

Q. Do you recall when you first qualified for service as a grand juror in the Southern District of New York? A. Well, I couldn't say how long ago it was. It was—I would have to guess. It is probably six or eight years ago.

* * *

Q. Mr. Todd, I show you what has been marked Challenge Exhibit 5 and call your attention first of all to your signature. Is that a photostat of your signature? A. That appears to be, yes; I am sure it is.

Q. And the date on which that purports to have been executed? A. 1940. I have forgotten all about that.

(1663) Q. Does that refresh your recollection as to the approximate time when you executed this document? A. Yes.

Q. Do you recall where you executed it? A. As a matter of fact, I do not, no. I suppose it was here.

Q. It might have been executed at your home or office? A. Well, I would doubt that. The fact is I have no recollection of it at all.

Q. Do you recall any circumstances which preceded your being called as a prospective or to qualify as a grand juror? A. Well, the first thing I recall is getting the subpoena to appear.

Q. I see. A. And whether this preceded that or whether I signed this when I came down to report, I don't remember.

Q. You served, I believe, on the grand jury which brought in an indictment against William Z. Foster and others? A. That is right.

Q. Had you previously served on a grand jury? A. Yes, I served on two grand juries before that.

Q. Do you recall the approximate dates? A. Well, I presume the first one was pretty soon after this qualification form.

Q. That was in 1940, September of 1940? A. Yes.

(1664) Q. And do you recall about when the second was? A. Well, it probably was two or three years after that.

Q. What is your business, Mr. Todd? A. I am retired.

Q. What was your business before you retired? A. Well, I spent about 18 or 20 years working on an engineering research problem in connection with automobiles.

Q. Were you employed by yourself or were you associated with some firm? A. No, I was employed by myself.

Q. You were a graduate of what university? A. Princeton.

Q. And what degree did you take at Princeton? A. A.B.

The Court: Now, by the way, Mr. McCabe, I think I will, as these grand jurors are called here, I will merely note on the record that the person is white or Negro. I do not really think it is going to be essential that you put that question unless

it is really deemed most essential. I have been thinking about that, and you know, yesterday, I asked for the reference to the Supreme Court case that was supposed to say that it was necessary to ask such questions, and I have not received any authorities on that.

Don't you think it is a little more sensible?

(1665) Mr. McCabe: Your Honor, that question goes to the very heart of our allegation here that there has been a deliberate exclusion of Negroes from the panel.

The Court: Well, let us suppose, for example, taking it hypothetically, that we have some person who has heard in the family that perhaps back five or six generations ago there was some question as to whether there was some Negro blood in the family—do you think that that is the sort of thing that we ought to go into?

Mr. Crockett: May I be heard on that matter, your Honor?

The Court: Yes. Now, for instance, let me give you an illustration of myself. Now, my father's family came from Yucatan in Mexico. When the Spanish people came there it is common knowledge that a great many of them intermarried with the Indians there, with the Mayan Indians. If someone were to ask me whether I had any Indian blood or not I do not think I could truthfully say that I was sure that there was none, and I think I would probably rather resent the inquiry as being something that really was a little bit remote from anything that came up in court; but, of course, I would have to answer frankly as well as I could, and I would say just what I have told you.

Now, I do not happen to be one of those very (1666) sensitive individuals, but trying to put it to you that way, don't you think it is a little bit unnecessary to put those long questions to each witness as you have been doing?

Mr. Crockett: I suggest that the Court is mistaken both as a matter of law and as a matter of fact.

The Court: All right then, I will permit—

Mr. Crockett: I submit the Court is in error as a matter of law because any such notation made by your Honor on the record would have to constitute either the taking of judicial notice of one's race, which I respectfully submit no one can do, or, secondly, would have to constitute a finding of fact which would not be predicated upon any preceding testimony given by the witness. I submit that the Court cannot take judicial notice because I believe as a matter of common knowledge that there is no such thing as a pure race. All of us are hybrids; the chances are that if we trace our ancestry back we would find that we more or less have some Mongolian blood, Negro blood as well as Caucasian blood.

I think what is determinative of the matter is not whether or not one considers himself a member or associated with a particular race. That is the basis upon which we put the question. If this witness (1667) has customarily associated himself with the white race or the Caucasian race it is generally understood among reasonable men that he is white or he is Caucasian. I fail to see how we can otherwise have the record indicate that fact.

Mr. Sacher: If your Honor please, I would like—

The Court: You may put the question, so you need not discuss it further or make lengthy arguments, unless Mr. Sacher has something to add that may cause me to change my ruling, which at the present time is that you may ask the question.

Mr. Sacher: I just want to make this observation, that by your question this morning, your Honor, you raise the question as to the propriety of asking any individual whether some remote ancestor may have had Negro blood. And I say that implicit in that kind of question is the notion of racist supremacy. Because Negro blood is as good and in many instances better than so-called white blood.

And there is no implication of any kind in the question we ask. And I submit, your Honor, that I think the expression of your views in the question that you put indicates racial prejudice on your Honor's part.

The Court: Well, it does seem to me that is a most extreme view and a most unwarranted one. I don't (1668) quite see how anything I have said would warrant you in asserting that I have now indicated race prejudice, something which I never conceived that I entertained in the remotest degree. But however, I will note that. And do you move for my disqualification on that ground as well as the other ground?

Mr. Sacher: I do, your Honor.

The Court: Yes. That motion is denied.

Mr. McCabe: Your Honor has referred to extreme cases. And our whole allegations here go to an extreme distortion of the jury system here. So it is natural that some extremes will be reached even in our questioning I believe.

By Mr. McCabe:

Q. Mr. Todd, did you say when you had retired from active participation in business? A. I did not say when. It was some time ago, several years ago.

Q. Do you presently own any securities in any corporation?

Mr. McGohey: I object.

The Court: Sustained.

Q. Do you own any real estate in addition to your home in Bronxville?

Mr. McGohey: I object.

(1669) The Court : Sustained.

Mr. McCabe: I have no further questions.

I should like to offer this in evidence, your Honor.

Mr. McGohey: No objection.

* * *

(Defendants' Challenge Exhibit 5 for identification received in evidence.)

* * *

By Mr. Isserman:

Q. Mr. Todd, on the questionnaire which bears your (1670) signature and executed by you in 1940 there is a statement that your occupation was ceramic ware. Can you explain that, please? A. Why, yes. We were just beginning at that time; we had become intersted in sculpture, and my wife was interested in ceramic sculpture. So we went into a study of the subject to a certain extent, and we built a ceramic shop in the cellar of our house, built the kiln and the ball mill and all the other stuff that goes with it. And we did a lot of experimenting and a lot of work. My wife made a lot of models of different animals, what they call figurines, and we spent a lot of time making those, and for some years selling them.

Q. You were in a sense self-employed in that work, were you not? A. Yes.

Q. Was that after you had retired from your business in the automobile industry? A. Yes, that is right.

Q. How long had you been retired? A. Well, since shortly before 1940; I don't just remember.

Q. Now are you a director of any corporation, Mr. Todd?

Mr. McGohey: I object, your Honor.

The Court: Sustained.

Q. Were you in 1940 when you signed this application?

Mr. McGohey: The same objection.

The Court: The same ruling.

(1671) Mr. Isserman: I haven't finished my question.

Mr. McGohey: I beg your pardon. I thought you had. I withdraw the objection.

Mr. Isserman: Oh, it sounded as if I had, but my question was going to be:

Q. Were you in 1940 when you filled out this application a director of any corporation?

Mr. McGohey: The same objection.
The Court: The same ruling.

Q. Do you know whether or not your name appeared in a Directory of Directors? A. I am not sure whether it did or not. You are speaking of—

Q. You are connected with the Eastern Offices, Inc.? A. Yes, I am connected with them.

Q. And are you a director of that corporation? A. Yes, I am a director of that corporation.

Q. And were you a director of that corporation in 1940? A. Well, I am not sure. It was about that time; whether it was at that time or not I couldn't remember.

Q. Do you hold any office in that corporation aside from being a director? A. No.

Q. What does the corporation do, Mr. Todd? A. What does it do?

Q. What business is it engaged in? A. Eastern Offices? Well, it owns and operates the Graybar Building.

(1672) Q. Are you a stockholder in that company? A. Yes.

Q. Is your income over $5000 per year?

Mr. McGohey: Objection.
The Court: Overruled.

A. Yes, my income is over $5000.

Q. It is over $20,000 per year?

Mr. McGohey: Objection.
The Court: Sustained.

Mr. Isserman: I take it that the Court will sustain objections to any questions on income above the $5000 mark. I understand some statement like that was made at yesterday's session.

The Court: I so indicated yesterday. I consider the problem before me to be one of exclusion, deliberate, purposeful exclusion, and I have ruled, perhaps over-liberally, in allowing you to go this

far on it, but I felt that it was quite manifest that a person with an income of over $5000 was not a poor man. That is all I meant by it.

Q. The Graybar Building is located in New York City, is it not? A. That is right.

Q. And will you give us its location?

The Court: Now incidentally, yesterday it was suggested when I raised the question that the defendants' counsel were going to organize this matter so that (1673) we would have staccato questions, snappy quick disposition of each witness.

Mr. Isserman: I like that method, your Honor.

The Court: And I am trying to reconcile the questions this morning with that representation. However, you may proceed.

Q. Could you give us the—well, let me ask you in one question. Could you give us the location and size of the Graybar Building, in general? A. Yes. It is 420 Lexington Avenue. That is—

Q. Adjacent to Grand Central, is it? A. Yes, that is right.

Q. Built over the tracks of the Grand Central? A. Yes, that is right.

Q. How many stories is it? A. 20.

Q. It is an office building, is it not? A. That is right.

Q. Did you have any discussion with anyone in the clerk's office that you recall at the time you filled out this application? A. I don't recall any such discussion. In fact, I don't even recall signing that paper.

* * *

Cross examination by Mr. McGohey:

Q. Mr. Todd, either at the time you signed that or at any other time that you came in to qualify for jury (1674) service were you asked by the clerk or by any official of the court any question concerning your race, your religion, your political affiliations, your social connections, or your

financial worth? A. I say no to each one of those questions except the last. It seems to me that somebody asked me if I could raise as much as $250 worth of quick assets in one way or another, and I said yes.

Q. Now, besides that question were you asked any other question about the extent of your personal financial fortune? A. No, none whatever.

* * *

Redirect examination by Mr. Sacher:

Q. Were you asked any other question by anybody? A. I don't remember whether I was or not. I don't believe so.

Mr. Sacher: That is all.

By Mr. McCabe:

Q. By the way, in our discussion concerning the question as to the race of the witness I believe the question originally was overlooked, and I should like to ask Mr. Todd whether he is a member of the so-called white race. A. As far as I know, yes.

(Witness excused.)

(1675) JEROME S. BLUMAUER, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Crockett:

Q. Mr. Blumauer, what is your address? A. 205 West 88th Street.

Q. That is in Manhattan, is it not? A. That is true.

Q. Is that a private dwelling or an apartment house? A. It is an apartment hotel.

Q. Do you own any interest in the apartment house? A. I do not.

Q. What is your occupation? A. Plastic representative. I am a representative of manufacturers for the plastic business.

Q. What is the name of the company? A. Jerome S. Blumauer.

Q. Is that a corporation? A. No, it is not.

Mr. McGohey: Your Honor, may I ask that the witness keep his voice up a little bit more.

The Witness: Surely.

Q. What are your specific duties with that company? A. Why, I represent them and I take orders and I have them ship for me under my name.

Q. Do you own any interest in the company? A. I do not.

(1676) Q. How long have you been employed by the company? A. I haven't been employed by any company. I am my own boss. I have been in business for myself for five years. I was formerly a sales manager but I quit that about five years ago.

Q. Sales manager with what company? A. Lincoln-Ulmer.

Q. Is that the same company you are associated with now? A. No; I am still associated with them but I don't do very much business. That is a cigar line and I am active in it but I don't do very much business in it.

Mr. Isserman: I didn't hear him.

The Witness: I am active in it but I don't do very much business with them. My main business is plastics.

Q. What was the nature of the business of Lincoln-Ulmer? A. They make denicotinized cigars.

Q. What were your duties with the company? A. I was a sales manager.

Q. Did you have any employes under your supervision? A. Yes. About five.

* * *

Q. I show you, Mr. Blumauer, Defendants' Challenge Exhibit marked for identification No. 6 and I ask you if that is your signature at the bottom? A. Yes.

(1677) Q. Do you recall the date when you signed that document? A. No, I don't.

Q. Do you recall when you first qualified as a juror in the Southern District? A. 16 or 17 years ago; I don't know definitely. It is either 17 or 17 years I think. I mean, on the grand jury 16 or 17 years, but I was on the petit jury before that.

Q. How many times have you served on the grand jury? A. Three or four.

Q. Do you recall when it was? A. About five years ago I imagine, about that. I haven't been called in the last five years.

Q. You were a member of the grand jury which returned the indictment against William Z. Foster and others? A. That is true. I signed the indictment.

Q. You signed in what capacity? A. Acting foreman.

Q. Who was the foreman? A. He was Mr. Cox and he was away at the time.

Q. He was away at the time the indictment was signed? A. That is right.

Q. Who requested that you sign as acting foreman? A. When he left he told me I was in charge.

Mr. Crockett: I should like to offer in evidence Defendants' Challenge Exhibit No. 6.

Mr. McGohey: No objection, Mr. Crockett.

(1678) (Defendants' Challenge Exhibit 6 for identification received in evidence.)

Q. Is that the only document you recall signing with reference to jury duty in this court? A. I don't know of any other.

Q. Before you were first called for jury duty did you have a conversation with the clerk of this court? A. I don't remember, it is a long while ago.

Q. Have you ever served as a petit juror in this court? A. Yes, I have served as a petit juror before I was on the grand jury.

Q. Mr. Blumauer, is your income in excess of $5000? A. Not last year.

Q. You say it wasn't last year? A. Not last year, no. I had a very poor year.

Q. What was it?

Mr. McGohey: I object, your Honor.
The Court: Sustained.

Q. At the time you first served on a jury panel in this court, either grand or petit jury, was your income in excess of $5000? A. Not in those days, no, sir. It is a long while ago.

* * *

(1679) Q. The nature of the issues in this case, Mr. Blumauer, are such that it is necessary to have the record indicate the race to which you claim affiliation. You are a member of the white race, Mr. Blumauer? A. Well, I think so, yes.

* * *

(1680) *By Mr. Isserman*:

Q. I call your attention to the exhibit which bears your signature, Mr. Blumauer, and it is called a requalification notice. It is undated. Do you recall when you signed this requalification notice? A. No, I do not.

Q. Do you know whether it was in the last eight or nine years? A. I don't remember when.

Q. Now, in 1940 I believe your testimony is you had already served as a grand juror, had you not? A. Oh, yes. I have been serving 16 or 17 years.

Q. Now, in the year 1940 was your income over $5000?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Was your income over $5000 in any year between 1940 and the present?

Mr. McGohey: Objection.
The Court: Overruled.

A. Yes.
Q. Now, your testimony is that the Foreman of the jury appointed you as acting foreman, is that correct?
A. No—

Mr. McGohey: I do not think that is the testimony your Honor.
The Court: Do you object to that, Mr. McGohey?
(1681) Mr. McGohey: I do object to it, your Honor.
The Court: That is sustained.
Mr. Isserman: I would like to get the question and answer, if I may. I did not hear Mr. Blumauer so well.
The Witness: Well,—
The Court: You just relax and let me rule on these objections here. I have sustained the objection to it, and if you read it so that Mr. Isserman can hear what his question was he may desire to reformulate it.

(Question read.)

The Court: That is the one I sustained objection to. If there is any answer to it, strike it out.
Mr. Isserman: I would not object to the striking of the answer, but I would like the Reporter to read the original question put to Mr. Blumauer on this subject and his answer. It was one of those answers that I didn't hear very well because his voice was low.
Mr. Crockett: If the Court please, I asked the witness that question and the witness answered that he had been appointed by the Foreman—
The Witness: No, I did not—
The Court: Now, Mr. Blumauer, this is a place where you are just going to answer the questions that I rule that you shall answer.
(1682) The Witness: I am sorry.

The Court: And if you just follow that you will be all right.

Mr. McGohey: If the Court please, I ask the Court to take judicial notice of the fact that it is the practice in this court when a grand jury is convened for the Court impaneling the jury to designate a Foreman and a Deputy Foreman.

The Court: I do take judicial notice of that.

Mr. McGohey: So when Mr. Blumauer was appointed Deputy Foreman he was so appointed by the Court that impaneled the grand jury, and I ask your Honor to take judicial notice of these minutes of that impaneling which will show that.

The Court: I do so.

Mr. Isserman: May I get the question and answer which was given by the witness?

The Court: What is it that you are struggling to bring out?

Mr. Isserman: I am not struggling to bring out anything at this time but to get an answer which was given by the witness to a question which I did not hear.

The Court: I see. Do you think we should take an adjournment for about ten minutes so we can find out, or do you think it can readily be ascertained?

(1683) Mr. Isserman: I would ask the reporter that question, your Honor. I believe he can undoubtedly ascertain that.

The Court: It always seems easy but perhaps it may take a little time. You may look for it.

The Reporter: The other reporter had that.

The Court: I think perhaps you can keep your mind on what the question is that you desire to ask, and if it has anything to do with how the foreman and deputy foreman are designated, I take judicial notice of the way it is done here and of the minutes of that particular proceeding, so that it now appears fully exactly what was done, and I think that should dispose of the matter.

Mr. Isserman: In view of the fact that I do not have his question and answer I am not pursuing the matter.

The Court: All right.

Mr. Sacher: I have just one question, if I may ask it, your Honor.

By Mr. Sacher:

Q. I notice, Mr. Blumauer, on Defendants' Challenge Exhibit No. 6 that you have not answered the question which reads, "What education have you had?" Do you notice that? A. That is possible. I never went (1684) to college.

Q. Well, what education did you have? A. I went to public school and high school and I took a course in Packard's.

Q. A course in what? A. Packard's, Commercial business course.

Q. Just one more question. Did you at any time inform the clerk that that had been the education which you had had, or had you never told him what it was? A. I must have skipped that. I don't think I ever told him that.

Q. You don't think you ever told the clerk anything about it? A. I may have. I don't remember. It is a long time ago.

Mr. Sacher: All right.

Cross examination by Mr. McGohey:

Q. Mr. Blumauer, at the time you originally qualified for jury service, you were qualified in either this court house or the old court house at the Post Office building across City Hall Square; is that correct? A. Yes, sir, that is correct.

Q. And at that time you were interviewed by some clerk? A. That is true.

Q. At that time or at any other time in connection with your jury service did that clerk or any other clerk or any (1685) official of this court ask you any questions about

your race, your religion, your political affiliations, your social affiliations, or your financial worth? A. Well, will you ask me that separately, please, each question?

Q. Yes, I will. Were you asked at any time in connection with your jury service by any clerk of this court or any official of this court any question about your race? A. No, I never was asked that, but if I would have, I would have told them I was Jewish.

Q. Were you asked any question about your religion? A. That is what I am saying. I thought that was the first one. I would have told them that I am Jewish. They never asked me. I would have been glad to tell them I am Jewish.

Q. Were you asked any question about your political affiliations? A. No, sir, I was not.

Q. Were you asked any question about your social connections? A. No, I never was.

Q. Were you asked any question about your financial worth? A. No, sir, never.

Q. Were you asked whether or not you had $250? A. That is true.

Q. Now, beyond that were you asked any other questions? A. No, sir, I never was.

(1686) Mr. McGohey: Thank you, I have no further questions.

* * *

(Witness excused.)

JAMES R. FLANAGAN, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Sacher:

Q. What is your full name, Mr. Flanagan, please? (1687) A. James R.

Mr. Sacher: We have issued subpoenas, your Honor, for the remaining jurors, and some of them are on cruises and some are elsewhere, and we have not been able to get them all. If we could enlist the assistance of the Court or the United States District Attorney's office to get these few remaining grand jurors, we would appreciate it. Mr. Cox, I was told this morning, is somewhere on a yacht, and I do not know how to get him. But there are a couple of others, and if your Honor will permit us now to call the petit jurors so we have no delay in the advancement of the case, I think that will be satisfactory to us.

The Court: I will rule on the matters that come before me from time to time. I have nothing to say about the matter further.

By Mr. Sacher:

Q. Mr. Flanagan, where do you reside? A. 23 Haven Avenue.

Q. Is that in the Borough of Manhattan? A. Borough of Manhattan. It is up at the Medical Center on Washington Heights.

Q. You were notified that your name appears on the petit jurors' panel for January 17th, is that right? (1688) A. Yes, that is true.

The Court: This is not one of the grand jurors?

Mr. Sacher: It is not, your Honor, no. We have now exhausted all those that we have served who are accessible.

Q. Now, what is your business or occupation, Mr. Flanagan? A. Advertising agent.

Q. Do you—

The Court: Well, I will rule now that you may call no more petit jurors. I will in the exercise of my discretion, and I do now direct that the order of proof to be pursued by you is to withhold calling any further petit jurors at this time and proceed to establish some proof of your allegations otherwise. I do that because it is my judgment that the system of operating the courts here will be literally paralyzed by the continuing subpoenaing of large numbers of petit jurors on the panel, and because it also seems plain to me that the procedure is a mere futility. We are now almost to the time when a new panel will appear. Even with the utmost diligence and every conceivable facility you could not examine even a fraction of the present January panel, and so I will hear no further testimony from this witness.

Mr. Sacher: I would like to say this to your (1689) Honor: In the first place, I thought we had an understanding this morning that you were going to continue today as we had done yesteday pending Mr. Gladstein's arrival.

The Court: I thought Mr. Gladstein would be here this morning.

Mr. Sacher: But after you knew that he was not going to be here your Honor said that you would continue as you had yesterday. Your Honor announced that you had received a telegram from him, a copy of which is here in the courtroom—

The Court: I did that this morning.

Mr. Sacher: You did, your Honor.

The Court: And I received it this morning. I made no ruling yesterday on it.

Mr. Sacher: No, but this morning your Honor said that you would continue as we had done yesterday pending Mr. Gladstein's arrival, and that you would give him and Mr. Isserman and the rest of us an opportunity to argue out whatever it was that you had in mind on this subject.

The Court: What I gave you the opportunity to argue out was the two new motions to disqualify

me on the frivolous ground that I had directed the service of a memorandum of law which you said indicated palpable (1690) prejudice, and also to disqualify all the judges in this district. I withheld decision on those two motions because of the absence of counsel and because of the protest that had been made by two of the defendants, and I continue to withhold that until Mr. Gladstein has returned. In no event will I hear further testimony by any of the petit jurors on the January panel.

Mr. Sacher: Well, your Honor, I would simply like to say this: I think we ought to have a little time for our counsel here to confer. You have just about—

The Court: I told you yesterday that I was contemplating the making of this ruling. So far, as far as I can see, you have produced nothing.

Mr. Sacher: Well, you have asked for a memorandum and we have that in preparation.

The Court: If there is any evidence of this deliberate and purposeful discrimination that you and your colleagues have so repeatedly and at such length asserted to exist, I think it would be a good idea to proceed to prove it.

Mr. Sacher: We have no reluctance or hesitancy to prove it. But we had counted, in view of the number of jurymen that we had served, and in view of your Honor's direction to them to return today, that we would call them, and it was definitely our intention to do precisely (1691) what your Honor is talking about now as soon as this group of jurors had been completed.

Now what is happening now is that we are caught, so to speak, midstream, and we are not ready at the moment to go ahead with this other type of evidence. So I would suggest, your Honor, that if you permit us to use the balance of the day with this evidence, that we will be here with the kind of material you are speaking of the first thing tomorrow morning.

The Court: Your suggestion is rejected.

Mr. Crockett: I should like, your Honor, to call attention to the understanding that we reached yesterday. At that time it was pointed out that some of the defendants here represented were without counsel. We had a recess for the purpose of trying, if possible, to come up with some suggestion that might be acceptable to the Court and would permit the proceedings to continue in the absence of counsel. My recollection is that those defendants indicated through Mr. McCabe that they were prepared to go ahead without counsel provided the Court made no rulings which disturbed the pattern that was being followed at that time. Obviously that pattern has been disturbed when your Honor states without any argument that there will be no opportunity to argue on the part of defense counsel, that from now on the (1692) method of proof will be directed by the Court that we will no longer be permitted to examine jurors. Your Honor makes such a ruling without even awaiting the memorandum which was requested yesterday and on which we spent considerable hours in preparing.

The Court: It was to have been delivered at the opening of court this morning and you did not get it.

Mr. Sacher: It is on its way. We worked until midnight last night.

The Court: There won't be any further controversy over such a thing as the Court directing a memorandum.

Mr. Crockett: I am not making any controversy about the Court's directing a memorandum. I think by this time I should recognize the authority of the Court to direct a memorandum. The point I am making is that your Honor requested the memorandum, and we stayed up until long after midnight working on the memorandum. It is in the process of being typed now, and should be over here at any minute, and yet without even awaiting the memorandum or even requesting that it be produced, your

Honor just hands down a ruling changing entirely the order of proof and ruling out that possibility of calling any more jurors on this panel. I believe if the Court would await that memorandum you would find such authorities to justify the course of proceedings we have been following.

(1693) The Court: Do you recall, Mr. Crockett, the subject that the memorandum was to be directed to? If you were up until midnight with your collegaues getting it up you ought to remember what the memorandum relates to.

Mr. Crockett: The memorandum was supposed to, as I recall, relate to the right of defendants to examine members who have been called as jurors. Now, that is my understanding of what the memorandum was the Court requested.

The Court: I will tell you what the memorandum was to be about. It has been asserted here that there were authorities that plainly required that I take proof by the jurors, and when I inquired of Mr. Sacher he read me a quotation from the Fay case which I felt did not cover the point at all and was not susceptible to the interpretation that he desired to give it. I then asked him where are those other cases, if any, and, oh, he said there were a lot of other cases, and I said, well, then, let me have a memorandum of them at the opening of court, and I did not get it.

Now, what is there to add about it? If there are some cases you may tell me now. But I can't imagine, as I am pretty familiar with all these cases here, and I have seen nothing in any of them that justify such a (1694) procedure.

Mr. McGohey: Pardon me, may I interrupt just a moment, Mr. Crockett, please?

Mr. Crockett: Yes.

Mr. McGohey: Your Honor, I think the record ought to show that it was my understanding also that what your Honor's direction was yesterday is as your Honor just stated it now; and in that connection I too made some researches last night and

expected this morning that we would have the memoranda, and that we might have some discussion on it. It is perfectly clear in my mind that that is what the Court directed yesterday afternoon, and, indeed, I was prepared then and now—

The Court: Yes.

Mr. Crockett: If your Honor please, the memorandum is on its way over, but meanwhile I think Mr. McCabe can tell you briefly the authorities that are referred to in the memorandum.

The Court: Very well, I will listen to it.

Mr. McCabe: If your Honor please, the only reason we did not mention to you the fact that the memorandum was just in the course of having the last page typed up, or the last couple of pages typed up, was your Honor's statement that in view of Mr. Gladstein's absence we would proceed as we had yesterday. So that certainly (1695) we had no expectation that we would be called upon for the memorandum.

I would say that some of the authorities are authorities in which this very procedure was done, was the International Longshoremen's case, the Ackerman case—

The Court: Wait a mniute, let us have them one at a time. The International Longshoremen's case?

Mr. McCabe: Your Honor, I handed up the opinion of Judge Biggs in a three-judge court in Hawaii, the case that Mr. Gladstein cited.

The Court: I know. Just relax for a second until I get it before me. I have it here. Now what is the page and what is the reference that you say shows the jurors should be called?

Mr. McCabe: I do not have the case before me, your Honor.

The Court: Well, I will let you have my copy. You may look at it. Find me the place. If there is something in there that indicates that out of a panel of five or six hundred or many thousands of jurors the defendants can take over the administra-

tion of justice and get limitless delay by calling jurors in that way, why, let me see it.

Mr. McCabe: Let me say first, your Honor, that (1696) we considered this the most expeditious way of proving this case. This is not a maneuver to delay. This is the most expeditious way of proving the bias and prejudice in this case.

The Court: It seems to me, Mr. McCabe, that if these new techniques that you lawyers here seem to be developing are admissible and proper, that then anyone charged with a serious or other crime, surely in all conspiracy cases, the defendants and their counsel would at once take charge of the proceedings and could frustrate any conviction of the defendants, however guilty, by prolonging the proceedings indefinitely. I refuse to take the position that that can be the law.

Mr. McCabe: Excuse me, has your Honor finished?

The Court: Yes.

Mr. McCabe: That is certainly not the case here and could not be the case in any situation except where indications of an unlawful selection of the jury existed.

The Court: Well, let us see. There are on the January panel how many? 592 jurors?

Mr. McCabe: 592.

The Court: All right. Now we will say that taking what you say is the most expeditious method, you proceed at the opening of court to call the 592 jurors. (1697) Then before you get through with the 592 there will be a new panel for the following month of an equal number, perhaps more, and so that will go on and on and on. And if you have the right to do it here I would suppose that any person charged with crime could do likewise; and so the worse the crime charged the more likelihood there would be of such procedures being adopted and the whole administration of justice would be put to a standstill.

Mr. McCabe: If your Honor please, your Honor is building up a straw man and then knocking it

down. We had no expectation that 590 jurors would be called. Let me just say what we are doing here. We are—

The Court: You mean what you started to do but what I don't think you are going to do any more.

Mr. McCabe: Well, let me assure your Honor, then, that—

Mr. Sacher: Is your Honor making an accusation as to the propriety of what we have done up to now?

The Court: Mr. Sacher, when I decide to find that some lawyer before me has been guilty of any improper conduct I know how to make the finding. I have made none such yet.

Mr. McCabe: Now, if I may point out to your Honor what we had hoped to do here: We have charged (1698) deliberate exclusions. In order to prove deliberate exclusions we must first prove exclusions. I think that is obvious. If there are no exclusions there can't be any deliberate exclusions. We have been building up a pattern here through the circumstance that a certain number, practically all of the witnesses called so far, have been members of the class which we claim monopolized the places on the panel in this jury by showing—by the process of elimination we propose to show the exclusions. Now, it is not necessary in order to show those exclusions to call every person of the excluded classes in the City of New York. Obviously we could call 10,000 members of the negro class in New York, and the fact that not one of them had ever been called as a juror would not prove deliberate exclusions. On the other hand—

The Court: No, it would not prove anything else either.

Mr. McCabe: No. We agree with that, and therefore we did not resort to the tactics which were used in Norris vs. Alabama in which a large number of the excluded classes were called. That I think is not feasible here. What we have been doing is

building up a pattern just as the—well, the transmittal of photographs through the air, a pattern of dots. Now, you (1699) don't have to fill in every dot in that photograph in order to see the outlines of a pattern. What we have been doing, we suggest, and I think it has been commented on before, that when we get a sufficient number of dots on this picture that the general outlines of it can be shown, the general outlines which indicate exclusion. When they can be shown we then are in position to sit down as we are today and say, let us see whether instead of calling the individual members, we can't work out a rationale of proof here of stipulation by which the outlines which we have sketched through individual jurors can be blocked in. And that is what we propose to do after calling, after building up our circumstantial evidence through the individual jurors. We build that up to a certain point where we can point out to your Honor the outline, and then we say let us now stipulate, whether as was done in the New Jersey case by reference to a Master or Commissioner, whether as someone has suggested by sending out a new questionnaire which will fill in the details which were lacking in the Fay case, and give us that picture. Now, having shown that exclusion it then becomes necessary for us to show the deliberate quality of those exclusions, and that is a matter of orderly proof to which we will come in due (1700) course.

The Court: Well, you have come right to it now. Unless I have some tangible evidence of this discrimination and wilful and deliberate exclusion that you have been doing so much talking about, I am not going to hear any more proof. It is about time that I got something to show that there was some foundation for all these charges that have been bandied about.

Mr. McCabe: Your Honor told us to saw wood the other day.

The Court: Yes.

Mr. McCabe: And it seems to me that the sawdust is getting in somebody's eye. We are sawing wood a little bit too rapidly.

The Court: If you mean by that that you have perhaps got me in an ill humor, you are entirely mistaken, because I feel very pleasant and genial, and I have no desire or no thought of feeling disturbed at all; so if you meant by your comment that my attitude was perhaps changed or different, I think you are mistaken.

Mr. McCabe: I did not infer that at all, your Honor.

The Court: What did you mean?

Mr. McCabe: What I said, that the sawdust (1701) was getting in somebody's eyes?

The Court: Yes. Whose eyes were you talking about?

Mr. McCabe: I say the eyes of anybody who is interested in defending a system of selection of jurors which is as we claim it to be. I will say this, your Honor—

The Court: But you did not mean my eyes, I take it, did you? You could either say yes or no. Now which is it?

Mr. McCabe: Well, when sawdust starts flying around I guess it gets in everybody's eyes.

The Court: So you didn't mean me?

Mr. McCabe: No, I will say I did not. I will say this: Your Honor, if I walked into this courtroom and told you that the legs of that chair you are sitting on were cracked and were about to fall, or if I said that this wall had a big crack in it, and that the whole system looked bad—

The Court: It wouldn't scare me.

Mr. McCabe (Continuing): If I said to your Honor that perhaps there were other serious things wrong with this courtroom, just the physical aspects of the courtroom, I think that I am not far off in assuming that your Honor would cause the fullest investigation to be (1702) made to see that the physical safety, not of yourself—

The Court: That is where you are making a big, 100 per cent mistake. It would roll off my back like water off a duck, and I would not even look at the legs of the chair.

Mr. McCabe: I think, your Honor, if I said that the ceiling was falling, despite the fact of your indifference to your own safety, your Honor's interest in the safety of all these persons, including the defendants, would require an examination to be made. But I say when we assert that the foundations of our jury system the sacred quality of which I do not have to dilate, when the foundations are bad, I think that the fullest investigation is necessary. And when your Honor speaks of a little time being taken up possibly on the examination of a few—

The Court: A little time?

Mr. McCabe: Yes. Why, your Honor, in comparison with the ten years in jail which these men face, a few days is a very little time. I would say in comparison with other cases of much less importance, the time consumed in building up our pattern to a point where we can stipulate on the balance of the pattern is trifling.

The Court: Now, let me make a suggestion. Let us have a ten-minute recess.

(Short recess.)

(1703) Mr. Crockett: If the Court please, during the recess period the requested memorandum arrived (handing). And I also have here the memorandum in opposition to the motion to strike.

I would like to call the Court's attention to one case that is not referred to in our memorandum concerning our right to call jurors. I am sure the Court is aware of the Columbia, Tennessee trials of last year or the year before down in Maury County, Tennessee.

The Court: I don't think I am. What is the citation of that?

Mr. Crockett: There is no citation because this occurred in a trial court. However, I am prepared to call a witness to the stand who was present at the time of that trial and who is prepared to testify to your Honor that there again you had a challenge

to the array. It required five weeks to try the challenge. More than 500 Negroes were called as witnesses—

The Court: Mr. Crockett—

Mr. Crockett: —and that process continued until the Court finally decided that he was convinced that the grounds for the challenge had been established.

I mention that in order to point out as vividly as possible—

The Court: Now, Mr. Crockett, you know several (1704) times when I start to speak you and your colleagues go right on until I forget the question.

Mr. Crockett: I apologize. I had no intention to prevent the Court from speaking.

The Court: And I have almost forgotten it now, but not quite; it comes back to me.

I am accustomed to take the statements of counsel when they make them to me. You are no exception. Now, you go ahead and tell me about this case. You don't need to call a witness, unless something should make it necessary. Go ahead and tell me about it.

Mr. Crockett: Your Honor, I never thought for one minute that I was an exception. However, I have noticed several things that have happened here where I had reason to hope that we might have been able to call witnesses to substantiate the statements we have made. One of which is the allegations contained in our challenge. And in that connection I would like to direct your Honor's attention to the fact that this is not the ordinary challenge where we merely prepare legal documents and hand them up to the Court.

The Court: Perhaps you do not desire to tell me about that case, in which event I will let you do it in good time and when you choose. I merely meant to give you an opportunity, without calling a witness, to tell (1705) me what that case was about, but if you would rather argue the general question of the challenge you may do so.

Mr. Crockett: No, I shall proceed to tell the Court about the Columbia, Tennessee case. The case grew out of the wanton killing of several Negroes down in Maury County, Tennessee. There was of course a trial. And a challenge to the array was filed in that case. The basis for the challenge was that there had been systematic exclusion of Negroes from participation in the jury system in that county.

In the course of proving the challenge more than 500 Negroes were called to the stand for the purpose of testifying concerning the length of time they had resided in the county, their qualifications for jury duty, and the fact that during that period no Negro had been called to serve as a juror. They were also—

The Court: Now, that seems important, that all during that period not a single Negro had been called as a juror.

Mr. Crockett: That is right. The challenge there alleged complete exclusion of Negroes from jury service, unlike our challenge; we allege that there is exclusion in whole or in part. I don't think the Court needs to have me cite Supreme Court decisions indicating that even a limitation in the number of Negroes serving (1706) on a jury might constitute violation of the Fourteenth Amendment. That is an established fact.

The Court: You have reference to the Smith case, I guess.

Mr. Crockett: The point that I am making is that this Court should not be so hasty about cutting off the proof in this case, when you compare the fact that down in Tennessee, in the southern part of the State, where we expect some of the happenings that all of us deplore the court there allowed five weeks of testimony to be put in before the prosecution conceded that the pattern had been established. Here we have spent only two or three days putting in testimony in order to establish the pattern. To this period there has been no concession on the part of the Government. I assume that if

we continue to call these witnesses eventually the Government will be prepared to stipulate concerning what future witnesses will testify so far as the jurors are concerned. But if your Honor cuts us off now it means of course that we are unable to establish that pattern.

Now, I don't want to develop all of our legal objections to the course which your Honor seems inclined to pursue—I think Mr. Isserman will take care of that—but I would like to state, while I am speaking, that I subscribe fully to each of the legal objections that he (1707) will present.

The Court: I don't think that case is apposite. It seems to me an entirely different situation. But, however, I think it would be a good idea if you gentlemen would give me a moment or two to examine this memorandum before I listen to what else you desire to say.

Mr. McGohey: Pardon me, if your Honor please. I have a memorandum on the question of the propriety of the Court's curtailing the calling of further jurors (handing).

The Court: Well, all I am doing now is, as I have repeatedly stated, in the exercise of my discretion regulating the order of proof, and the authorities seem clearly to sustain my right and my power to do that.

Mr. Sacher: Could you cite that case that your Honor is relying on for that proposition?

The Court: No, I will not, Mr. Sacher. I don't think I am under any obligation to cite cases for my rulings. And therefore you will proceed with such other proof as you desire to offer, and I will come later to the question of whether the petit jurors may in whole or in part be called at a later time.

You desire to address me, Mr. Isserman?

Mr. Isserman: Your Honor—

(1708) Mr. McCabe: Your Honor had asked me a question before we sat down and in the excitement the question was not answered.

Your Honor asked me to call your attention to some cases in which such a course of procedure as we had initiated was carried out. I have here the record in the State of New Jersey vs. Wesley Mitchell in which a similar inquiry was made as to allegations concerning the illegal selection of a jury in New Jersey, and the Court there referred the taking of testimony to a commissioner. Between six hundred and eight hundred jurors were examined there; it was done expeditiously. I haven't heard that the administration of justice in New Jersey was completely paralyzed by such a procedure. I see—

The Court: You see, Mr. McCabe, that was a case where the motion was timely made and the commissioner appointed. You will recall that in this case there was a challenge and certain motions filed last November and then, despite some discussion, which as I recall it, rather indicated a disposition on the part of the United States Attorney to require some promptness in the disposition of the matter, the challenge and the motions were withdrawn. And then on the very eve of the day set for trial, and after numerous and repeated endeavors (1709) to get delay, there was filed this new challenge. So that I think the situation is different.

In any event, I am not ruling now that the evidence of some or many or all jurors will not ever be admissible here; but I am ruling that I will take no more testimony of that character until I have seen some proof, something besides the mere assertion of counsel that discrimination and purposeful, wilful exclusion really did take place.

Mr. McCabe: Your Honor suggested, for instance, yesterday we call the jury commissioner and the clerk of the court.

The Court: Well, I thought of course you were going to call those people. You told me you aren't.

Mr. McCabe: We have not decided yet whether we shall or not.

The Court: Well, I am not telling you—

Mr. McCabe: We have attacked the credibility of those witnesses. Now certainly at the outset of

our case it would be foolish for us to call as witnesses those whose credibility we are attacking and whose false statements we allege is the basis for our being lulled, not into a sense of security but to some sense of thought when they fooled the United States Attorney into thinking that they were pursuing an unbiased way of (1710) selecting jurors, that they fooled us to some extent. We pursued our examination and at the earliest moment we presented our case.

Your Honor will recall, with reference to the time of presenting the objections and the motions which we are pressing now, there was some discussion and I think it was agreed on all sides then that the matter would be taken up when the case was called for trial. I say that, your Honor—

The Court: I don't know about that agreement on all sides.

Mr. McGohey: It certainly was not agreed by the United States Attorney, your Honor. I tried very hard and argued at some length that if there were to be a challenge to the entire panel, the array, which I interpreted to mean the entire jury list of this district, I urged that that motion ought to be brought on and determined some time between November 1st I think it was or November 15th and the date which the Court had set for trial. And I think the minutes will reflect that I argued to the Court that the reason that that should be done was that when we came to January 17th the question of the jury ought to be out of the way.

The Court: That is my recollection.

(1711) Mr. McCabe: Let me say this. Your Honor has said something about the—

The Court: By the way, before you get going on that. I haven't intended to rule that you have to call any particular persons. I have assumed, because of what has been done in other cases, that you were naturally going to call the jury commissioner, the clerk and the deputy clerk. Now, if you don't care to call them that is your business.

Mr. McCabe: We know that, your Honor. And I did not—

The Court: If you think I ruled that you had to call them, which your comments a few moments ago indicated to be the fact, I now say that I did not intend to rule that and I do not rule that.

Mr. McCabe: I certainly did not understand your Honor to rule it, and I know that you have no power to rule it. You would have no power I believe to direct us to call any witnesses. And it was a suggestion merely that you had made, just as you put it now, that that would be the way in which it might be proved, and we say that is not the way. Your Honor has expressed some thought regarding our particular interest in the present panel. We are not interested—

The Court: What did I say about that?

(1712) Mr. McCabe: Some particular interest in the present panel, as calling, intending to call all the members of this panel, with the indication that perhaps when a new panel was drawn we would call of the members of that panel.

The Court: You see, you started with the A's and you apparently were going right down the line. But perhaps I drew an unwarranted inference.

Mr. McCabe: We didn't want to pick them. We were taking them as they came, your Honor, and letting the chips fall where they could. We weren't doing what the clerk did, we weren't adopting any particular selection. But Mr. McGohey says that he thought we were attacking the entire system. That is precisely what we are doing. And I say that when your Honor cuts us off in an attack upon a panel containing 15,000 names, cuts us off after calling 15 names, even though that 15 certainly demontrates the beginnings of an outline of our pattern, your Honor is choking us off just at the beginning of our proof.

And I say that certainly indicates not a mere sawdust in anybody's eyes; it is not a matter of similes or anything like that, but it is a matter of

expression of your Honor's bias, your Honor's bias in having an interest in defending the system; that just as we (1713) begin to tilt—

The Court: What? Some more bias? Because I regulate the order of proof that shows bias and prejudice? Is that what you really believe?

Mr. McCabe: That is not regulating the order of proof, your Honor, when just as it looks, as everybody realizes, that the initial proof absolutely supports our assertion then suddenly we are cut off and shunted on to some other way; that our orderly procedure and expeditious procedure in proving our case is suddenly disrupted by your Honor's ruling. I say it certainly indicates some fear on your Honor's part.

The Court: Well, I have no fear. If you have any impression that I am afraid you may put that out of your mind entirely, because I have not felt any fear, and I can only remember once in my life that I was afraid, and I am not accustomed to be afraid, and I am not afraid now. So you can just drop that subject. If you want to know what that one time was that I was afraid, I will tell you sometime.

Mr. McCabe: Your Honor picks up the word "fear." I would like to get back to the word "bias," then.

The Court: All right.

Mr. McCabe: I say that your Honor's action (1714) in cutting off our proof now, the expeditious manner in which we are proceeding with our assertion that we are prepared to submit plans for expediting it even further, that that indicates that your Honor wishes to protect this system which we claim is rotten to the core. That is unfair, goes far beyond the right of your Honor to regulate the orderly procedure of a trial; and it is just the opposite—it disrupts the orderly procedure of this trial.

Mr. Isserman: Your Honor—

Mr. McGohey: If the Court please—will you pardon me, Mr. Isserman? And I make this sug-

gestion for this reason: it has been urged once or twice I think, at least once before, that counsel for the defendants were under a disability in presenting their arguments because for some reason their arguments were made first and then the United States Attorney made his argument and they desired to make some reply to that.

The Court: Well, let us ask them which they prefer.

Mr. McGohey: I suggest, your Honor, I represent to your Honor that I have an argument, I should like to make an argument on this question. And perhaps it would be helpful if it was made now so that when counsel (1715) for the defendants make their arguments they will have the Government's view.

The Court: You may do so.

Mr. Sacher: What does counsel want to argue?

The Court: They do object. So—

Mr. Isserman: I have only said, if the Court please, I would like to be heard.

The Court: You may be heard now. I will reserve for Mr. McGohey a little time later on, and after he concludes his argument you and each of you may respond to the extent which you feel you desire to respond.

Mr. Isserman: I was about to observe that whatever the procedure might be in respect to Government argument first and defense second at this point, the defense having commenced argument it should be allowed to complete it.

Mr. McGohey: I am very happy to have that done.

Mr. Isserman: I would like to at this time, if the Court please, again voice an objection which I have voiced before in similar situations.

I find myself standing up to present a position, objections and argument on behalf of my clients after the Court has ruled and after, either before or after some of the other counsel have stated their position. (1716) It leaves me with the feeling

which I have previously expressed, that I am adding, if I may use a newspaper term, a shirt-tail to a finished story.

The Court: That is a new expression.

Mr. Isserman: Shirt-tails are those little squibs that they put on after an article is written. They have a little historical background or some pleasant decoration of the theme which follows the main story with a little line, between the main story and this little—

The Court: That is a shirt-tail?

Mr. Isserman: Yes.

The Court: We learn something every day.

Mr. Isserman: Well, I don't want to be a shirt-tail to an argument or a tail to a kite of argument, whichever way we look at it. And I say that not to be facetious, your Honor. But the purpose of argument is to present matters to the Court which the Court should consider in its judgment. And I don't think the purpose is served when the Court, after having made up its mind, says, "Well, you can say your piece, you may have your shirt-tail, you may argue in extenso"; and sometimes, with all due respect to the Court, as if it is just so much water over the dam and the Court is perfectly willing to spend a little time on indulging counsel.

The Court: Well, I do thinking on my own (1717) account, and I have been watching and listening, and in the little period when Mr. Gladstein was away I read over all that record and I got certain impressions that led me to make the remarks I did yesterday about what I thought I was going to do, and this morning I have done it. Now, you know there is a point beyond which one cannot go in listening to argument on a matter of the Court's discretion, which courts commonly exercise all the time. I don't quite see why I need so much argument, but I don't want to be unpleasant about it.

Mr. Isserman: I am sure that your Honor has when he has been on this side of the bench always

sought to protect his clients by making the objections necessary to protect them and stating the force behind those objections in law. And I assure your Honor that that is all I care to do.

The Court: That is perfectly proper.

Mr. Isserman: But I would like to have some time, a chance to do it before it seems as if your Honor's mind is made up.

The Court: At this time I really think my mind is made up. But you never know what argument may do to persuade you that you have made a mistake. And there have been many times when I have altered my judgment when I find that I have been wrong.

(1718) Mr. Isserman: Now if the Court please, at the outset I would like to object to the remarks made by the Court in reference to the defendants, including those that I represent, and as near as I could take them down in my notes it was to the effect that the defendants—the Court would not allow the defendants to take over the administration of justice and to get limitless delay by this proceeding. After all, we are here as officers of this court. We have assured the Court that we have no intention to get limitless delay, while at the same time asserting that we should have the time needed to protect our clients.

We have no intention and no power and no desire to take over the administration of justice, and such a remark on the facts before your Honor coming from the Court I respectfully object to. What we are doing and what we have sworn to before this Court—and I would like the Court to bear in mind that we have before this Court an affidavit which supports a challenge and in that affidavit and in that challenge we have put in a substantial and considerable amount of evidentiary material, pages of it, showing tables and analyses and—

The Court: You don't mean those new affidavits. You mean the main affidavits.

(1719) Mr. Isserman: I am talking about the main affidavits.

The Court: Yes.

Mr. Isserman: I believe the information and statistics which we have developed which if true—which if true—support the allegations of our challenge and indicate its sufficiency. And if those allegations are supported as set forth in our challenge then indeed we are calling attention to an evil in the administration of justice which not only affects the defendants in this case but affects the defendants and in fact all litigants in civil and criminal cases that are brought before this court.

Now we have very carefully studied the material. We have studied the cases very carefully, and we have an abiding and profound conviction that the method of selection juries in this court is and improper and illegal and unconstitutional one. And that is why we are presenting evidence on that point.

Now in reference to your Honor's specific ruling in this case we say that the ruling, which I understand now is limited to the order of procedure in respect to calling members of the January panel—

The Court: The order of proof. That is all I am ruling on.

(1720) Mr. Isserman: The order of proof in respect to the January panel we say is nevertheless a denial of due process, and we say it for these reasons. We have studied the January panel as is indicated by the challenge filed, and we say that that panel shows a pattern of discrimination which exists as we have analyzed it in the challenge. It is of no moment, your Honor, that that jury, that that panel may be dispersed at the end of this month or be excused at the end of this moment and that doesn't mean either that we will then take the new panel. But we had to have a starting point, and our starting point was the January panel. And by showing, by analyzing that panel, by getting the facts of economic relationship and placing the members of that panel in their proper classification, we show what that panel is composed of.

Now our analysis shows that that panel, taken by itself, indicates discrimination and exclusion. I don't think under the cases we could say that that exclusion by itself is systematic. But in order to show the pattern, your Honor, we have to take each one of these persons and place them where they belong, as we have been doing. After that is done our next step, and that is what we propose showing by this (1721) proof, is to show that this pattern which exists for January 1949 was not something which happened by the turn of the wheel of chance or the jury wheel, out of a method which is in accord with the statute and principles of the Supreme Court. We want to show that that pattern repeats itself, that it repeated itself a number of times, the times we tested in 1948; that it repeated itself in 1947 and going back into 1946 and 1945 and 1943, down to 1940, to the approximate time of the Toland Report. Now—

The Court: Let me ask you a question, Mr. Isserman. If these defendants in this case have the right to do all these things that you say, isn't it true that every other defendant in a criminal case in this court would have a similar right?

Mr. Isserman: May I answer that question?

The Court: Certainly.

Mr. Isserman: I would say that any other defendant who has before him the facts that we have as contained in our challenge would not only have a right to do it for himself but an obligation to do it for the community, if the facts are true.

The Court: Now of course it is customary for lawyers to assert facts which they claim are true, and (1722) one of the functions of the Court and of the judicial system is to decide whether they are true or not. The lawyers on one side say one way, the lawyers on the other side say just the opposite; and the mere assertion on the one hand and on the other of course proves nothing. So that you must I think concede that if a lawyer or lawyers for defendants in all criminal cases asserted and

came along with affidavits such as you have here they would have a similar right; and if they have, I wonder what happens to the administration of justice, which would then conceivably be turned over to the defendants' lawyers calling all the jurors, calling all the clerks, calling all the judges, and keeping that up month by month and year in and year out.

Mr. Isserman: If the Court please, I struggle with your Honor's statement of assertion. Assertion is made in the challenge, there are allegations in the challenge which are sufficient in law. I am convinced they are sufficient in law. Those assertions are supported by factual data, and I might use your Honor's expression "in extenso"—they are supported by factual data, full and complete, not fully complete but sufficient data, with sources given, which would indicate that if any other person would go through the procedures that are indicated have been gone (1723) through in the affidavit, which is more than an assertion, it is a bringing of fact before the Court—that we have already done more than assert. We have established by our challenge and supporting affidavit and documents a prima facie case.

Now it is also true, your Honor, that since that time several additional affidavits have been filed which I think bear out the allegations of that challenge.

Now we are prepared—doing what? We are in the process of proving our assertions. And on the very eve of the presentation of our evidence I see a brief here from Mr. McGohey which I haven't had time to read, your Honor—I read briefs rather slowly—but a heading which says that the "Defendants' evidence utterly fails to show any deliberate or intentional exclusion of workers, women, Negroes or Jews."

The Court: I thought I saw the word "relevant" in there too.

Mr. Isserman: No, I am reading Point I.

The Court: Doesn't he say that the evidence is not relevant?

Mr. Isserman: I just read the caption of the point. I haven't gone beyond that. But that caption would be a proper caption if we had said "The defendants' rest" without putting in our case. We are—

(1724) The Court: That is the first thing they say in here: "The evidence presently being offered by defendants in support of their challenge is not relevant."

Mr. Isserman: Yes, but I am reading the "Defendants' "—

The Court: That is important if that is so, isn't it?

Mr. Isserman: Oh, certainly.

The Court: Yes.

Mr. Isserman: Oh, it certainly is relevant because your Honor has ruled that it is relevant. And also your Honor has directed his motion—his expression, rather to the order of proof.

The Court: I have great difficulty in seeing that these petit jurors or these grand jurors have testified to anything of consequence. I don't know. Maybe it is going to fit into some pattern. But it sounded to me as though they were all testifying in effect that there had been no discrimination.

Mr. Isserman: I appreciate that your Honor was perhaps principally impressed by the negative answers Mr. McGohey got from the witnesses. But that isn't any part of our proof. We don't need answers the other way to prove our case.

But I think your Honor has put his finger on (1725) a point when he says perhaps a pattern will develop. I would like to draw another analogy from newspaper experience. It is very much like a picture coming over a wirephoto machine, your Honor, and all you see at first is some dots and dashes and some cloudy little markings which are of no significance until the entire picture is done, and then, by God, there is somebody's picture

taken three thousand miles away. And if you listen to the apparatus you will hear the little hums, little noises and pauses, and when you get the initial result all you really get are some electrical impulses. But they have a way of arranging themselves into a picture.

Now, we have a pattern to build which has very many little parts—each juror is a dot, if you please—and in order to show our picture we simply have to take those dots and assemble them and put them where they belong in their economic classification, stratification. You can't say when you have 15 dots, in a picture which requires, say, one panel, 500 dots, that your dots don't show anything.

The Court: Mr. Isserman—

Mr. Isserman: It sems to me that is the force of Mr. McGohey's argument.

The Court: Did you and your colleagues indicate that you were going to call the judges?

(1726) Mr. Isserman: No, I did not indicate that I was going to call all the judges, your Honor.

The Court: Was there any indication in this challenge that you were going to call some witness to testify to statistical data prepared by him?

Mr. Isserman: I think that would be a fair inference from the challenge, your Honor.

The Court: And maybe there are a lot of other modes of proof that you have available. Now, why don't you follow my direction.

Mr. Isserman: I haven't finished the point of my objections. I want to list them.

The Court: All right.

Mr. Isserman: I digressed to answer your Honor's question.

The Court: Yes.

Mr. Isserman: Now as I was saying, that the pattern which we say will be shown by the January 17th panel will repeat itself in panel after panel through the years. We will show that the persistent and continuous repetition of this panel through the years went back to some time before the date of

the Toland memorandum mentioned in the challenge. The evidence will show that repeated persistence could not possibly have been achieved through the method of (1727) selection provided under the law, and would lead to the clear inference that the exclusion was systematic and deliberate.

Now, if your Honor please, if I could just take a colloquial example—

The Court: Yes. I like those.

Mr. Isserman: I was talking to the statistician about this. And I said, "It seems to me that the way these jurors come out of the wheel is something like pulling a royal flush."

And he said, "If in a poker game you pulled five royal flushes in a row"—

The Court: Who did that?

Mr. Isserman: —"it would be"—what?

The Court: Who did that?

Mr. Isserman: A statistical person.

The Court: Oh.

Mr. Isserman: He said "if", your Honor.

The Court: I was going to say, I want to meet that man.

Mr. Isserman: Oh, you would say, if he pulled five royal flushes in a row that the deck is loaded, your Honor. It wouldn't be—

The Court: I would get suspicious, there is no question about it.

(1728) Mr. Isserman: Now when I said to him, "This is like pulling a royal flush," he said, "If you pulled five royal flushes in a row in one game the probability of that is greater than the probability that each of these panels could repeat themselves through the years by following the ordinary method of selection."

Now that is what we expect to prove to your Honor by competent evidence. I am simply trying to point out to your Honor that we are taking this matter very seriously and we regard it as so fundamental that the time factor, the time factor should

not be a controlling factor in the presentation of evidence.

Now we say that if we are allowed to build our proof and proceed in the fashion that we are proceeding, by building up a pattern and showing this repetition—we don't have to go into the February panel; we will go back into other panels which we have studied. And we say that at this time and under these circumstances, to deny us the right to proceed as we have been doing is in effect a denial of due process, in that the defendants by this ruling will be barred from the orderly presentation of their evidence in order to lay the basis for the claim of the constitutional invalidity based on the guaranties of the Fifth and Sixth Amendments.

(1729) Mr. Isserman: Now, the reason why this ruling on order of proof has the aspect of an abuse of discretion going to constitutional invalidity by itself, are several—the reasons are several: One is that there is the absence of counsel who unfortunately was grounded on his way East, and I hope he will be here some time before the day is over.

The second is the element of surprise at the Court's ruling. We have witnesses who been subpoenaed who are ready to testify, and at least counsel got the impression that that procedure would continue without sharp change until the return of Mr. Gladstein.

The Court: Were you informed of what I said yesterday about the calling of jurors? You say you are surprised about it today. It may be because you were away yesterday.

Mr. Sacher: No, I was here, but I am surprised too. I was here and I am surprised.

The Court: Well, your surprise will be duly noted.

Mr. Sacher: But that does not dispose of it, does it?

The Court: No, but it is pretty close to being disposed of.

(1730) Mr. Isserman: And in answer to your Honor's question I would like to say that I did not read the record of yesterday's hearing because I was at work on the memorandum that counsel said modestly until after midnight; I was at it until 3.00 a.m., your Honor. But I did confer with counsel, and they, so to speak, briefed me on the situation, and apparently all counsel somehow or other got the impression that this procedure was to continue until Mr. Gladstein would return.

Now, perhaps there was some unclarity in the record or in the explanation, but all of them uniformly had that view, and I certainly relied on it. I have a right to rely on impressions gained by co-counsel when I confer with them.

Now, this question which has come up here of the timeliness of the motion, I only want to say one word about that, that I think the best statement of that appears in the Perlman letter, which is an exhibit before your Honor, in which it is stated "Petitioners answered this request"—I better go back a little bit:

> "The Government urged upon the Court at that time that the attack on the jury system in the Southern District of New York be disposed of in the period intervening before the trial."

I think Mr. McGohey was right when he said (1731) he had thought it should be disposed of before the trial.

The Court: Yes?

Mr. Isserman: And then there is the next sentence which says:

> "Petitioners answered this request by withdrawing their motion 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 in a paneled."

That was my impression at that time of your Honor's statement, and I believe I did see that statement in the record.

Now, the Solicitor General has told the United States Supreme Court that the challenge would be heard on the 17th in accordance with a prior instruction by your Honor, so I think that that point is perhaps cleared up in this way.

Now, on this question of the time factor: I wish to assure your Honor that this is not a delaying procedure. I have been in cases, and I am sure your Honor has been in cases in which trials have gone on over an extended time, and at some point where a series of facts or related facts have to be established there will (1732) be the putting on of one or two or three or a number of witnesses, and as a pattern begins to emerge very often there will be an offer of stipulation by either side which will say, Now let us stipulate that if the following people were called their testimony would be thus and so; and we hoped to shorten the proceedings in that way. I would certainly say in this case we are open to such suggestion; we are willing to sit down and try to work out some form of stipulation in your Honor's presence or outside of it, as your Honor may direct or suggest, to shorten this procedure.

We are also willing to consider with your Honor the question of reference to some Commissioner or Master to facilitate the procedure, so that even this Court's time is not occupied to the maximum extent.

We are also willing to try to work out a system of perhaps submitting by mail a questionnaire containing approved questions with a stipulation that on the coming in of those results we will tabulate them and consider them as if the witnesses testified, and while that is being done, to proceed with the rest of our proof.

In other words, we are not obstreperously standing on a specific procedure which seems to the Court to be a delaying one, but we do say that under the cases our right to establish the classification of these

jurors (1733) and their place in the community, as well as their race and these other factors we have been bringing out, is clear.

Now, it is true Mr. McCabe said that we were proving in part our exclusion by circumstantial evidence. But the facts of that circumstantial evidence, the facts which make it up, we are trying to prove by what is the best evidence, which is the evidence of the persons who know what they do, who they are, where they work, and where they fit in the economic scale. That under the best evidence rule would be the evidence we would be required to produce if we were trying to establish this fact.

So that our position is that we are—we feel that at this time the disruption of the pattern which we are building—because we are not through with showing pattern No. 1; we are at the threshold of that pattern—that the disruption of that pattern destroys the orderly presentation of this case which we are ready to make and which we would like to make, so that it would be abundantly clear that assertions, as your Honor says we have been making, but which we say are already supported in our challenge, are in fact true. And if they are in fact true, it would seem to me that the time needed to establish those facts is a factor which is insignificant, because (1734) the consideration, the prime consideration here, as your Honor will, of course, state, is justice; is the presentation of the evidence needed to get justice; the presentation of the evidence needed to establish a constitutional objection; and it has never been said that because it takes time to do that, whether it be the 300 witnesses who were called in Scottsboro, or the 500 in Columbia, Tennessee, or the 700 in New Jersey—it can never be said that because this is a difficult procedure that it should be curtailed.

Now, I urge your Honor seriously to consider these matters in this light, and to allow us at least until Mr. Gladstein's return to proceed in the way we have proceeded, with this assurance which I be-

lieve I can make, that if your Honor then maintains this ruling, we would be fully ready to proceed with other evidence which while not in a sense being specific as to each juror from himself will nevertheless develop the pattern which we say exists.

Now, the reason why I stress Mr. Gladstein is, first, I think all defendants should be represented; but your Honor has already indicated that he has noted that Mr. Gladstein has taken over a prime function in this matter, and the truth is, he has. It would be our hope and it is our expectation, and it is our arrangement (1735) with him that when our principal witness on much of this evidence is called, that he will lead the direct examination of that witness. He has been preparing for that, your Honor.

So we say, above all there is now this element of surprise and unreadiness on our part to proceed today, but we are perfectly willing, if your Honor will not change his ruling—not only willing, but, of course, we would yield to your Honor's ruling—but we are perfectly ready if your Honor will adhere to the ruling, to start this proof from another angle, and then perhaps at a later time your Honor will see the advisability and need of allowing us to call these jurors; or perhaps some arrangement can be made which will eliminate the expense to us and the trouble to us, and the expense and the trouble to the jurors for each to come down here and state his piece of those points which are relevant and material to support this most serious challenge which we are making.

Mr. Sacher: I should like—

The Court: Just before you speak, Mr. Sacher, Mr. McCabe, I should like to have that record in that New Jersey case if you can let me have it.

Mr. McGohey: We have it here, your Honor.

The Court: If you have it there, all right, (1736) because I would like to take that upstairs with me.

Mr. McGohey: There are some briefs. Would your Honor care to have the briefs also?