The Court: Well, you see, the way you were trying to summarize, it means that Mr. Gordon must stop and check over all the testimony and that I must think about it, and I think it is wholly unnecessary. This Exhibit 165 was identified and described when it was first produced.

Mr. Gladstein: Very well.

(4008) The Court: Now all the contents of that envelope are being given exhibit numbers. They are all in evidence now. And if there is some special thing on one or another of those papers that you wish to interrogate the witness about, I will be very glad to permit you to do it.

Mr. Gladstein: I think your Honor misunderstood my intent. I did not mean to circumscribe the witness by any implication that these are all of the lists so as to indicate that the voting list was not used, but I simply want the record to show that the lists that are now being received in evidence, the ones that remain in this envelope 165 for identification, are lists of names and addresses of people which were either compiled in the office of the clerk or received by him from some other source and which lists were used for the purpose of sending notices to qualify.

The Court: You see, that is the trouble. He has said as to many of them that they probably were used, as to others that they were used, as to others that he does not know because he sees nothing on them that will help him to say. So that is going to be a matter of argument I think by you. But don't say that he said it because he didn't say it.

By Mr. Gladstein:

Q. Well now, let me ask you this, Mr. McKenzie: (4009) It is a simple matter, is it not, to ascertain whether you have a history card for a person or a questionnaire filled out by a person whose name appears on any of those lists; that is so, isn't it?

Mr. Gordon: Objected to as to form—"it is a simple matter."

Mr. Gladstein: Well, it is true.

The Court: I will allow it. I think he knows what is meant.

A. Yes, that is correct.

Q. All right. And the date of course when a person fills out a questionnaire and the date when his history card is made out upon qualification is shown on those documents, the questionnaire and the history card? A. The date that he qualifies shows on the history card.

Q. And the date that he fills out the questionnaire shows on the questionnaire? A. That is so.

The Clerk: Defendants' Challenge Exhibits 240 to 287, inclusive, received in evidence.

(Marked Defendants' Challenge Exhibits 240 to 287, inclusive, in evidence.)

The Court: Now, Mr. Borman, you remember that those merely marked for identification, such as 234, 28 and 29 will now be marked in evidence.

(4010) The Clerk: Yes, they are on the record.

Q. I believe you have testified that the main source of names, main source of jurors in 1940 and thereabouts was the voting lists, is that right? A. The book indicates that.

Q. What is your testimony? Was that the main source or not? A. Will you repeat that question?

The Court: The main source of persons to whom they sent notices to come in to qualify.

The Witness: I don't know as I could state that. There is nothing in the book there that I could refer to.

Q. Well, there is no book that shows the sources for 1939, 1938, 1940, is there? A. That is true, there is no record kept that the notice was sent out.

Q. In fact you had no record until July 1942, which is the first time that your record begins to show the source from which you obtained the names of jurors, isn't that so? A. That is so.

Q. Now as to prior to July, 1942, the period say in 1938, 1939, 1940, 1941, when you were requiring jurors here, what was the chief source from which you obtained the names of those persons? A. The list of registered voters was always the main source.

(4011) Q. Isn't it a fact, Mr. McKenzie, that the address phone book was the main source?

Mr. Gordon: That is objected to as argumentative.

Mr. Gladstein: It is cross-examination.

The Court: Yes. I think, however, it is only fair to indicate the time. You remember he testified on his direct and again on cross several times about the different procedures that were used at different times.

Mr. Gladstein: Yes.

The Court: And I think a question such as you have just put to him is apt to confuse him.

Mr. Gladstein: Very well.

Q. Isn't it a fact that up until the early part of 1942 the main source or chief source from which you obtained the names of your jurors was the address phone book? A. I wouldn't say that, no.

Q. Did you assist Mr. Follmer, your chief, in preparing a report in the year 1942 on what your sources were for jurors? A. No, I did not. You were the first one told me about that when you came into the office.

Q. Oh, is that so? A. You called my attention to it, yes, sir.

Q. You are familiar with the fact that such a report was made; correct? A. I went to my files and found it under the date that you told me, or year, month.

(4012) Q. Do you have that with you? A. I don't believe it is in the subpoena when you subpoenaed me. On your subpoena you did not mention—

Q. Do you have it, sir? A. I believe it is still in the files upstairs.

Q. You also have, do you, a report made by the jury commissioner at or about the same time? A. An answer to the report or an answer, if you want to class it as a report—

Q. An answer to what, sir? A. To the correspondent or whatever it was that received a questionnaire or there was something there that they were asked questions.

Q. Does Mr. Doyle have those two letters or reports, do you know?

Mr. Gordon: I am going to object to anything further on them, your Honor. They are obviously hearsay as to this witness and I do not think they contradict the witness.

The Court: Well, I had better get down in my notes what they are.

Is it some report by Smythe?

Mr. Gladstein: No, your Honor. I am referring now, as I understand the testimony—

The Court: I am only trying to get clear what you just asked him because—

(4013) Mr. Gladstein: I don't think Mr. Smythe was then commissioner.

Q. Was he commissioner in 1942? A. No. J. Donald Duncan was the commissioner in 1942.

Q. Now Mr. Duncan and Mr. Follmer both wrote letters constituting reports or replies to some inquiry; isn't that right?

Mr. Gordon: That is objected to as irrelevant and leading towards a hearsay matter.

The Court: If it is simply to find out whether there is such a paper in existence I will allow it.

Is there such a paper in existence?

The Witness: There is, your Honor.

The Court: Is it one that you knew anything about at the time it was made?

The Witness: No, I did not, your Honor.

Q. Is it in your office files? A. Yes, it is in the file.

Q. In what part of your office files are those two written documents? A. In my files, the correspondence files in the office of the jury office, in the correspondence.

Q. What other types, just in general, without disclosing the source, what other types of correspondence are contained in that particular file? A. All sorts of correspondence, of recommendations.

(4014) Q. The same file, Mr. McKenzie, that contains the letters, for example, that the Federal Grand Jury Association would send to you regarding recommended persons or would supply recommended persons with to bring to you? A. It is in the file in my office there and it is in—yes, I would say it is in the same file. There are letters from the Federal Grand Jury Association in that file.

Mr. Gladstein: Your Honor, I would like to have that file produced so I can examine the witness on it.

Mr. Gordon: Objected to.

The Court: Sustained.

Mr. Gladstein: May I state the purpose?

Your Honor will recall that this is the file that contains documents described by the witness that relate to the manner in which the witness obtained persons to become jurors.

The Court: Mr. Gladstein, after what occurred yesterday I am not going to direct that any more files be placed at your disposal.

Q. Well, now, isn't it a fact, Mr. McKenzie, that the largest percentage of jurors you obtained from any single source during the period 1938, 1939, 1940, 1941, the early part of 1942, was the address telephone book?

Mr. Gordon: I am going to object to that question on the ground that the witness has testified that (4015) from 1938 to 1940 he was an assistant in the office not in charge of it.

The Court: I will allow the question.

A. I would not state that.

Q. You would not either affirm or deny it? A. No, I wouldn't say that that was the main source of supply. There was even a greater source from the address telephone directory.

Mr. Gladstein: May I hear the answer?

(Answer read.)

A. (Continuing) I didn't mean—

Mr. Gordon: "Then from the".

The Witness: Then from the.

Mr. Sacher: He didn't say "then from"; he said "from the".

The Court: Well, if it was a slip of the tongue it has been corrected.

Q. Isn't it true, Mr. McKenzie, that during the period 1940, 1941, there were occasions when people came in and signed and filled out questionnaires— A. If they came in and made any inquiry as I stated on the other—

Q. I have finished my question. (Continuing)—and were found to be qualified as far as the statute is concerned, that is the property qualification, age, (4016) citizenship and so on, but whom you did not put into the active lists because you regarded them as undesirable; isn't that so? A. That is not so.

Q. It is not so? A. Certainly not.

Q. Did you ever remove a card from the active jury lists because you regarded or your office regarded the juror whose card was being removed for the reason that you regarded him as undesirable? A. Never.

Q. Never did. Are you sure about that? A. Positive.

Q. Were you the person in your office during that period 1940, 1941, 1939, who was responsible for the removal of such cards from the active jury files that were removed? A. If a person was taken off it was all done by my assistant.

Q. By whom? A. If the person was taken off, the actual clerical operation was done by my assistant.

Q. But it was not done unless you directed it, is that right? A. The questionnaire, or the man qualified or—

Q. No, please. Was it done only at your direction by your assistant? A. I would say yes.

Q. All right. So that all cards that were removed from the active list would be removed only upon your direction; correct?

Mr. Gordon: That is not his testimony.

(4017) The Court: Well, what is the fact about the removal of these cards?

The Witness: In other words, your Honor, if a person was taken off, the assistant or whoever han-

dled the physical operation, he took them off and marked it as such.

The Court: Was that always because prior to his taking it off you personally had made some decision that it be taken off and give him directions accordingly?

The Witness: Yes, your Honor.

The Court: Or were there others that might make that decision also?

The Witness: Well, I mean, in the passing on qualifications I was the only one there at the time that was passing on it.

The Court: What time are you talking about?

The Witness: 1940, 1941, 1942.

Mr. Gordon: The question was not directed to passing on qualifications, your Honor. It was directed to whether people got removed from the active list and put in the Off list, and we have already had a wealth of testimony that the judges who pass on jurors coming into Room 109 often direct that, and we have exhibits in evidence to that effect. I think the witness is confused.

The Court: Well, you did not mean to cover (4018) the action of the judges?

The Witness: No, I am only covering my own action on the qualification.

The Court: I see what Mr. Gordon means, and I think it is a very fair comment, because you have already testified that as to taking names off there were occasions when the jurors appeared before the judges down in Room 109 and the judge, or one of the judges, directed that he be taken off.

The Witness: He marked that on the summons, your Honor.

The Court: You did not do that?

The Witness: No.

The Court: That was the judge who did that?

The Witness: That is correct.

Q. With the exception of those occasions when a judge of this court instructed you to remove the card of a juror from the active files, is it correct that such removals were

otherwise always an occurrence directed by you? Yes? A. I don't understand that. When you say just removed, I didn't remove the card unless the questionnaire the man filled out—

Q. Whatever the reason—

The Court: Let me get his answer.

Remove the card unless what?

(4019) The Witness: Unless when a man filled out his questionnaire he was rejected or deferred or not put on the jury. In other words, if the man wasn't put on the jury then there was no card went into the active file of the man.

The Court: Maybe there is a little confusion here.

When these persons came in in response to the notices, you sat down with them and there was some interview and some filling out of a questionnaire, wasn't there?

The Witness: That is true.

By the Court:

Q. Now, for a variety of reasons, as provided by statute, you found some of them ineligible? A. That is correct.

Q. So that they did not qualify, did they? A. That is true.

Q. In such a case there would be no occasion to take any card out of anywhere, would there? A. That is true, yes.

Q. So that what this taking of a card out must refer to, is that after a person has been qualified and he has been put on the active list of jurors, sometimes his card as an active juror is taken out; that is what you are talking about, isn't it? A. That is right.

Q. Now, when that was taken out in that fashion, (4020) what was the occasion for taking it out when you did it yourself? A. Well, in other words, your Honor, if a juror was taken off on a summons by the judge that summons would come up to our office, and my assistant would take the card out of the active file, mark it off, and he would be—

Q. You mean, where a judge passed on it? A. That is right.

Q. Now, I am talking about when you passed on it. What would be such an occasion when you had occasion of your own decision to direct that a card be taken out? A. In other words, if these jurors that were qualified by mail, after two years instead of a juror going in the wheel, if we have the clerical help at the time we will send out a notice asking for the information up to date on that juror. And it comes back and is a self-addressed envelope. If the juror is over age or he is a non-resident, then I put "Off—Non-resident" or "Deceased"; I might mark anything of a number, and my assistant will take that card off.

Q. But you say that as far as checking and looking at somebody and saying you didn't like his looks, therefore he was out, you never did that? A. No, your Honor, definitely not.

Q. Because he was colored or a Jew, or a woman, or (4021) anything else? A. Never, certainly not, your Honor.

Mr. Gladstein: May the record show my objection to the last two questions of the Court as leading and suggestive.

The Court: I think the question at issue is whether the jury system was operated so as to deliberately exclude Negroes, Jews and women and perhaps others, poor people generally. Now, I think it is a perfectly proper question to ask him whether he did it. If you can show he didn't do it, you may—

Mr. Gladstein: May I proceed?

The Court: Yes, you may.

By Mr. Gladstein:

Q. Whatever the reason for which a juror's card was removed from the active files, discounting for the moment for the purpose of this question those occasions where the judge ordered it, in all other cases no card was removed unless you directed that it be done, is that right? A. I will say that is correct, yes.

Q. And the reason underlying that direction by you to remove the card would be placed upon the juror's active card when it was being transferred to the Off list; correct? A. Not in all instances, no.

Q. What was your practice as to whether you put the reason on a juror's card? A. The man who made the (4022) clerical operation, he might put "Off", he might put "Off—Non-resident," or "Off—Deceased," or just "Off."

Q. You had no practice at all as to whether the reason was placed on the card or not? A. Not on all occasions, no.

Q. You gave no instructions or directions on that score? A. I did not.

Q. All you did was tell the man to take the card out of the active list? A. The ones that were marked "Off" he took off.

Q. Who did the marking, you or a clerk? Or did it vary? A. Myself in passing, when they were doing it, or someone else may have done it; Mr. Tanner may have gone through batches of them and he marked them according to the information that was on there, the same as Mr. Doyle would do today.

Q. Now then by looking at the cards in your Off list you could tell whether it was your handwriting or whether it was Mr. Doyle's handwriting that appears on there and what the reason is indicated for having that juror's card taken out of the active list? A. As I said, it was just off.

Q. Is that right, sir? A. It would indicate whose hand —that is correct, yes.

Q. Do you know how many cards in the Off list—do (4023) you have any record of how many cards in the Off list have the word "Deferred" on them? A. I haven't any idea.

Q. You know that there are cards on which the word deferred has been written, don't you?

Mr. Gordon: I thought he testified—

The Court: We had a lot of testimony about that.

Mr. Gladstein: All right.

There are some exhibits marked for identification which I would like to ask to be received in evidence. There is a map of the 9th and 10th Assembly Districts in the Bronx, your Honor.

The Court: That is Parkchester.

Mr. Gladstein: Yes. 132 and 133 for identification. May those be received?

Mr. Gordon: No objection.

The Court: Yes, they may be received. You had better get them out and have them marked. If you desire, you may introduce things of that kind after you have concluded the cross-examination of Mr. McKenzie, but where you think that his testimony may have some bearing on them, why it is better not. But I think you have already covered those maps and maybe others of a similar character. You could defer offering them until later.

Mr. Gladstein: There are, such as lists and history cards and so on, about which I think there (4024) will be no dispute.

The Court: I think it would be wiser if you defer that until after you have concluded his cross-examination.

The Clerk: May I have those two maps, your Honor?

The Court: Yes. The two maps had better be marked now so that the record will be clear.

(Defendants' Challenge Exhibits 132 and 133 for identification received in evidence.)

By Mr. Gladstein:

Q. Is there any record to which you could go to ascertain which was the Assembly District in Manhattan that you used as a source of names between 1945 and 1947? A. 1945? There was a West Side; I don't know just what the Assembly District was.

Q. Can you identify it in any way? A. As to the area?

Q. Yes. A. It is up around Central Park West, I recall that.

Q. You don't know how far up? A. No, I do not.

Q. It was the only Assembly District list that you used during that period for Manhattan, is that right? A. I would say yes.

The Court: Is that 1945 to 1947?

The Witness: That was 1945 to 1947. It was the '44 year election list of voters.

(4025) Q. I want to show you—it is not in evidence, but it is a map—

Mr. Gladstein: Perhaps we ought to have it marked as long as I am going to show it to the witness.

The Court: That is the one that you let me have the other day.

(Marked Defendants' Challenge Exhibit 288 for identification.)

Q. Now, Mr. McKenzie, take a look at Challenge Exhibit 288 for identification, which is a map by Assembly Districts of the Borough of Manhattan. You have just said that during the period 1945 to 1947 you used as a source of names of jurors the registered list of voters for one Assembly District on the west side of Central Park? A. That is my belief, it was the west side. I am not certain now as to the location on it, but I know it was one from Manhattan and one from Bronx.

Q. Can you by reference to that map and what it shows you regarding the area immediately surrounding Central Park, now state whether it was the west or the east side of Central Park and if, whichever it is— A. What part of the area?

Q. Do you know or would you be guessing? A. I would be guessing.

Q. So that you don't really know? A. Absolutely I (4026) don't know.

Q. You really don't know whether it was the west side or east side? A. I didn't say that.

Mr. Gordon: He didn't say that.

The Court: That is a fair question on cross-examination.

Is it that you can't tell whether it is the west side or east side or is your best recollection that it was the west side?

The Witness: My best recollection is that it was the west side, your Honor, but I can't definitely state.

Q. And if it was the west you are unable to recall what portion of the area on the west side of Central Park that Assembly District was located in; correct? A. In other words on this new book for the new Assembly Districts I had stricken out stuff on Central Park West indicating we had been into that registered voting book. Now, that is what sort of ties me up as to the previous book. I knew I used, that we used the registered voting book at that time, and in this registered voting book for 1946 I put lines through Central Park West to indicate that we had been there.

The Court: Let us get it out.

Mr. Gladstein: Now, which one would that be?

The Witness: I believe it was the 9th and the (4027) 10th.

The Court: Maybe Mr. Borman can take that and get the Assembly Districts that are around there in that neighborhood. This circumstance you just referred to is what made you think it was on the west side?

The Witness: That is true, your Honor.

The Court: Mr. Shapiro has handed me this. See if that is the one you are looking for (handing to witness).

The Witness: This is the Central Park south area, and West 59th, West 59th.

The Court: Where did you cross it out?

The Witness: Right down there (indicating).

The Court: On page 10 and page 11?

The Witness: That is right, your Honor.

The Court: Of exhibit—

Mr. Gladstein: 183-Q.

The Court: All right.

Q. Now is it your testimony then that during the period 1945 to 1947 the area for which you had an Assembly Dis-

trict map and which you resorted to for use as a source of names for jurors is that portion crossed out on pages 10 and 11 of this exhibit? A. I said that doesn't necessarily mean that I (4028) used it during the 1945 to 1947 period—that is what gave me this west side, where I said the west side on the Manhattan book. I knew I used one.

The Court: I think you were mistaken in your question, Mr. Gladstein. I think you said map and you meant to refer to registered voting list.

Mr. Gladstein: So I did, your Honor.

Q. I don't understand your testimony now. Since you have looked at 183-Q and have found that on pages 10 and 11 certain columns have been marked with blue lines, is it or not your recollection that the section of Manhattan corresponding with the area referred to on these two pages of the exhibit is the one to which you sent notices to people living therein to come in to qualify? A. No, it could have been either a previous one, though I am not certain of that mark as the identifying one from 1945 as to 1947. I knew I used one from Manhattan and one from the Bronx.

Q. You aren't able now to tell anything at all about whether it was— A. The location of it.

Q. Of Manhattan? A. That is correct.

Q. But you do know that the one of the Bronx was the Parkchester? A. That took in the Parkchester.

Q. That is the Parkchester Development? A. That is true.

(4029) Q. Development means housing development, is that right? A. That is correct.

The Court: Have you got that voucher here that Mr. Sacher asked for yesterday?

The Witness: Yes, your Honor.

Q. Do you remember that you said when you came back in 1943 you found some notices that had been accumulated by your predecessor, these being notices to people to come in to qualify? Do you recall that? A. That is true.

Q. Your predecessor I suppose was Mr. Borman, is that right? A. That is correct.

Q. Do you have a record of how many such notices you had at that time? A. No, I have not, sir.

Q. Do you have a recollection? A. No, I have not.

Q. Do you have a record as to the source from which the names were taken that were put in those accumulated notices? A. As to the source from which that—no, I have not.

Q. Do you have any recollection of the fact? A. No, I have not.

Q. Your testimony is, however, that you did send out those accumulated notices; correct? A. The book shows for about 10 or 15 days in that book there, it shows the number of notices that I mailed each day, but there (4030) is no notation as to what Assembly District or what source they came from. It is just the date in which they are mailed out under.

Q. Now when a person received a notice and failed to respond, what was your practice? Send him another notice? A. Send him a final notice.

Q. All right. That is the same kind of notice that appears attached to the Tolman memorandum, is that right? A. That is true.

Q. Now if the person did not come in in response to the final notice you sent him a notice of the possibility of bench warrant action being taken, is that right? A. There were notices that are called orders to show cause that were sent to him.

Q. Now, how many such notices or orders to show cause have you had occasion to send in the last ten years? A. It all depends as to how much help you had in the office to write up the notices or send them out.

Q. What is your best judgment? A. I haven't any idea.

Q. Generally there was a response to the final notice, isn't that so? A. Yes, I would say there was.

Q. And it would be rare to have to resort to bench warrant action, isn't that so? A. It is not bench warrant action.

Q. I mean the order to show cause. A. The order to (4031) show cause.

Q. That would be very rare? A. No, I don't know; it all depends as to the notices there. I couldn't say it would be rare or not.

Mr. Gladstein: Your Honor, I have nothing further except the offer of some of these exhibits which I will defer until after the witness is off the stand, if that is satisfactory.

There is a subject that I have not touched on and which Mr. Isserman has asked to examine upon and which he is prepared to examine on. I want to reserve the right however, and I ask the Court to reconsider its ruling on this, to have supplied in response to a subpoena that I served on this witness three documents that his testimony today refers to, and these are documents dealing with the year 1942, and they are in his office the witness thinks, as he said.

The Court: Well, whatever papers are covered by a subpoena duces tecum will be produced without any limitation whatsoever. And nothing that I have ruled heretofore may be taken as indicating that I have prevented you from serving a subpoena duces tecum, so that you can serve any subpoena duces tecum you want, and if you have already served one and there are certain papers, you may tell the witness which ones you desire (4032) and he will produce them.

Mr. Gladstein: Yes. Well, the ones that I had in mind and which were called for by the subpoena duces tecum, the ones that I am now referring to, are a questionnaire and two replies, one by Mr. Tolman and one by Mr. Duncan, and I think—

The Court: Did you tell him before he came in here this morning that you wanted those today?

The Witness: No.

The Court: You tell him now what you want and he will have them for you right after lunch.

Mr. Gladstein: He may have them now.

The Witness: I have not.

Mr. Gordon: May I object, your Honor?

The Court: Yes, you may.

Mr. Gordon: These are papers which were included in an original subpoena which I have seen, which is described in the ordinary language as so broad as to include the kitchen sink. That subpoena,

as I understand the testimony of Mr. McKenzie, Mr. Gladstein told him he did not have to comply with, and it was in effect withdrawn. Thereafter another subpoena was served on Mr. McKenzie.

The Court: A supplemental subpoena?

Mr. Gordon: Yes. And that is the one that Mr. Gladstein told him to comply with. Now this paper (4033) is not included in that.

An additional ground for my objection is—

The Court: Just a second. Now, let me make a suggestion, Mr. Gordon.

Mr. Gordon: There is another ground.

The Court: I know. There are two steps to these things. First of course, as you realize, is the production of papers; the second is whether the papers are going to be turned over to counsel or not. Now as I understand it, from what I have been looking at here while everybody has been talking, is that he has got them right in his hand, so that as far as the paper—

The Witness: I have not, your Honor. I have the subpoena here.

The Court: All right, that is the subpoena. Very well.

And so now we are addressing ourselves to question 1, whether they are to be produced pursuant to a subpoena duces tecum. If they are not in the supplemental subpoena I should see no problem to it. But if you desire one or two papers like this and to have it regarded as though a new subpoena duces tecum had been served, for that purpose I will direct that after the luncheon recess he produce these—

Mr. Gladstein: Three documents.

(4034) The Court: I have two here; the Tolman letter, the J. Donald Duncan letter. And what is the third one?

Mr. Gladstein: And the questionnaire to which they were replies.

The Court: The questionnaire.

Mr. Gordon: May I state the second ground?

The Court: Yes, Mr. Gordon, you may.

Mr. Gordon: I think it is something that your Honor should know about. I believe, although I did not see the document, I believe that these are documents which counsel asked Mr. Chandler for and I believe that they are included among the ones that Mr. Chandler said should be considered confidential.

The Court: I rather suspected that that would be the case. If so, I will not direct that they be handed over to counsel.

Mr. Gladstein: May I be heard, or does your Honor wish to—I would suggest this, your Honor.

The Court: Well, Mr. Gladstein, I don't want to have any possibility that at three o'clock somebody shall say that there has been so much colloquy that they haven't had the opportunity to use their time.

Mr. Gladstein: No.

The Court: And these papers this witness says he knows nothing about. So you go ahead with the rest (4035) of your cross-examination and then we will later take up, when the cross-examination is over, we will take up the question of whether he must produce papers and, if so, whether they are going to be turned over to you.

Mr. Gladstein: Very well.

The Court: Now, Mr. Isserman.

By Mr. Isserman:

Q. Mr. McKenzie, before you started working in the office of the clerk of this court in 1935 what was your occupation? A. I was with a construction company, Irving V. A. Huhie.

Q. Did you quit working for that company just before you accepted the position in the clerk's office in 1935? A. They went bankrupt.

Q. When was that? A. Well, I don't know if it was 1934 or—I don't know just the exact dates; at least 1934 or 1933.

Q. So that when they went bankrupt in 1933 or '4 you stopped working for them, did you not? A. That is correct.

Q. Now after you stopped working for them what employment did you have between that time and the time that you took the position in the clerk's office in 1935? A. I believe I was with True Mint. I had spent some time with the True Mint Corporation.

(4036) Q. What did you do with the True Mint Corporation? A. I serviced some of their machines.

Q. Can you tell us when you started that work and when you quit it?

The Court: Doing what with machines?

The Witness: Servicing machines.

The Court: Servicing machines.

The Witness: That is right, your Honor.

I don't know the exact dates as to time I was there, that I was with them.

Q. Is there any other employment you had between the time you quit the construction company, worked for the True Mint Company and before you started to work in the office of the clerk of this court as assistant clerk? A. I was on Joseph V. McKee's campaign, campaign headquarters.

Q. When was that? A. As to whatever time he ran there against LaGuardia; with no salary, there was no salary attached to it.

Q. Was there any other employment that you had immediately before you became the assistant to the clerk in the office of this court? A. I am not certain as to dates, or just when they come in there.

Q. Do you know what work you were doing just the week before you started to work as an assistant to the (4037) clerk in this court?

Mr. McGohey: Objected to as irrelevant, your Honor, and immaterial.

The Court: Sustained.

A. In other words, I came here in 1935—

Mr. Gordon: The objection was sustained, Mr. McKenzie.

The Witness: I am sorry.

Q. Did you ever work for the Federal Grand Jurors Association? A. No, I did not.

Q. Did you ever perform any services for them for which you received compensation? A. No, I did not.

Q. When you started working as an assistant clerk in this court in 1935, was there anybody in the clerk's office at that time from the Federal Grand Jurors Association working on jury lists? A. Anyone working from the Federal Grand Jury—

Q. Yes. A. No, definitely not.

Q. You knew that had been the practice, did you not?

Mr. Gordon: That is objected to, your Honor.

The Court: Sustained.

Q. Don't you know, Mr. McKenzie—

Mr. McGohey: There is no evidence to support that in the record, your Honor. That is another one of those questions with a large fish hook.

(4038) The Court: Yes. Objection sustained.

Q. Mr. McKenzie, are you familiar with the publication known as the Federal Juror? A. I have occasion to read it.

Q. Don't you get it every time it comes out? A. I believe it is mailed to me.

Q. And you read it when it comes out?

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

The Court: Maybe there is something in there that he is going to later ask the witness if he didn't say.

Mr. McGohey: Oh.

Q. May I hear the answer?

The Court: Did you read those all through as you got them?

The Witness: No, I glanced at them, but I don't sit down and read them.

The Court: What is the part that you want to ask?

Q. Now, I will ask you whether or not you have read in the Federal Grand Juror at the time—

Mr. Gordon: I am going to object to that, your Honor.

The Court: If there is something in some one of those issues, Mr. Isserman, show it right to him and ask him if he read it.

(4038-A) Mr. Isserman: I am coming to it, but there is objection before I can proceed with it.

The Court: There is nothing before me at the moment, so if you will just reframe your question I think you will get right down to what you have got there and that will save your time.

(4039) Q. I call your attention to the issue of the Federal Grand Juror—

Mr. Isserman: I would like to have this marked for identification.

(Marked Defendants' Challenge Exhibit 289 for identification.)

Mr. Gordon: May I see it?

Mr. Isserman: Surely you may see it—

The Court: Mr. Isserman is not required to show it to you now unless he desires.

Mr. Isserman: I would prefer to continue my questioning now and then I will show it to him.

The Court: Now I will ask you to show the witness the part you desire to call to his attention, without reading it out loud or putting it in a question, and ask him if he read that part, and then let me look at it before you do anything more.

Mr. Gordon: If he shows it to the witness, your Honor, I would like to see it after that.

Mr. Isserman: I think Mr. Gordon is entitled to see it when it is offered; isn't that true, your Honor?

The Court: I think at the moment I will wait until I have looked at it myself, Mr. Gordon.

Mr. Gordon: I meant after that, your Honor.

The Court: Now just show him the part without (4040) reading it, Mr. Isserman, and ask him if he read that part.

Mr. Isserman: That was not to be my question. I was going to ask him if he was familiar with the substance of the statement made in the Federal Juror.

The Court: You may do that, but I don't want you to read it out until after I have looked at it. You may show it to him, point it out to him with your finger.

By Mr. Isserman:

Q. I call your attention to the first paragraph on the top of page 5 in the righthand column entitled "Revision of Federal Grand Jury Panel," and ask you to read that paragraph.

The Court: Read it to yourself.

The Witness: Will you point it out, please?

(Mr. Isserman indicates.)

Q. Have you read it? A. I have.

Q. Did you have occasion to read that before, Mr. McKenzie? A. No, I have not.

Q. Now I ask you whether you were not familiar with the fact that the practice therein described in fact was in effect in the office of the clerk of the U. S. Court to your knowledge? A. No, it was not.

Q. You would say that the statement contained therein (4041) is untrue, is that right? A. I would say yes.

Q. Do you know the nature of this publication, Mr. McKenzie? Do you know that it is the official organ of the Federal Grand Jurors Association? A. Mailed out each month?

Q. And it is their official organ; you know it to be that, don't you? A. I know it to be that.

Q. And you say that the statement on top of page 5 as contained in this exhibit which I call to your attention is not true?

The Court: He says it is not the fact. I think that business of saying "it is not true"—all sorts of implications come in, and it is really not proper. But what he states, in effect, is that that is not the fact.

Mr. Isserman: I will take it either way, your Honor.

Mr. Gordon: I don't think he is competent to testify as to whether—

Mr. Isserman: He has testified—

Mr. Gordon: May I—please, please.

Mr. Isserman: Are you objecting now?

Mr. Gordon: Please. Let me speak.

Mr. Isserman: There is nothing before the Court now.

The Court: Don't let them disturb you, Mr. (4042) Gordon.

Mr. Isserman: He seems to be unduly disturbed. I don't know why.

Mr. Gordon: I am disturbed, your Honor, merely because I wanted to say that I object to the witness being asked to characterize the exhibit as the official organ of the Federal Grand Jury Association. I do not think he is competent to do that.

The Court: Maybe he doesn't know about that.

By the Court:

Q. Do you really know it is the official organ? A. No, I certainly do not, your Honor.

Q. But you always thought it was? A. Yes, that is true.

The Court: Now, he says he always thought it was and he does not know exactly, any more than I do, and I can't imagine at the moment that it is a matter of great consequence.

But let me read the part.

Mr. Isserman: Surely.

The Court: Very well. Now for the record I will ask the stenographer to copy into the record, which he may do very quickly, this short paragraph of five or six lines at the top of page 5, so that it may be in there.

Mr. Isserman: Would the Court allow me to (4043) read it into the record?

The Court: No. I don't want to start something here, and the reason is that we are apt to use up time that will be more valuable in the cross-examination.

(Paragraph referred to is as follows:)

"Revision of Federal Grand Jury Panel: Clerical help to assist in keeping up the list of federal grand jurors in the office of the Clerk of the Court was continued by the Association."

By Mr. Isserman:

Q. Now Mr. McKenzie, getting back for a moment to the question of whether or not—

Mr. Gordon: May I look at it?

The Court: Mr. Gordon may look at it now.

Mr. Isserman: I have not offered it in evidence yet.

The Court: I know you have not, but I am only doing it because I don't like to have mysteries appear when there is really nothing mysterious at all. He may look at it.

Mr. Isserman: The best way to clear up the mystery would be to read the three lines into the record, (4044) your Honor. The mystery has been created now.

The Court: You see, Mr. Isserman, that is just what you are not going to do.

Mr. Isserman: I understood your Honor's direction.

Mr. Gordon: Did your Honor see the date on this publication?

Mr. Isserman: Are you examining now, Mr. Gordon?

The Court: What is the date that was in question here? What is the date, Mr. Isserman?

Mr. Isserman: The date of the publication is January 1937.

The Court: January 1937?

Mr. Isserman: That is correct. Your Honor, that is when this man started to work there, if you please.

Mr. Gordon: Not in the jury clerk's office, as I understand it.

The Court: I certainly thought—well, anyway—

Mr. Isserman: I don't think it is a matter for facetiousness, your Honor.

I call your Honor's attention to the fact that the Tolman report, which is in evidence, is dated 1941, and describes a system started three or four years before, which is 1937 or 1938, and that is in evidence, and that is all we are talking about in this proceeding; and I must object to the facetiousness both by the District Attorney (4045) and by the Court.

The Court: There has not been anything facetious at all here, Mr. Isserman.

Mr. Isserman: Well, it seemed so to me.

The Court: And if you are wise you will just go ahead, because you have got until three o'clock, and you have such a tendency at the slightest drop of a hat to go off into a lot of oratory, and it is going to be better for you to just go on sawing wood.

Mr. Isserman: I object to your Honor's characterization of my conduct, and I certainly object to the limitation on cross-examination which your Honor has put on us.

The Court: What limitation? I don't remember—oh, you mean the limitation to three o'clock?

Mr. Isserman: Yes, certainly.

The Court: Oh, that is going to be. Positive.

Mr. Isserman: Well, that may be, your Honor. I would not mind it if we finish. If we don't finish, we will mind it.

The Court: That is just going to be so positive that you will be surprised.

By Mr. Isserman:

Q. Now, you have not told us, Mr. McKenzie, what you did in your official capacity from 1935 to 1937 while (4046)

working in the clerk's office. Would you please tell us now what your duties were? A. From 1935 to the latter part of 1936 I was a clerical assistant assigned to the bankruptcy record room.

Q. And in that period you had nothing to do with any of the jury or grand jury lists? A. That is correct.

Q. Now in 1937 you were appointed assistant to the jury clerk, were you not? A. I believe in the latter part of 1937, that is so.

Q. And at that time you were already a deputy clerk, is that correct? A. That is correct.

Q. When were you made a deputy clerk? A. In the latter part of 1936.

Q. Was it at that time that you commenced working on jury material in the clerk's office? A. In 1936 I was a deputy court clerk. I worked in court.

Q. And when did you start working on jury material in the clerk's office, as you have testified? A. I believe it was in the summer of 1937.

Q. Now how many deputy clerks worked with you on jury material in the summer of 1937 to the balance of that year? A. I would say in 1937 approximately up to the start of the court sessions there may have been eight or nine deputy court clerks working with me.

Q. On jury material? A. On jury material.

(4047) Q. Had they been deputy clerks at the time you were appointed? A. Some were deputies and possibly some were clerical assistants.

Q. I am talking only about deputy clerks. Do you know how many deputy clerks there were at the time you started to work on jury material in the summer of 1937? A. I don't know. I don't know.

Q. For how many years did you work on jury material commencing 1937? A. For how long did I work on jury material?

Q. Yes. A. Prior to the time I was made jury clerk?

Q. That is right. A. I was made jury clerk in the early part of 1940.

Q. Now, in the three years of your work as assistant jury clerk you worked on jury material without interviewing any prospective jurors, isn't that true? A. That is correct.

Q. Now, how many deputy clerks worked with you in that period doing the work you were doing on jury material? A. I would not know.

Q. Was there one? A. It could have been one at one time and nine or ten at another time.

Q. Can you name the one that you remember at one time working with you? A. I couldn't name an individual.

Q. You don't know the names of the deputy clerks (4048) with whom you worked in 1937 and 1938? A. Only as a group but not as individuals working with me at any one time.

Q. You don't know their names?

The Court: Did they vary?

The Witness: Yes.

The Court: Some more and some less?

The Witness: Yes, and one day you might have one and the next day—

The Court: Was it always the same group who came back, or were they different?

The Witness: It would be whoever the chief deputy would assign; it could be the same group or different groups, or whatever individual the chief deputy would assign.

The Court: The question is, do you remember their names?

The Witness: No, I don't, your Honor.

By Mr. Isserman:

Q. So in your work in this three-year period on occasian there would be deputy clerks assigned to help you for shorter or longer periods; is that right? A. That is true.

Q. And some of them worked for as little as a day or two, is that correct? A. That is true.

(4049) Q. And then they would come back and assist you at some other time? A. That is so.

Q. How many of those jury clerks worked with you steadily on jury material in that three-year period? A. I don't believe I have anyone that was steadily working with me during that period.

Q. You were the person who worked steadily on jury material and the others came in to help you from time to time; is that correct? A. I would say yes.

Q. Now, was there any other deputy clerk from 1937 to 1940 who spent all his time like you did working on jury material? A. No, I would say not.

Q. Now I call your attention to the following paragraph in the Exhibit 102, the Tolman letter, which reads as follows:

"He"—referring to the—well, I don't know, I have a photostat here; I would like to see the original exhibit.

Mr. Gordon: It is your exhibit.

Mr. Isserman: I will get it.

Referring to the last four words on the bottom of the first page and going beyond that on page 2.

The Court: This is the photostat you are using?

Mr. Isserman: That is correct, your Honor.

The Court: What page?

(4050) Mr. Isserman: It starts on the first page and runs over to page 2.

The Court: All right.

Q. "He" referring to Judge Knox—"also arranged for the appointment as deputy jury clerk of an energetic young man of pleasing manner who is a good judge of character and has a thorough practical knowledge of the social, racial and economic groups of New York City and their geographic distribution."

And I ask you whether or not you don't know of your own knowledge that the deputy clerk referred to in this exhibit is yourself? A. I couldn't say that, your Honor.

Q. What other deputy clerk was there in this period except yourself who worked on jury material? A. I was the only one as assistant jury clerk at that time.

The Court: It is probably his modesty.

Mr. Isserman: Now, I would like to ask him, to pierce the veil—

The Court: I understand that he is the man referred to.

Mr. Isserman: I am sorry.

Q. Do you understand that you are the man referred to? A. I understand that is so.

(4051) Q. Would you say that the description put in this memorandum is incorrect in so far as it describes you?

Mr. Gordon: That is objected to, your Honor.
The Court: Sustained.
Mr. Isserman: All right.

Q. Didn't you between 1937 and 1940 have a practical knowledge of the social, racial and economic groups of New York City and their geographic distribution?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Now your testimony thus far on the work you did between 1937 and 1940, as I get it on page 3441 of the record, was to bring up to date all of the jury material in the jury office—

Mr. Gordon: If it will save time I will agree that that is what 3441 says.
Mr. Isserman: Well, I was about to ask him a further question about it.
The Court: Yes, you may do that. You may proceed on the assumption that he said "Yes" to that.

Q. (Continuing) Now will you tell us precisely what you did in bringing the jury material up to date between 1937 and 1940? A. A great deal of the time was spent in making notations of the jurors who had served from the panel sent up from (4052) the calendar commissioner's office with all of the jury cards showing that these jurors had served and been excused. These envelopes had accumulated for a couple of years; they had not only got out of the envelope and all sorts of disorder that had to be brought back and checked with the original panel and a notation on them as to whether or not they were excused or served, and put into the files in their proper places.

Q. And that is what you did for three years, Mr. McKenzie? A. That was one of the main sources of bringing

the old records or the old information up to date. We also changed the cards from a white on both grand and trial jurors, to a blue for the grand juror and a white for the trial juror. So each card had to be transferred over after a notice was mailed to the juror and ask him to fill out the information and mail it back to the office. When that information came back through the mail a blue card was typed up for a grand juror and a white card was typed up for a trial juror.

Q. Now, what else did you do in bringing the jury material up to date? A. That took plenty of time.

Q. Yes, but what else did you do in the three-year period? A. We also compiled names, as I have already testified, and sent out—

(4053) Q. Well, I call your attention to this part of the Tolman report and ask you if you were concerned with this work, reading the second paragraph—

> The Court: Now you are on the mimeographed one?
>
> Mr. Isserman: I am sorry.
>
> The Court: That is all right, I have them both here, so we won't lose a minute. I have got it right here. What is the page? You don't need to transfer to the other one because I have them both here. Whichever way you shift I am right with you.
>
> Mr. Isserman: Well, I would rather not shift. I am reading from page 2 of Exhibit 102.

Q. "Next the sources from which prospective jurors were chosen was given close attention. The registry lists of voters had previously been the primary source of names. It was decided to supplement this by other more select material."

And ask you if your work in that period, 1937 to 1940, was not engaged in doing the work described in the sentences I have read? A. Part of the time was for that.

> The Court: That is, using the "other more select material"?
>
> The Witness: Pardon me, your Honor?

The Court: That is, in using "other more
(4054) select material"?

The Witness: No, in sending out for jurors—

The Court: No. You see, what Mr. Isserman is asking you is this: He read to you from this report and said that it was decided to supplement the registry lists which had previously been the primary source of names by other more select material. Then he asked you whether from 1937 to 1940 you did not busy yourself on this other more select material.

Now did you or didn't you?

The Witness: I did not, your Honor.

The Court: Well, you sounded to me as though you said you did.

Mr. Isserman: That is the way it sounded to me, your Honor.

The Witness: The time that was spent in addition to what work I was doing in compiling names from the registry voting book and the sources described therein.

The Court: Well, then, whatever these more select materials were, you were using them to some extent between 1937 and 1940?

The Witness: Well, we did not start, your Honor, until about the latter part of 1949—

The Court: You mean 1939?

(4055) The Witness: 1939, I should say. The greater part of the time was spent in bringing the records up to date and sending out these qualifications and getting these notices back to transfer from the blue cards or from the white cards to the blue cards.

Mr. Gordon: Since there is some confusion, your Honor, may I suggest that you ask the witness whether he passed on the qualifications of jurors at that time?

Mr. Isserman: If the Court please, that is not an issue at this moment.

The Court: I won't interrupt the cross-examination, Mr. Gordon.

Mr. Isserman: I have not raised that question.
Mr. Gordon: All right, I withdraw it.
The Court: Go ahead, Mr. Isserman.

By Mr. Isserman:

Q. Now, you said a moment ago, Mr. McKenzie, that you spent part of your time on the select sources and you used the expression "described therein." Were you referring to the second paragraph of the Tolman letter, Exhibit 102? Tell me if that is what you meant. A. At that time we were compiling names, and it was at that particular year or—the time as to what source was being used, I couldn't state as to just what source (4056) was being used.

Q. So when you testified a few minutes ago that you were engaged in using more select material as described therein, you did not mean that you were using the material described in paragraph 2 of this report, did you, or did you mean that? A. I meant we were using the registered voting book along with other sources there.

Q. Other sources where, in this paragraph? A. That is mentioned—

Mr. Gordon: You better read that paragraph.
Mr. Isserman: Just leave him alone, please.
The Court: Yes, that is right.
You did read that paragraph, didn't you?
The Witness: It menitoned Who's Who—
The Court: Yes, but you read it when Mr. Isserman showed it to you; you read it?
The Witness: Yes.
The Court: So you know what you are talking about.

Q. Do you want to read it again? A. If you don't mind, let me read it. Mr. Isserman didn't let me read it.

The Court: What is the question, Mr. Isserman?
The Witness: All right.

Q. Well, now, what I am trying to get from you, Mr. McKenzie, is whether or not when you referred a few minutes (4057) ago to the select sources therein, you were referring to the first whole paragraph on page 2 of the Tolman memorandum from which I read; is that right, or is it wrong? A. No, we did not use all that stated in there.

Q. Now, you tell me what in paragraph 2 which is stated in that paragraph is wrong.

The Court: This is 1937 to 1940?

Mr. Isserman: In the period 1937 to 1940. We will get to 1939 in a few minutes.

A. In other words, in my office, we did not use Who's Who in New York. We did use Poor's Directory of Directors; we did use the Engineers Directory.

The Court: Now when did you use those?

The Witness: Back in 1939 or 1940. We did not use the Social Register. We did use some alumni directories, universities. That is all I see here.

Q. So would you say that paragraph 2 is correct except for the reference to Who's Who and the Social Register, is that right?

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

The Court: Sustained.

Mr. Isserman: Well, it describes what he did, your Honor, and I am asking him if it is correct or not.

(4058) Mr. Gordon: But there are a lot of things in paragraph 2—

Mr. Isserman: I am asking him about that.

The Court: I sustain the objection to it.

By Mr. Isserman:

Q. I ask you to read paragraph 2 again and tell me what in paragraph 2 is wrong except the reference to Who's Who and the Social Register.

Mr. Gordon: That is objected to as immaterial.

The Court: Sustained.

Q. Does paragraph 2, Mr. McKenzie, refer to the work you did between 1937 and 1940 in part?

Mr. Gordon: Objected to.
The Court: Sustained.

Q. A few minutes ago you started to say "in my office" when you were referring to the Social Register. Did you know that it was used in some other offices for purposes of the clerk in selecting jurors for this district, Mr. McKenzie?

Mr. Gordon: Objected to.
The Court: What is "it"?
Mr. Isserman: Between 1937 and 1940.
The Court: What is the "it"? You said "it was used." What is the "it"?
Mr. Isserman: The Social Register.
(4059) Mr. Gordon: Objection.
The Court: I will have to have it read. I can't keep my mind on the question—
Mr. Isserman: I will withdraw the question.
The Court: —when you jump—
Mr. Isserman: I am not jumping. I am keeping on paragraph 2, but your Honor won't allow me to.
The Court: But, you see, paragraph 2 is a paragraph of a report dated January 2, 1941.
Mr. Isserman: That is right.
The Court: And when you keep asking the witness about what he did in 1937 and show him the report and ask him whether it is right or wrong, it seems to me a person might readily be misled.
Mr. Isserman: Yes, he might be misled, except for another section of the report which I will call to his attention.
The Court: The report did not purport to state what was done in 1937 or 1938 or 1939. That is the ground on which I sustain the objection.

By Mr. Isserman:

Q. I call your attention—you are familiar with this report 102, aren't you? A. The last time I read it was when Mr. Gladstein showed it to me.

Q. And you were familiar with it in 1941, were you (4060) not? A. I believe I read it once or twice when he came in—

Q. Now I call your attention to the first page of that report in describing the jury system in effect in the Southern District on January 2, 1941, which says: "The system took its present form three or four years ago."

Now, that would bring it down to about the time that you started to work, would it not? A. This is dated January 2, 1941. A. Yes, that is so.

Q. Now, my question is whether in the period 1937 to the end of 1940, whether paragraph 2, in so far as it describes the work with which you were familiar, is correct?

Mr. Gordon: Paragraph 2 of what?

Mr. Isserman: On page 2.

A. No, it is not.

Q. You know that it is not correct?

The Court: That is the one starting "Thus, the basic jury material" or are you off on the mimeographed one?

Mr. Isserman: No, I am not off on the mimeographed one.

The Court: Well, the photostat, second paragraph, starts with: "Thus, the basic jury material."

Mr. Isserman: I am on a prior paragraph, which is the first whole paragraph.

(4061) The Court: You meant to say paragraph 1.

Mr. Isserman: It is the first whole paragraph on that page.

By Mr. Isserman:

Q. Now, except for the reference to Who's Who—

The Court: We will take our recess now.

(Recess to 2.30 p.m.)

AFTERNOON SESSION

JOSEPH F. MCKENZIE, resumed the stand.

Mr. Gordon: Your Honor, before we resume, and while Mr. Isserman is collecting his papers—

Mr. Isserman: My papers are collected.

Mr. Gordon (Continuing): I believe you instructed the reporter to copy some lines from an exhibit—

The Court: That is right.

Mr. Gordon (Continuing): —which Mr. Isserman had shown to the witness concerning his knowledge of the practice.

The Court: Yes.

Mr. Gordon: May the record show that the exhibit indicates that the period of time which was being described was 1931?

The Court: 1931?

(4062) Mr. Gordon: 1931, your Honor.

Mr. Isserman: That is apparent on the record, your Honor.

Mr. Gordon: It was not apparent on the page which was shown to the witness.

The Court: Well, it was not apparent to me, but if everybody says that is the fact, it is apparent now.

Mr. Isserman: The exhibit and the line of examination was to show the continuation of a practice—

The Court: Well, I didn't realize it was 1931. But you may proceed with your cross-examination.

Mr. Isserman: Now, if the Court please, I ask the Court to reconsider its ruling fixing three o'clock as the termination time for cross-examination by defense counsel.

The Court: I have decided that I will give you an additional five minutes, because I evidently misunderstood as to the report dated January 2, 1941. Just before the recess you indicated that there was something on the face of that that showed that it

related to a time three or four years before. I think you said that.

Mr. Isserman: My application, of course, does not go to the five minutes,—

The Court: I know—

Mr. Isserman: —which your Honor is granting.

(4063) The Court: I know, but I have been thinking that over and I will give you an additional five minutes. Five minutes past three.

Mr. Isserman: Now, if your Honor please, in view of your Honor's failure to withdraw the time limit, and solely because of that, I will cease my examination on the Tolman report which is in evidence and on the clerk's duties in connection with that report, and the cross-examination on the accuracy of that report in the light of this witness's experience with the operation of the office.

Cross examination continued by Mr. Isserman:

Q. Now Mr. McKenzie, your testimony has been (referring to page 3495 of the transcript) that you had received letters from the Grand Jury Association which enclosed recommendations for people for service on grand and petit jury lists. Is that correct? A. When those lists were received?

Q. Yes. A. I don't know if a letter accompanied them at all times or whether or not it was just a list of names which would come in.

Q. Isn't it true that in the period from 1937 to 1940 in the course of your work in the clerk's office that you had occasion to examine letters received from the Federal Grand Jury Association relating to and concerning the selection of jurors in the clerk's office? (4064) A. All I did was file the letter. Mr. Kellogg, the jury clerk at that time, received all of them, and he gave them to me to file, and the lists be checked with the files to see if a juror was on, or whatever it might be.

Q. Wasn't it a fact that you had frequent communications with persons in the office of the Federal Grand Jury Association? A. I did not.

Q. In that period did you ever make any phone call to any officer or person employed by that Association? A. I may have between 1937 and 1940. I don't know.

Q. Your testimony was—and I am referring to page 3521 of the record—that you do not recall any phone communications with that Association; is that correct? A. I may have had; I don't know if I—

The Court: A specific one?

Q. Isn't it a fact that you had frequent telephone conversations with persons in the office of that Association? A. No, that is not so.

Q. Isn't it a fact that you on occasion between 1937 and 1940 met with representatives of that Association? A. They may have been in the office but they were not meeting with me.

Q. I am asking you whether you personally met with any representative of the Federal Grand Jury Association (4065) between 1937 and 1940 either in your office or at the office of the Association.

The Court: What does "met with" mean? Does it mean he saw the—

Mr. Isserman: "Met with." I think he understands the question.

The Court: Well, I don't. Conversed with? Talked with?

Mr. Isserman: I mean had a conference with.

A. No, definitely not.

The Court: All right.

Q. You never conferred with any representative of the Federal Grand Jury Association from 1937 to 1940 on any matter relating to nominations or recommendations for grand and petit jurors for the Southern District of New York? A. I handled everything for Mr. Kellogg. He was the jury clerk. And he turned everything over to me.

Q. You know that that Association has committees known as Panel Committees?

Mr. Gordon: That is objected to.

A. I don't know—I am sorry.

Mr. Gordon: Not germane to the direct examination, and not of any probative value.

The Court: Well, in view of the limitation I (4066) have placed upon the cross-examination I am not disposed to rule matters out on the ground of repetition today.

Mr. Isserman: If the Court please—

Mr. Gordon: Then I will make no further objection.

Mr. Isserman: If the Court please, it is not repetition and—

The Court: Whether it is or not, it is all right. You can repeat all you want from now to 3.05.

Mr. Isserman: I am not repeating, if the Court please.

By Mr. Isserman:

Q. Now, do you know whether or not the Association, the Federal Grand Jurors Association for the Southern District of New York had panel committees which concerned themselves with the selection of grand jurors in this district? A. By panel committees—just what do you mean by a panel committee?

Q. Committees of that Association which concerned themselves with the selection of grand and petit jurors for this district and recommendations for such selections. A. If they did I never knew anything about it.

Q. You are now referring to the period 1937 to 1940? A. I am.

Q. Now, from the period from 1940, subsequent to 1940 (4067) to the present date did you on any occasion meet with any official or representative of the Federal Grand Jurors Association relative to nominations and recommendations for members of grand and petit jury panels in this court? A. I met the executive secretary at that time, Mrs. St. Clare.

Q. How many times did you meet Mrs. St. Clare from 1940 to the present? A. Well, she would come down once a month to pick up any cards as to the number of grand jurors that were put on the jury panels; she picked up a duplicate card.

Q. Yes? A. And she would come down once a month on that occasion.

Q. And you furnished her a duplicate card every time a new grand juror was selected? A. Every time a new juror went on the grand jury a duplicate card was—

Q. That is, a duplicate history card, its't that so? A. A duplicate history card.

Q. And weren't you aware of the fact that when she picked up that card it was to keep current the files in the office of the Grand Jurors Association for the entire jury panel? A. I don't know.

Q. Well, for how long a time has she been coming to your office to pick up history cards of grand jurors? A. Since I have been jury clerk. Since 1940, that (4068) I know.

Q. And at the time she came to pick up these duplicate cards, did you have any conversation with her relative to recommendations or nominations for persons to serve on grand jury panels? A. No, I did not discuss it with her.

Q. Did you ever meet with Mr. Adams, the former president of the Association? A. Yes, I did.

Q. And did you know that at one time he was chairman of a panel committee of that association? A. I did not.

Q. Now, coming down to 1947—on the occasion when you saw Mr. Adams, by the way, was that at an annual meeting of the association? A. I never attended any meetings of the association.

Q. Do you know those meetings were held in the court house here? A. I never even attended them in the court house.

Q. You read on occasion the Federal Juror, the publication of the Association? A. I did.

Q. And from the reading of that bulletin you did not know that there were panel committees of that association

which concerned themselves with the jurors in this court? A. In reading over them I certainly never detected anything about panel committees.

(4069) Q. How many times did you meet with Mr. Adams? A. Maybe two or three times.

Q. And what did you discuss with Mr. Adams?

Mr. Gordon: Objection.

The Court: Did the discussion have anything to do with the selection of jurors?

The Witness: No, your Honor, not to my knowledge. I don't recall.

The Court: I sustain the objection.

Q. Well, did it have anything to do with the nomination and recommendation of jurors for the grand jury panels? A. Not to my knowledge, no.

Mr. Isserman: I would like to have these two exhibts marked for identification.

(Defendants' Challenge Exhibits 290 and 291 marked for identification.)

Q. Now isn't it a fact, Mr. McKenzie, that from 1940 on there were frequent occasions that you met with Mrs. St. Clare and Mr. Adams and other officials of the Grand Jury Association relative to the nominations and recommendation and selection of grand and petit jurors of this court? A. That is not so.

Q. Do you know of any way between 1940 and the present in which your office and you acting for your office cooperated with any committee of the Federal Grand Jurors (4070) Association in the nomination and recommendation and selection of grand and petit jurors for this court? A. Do I know of any?

Q. Yes. A. No, I don't.

Q. I show you—

The Court: That would cover all the rest of the people in the office.

The Witness: Well, I don't know about the other people in the office.

Q. I am talking about you.

Mr. Gordon: The question was, did he know of any one.

The Witness: Yes, to myself.

Q. You don't know of any person under your direction from 1940 to today who has cooperated with the Federal Grand Jurors Association in connection with recommendations, nominations and selections of grand and petit jurors of this court? A. The man from my office went up there and took names from a directory or a book that was there at the office?

Q. Isn't it a fact that the directory used in that office was the Social Register? A. No, that is not so.

Q. What directory was it? A. The directory there, it was Poor's Directory. I used those alumni, the (4071) Engineer's Directory.

The Court: You mean those books were up in the Association?

The Witness: They had either borrowed them or purchased them and they had them in the Association there.

Q. They didn't borrow them from you, did they? A. No.

Q. You knew they were there, didn't you? A. Yes, I did.

Q. When you sent your man to the office of that Association to copy names out of the books you mentioned, was that in addition to the times that you sent persons to the library to copy names out of directories? A. No, at that time he was going there just to the Association.

Q. At what time was that? A. I would say in the period 1940 or possibly in the early part of 1941.

Q. Didn't he bring back lists of names from the office? A. He did.

Q. Other than those that he copied? A. No, he didn't. I mean; when he brought back a list that he compiled himself.

Q. How many times did he do that? A. I couldn't state a definite number of times.

Q. Weren't there frequent occasions when you sent (4072) persons from your office over to the office of the Federal Grand Jurors Association between 1940 and the present time?

Mr. Gordon: That is objected to—"frequent occasions."

The Court: Sustained.

Mr. Isserman: I am cross-examining, your Honor.

Mr. Gordon: That is obvious.

The Court: Well, let me hear the question again.

(Record read.)

The Court: I will overrule the objection.

A. I wouldn't know, your Honor, how many times the man went up there.

Q. Was it once or twice? A. I wouldn't know.

Q. Was it once or twice a month? A. I couldn't state.

Q. Well, will you give us your best estimate of the number of times that you sent a man over every month?

The Court: You mean to see these books?

Mr. Isserman: No, I mean to go over to the Association for any purpose.

The Court: For any purpose?

Mr. Isserman: Yes.

The Court: All right.

A. He went there and compiled names from that particular book, whatever book it was, and when he completed that (4073) he had no occasion to go back there; so it was only during that period of compiling names.

Q. Was there any time in 1947 that you or anyone from your office went over to the office of the Grand Jurors Association and met there with Mrs. St. Clare or others relative to recommendations of names for service on grand or petit juries in this court? A. I or anybody under me never went to the Grand Jurors Association.

Q. Except for the visits you have described of Mrs. St. Clare to your office once a month to pick up some cards, duplicate cards, you had no conference with her or conversations relative to the selection of names for jurors? A. Not unless she came in for an occasion during that month, but that was customary for her to come down once a month.

Q. Let us forget the customary once a month, for a moment, and tell us about the other occasions when she came into your office in the course of any month. A. She came in; I can't account for each time or any number of times or how many times.

Q. What did she come in for when she came in on these different occasions? A. She would come down and tell me that a man died, did we know that such and such a grand juror had died; "We hear that a man had moved." She (4074) might give us any sort of information.

Q. Did she ever say, "Such and such names"—that she suggested for service on grand jury? A. She may have brought in one of those lists herself instead of mailing it in.

Q. That was a pretty frequent occasion when she did that, wasn't it? A. No, I would say not.

Q. The letters which you have in your files from the Federal Grand Jury Association have some references to nominations for grand and petit jurors, do they not? A. If there are letters of such nature, there are, but I don't know if there are letters.

Q. Didn't you testify on a previous occasion that there were such letters? A. There may have been a letter and that letter may have been recommending a certain individual for grand jury, and a list of names also in that envelope.

Q. Now I call your attention to page 3495 of the record —may I have that, please—and ask you whether or not you did not previously testify that you did receive such letters from the Federal Grand Jurors Association? A. If I did—

Mr. Gordon: And he so testified just now, your Honor.

Q. Is it the fact that you did receive such letters? A. If I did, yes.

(4075) Q. Well, did you?

The Court: He just said that he did.

Mr. Isserman: He said, "If I did." That is no answer, your Honor. I want to know if he is speculating or whether he knows that he received such letter.

A. I received a letter at some time or other.

Q. You have those letters in that file? A. We have it in the file.

Mr. Isserman: I will ask the Court that those letters be produced.

Mr. Gordon: Objected to.

The Court: Motion denied, and I will not grant that.

Mr. Isserman: If your Honor please, I reserve the right to state my position with respect to those at a later time.

The Court: Yes. After five minutes past three I will hear each one of counsel for the defendants to make their protests on any ground they desire to make because of my rulings today.

Q. I show you Defendants' Challenge Exhibit 290 for identification, which is the Federal Juror, a publication of the Federal Grand Jury Association for the Southern District of New York, dated March 1946, and ask you if you have seen that publication before?

(4076) The Court: Seen that particular one.

Mr. Isserman: I mean a copy of it.

The Court: Yes. But you don't mean to say that very copy. You mean a copy of this particular one.

Mr. Isserman: A copy of this particular one.

Mr. Gordon: This is a copy of it, your Honor.

The Court: I think I understand now what he means.

A. I don't recall this particular bulletin.

Q. You know these publications come out about once a year or so, don't you, Mr. McKenzie? A. Once a year or once a month.

Q. You think they come out once a month? A. I always thought they were mailed out once a month.

Q. And they are mailed to you regularly, aren't they? A. I receive one, yes.

Q. Now I call your attention to page 3 of this exhibit, to a section in the lefthand column of that page entitled "Panel Committee," and ask you to read the two paragraphs underneath the heading "Panel Committee."

The Court (To the witness): Read it to yourself.

Q. Particularly the last paragraph in which your name is mentioned. I ask you if that statement is an accurate statement of your relationships with the panel committee (4077) of the Federal Grand Jury Association.

Mr. Gordon: Objection, your Honor.

The Court: It relates to 1946, does it not?

Mr. Isserman: That is correct.

Mr. Gordon: The objection is not on the basis of time but it is a general objection that newspaper articles, of which this is a similar type, are not proof of anything.

The Court: The question is in effect asking him whether that refreshes his recollection so that he can say he did the things that that paper says he did, if it says he did anything. Take the question to mean that way.

Mr. Gordon: I would have no objection to that, your Honor.

The Court: Yes. Take it that way.

Does that refresh your recollection as to your doing any of the things that are stated there, if it states anything that you are supposed to have done?

The Witness: I would say I have not done what this states here.

The Court: You haven't done it; you have no recollection of doing it?

The Witness: That is right, your Honor.

Mr. Isserman: I would like to read this and examine him further on this question.

(4078) The Court: You let me look at it first.

Mr. Gordon: That is exactly what I am objecting to, your Honor. This is improper cross-examination.

Mr. Isserman: This is cross-examination, because this witness has mentioned the fact that he has had some relations with the Association in question, and I am probing now the extent of those relations and to show that the answers he has already given are untrue.

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

The Court: Yes. I will sustain the objection. You may not do it. You may mark the paper. It is already marked for identification.

Mr. Isserman: May I have the clerk put into the record the two paragraphs to which I refer?

The Court: He may do that during the recess.

(The article referred to is as follows:)

"Panel Committee: It is with sincere regret that your Association announces the retirement of Mr. George J. H. Follmer, clerk of the United States District Court for this district, after 54 years of Government Service—a record of which he may be proud. Mr. Follmer will be greatly missed by representatives of your Association who have enjoyed very pleasant official relations with him. He has shown much interest in the work of the Association and has always (4079) given us his heartiest cooperation in every way possible. We are happy to welcome as Mr. Follmer's successor Mr. William V. Connell, who already is proving his fitness for this highly responsible office.

"The appreciation of your Association is also extended to Mr. Joseph F. McKenzie, jury clerk, and to his very able assistant Miss Kathleen

> Keenan for their splendid cooperation with your Panel Committee and the many courtesies they have extended to the Association. We are gratified to report that due to the efforts of Mr. McKenzie and Miss Keenan the grand jury panel has been kept up to its usual high standard of personnel. Your Panel Committee is cooperating with them in every way possible in helping to maintain such standard."

By Mr. Isserman:

Q. It is your statement now, Mr. McKenzie, that in the year 1946 you in no way cooperated with the panel committee of the Federal Grand Jury Association to keep up the usual high standard of personnel on grand and petit jurors in this court?

> The Court: He said he never heard of the panel committee.
>
> The Witness: That is true.

(4080) Q. Is it your testimony now that you never heard of a panel committee of the Federal Grand Jurors Association? A. I never have.

Q. Did you ever hear of an executive committee of the Federal Grand Jurors Association? A. I have heard of the executive committee.

Q. Did you ever meet with members of the executive committee of the Federal Grand Jurors Association? A. Only if Mr. Adams was one of the executive committee and a visit to the office, and Mrs. St. Clare is the secretary to the executive committee.

Q. Did you ever meet with Pierre Bedard? A. What is that name?

Q. Pierre Bedard, B-e-d-a-r-d. A. No, I did not.

Q. Did you ever meet with Mr. Cantwell? A. Cantwell? No.

Q. Mr. Cantin, I mean, C-a-n-t-i-n? A. I met a Mr. Cantin, yes.

Q. How did you meet Mr. Cantin? A. He came into the office.

Q. And he is connected with the Federal Grand Jury Association, is he not? A. Yes, I believe he is.

Q. And he is honorary president of that association, isn't he? A. Yes, I believe—

Mr. Gordon: If you know.

(4081) The Witness: I don't know; I am not sure.

Q. You don't know that? A. No.

Q. When did Mr. Cantin come into your office?

Mr. Gordon: Well, now, your Honor, Mr. Sacher says "Nothing like a little hint." I object to that.

The Court: We have just about ten minutes left. Why don't you let him use the time?

A. As to the last time Mr. Cantin came into the office, I don't know. It was a year or a year and a half ago.

Q. And what did he come into the office for? A. I certainly don't know just what his visit was for.

Q. Did he talk to you? A. He did.

Q. You don't know what he talked to you about, is that correct? I will take your answer. Is that your answer? A. That is correct, I don't know what he, just what his—

Q. You don't even know that he talked to you about grand and petit jurors or nominations for grand and petit jurors, do you? A. He may have, he may have asked how the jurors were coming along.

Q. Yes, but, do you know whether he talked about the jurors? A. I don't know, definitely don't know just what his conversation was at that time.

Q. Didn't you on many occasions talk to Mr. Cantin about recommendations for grand and petit jurors for (4082) this district? A. That is not so.

Q. Did you receive communications signed by him in that connection which are in your files? A. No, I did not.

Q. Who signed the communications you received from the Federal Grand Jurors Association? A. Mrs. Ruth St. Clare.

Q. Did she sign all of them? A. She did.

Q. Now I call your attention to the Federal Juror for February 1947, published by the Federal Grand Jury Association for the Southern District of New York, and call

your attention and ask you whether you have seen that publication before?

The Court: That is 291 for identification?

Mr. Isserman: I think that is correct, your Honor.

The Clerk: Yes, your Honor.

A. I believe I have.

Q. That is a recent one, isn't it? You have seen this one before? A. I believe I did.

Q. Now I call your attention to the following paragraph in the second column of that publication, "The Grand Jury according to"—

Mr. Gordon: Objection.

Mr. McGohey: It is not in evidence.

The Court: He has stated that he saw this one and recalls it.

(4083) The Witness: I saw—I didn't read it.

The Court: Oh, I misunderstood.

The Witness: I did not read it, no.

Mr. Gordon: My objection is that you cannot prove facts by bringing in a paper which is like a newspaper or magazine and read it.

The Court: No.

Mr. Isserman: Mr. Gordon knows that is not the effort. I am cross-examining this witness as to a state of facts—

The Court: You show it to him and ask if it refreshes his recollection as to the fact. Let me see that one.

Mr. Isserman: My purpose is merely to ask him if the matters stated therein are true. I am not trying to prove the fact; I am trying to prove his knowledge.

The Court: Yes, if you will follow the same procedure that you adopted as to the others, show it to him.

Mr. Isserman: I understand that is the direction of the Court?

The Court: Yes, it is a direction of the Court.

Q. I show you the paragraph in the second column, it is the last paragraph of the second column which starts out (4084) with the words "The Grand Jury," and ask you whether the reference to the Association contained therein in respect to grand jury panels is true or false?

The Court: And I will change that to: Read that and then tell me whether after refreshing your recollection from that paper you can state the fact to be as stated in that paper or not.

The Witness: I could not.

Mr. Gordon: Could not what? Your Honor,—

Q. Could not what? A. I couldn't state as to the content that is in this paragraph.

Q. You don't know whether they are true or false? A. Oh, as to the true or false?

Q. Yes.

The Court: The question is, whether after reading that your recollection is refreshed so that you can state the fact to be as stated in that paper; that means whether you know it to be so, not whether you heard somebody talking about it. If you do know that fact to be so and that refreshes your recollection, say so.

The Witness: Yes, I do know that—

Q. And that is the fact? A. Yes.

Mr. Isserman: If the Court please, I would now like to read the paragraph into the record.

Mr. Gordon: I would like to see it.

(4085) The Court: You may look at it.

Mr. Gordon: We have no objection to your reading it. Go ahead. Is this the bottom paragraph?

Mr. Isserman: That is it.

The Witness: I read where it is underlined.

Mr. Isserman: At the bottom or the top?

The Witness: Down at the bottom where it is underlined.

Mr. Isserman: That is the paragraph to which I call attention:

> "The Grand Jury according to tradition and law is composed of substantially intelligent men and women, good citizens. The Association assists in securing such citizens for the panel."

Q. Now, is that true or isn't it true? A. The first part is true, about the good citizenship, and as to securing, they have sent names to us and we passed on the qualification.

Q. Have they done that as recently as February 1947? A. An individual name only. They have never sent a list to my office since I came back from the armed forces.

Q. How much such individual names did you receive in the year 1946? A. About 20 or 25.

Q. You have letters in the file showing that? (4086) A. There is a letter for each one. The prospective juror walks in with the letter addressed to him, told to report to 601-A, to Mr. McKenzie, the jury clerk, at which time he is given an application and is treated as though we had sent out a qualification notice for the man to come in to qualify.

> Mr. Isserman: If your Honor please, I will not continue this line of examination because of the time limit your Honor has put upon my examination, and will go into another subject.
>
> The Court: Very well.

Q. At the time you started to make blue cards for the grand jury panels which I think you said was between 1937 and 1940, was that the first time that grand jury panels were kept separately? A. No, they were always kept together; the cards and the history file.

Q. You mean Federal Grand Juror and Jury cards were kept together? A. Petit and grand jury cards were kept together.

Q. I mean petit and grand jury. But isn't it true that you have a separate grand jury panel or list of federal grand jurors from which federal grand jurors are drawn? A. There is one file that both the grand and the trial jurors' history cards are compiled.

(4087) Q. Yes, but they are separately designated, are they not? A. They are blue for the grand and white for the trial.

Q. Before you made the blue cards was there a separate indication of who was eligible for federal grand jury service and who was eligible only for petit? A. Up in the righthand corner of the history card was a G on the white card indicating that was grand jury.

Q. Now when an applicant, when a person enters your office to fill out a questionnaire, do you know at that time, and before the questionnaire is filled out, whether that person is destined, if qualified, for service on the grand jury or for service on the petit jury? A. I do not. I have no knowledge of knowing beforehand until the man fills out his application and is passed on.

Q. I call your attention to Exhibit 180, page 9, to the initials GJ in the lefthand column, the last line, alongside of which it says, "Quantity mailed, 10." Will you tell me what the GJ stands for? A. That is in Mr. Borman's time.

Q. January 1943? A. Yes, that is Mr. Borman's time.

Q. You wouldn't know what that stands for? A. I don't know.

(4088) Q. Haven't there been occasions in your time when you sent notices to come in to qualify to persons whom you knew had been nominated or recommended for service on the grand jury, as distinguished from the petit jury? A. There might be an individual occasion where a judge would send a letter to you, saying this party that he received the letter from would like to get on the grand jury, so you use the same qualification notice that you mailed and on it you write in ink, "Grand juror," so that when the prospective juror would receive that it would be on there, grand juror, and he would come in then to ask—to be qualified for grand jury.

Q. And the only time—

The Court: The cross-examination is over.

(4089) Mr. Isserman: I object, your Honor, to the termination of cross-examination at this point.

The Court: Very well.

Now, you may, each of you, make your objections to my rulings today, just as extensively as you desire.

Mr. Sacher: Why couldn't we take that time in cross-examination instead of on the argument?

The Court: Because I have directed that the cross-examination shall cease at a certain time, and it has ceased. My ruling in that respect was based on a great variety of circumstances not the least of which occurred yesterday.

Mr. Isserman: If the Court please, may I be heard?

The Court: You may.

Mr. Isserman: I object to your Honor's ruling curtailing cross-examination time, as counsel for the two defendants I represent. I object on the ground that such curtailment of cross-examination is a violation of the due process guaranteed by the Fifth Amendment to the United States Constitution—

The Court: It is very commonly done, as you know.

Mr. Isserman: —and as guaranteed by the Sixth Amendment.

(4090) While admitting the discretion that the Court has on occasion in respect to cross-examination, that discretion may only be exercised after counsel has had an opportunity to cover all the matters raised by the witness on direct examination.

I have been engaged in cross-examination for—certainly for less than an hour, or certainly not more than an hour, or approximately an hour, and it was impossible for me in the time given by the Court to me to cross-examine the clerk, to cover examination on the practices described by the clerk in his office, first from the period 1937 to 1940; secondly, in the period 1940 to the present, in the course of which innumerable exhibits were introduced of various kinds and descriptions. It has been impossible for me in the time allowed to elicit from this witness, whom the record shows was a witness reluctant and evasive, to bring out the facts concerning the operation and method of selecting of jurors for grand and petit jury panels in this court.

In connection with the line of examination on the Tolman memorandum, it was my intention to establish through this witness that that memoran-

dum, in fact and in effect did describe the system of operation which was in effect in January 1941, the date of that report.

I intended in examination of the witness in (4091) respect to his connections with the Federal Grand Jury Association to establish the fact that the Association from 1937 to 1940 and subsequently, down to the present time, has frequently communicated with the clerk through its executive secretary, through its panel committees, especially set up to cooperate with the clerk of this court, and with Mr. McKenzie in particular in connection with the selection of grand and petit jurors in this court, with particular reference to grand jurors.

In connection with the history cards concerning which there was direct evidence, it was my intention to show and to cross-examine the witness on his statements with respect to history cards and with respect to the use of his cards, to develop the fact that the witness does know and can ascertain from those cards the number of grand jurors and the number of petit jurors that were added each year to the grand and petit jury lists; and by questions relative to the qualifying questionnaires, to establish that it was possible to determine the source of these jurors, the place from where they were drawn, the time they were drawn. Also to establish that the number of Negroes selected for jury service was a token number not drawn from any area where Negroes reside, and drawn for the purpose only of discriminating against Negroes and not allowing them their full service (4092) on the jury.

The Court: You certainly flatter yourself as to what you would have done in that cross-examination. It is funny you did not bring some of that out in the four days you were working on it.

Mr. Isserman: I am talking about my cross-examination, your Honor.

In connection with the questionnaires, in regard to cross-examination on the questionnaires put in evidence, I would show that in the period 1945 to 1947, the period in which the clerk testified that

single books were used, single election books were used, one for Manhattan and one for the Bronx, that the book which was used for Manhattan was not used for any area or Assembly District in which Negroes and working class persons predominantly reside.

It would show also that the names added in that period to the list did not come exclusively from the election books which the witness claimed to have used, but also in substantial part from names submitted to the clerk and to the clerk's office by the Federal Grand Jurors Association.

The Court: It seems to me that all this big talk about what things you were going to prove about this corrupt system, and how all this discrimination (4093) took place — the cross-examination which has taken four days has pretty well convinced me to the contrary.

Mr. Isserman: If the Court please, I would further establish through examination of the Board of Elections lists of registered voters, which have been put in evidence, which I have only been able to examine in part from the time they have been put in evidence, that the selection from those lists was not higgledy-piggledy, as your Honor said, or random, but was a selection which was designed to exclude working class and Negro areas of the Borough of Manhattan and the Borough of the Bronx; and that the selection was further intended to achieve the same result as to the concentration of jurors geographically as according to economic status as existed before the use of those lists in 1946 and 1947.

Particularly in regard to specific Assembly Districts, we would show the entire exclusion of those districts not as a matter of accident but as a matter of design.

We would show too that the use of Parkchester as an area for the selection of petit jurors was used far in excess of any system which would have sought fairly to get a cross-section of the Bronx, and that fact is of particular significance, as we would show—

(4094) The Court: You know, if it all depended on you lawyers, you would make a beautiful picture of discrimination. You allege, you assert, you repeat, but when you get a chance to prove it with the man on here for a solid week, you prove nothing.

Mr. Isserman: And that fact, your Honor, is of particular significance in view of the fact that we are prepared and will show that Parkchester is a community of some 40,000 people—

The Court: You have held your fire back just too long then. If you had all that ammunition it would have been wiser to start in with it way back last Monday.

Mr. Isserman: I object to your Honor's characterization in respect to my conduct on cross-examination.

The Court: Well, I really don't think you had any fire from the beginning, to tell you the truth.

Mr. Isserman: I object to that remark, your Honor.

The Court: I think it was just a lot of big talk, and when you came down to the point of producing you didn't have anything to produce.

Mr. Isserman: If your Honor please, it is produced in those records, and had the Court not taken over cross-examination, to which we had objected on (4095) occasions in the last several days, and had not directed particular questions to the witness, who was an evasive witness, it would have been more easy to make apparent the situation which we are describing.

The Court: You have repeatedly stated that Mr. McKenzie was a reluctant and evasive witness. I have been listening to him for a week, and I can see no evasiveness or reluctance on his part. I heard you keep saying that every once in a while. It is like a lot of other things here. You lawyers keep asserting the most extravagant charges and statements of one kind or another, but when it comes down to producing you don't seem to have the goods.

Mr. Isserman: If the Court please, on that subject I will prepare for your Honor at our next session a memorandum dealing solely with that question. I remember at one point your Honor said the witness has three times stated he did not know what a check mark meant. Subsequently and after that remark of the Court he conceded that the check marks meant that names had been processed. Just one example.

The Court: I don't so recall his testimony.

Mr. Isserman: I will show that to your Honor—I will call that to your Honor's attention.

But what I was saying about the question on (4096) Parkchester is this, that we are prepared to show and will show that Parkchester was a community of some 40,000 persons from which Negroes are and have been excluded.

If the Court please, particularly in relation to the grand jury—

The Court: What happened to this part about the exclusion of Jews that you were talking so much about? That seems to have disappeared.

Mr. Isserman: If the Court please, on that question we have shown by this witness's testimony that he has excluded from consideration on jury panels the areas comprising the Lower East Side—

The Court: Yes, and disregarding the fact that thousands of names, apparently Jewish names, are on these lists that have been bandied about here. The same way about the women. Proof that thousands upon thousands of women are in here in this system, and yet you come up there and look me in the face and tell me how women have been excluded, and get poor misguided people into thinking that they are, whereas the facts show just the contrary.

Mr. Isserman: I am not going now to be drawn into an argument on the conclusion of the case—

The Court: It seems to me it is about time to put a stop to this business. I kept thinking all (4097) the time that maybe you had something.

Mr. Isserman: If the Court please, in respect to the nine names which were selected out of the

2nd Assembly District in the Bronx, which your Honor considered a random selection out of some 30,000 names, we are prepared to prove and desire further cross-examination of this witness that no history cards appear for the majority of these jurors; that the majority of them received no notices, and that the selection of the nine names was for the purpose of qualifying one or two persons who were known to the clerk in advance.

The Court: Do you want to go ahead with the redirect or does somebody else want to say something?

Mr. Sacher: I don't know if Mr. Isserman is through.

Mr. Isserman: If the Court please, in respect to the grand jury, we would show that the selection, the method of selection of grand jurors by the clerk was largely influenced by the Federal Grand Jurors Association and consisted predominantly and to a higher degree of persons in the executive classification, and were drawn with a greater concentration from the areas indicated on our panels and maps—indicated on the maps of the panels, and on the tabulations heretofore put in, which areas are occupied and resided in by the wealthiest (4098) persons in this community.

We would show that that selection was intended and deliberate and that the Federal Grand Jurors Association was largely instrumental in bringing that about.

The Court: That you were going to prove by this witness if I let you cross-examine any longer?

Mr. Isserman: Yes. And we will show further that this witness in his statements denying his cooperation with that Association and close relationship with it, was not telling the truth.

Mr. Sacher: May it please the Court, I wish to interpose objection to your Honor's limitation of cross-examination on one very specific ground and on a number of general ones:

The specific ground deals with the memorandum which your Honor ordered the witness, Mr. Mc-

Kenzie, not to produce yesterday until such time as your Honor—

The Court: That is right, and he had it here after the recess of 3.30 and you had it in your hand for about an hour or so.

Mr. Sacher: Yes. And I would like to point out to your Honor that it was handed to me at the time that Mr. Gladstein was engaged in cross-examining the witness; that Mr. Gladstein had not completed his (4099) cross-examination yesterday; that he did not complete it until this morning; that I, out of deference to the Court's ruling and its insistence upon observance of the procedure which it had outlined—

The Court: I never insisted that you should go in any order. In fact, I have let you lawyers take such order as you chose between yourselves, and I felt I would have a lot less trouble if I did that. Rather than trying to have you go in some order, which would only make for confusion and disturbance, and be bad for you, I thought it was much better to leave you alone, which I had done.

Mr. Sacher: I thought it was better to leave your Honor alone for a little while today in the hope that after the examination in main had been completed by the counsel—who, by the way, each act independently on behalf of their own clients—

The Court: I know your view is that there has been no concerted action, but I have found on the contrary that there has been concerted action, wilful and deliberate concerted action for delay, and I have found plenty more of it this week.

Mr. Sacher: Your Honor, I ask for the opportunity to address objections—

The Court: I know.

(4100) Mr. Sacher: —and I did not extend an invitation to have those objections interrupted—

The Court: Well, you see, I don't have to wait for an invitation.

Mr. Sacher: I realize that, your Honor. In that respect you have something of an advantage over me.

The Court: Yes.

Mr. Sacher: But I would like to make this observation, that the fact does remain, no matter what may or may not be said, that I was denied the opportunity to examine Mr. McKenzie concerning a most material item, namely, the item as to when he sent this gentleman, Mr. Rexrode, to the Public Library to examine Poor's Directory of Directors.

The Court: That vital fact.

Mr. Sacher: Well, I will tell your Honor something: I will ask you for the opportunity at least to place that exhibit into the record so that you or the courts above may see how vital it might have been.

The Court: Let us not hear about the courts above.

Mr. Sacher: I withdraw that.

The Court: You have such a nice way of telling me what the courts above are going to do. Now let us worry about what we are going to do, and let the courts (4101) above—

Mr. Sacher: I don't think there is any need to worry about it. Your Honor has given indication from the first day we got here as to what the courts below will do; and so we are like those poor people, the meek, who if we can't get anything on earth, hope for something in heaven, you see, up above.

The Court: I am sorely tempted to—

Mr. Sacher: Well, you know what the Good Book says, resist temptation, your Honor.

The Court: That is right.

Mr. Sacher: Now I should like to come to something a little bit more general but perhaps a bit more vital.

We applied to your Honor about two weeks ago in accordance with the provisions of Rule 17(c) of the Rules of Criminal Procedure for permission to examine the records in the clerk's office, records which had been subpoenaed, an examination of which prior to production in court is expressly authorized by the rule. At that time your Honor denied that

application. In the course of our examination of Mr. McKenzie he testified that he has marked all questionnaires filed by qualified Negro jurors with the letter C from the time Mr. Follmer asked him to do it in 1941, down to date.

(4102) The Court: Of course, that is not quite so.

Mr. Sacher: It is literally so.

The Court: All right, you have your view; I have mine.

Mr. Sacher: Very well.

Now, your Honor, the point is this, that we applied to your Honor for an opportunity to examine the questionnaires for the year 1948. As a matter of fact, the day before yesterday Mr. McKenzie indicated from the stand that he had those questionnaires, and the questionnaires for preceding years separated into different periods of time, into years, I think. We asked for the production of those questionnaires for the purpose of seeing whether or not there was any questionnaire with the letter C on it. Your Honor will recall that your Honor, counsel for the Government and counsel for the defense had a conference with your Honor in your chambers yesterday concerning that matter.

The Court: That is right, and I thought it over and I deliberated on it overnight, and I got thinking about what had happened yesterday, and I said to myself, "They are up to that same old monkey business again and I will put a stop to it."

Mr. Sacher: Now, am I at liberty to disclose here what we discussed there, or does your Honor regard (4103) that as an off the record discussion?

The Court: Well, I don't want anything that I have said to anybody regarded of such a character that it should be kept secret.

Mr. Sacher: No.

The Court: I can recall nothing in the conference that I should suppose would be helpful to bring out here. It probably will result in a dispute between counsel for the defendants on the one hand and the

United States Attorney and his staff on the other; and I can see no good which can come of it; but I do not tell you to refrain, because I do not want anybody to get the impression that I said anything that I do not desire repeated.

Mr. Sacher: I don't mean to quote your Honor. I wanted to quote myself, and I just wanted the Court's permission to make reference to it.

The Court: Well, why don't we let it stay this way, that you and your colleagues made every conceivable argument that could be advanced in favor of the exercises of my discretion in favor of granting your relief that you asked; that the United States Attorney and his assistants argued the other way; that I felt doubt about it; that I desired time to think it over; that I did think it over, and that after he time (4104) we had our argument and before I made my determination, a lot of things happened here in the courtroom, and that I just denied the application.

Now what use is there in trying to go into what we said there?

Mr. Sacher: Then I won't.

Then let me make just this observation, that I am convinced beyond all doubt that if this clerk produced the questionnaires which he has on file for qualified jurors there would not be a single questionnaire in 1949, in 1949, 1947, 1946 or 1945 which bears the letter C because he has not qualified a single Negro juror during all those years.

The Court: That is what you say.

Mr. Sacher: Precisely. And I say—

The Court: And obviously you know nothing about it.

Mr. Sacher: And obviously by your refusal to permit us to have examination of those questionnaires your Honor has deprived us of a material opportunity to establish that fact.

Now, finally, your Honor has made some observations concerning McKenzie—

The Court: Concerning what?

Mr. Sacher: Concerning McKenzie, the witness (4105) Mr. McKenzie.

The Court: I only did it in response to what Mr. Isserman said.

Mr. Sacher: That may be. But I think it depends on the side of the fence from which one views Mr. McKenzie and his testimony. It seems to me, your Honor, that in the light of the witnesses's confession that he testified—that he submitted a false affidavit to Judge Hulbert—

The Court: Now, I will not permit you to go on with that again. The affidavit was not false.

Mr. Sacher: He said it was false.

The Court: You and I know what a false affidavit is.

Mr. Sacher: I know what a false affidavit is.

The Court: And the statement that he made in there was perfectly correct and not false at all.

Mr. Sacher: I must respectfully disagree.

The Court: And many a time on cross examination when a cross examiner is pressing the witness he will say such and such a thing was false when it is not. Now, I tell you, as I said yesterday, the affidavit might be argued to be misleading because it did not state the full picture; that it could be charged as false despite his statement, I deny, and I am not going to have a (4106) witness have such things said about him, whether he is a man from this court or from anywhere else, when it is not so. That is a very serious charge to make against a witness, and I am not going to have it in my court.

Mr. Sacher: If it please the Court, if the witness had not himself characterized his testimony as false, you might be right. But in view of the fact that the witness said right from the stand "My affidavit was false," then I must refer your Honor to his statement and not to mine.

The Court: And yet you and I know that it is not false.

Mr. Sacher: I believe it definitely to be false. I join the witness in his belief.

The Court: Mr. Sacher, is it an arguable question whether two and two make four?

Mr. Sacher: Of course not. Of course not.

The Court: Now, when you have a statement of fact that is literally true, can it rationally be called false?

Mr. Sacher: Yes.

The Court: Then I guess that is all—

Mr. Sacher: True to the letter but false in spirit and false in essence. That is what his affidavit was, drawn by a shrewd lawyer, designed to remain within (4107) the framework of literal truth but so framed as to deceive the United States Attorney himself and to deceive the Court successfully.

The Court: Now we take our little recess.

(Short recess.)

Mr. Crockett: If the Court please, I desire to object on behalf of my clients to the ruling made by the Court curtailing our right to further cross examination of the witness. I submit that that ruling amounts to a denial of due process of law to my clients under the Fifth as well as the Sixth Amendment, in that it denies to my clients and to myself the opportunity to effectively represent them, an opportunity to which all defendants in a criminal trial are entitled to under the United States Constitution.

I also wish to object to the ruling made by the Court near the close of the session yesterday upon the occasion when I requested permission to examine certain history cards with reference to names which appear on certain lists submitted to the jury clerk and already offered in evidence. I think that was a most arbitrary—

The Court: You mean that I refused to let you look at papers that were in evidence?

Mr. Crockett: I mean precisely that—not the (4108) papers that were in evidence, but the cards which related to those papers that were in evidence.

The Court: Oh, that is different.

Mr. Crockett: —when those cards were present right here in the courtroom not more than five feet away from the witness stand, and when I might very well have walked over there and examined those

cards without in any way interfering with the conduct of the trial.

The Court: Well, you probably remember what was discovered in the colloquy about that. You made a representation to the Court which turned out not to be the fact.

Mr. Crockett: I deny the Court's statement that I made a representation to the Court which turned out not to be the fact.

The Court: You said that you had to get those cards to see whether any one of those persons had ever been on the grand jury, thus giving me the impression that you did not know that any of them were on; and Mr. Gordon walked over and picked out some of the papers already in evidence on which were one of these very persons, and there was the blue card showing that he was a grand juror or had been, and you must have known it. So, naturally, I took that into consideration.

Mr. Crockett: I wish to object further to the (4109) general attitude exhibited by your Honor during the cross examination of the witness Mr. McKenzie, and I object to it because in comparison with the attitude which your Honor exhibited at the time of the Government's cross examination of the witness Doxey Wilkerson, it is very evident that your Honor's attitude was biased and prejudiced in favor of the witness McKenzie.

I regret, of course, that the record does not indicate the inferences and the inflections in the Court's voice at the time the Court addressed questions to the witness Doxey Wilkerson, as compared with the inferences and inflections in the Court's voice at the time the Court addressed questions to the witness McKenzie.

Your Honor has mentioned on several occasions that there has been no proof presented in this case of discrimination. I submit that the charts, the maps which were introduced in evidence clearly showed that the area in this district known as Harlem, which is predominantly inhabited by Negroes, had certainly been discriminated against in favor of the so-

called Silk Stocking area which has been pointed out in the course of these proceedings.

Your Honor also has on several occasions called attention to the fact that there had been no proof concerning systematic, deliberate and intentional exclusion of Negroes, (4110) as well as other minority groups. I submit that just at the time when we were on the verge of bringing out that intent even more forcibly than it has already been demonstrated by the testimony given by the witness McKenzie, your Honor arbitrarily and in a manner that constituted a gross denial of due process, saw fit to curtail that examination.

The witness McKenzie has already admitted that the so-called colored lists were submitted to him. They were submitted approximately seven years ago. There could be no possible reason for accepting lists which on their face indicated that they were intended to aid discrimination unless the person who received those lists and retained them for a period of seven years intended to go through with that system of discrimination.

Your Honor, I submit, has closed his eyes to something which to me is very evident, and that is by retaining these lists of so-called prospective colored jurors, it was a simple matter to look on that list, pick out a name of a Negro, go over to the history card, and pick out his card, and in that way make sure, if you wanted to, that every panel of jurors perhaps was sprinkled with one or two Negro names. That, I submit, in essence constitutes (4111) discrimination. It also constitutes adequate proof of an intention to discriminate, an intention which the evidence which we presented in the form of maps and charts clearly indicated was carried out.

The Court: Mr. Crockett, one could get the impression, if we listened to you lawyers talking, that there is the worst kind of discrimination you could have. You make allegations; you make assertions; you say you are going to prove this and that; but unfortunately for you the proof is not forthcoming. Now, you have just told me that in just a minute or

two you were going to prove that sort of thing from Mr. McKenzie. Well, if there was any possibility of such proof as that I should have thought you could have gone into that the first day you had him on cross examination. It is just these extravagant assertions of what you think you are going to do that I thought at the beginning that some sort of substantiation was going to come forth when we had on the stand the man who knew all about the system and was actually working with. And then we get through with four solid days of cross examination and we find just nothing that I can see that shows any discrimination at all.

Mr. Crockett: Finally I wish to object to the rulings that I have mentioned because they constitute (4112) the latest expressions of what has characterized this trial from its inception, as a trial in which my clients, the defendants, cannot possibly get the fair trial that is guaranteed to them under the Fifth and Sixth Amendments to the United States Constitution.

The Court: Do you wish to make a motion that I disqualify myself for prejudice, as you have already made?

Mr. Crockett: I want to reserve the right to make such a motion, your Honor.

The Court: You have made it, I suppose, you and your colleagues, I don't know how many times, and I think we all understand that you charge I am biased and prejudiced and corrupt and everything else.

Mr. McCabe: If your Honor please, I should like to object to your Honor's ruling in curtailing the cross examination which was being conducted by Mr. Gladstein and Mr. Isserman because of the fact that I believe it bears no relation to effecting a speedy or fair and just determination of the issues being tried here.

I believe, despite all that your Honor has said, that there has been no undue repetition during the cross examination. There has been no effort to burden the record unduly in any way. This record,

(4113) your Honor knows, is not of our making. The exhibits are not of our making, as developed in this cross examination. The exhibits are the exhibits which have been made in the office of the grand jury clerk and the commissioner over a period of a number of years. And the examination of records of that sort cannot be conducted with the brevity which might be sought or accomplished or even be desirable in another matter.

The Court: Well, you see, Mr. McCabe, it would be one thing if this were some sort of a congressional investigation and all kinds of people were working on this and that. But this is a case where the defendants through you lawyers have made a charge; have filed what is in effect a pleading, so that the assumption that anyone might draw would be that you had the evidence to prove what you asserted—not that you were going perhaps to get it sometime, but that you had it; and then after all these five weeks you stand there and tell me that if you only had some more time to look over some more records you might find something. That does not appeal to me as a very good way to show good faith in raising a challenge of this character, with all these charges that all the judges were corrupt and that the whole system was one solid mass of the most vicious discrimination, when all you meant by it (4114) was that you hoped in the course of the proceeding to find something to substantiate the suspicion or the hope or the thought that perhaps there was discrimination. I don't understand that.

Mr. McCabe: Your Honor's characterization—

The Court: Well, you keep saying if you only had a few more days you would have come across something; but I am saying you are supposed before you make such charges as these to have the evidence at hand, not to base it all on mere surmise and speculation.

Mr. McCabe: I say to your Honor that we have not fairly and substantially exhausted our rights to cross examine this witness. Just the little matter of the 2500 names being missing, 25 per cent of the

whole record—I don't know whether there is any connection between that and the 8 missing pages from the book—those things, if they had occurred, I would say, in the case of the defendants would have met with a very different reception from your Honor than that which was accorded the revelation of those discrepancies in the office of the jury clerk.

Now, we are concerned here—

The Court: I don't remember making any comment about that discrepancy of some 2500 names.

Mr. McCabe: No, I know you didn't.

(4115) The Court: I didn't say a word about that.

Mr. McCabe: I know you didn't your Honor. That is my point.

The Court: Well, what do you mean by—

Mr. McCabe: You passed over very quickly to something else.

The Court: What do you mean by your statement of my reception of that, as though I had made some comment about it?

Mr. McCabe: Well, your Honor, I remember with Mr. Wilkerson when there was some little error in tabulation when he had said there were 1100 names and there were only 332, and your Honor said "332" as though the whole jury system were vindicated because an error had been made in computation; yet when the clerk calmly announces that out of the 9000 names they had there, 2500 had disappeared in some manner which was unexplained, not a word of comment on that. When 8 pages are torn from a book which is under attack, that is perfectly all right.

The Court: Well, who says it is perfectly all right?

Mr. McCabe: Well, the very fact that your Honor said that there was nothing wrong with it—

The Court: Well, I don't remember saying that. (4116) All I said was—I asked for the book; I looked at the book. I could not see any evidence of tearing pages out. I don't know. Maybe they were. I was not attempting to do more than record

what a visual and superficial examination of the book showed. I am not precluding you from later showing that there were pages torn out; but this witness which you had on there was asked about it, and he said he knew nothing about it. You might cross-examine him till doomsday. I don't see what more you could get on that subject.

Mr. McCabe: I would like to say to your Honor that I really have come to believe that the constant repetition by your Honor at intervals which are almost as regular as the tolling of Big Ben—and I mean nothing personal in the illusion—or the eruption of Old Faithful out in Yellowstone Park, or wherever it is—these come at stated periods. I think you can pick 11.20 and 3.20 when these statements come that we are delaying; we are doing nothing; your Honor has seen nothing in the record. I say, I don't want—

The Court: What is the point of those times, of those particular times?

Mr. McCabe: 11.30 I think is the deadline for the afternoon papers, your Honor, and I think around 3.20 is the deadline—

(4117) The Court: Well, that is something I had no idea of, and I must say you have got an ingenious mind to suppose that something was said for such a purpose. I think you ought to be ashamed of yourself.

Mr. McCabe: Your Honor, I would like to make one closing remark: that is that I think what your Honor has overlooked here has been the fact that 11 men are under indictment, which we are attacking, and which involves penalties of ten years in jail. I think that when the defense in that case as a preliminary move makes an attack on the very system of the selection of the grand jurors which indicted those men, I think that that attack should not be frustrated by mere desires to conserve time; nor do I think that that is the reason.

Whatever pride I have in the last couple of hundred years of this country is wrapped up in the law; whatever pride I have in the last 26 years is wrapped

up in a devotion and an affection for the law. Whatever pride I have for the next few years is wrapped up in that. And for years I have been talking to clients and telling them that this law of ours, its institutions, is a pretty sacred thing and not to be tampered with. I have had the occasion—

The Court: And if the judge disagrees with you he is prejudiced.

(4117-A) Mr. McCabe: —I have had occasion to represent many persons who had chosen paths outside the law, and in pointing to them the error of their ways, I had occasion on many a time to assure them that they were going to get a fair trial. I am throughly devoted to that, your Honor. But it goes beyond this case—

(4118) The Court: Of course, you abandoned all thought of that, you and your colleagues, long ago here because you charged me again and again with corruption, bias, prejudice and having something to do with the system that I had nothing to do with. So I understand thoroughly what you think about me. Now, I can't help that. I must do my duty as best I can. So if you want to go on and call me some more names, go ahead and do it. It may come within part of your duty as you see it, and certainly it would be relevant to the case, and I am not going to stop you, so go right ahead and call me anything you want.

Mr. McCabe: I have not abandoned all hope, your Honor. Locus poenitentiae is a part of my whole being.

Mr. Gladstein: Your Honor has asked each of the defense attorneys to state—

The Court: No, I have given you an opportunity if you desire to object and protest. I thought from prior experience that you probably would each desire to do so.

Mr. Gladstein (Continuing): —each of the attorneys to state such grounds as he has to object to the ruling that terminates the cross-examination of Mr. McKenzie. The Court also granted me leave upon my (4119) request this morning, to address

myself to the ruling of the Court by which I was denied the opportunity to have produced here certain documents which were within the possession or custody of the witness McKenzie.

That the Court is not concerned with the consumption of time is evident from the fact that during the past 35 or 40 or 45 minutes, perhaps longer, as each of the four attorneys who preceded me attempted to present his statement of objections, the Court constantly and frequently interrupted for the purpose of—

The Court: If you expect I am going to sit here like a bump on a log while they make statements that are absolutely not so, I can tell you now I won't do it.

Mr. Gladstein: I desire—

The Court: There is no rule I ever heard of that a judge is supposed to sit silent while the attorneys flay him.

Mr. Gladstein: I desire to make an orderly, logical presentation of what I have to say,—

The Court: Go ahead and do it.

Mr. Gladstein (Continuing): —in opposition to the Court's ruling, two rulings; one which terminates the cross-examination, the other which prohibits or prevents us from having access to the documents that I called for.

(4120) The Court has said that there has been no proof of discrimination. I do not wish to argue any point at this time, but for the purpose of understanding the basis of my objection it is necessary for me to point out that Mr. McKenzie has admitted here that for an entire period of two years all through 1947, all through 1948, while he had in his possession the registered voters lists for every Assembly District in Manhattan and in the Bronx, and while he used liberally certain of these Assembly District lists, particularly those which are located or which refer to areas within the Silk Stocking District, within the 17th Congressional District, he consistently and persistently did not use any single one of the four registered lists dealing with the

11th, 12th, 13th and 14th Assembly Districts in Manhattan, of which the Court took judicial notice—

The Court: Are you addressing yourself to my ruling in cutting off the cross-examination?

Mr. Gladstein: I am. (Continuing) —of which the Court took judicial notice that these four districts are represented by Negro Assemblymen in the State Legislature.

Also, the clerk admits that during that entire period of two years, although there was available to him the registered voters lists for the Fourth and (4121) Sixth Assembly Districts of Manhattan, those are the two in the Lower East Side where the poor Jews reside, not one name was used from either of those two registered lists.

The Court must also be aware of the fact that Mr. McKenzie has testified that from 1945 to 1947, which brings it back another two years, he used the registered lists for one Assembly District in Manhattan and he is unable to identify it, one only, and one for the Bronx, that one being the one that embraces the Parkchester housing development.

So we have a period of four years' continuous, systematic pattern established by the testimony of the Government's witness.

We also know from Mr. McKenzie that from 1943, when he came back from the Army, to 1945, he sent out no notices of any kind that are here reported because he had certain ones accumulated; and we know that from 1940 to 1942, based on his own testimony, he used lists and sources from which he got his names of jurors, lists provided by the Federal Grand Jurors Association, lists in which they had the temerity to state whether you were black or white. We also know that—

The Court: I never could see what was wrong with that. That to me is the most extraordinary contention. (4122) According to the testimony of Mr. McKenzie, Mr. Follmer, the clerk, told him that somebody had wanted to find out how many Negroes were on the jury cards and that he was told, as they had no way to indicate it up to that time, to make

some indication on these questionnaires, which he did; and he did it from that time on. Now, I think there must be something wrong with my thinking apparatus if merely putting those C's on there for that purpose is an illegal act that makes a whole jury system open to such an attack.

Mr. Gladstein: And we also—

Mr. Crockett: Your Honor, the very fact that you can't see anything wrong with that is why at the outset of this case we asked that you be disqualified from presiding.

The Court: You see, it is what I said before, that if the Judge disagrees with you, then he ought to be disqualified, so that you always win. It is the funniest thing I ever heard of.

Mr. Gladstein: And we also know, if the Court please, that during this period of time from 1940 through 1948, although at no time was any effort made by the clerk to obtain members of trade unions to serve on juries, hundreds upon hundreds of names were obtained from the directory that contains the names of the corporation (4123) directors of this community so that they could be brought into the grand juries and petit jury service. Now, these facts were obtained from an adverse witness, from a witness who was produced by the Government. Your Honor knows that on cross-examination—

Mr. Gordon: I wonder if Mr. Gladstein could stay off my neck. I don't wish to be associated with him in any way.

The Court: Go ahead, Mr. Gladstein. Don't be getting right in the back of Mr. Gordon's neck. He finds it bothers him.

Mr. Gladstein: Your Honor knows that when a jury clerk takes the witness stand in a matter of this kind he is recognized in law as an interested witness. It is recognized by the law, very sensibly, that he is understood to feel that he is on the defensive and that he intends when he takes that witness stand to defend his conduct and, if necessary, to do so by concealment or by failing to tell all the truth, or by being misleading, for example, as he

has been even by the concession of your Honor with respect to the filing of one affidavit, and so—

The Court: Now, I cannot remain silent when you say those things. I never made any such concession, and it is the way you lawyers were doing earlier. Every (4124) time Mr. McGohey or Mr. Gordon said anything you jump up and say he conceded something. All I said was that that statement was not false, that the most that could be argued was that it was misleading.

Mr. Gladstein: Just what I said.

The Court: And you say therefore I concede that it is misleading. Now, I don't know why you keep doing that, but however that may be, when you do it don't expect that I am just going to sit here. Sometimes I can sit quietly and listen to these fulminations and say nothing, but once in a while I just can't sit quiet.

Mr. Gladstein: From this very witness, Mr. McKenzie, have come these admissions that go to establish the kind of system that has been in operation here for the past eight years under his immediate and direct supervision. This witness I have sought to impeach by asking the Court to bring me certain documents for two purposes; one, the positive purpose to introduce proof in the record, the other, the purpose of impeaching the credibility of Mr. McKenzie, if any additional impeachment were needed, so as to justify any court in holding that when Mr. McKenzie denies on the witness stand an intention to discriminate or that he has discriminated, that denial is not worth credence. And I have asked particularly (4125) for documents that were signed and sent in the year 1942 by the clerk of this court and by the jury commissioner of this court, and if those documents are produced they will prove the following, among other things—

The Court: Now, before you go on: Remember when you started you and your four colleagues cross-examined and one batch of papers after another was asked for and I said, then "Get them out."

Look at them for a minute—down, and go on to something else. Another batch—we sent for them, bring them all in, look at them for a minute or two, down they go. Then they have another batch. That kept up until I finally felt that—although at the beginning it seemed as though maybe you were calling for documents that were going to impeach, as none of them did—it would just be a useless procedure to go on and on, because there were enough files here for you to explore to keep this thing going for another six months.

Mr. Gladstein: Now the documents that I have requested and which were called for by the original subpoena and which the witness did not bring in response to that subpoena, and which I have requested earlier today by reason of the testimony of this witness on this particular subject, thereby making it timely, would establish (4126) among other things the following, if the Court please:

First, that when this witness testified that in 1940, 1941, 1939, whatever that period was there, when he testified that the voting lists were the chief source from which the names of jurors were obtained, he was not telling the truth, and that in fact and in truth the chief source used by him from which he obtained the greatest of all, among other sources, percentage of jurors, was the address phone book in which the city is chopped up by geographical sections.

Secondly, these documents will establish that, whereas this witness has here testified under oath—

The Court: You mean the documents that you haven't got.

Mr. Gladstein: The documents I have asked the production of.

The Court: Yes, the ones you have asked for the production of and that you haven't seen yet. Those are the ones you are so sure are going to show this.

Mr. Gladstein: Those are the ones I am referring to. I may say I have seen them and I have made notes of their contents, and I have seen them in the office of Mr. McKenzie and he was present when I saw them, and unless the evidence of my—

The Court: If they are such good documents (4127) I think you would have done well to start in with them first and leave all these other inconsequential ones to come later.

Mr. Gladstein: Your Honor will recall that the witness has not brought them in response to a subpoena which covers them and calls for them.

Now, a second thing that I would prove by these documents is that whereas the witness has stated under oath that he never removed from the active jury files any card of a juror except when that juror was disqualified in accordance with the statute, the truth is that cards were removed by the witness, Mr. McKenzie, from the active file of jurors not only when jurors became ineligible but also when they became in the judgment of Mr. McKenzie undesirable; and that those persons who were fully qualified to be jurors by law, who had established their qualifications as jurors and who had acted as jurors and who were still qualified to remain as jurors were removed.

The Court: Now, you remember this afternoon the question was asked of Mr. McKenzie whether he had taken any of those cards out because the people were undesirable, and he denied that. Now, if you knew right away that there was a particular one, as you say now, that he had done that with, why didn't you say so?

(4128) Mr. Gladstein: And I say that this document—

The Court: I am afraid there isn't any particular one.

Mr. Gladstein: I say that this document states that that has occurred, and this is the document which was signed by the clerk or the jury commissioner of this court. And I have notes of both docu-

ments, I have seen both documents. I assert to the Court that it is a fact.

The Court: Well, you should have started in with that a little earlier.

Mr. Gladstein: I also reserve the right in view of your Honor's ruling, which enabled the Government to produce Mr. McKenzie, I reserve the right to call him as my own witness, even though I do not wish to vouchsafe for his credibility; but my purpose in calling him will be, if the Court please, to establish the balance of that documentary proof which I submit will carry far beyond any necessary preponderance which the law requires us to establish the proof of the discriminatory nature of the system here.

The Court: Well, you know, I have only ruled so far on the order of proof there, so that it may well be that you will have that opportunity.

Now we will take a recess until next Thursday.

(4129) Mr. Isserman: If the Court please, before we do—

The Court: No, the session is over for the afternoon.

Mr. Isserman: We want to examine some documents over the recess which have been marked in evidence.

The Court: Oh, documents which are in evidence? Certainly, you may see them.

Mr. Isserman: And will the Government be instructed to give us access to them?

The Court: I can scarcely imagine that such instruction is necessary. All exhibits that are in evidence must be available to everybody.

Mr. Isserman: And we would like an application to examine the history cards and qualification notices.

The Court: I will hear no further application this afternoon.

Mr. Gordon: He is asking for something not in evidence now.

The Court: I know.

Mr. Isserman: That is my second application.

The Court: Well, the court session this afternoon is over. You may make new applications when we reconvene.

(Adjourned to February 24, 1949, at 10.30 a. m.)

(4130) New York, February 24, 1949;
10.30 o'clock a. m.

The Court: Very well, gentlemen.

Mr. Gordon: I take it that defense counsel have finished with the objections which they were voicing last Friday, your Honor.

The Court: Yes. You may proceed with your redirect examination unless there is something additional.

Mr. Isserman: If the Court please, we have an application to make in respect to the documents which have been subpoenaed from the clerk. We can make it at a later time or now as the Court directs.

The Court: I see no reason to defer it. You may make it now.

Mr. Isserman: If the Court please, we move that the clerk be directed to produce in this court, so that the same may be offered and marked in evidence by the defendants, the records which I will refer to in connection with this motion, and which records are covered by the clerk's subpoena.

To the extent that the application covers some rulings heretofore made by your Honor in respect to
(4131) production of the records we ask that the Court give reconsideration to the previous rulings.

In the alternative to have the records offered and marked in evidence, and with that realization, that to do so might interfere with the work of the clerk's office we ask that we be permitted to inspect the records in the presence of a representative of the office of the clerk of this court and of the United States Government, and at such times and in such

manner as the Court may direct in order to make tallies from the same and make copies thereof as may be required for the offering of the tallies and summaries and for the copies in evidence instead of the actual records themselves.

The records include the following, and in mentioning what they are I will try to mention very briefly the basis for the request.

Mr. Gordon: Excuse me a moment. Mr. Isserman referred to a subpoena, your Honor. Two have been served on the clerk. I wonder which one—

The Court: He refers to the supplemental subpoena. It sort of passed out of the picture.

Mr. Isserman: The supplemental one, too, your Honor, that is right. A further subpoena was served and there was some question whether there had been a substitute for the original. That we do not deem so. It would go to the original and supplemental subpoena.

(4132) First is the history cards of all persons qualified to serve on petit juries—

The Court: Go a bit slower.

Mr. Isserman: The history cards—

The Court: The history cards of all jurors who have ever served.

Mr. Isserman: Grand and petit who are qualified and whose names are now in the active files in the clerk's office.

The Court: Well, that is every juror who is in the active file.

Mr. Isserman: That is correct—together with the questionnaires made out by the persons whose names appear on such history cards, and such of the 2 by 4 white cards which have been testified to on several occasions by Mr. McKenzie, which were used by the clerk's office in connection with the qualifying of said jurors.

The Court: I do not understand that part, "in connection with the qualifying of said jurors."

Mr. Isserman: Your Honor will recall that in connection with the "6 List" and the "5 List," as

well as in connection with the names taken from certain of the directories, that names were entered on 2 by 4 cards and given a number of some kind which were keyed to the questionnaire which was sent out.

(4133) The testimony was that when the questionnaire—I am sorry—to the notice which was sent out, and upon the coming in of the person with the notice the 2 by 4 card was put into the Off file, and if the juror qualified—and I am quoting the clerk's testimony—"and if the juror qualified his history card was put in the active file."

In other words, these 2 by 4 cards were a method used in a number of different connections to keep record of notices sent to persons who were coming in to court.

The Court: I thought he testified that after the notices were out and the time for the persons to come in had expired, or a reasonable time had gone by, those cards were destroyed; am I wrong about that?

Mr. Isserman: I can call your Honor's attention to the portions of the record in which specific reference is made to these 2 by 4 cards and the fact that they were put alphabetically in the Off file.

The Court: It must be just certain ones.

Mr. Isserman: Whether they were qualified or not.

The Court: I am quite distinct in my recollection that large numbers of them were destroyed, certainly as to those who never qualified.

Let me ask Mr. Gordon what he says about that before you proceed with the rest of your motion.

(4134) What do you say the evidence is on that, Mr. Gordon?

Mr. Gordon: My recollection, your Honor, is that some were kept in the file and some were not; some were destroyed.

The Court: And what was the determinating factor as to whether they were kept or destroyed? You have some doubt about it?

Mr. Gordon: I have some doubt unless I can find it in my notes.

The Court: All right.

Mr. Gordon: I know there were some that he said he would put into the Off file and the person who was qualified would have an active card put in the active file.

The Court: That is as to the ones that qualified.

Mr. Gordon: That is right, your Honor, and as to the ones which didn't or which never came in, I think those cards were just torn up and thrown away.

The Court: That is what I thought, but let us not pause to inquire further into that. I now have clarified my mind as to what cards you were talking about, so you may proceed with the balance of your motion, Mr. Isserman.

(4135) Mr. Isserman: I might say that I can give your Honor the specific references to the white cards.

The Court: Yes, if you will do that.

Mr. Isserman: I would say I couldn't answer your Honor's question because the state of the record is not complete on that subject, but there are at least three references to the use of the cards and to the placing of them into the Off file.

Now we say in support of the motion that the history cards, the questionnaires and the 2 by 4 white cards are relevant and material to establish the following facts:

First, the dates on which such persons qualified for jury service, which dates would establish that a substantial number of jurors now on the active list were qualified or re-qualified in the period between 1938 and 1945, in which period certain select sources not representative of a cross-section of the community were used, as established by the evidence, from which sources persons were drawn for jury service. I need not now list those sources. Your Honor will remember amongst others they

included some directories, telephone books and lists supplied by the Federal Grand Jurors Association.

The Court: Yes. You have taken the position, you and your colleagues, as I understand it, that the (4136) Jury Commissioner, the clerk and his deputies had no right to use those, that they must use exclusively the list of registered voters.

Mr. Isserman: No, that is not our position, if the Court please.

The Court: Well, why then would you think it significant to show—

Mr. Isserman: Our position is that the use of these sources as used in this period, in the period referred to, was designed to create the result which we established by the analysis of our 28 panels, and it isn't so much that the law requires the use solely of voting lists but it is the method by which these sources were used and the method by which such voting lists as were used were used and which created, in our view, the pattern of discrimination.

The Court: Well, haven't you got all that in the record now?

Mr. Isserman: No, the record does not show. I think as I will go on your Honor will see in what way the record does not indicate these matters. Now they indicate them but not as fully as they should. For instance, the clerk was asked on this particular point whether he could ascertain the number of jurors presently serving who had been on a jury list for a long period—I have forgotten the specific date that was mentioned—and he (4137) said while he could give the additions and the subtractions which would indicate a more or less constant list, that nevertheless from his tallies there would be no way of knowing how many jurors were selected in 1940, 1941, 1942, 1943 and 1944 before the period even when the first voting book was used in the 1945 to 1947 period, who are still on the juror panel. Now there is some language by the clerk, or some statement to the effect that there was a change in 1947 by a resort to various Assembly

lists, but the evidence already indicates that the degree to which there was a change, certainly from our analysis that the result was not affected, and also that many of the jurors who are currently being called in for jury service qualified long before the date in 1947 when these Assembly books were used, or qualified long before the date in early 1945 when the one Manhattan book and the one Bronx book was used.

Now these history cards would show precisely how many jurors selected under the conditions described on this record between the period 1938 and 1945, and in fact to date, or in the various periods who qualified, when certain methods were, as described by the clerk, in use.

The Court: Of course there has got to be a certain discretion as to how far one may go, and I became (4138) impressed some time ago with the possibility that defense counsel would desire to go into every juror and then every juror who served and when he did serve and then every member of the population, as to whether he was a Negro or a Jew, and so on, and I can just see as an opening of the door that it would be very difficult to shut, and then go on and on for what might well be several months, which I think is quite unjustified.

It seems to me you have got the basic, fundamental material in your record now, and if it demonstrates what you claim it demonstrates, there it is, without all this interminable detail; but, however, you go ahead now. You said, first, if those things are done you will get the dates on which such persons qualified, and then from that you will be able to draw certain inferences, and now you have got some more things you want to tell me about.

Mr. Isserman: Yes. Now we say the history cards and the questionnaires and the 2 by 4 cards would substantially establish the occupational classification of said persons who are now active jurors, and would establish that said persons do not constitute a truly cross-section of the community but

comprise wealthy persons and members in the executive classification as used in this proceeding, in heavy disproportionate numbers, favoring such numbers to the substantial exclusion in (4139) large part of poor people and manual workers, in substantially the same proportion to the 28 panel sheets put in evidence before.

Now we are aware of the problems raised by the Fay case, but putting that aside for the moment, with respect to the classification, an analysis of these cards would definitely establish the proportions of the classifications for the entire list; as we have indicated, the samples which we believe were properly selected and drawn, and have indicated in this respect as in others, your Honor, and that goes to the question of the amount of investigation. We are at all times willing, under the direction of the Court and with the Government participating, to determine where the matter lends itself to such determination, a standard of sampling which would be deemed adequate for purposes of this case.

Now we say that the history cards, the questionnaires and the 2 x 4 white cards, particularly the questionnaires, would establish the number of Negroes qualified for jury service since 1940, and would establish further that such number is a mere token representation substantially excluding these people from grand and petit juries, and that even said token representation—and we have checked, your Honor, so far as our 28 panels are concerned—that the representations are substantially comprised of well to do (4139-A) Negroes largely in the executive and professional classifications, and substantially even within that discrimination excludes manual workers.

(4140) Now it is true that there is some testimony from the clerk about some names he forgot or markings he forgot on occasion, but he was under instructions, according to his testimony, from 1940 on to designate on the questionnaires those persons which were Negroes.

Now subject to whatever weight might be given to his testimony in respect to his occasional lapse from the duty imposed upon him, this enumeration would establish the facts that we say exist, and at this point on the record there is no such evidence complete. Our evidence on exclusion necessarily was pitched in a different direction by showing the exclusion of Negro areas, I will say exclusion of Negro areas in this City, but this tabulation did not determine the fact which we contend is so.

The Court: Is the tally, in so far as it relates to women and Jews, abandoned?

Mr. Isserman: On that question, your Honor, the answer is it is not abandoned. We have never said that all Jews were excluded. We have said there was substantial exclusion of Jews by the elimination from the areas of selection. Many areas, both in Manhattan and in the Bronx which are largely inhabited and lived in by Jews, and particularly Jews of a lower or lowest economic level and class. Now we can establish that. (4141) The record already shows that, and we maintain as a matter of law that that exclusion in that manner is an exclusion of Jews. That is not to say, as the record indicates, that there are not a selection of Jews on the panels.

Now in respect to women, I think Mr. Gladstein stated the position the other day when he said that the exclusion there consists of a systematic and deliberate limitation of women to approximately, I believe it is, 10 to 11 per cent.

The Court: But there were several thousand of them on the lists.

Mr. Isserman: Yes, but that was an arbitrary limitation to that percentage which is referred to as well in the Tolman letter and we maintain is a substantial exclusion of women.

The Court: Earlier I raised the question as to how you were going to tell who was a Jew or who was not a Jew. I said that because I can think of no way, just by looking at somebody you can tell, and then these lists began pouring in and I saw thou-

sands and thousands of names that looked to me like Jewish names. Is that an erroneous thing? You take the position there is no such things as a Jewish name, but we know the inference could be drawn from such names as a person might think (4142) were Jewish names—am I all wrong about that?

Mr. Isserman: I would say in many instances one can tell a Jewish name and in some one cannot.

The Court: You see there were many thousands of those and they seemed so clear that I got the impression that maybe that matter of the exclusion of the Jews was just out of the case, but you tell me it is not, so that is all right.

Mr. Isserman: And I did want to say, your Honor, pursuing this name matter a little further, that there are areas excluded, in which from the area one can tell, using the same test, that the area is predominantly Italian and we can say that in specific area after specific area that there has been that type of selection which tends to exclude persons with Italian names.

The Court: But the Jews are not restricted to any particular part of the city. That is absurd on its face. They live all over.

Mr. Isserman: It is true, but they concentrate in certain areas and in certain areas there has been as it appears an elimination of those areas as areas from which jurors are drawn.

The Court: All right.

Mr. Isserman: Now there were also these history cards, questionnaires and 2 x 4 white cards that would (4143) establish, on discovery, areas and the political subdivisions in those areas every person who were called to qualify for jury service for such periods for which no records, at least the summaries that have been produced by the clerk of this court, indicating the areas for instance in the period from 1938 to 1942, there is no record before this Court which indicates the geographical subdivisions or areas from which these jurors were called. Say in the period from April 1942, which was on Mr.

McKenzie's return, as I remember—just a moment, now—the period from July 1942, from the date of his return. I am talking about the period from his return in April 1943.

The Court: You mean the period when Mr. Borman was taking Mr. McKenzie's place?

Mr. Isserman: No. I was trying to describe the period which has the beginning date on the return of Mr. McKenzie in April 1943, and the period from that date to 1947, in which the summaries do give no indication of the area from which jurors were drawn by political subdivision, although the general testimony is that one book was used—do you remember?

The Court: Two books.

Mr. Isserman: Yes, one for Manhattan.

The Court: And one for Manhattan and one for
(4144) the Bronx.

Mr. Isserman: With considerable uncertainty, thus far, as to the location of the Manhattan book.

The Court: It does not seem to me there is much more you want on that. Whatever point there is there you have the proof on it.

Mr. Isserman: We do not have the proof of the persons who actually qualified in that period; where they came from, your Honor. We would say the analysis of those names, from our knowledge of the records and of the facts, would indicate that in that period there was the concentration in the East Side of Manhattan, in the Sutton Place and Fifth Avenue area similar as existed on all the panels we have tested, and a concentration in Parkchester, which evidence can be inferred from the fact that the book including Parkchester was used, and an ample study of the cards will indicate not only that district was used in the Bronx, both of which contained part of Parkchester, and it was not a whole district but the concentration on Parkchester which it is well established is an area in which Negroes do not and may not reside.

Now in respect to the grand jurors, the same evidence would indicate a much greater concentration

of persons in the class we have described as the executive (4145) class, well-to-do persons, as against poor persons, manual workers and Negroes, to the virtual or substantial exclusion of the latter categories.

Now we come to the question, your Honor, of the inactive cards.

The Court: You are still arguing in support of your motion to have the designated files and records placed at your disposal?

Mr. Isserman: That is correct. Or in evidence, or placed at our disposal, or subject to such inspection as the Court may work out or direct. Now we are talking about history cards, questionnaires and white cards.

The Court: We have been talking about those all the time.

Mr. Isserman: Now I am going to some cards in the inactive files as distinguished from the active files.

The Court: This is another motion?

Mr. Isserman: It is the same motion, and it is directed to records in the inactive files of the court, the files containing names of inactive jurors, or inactive files.

The Court: You mean the 2 x 4 white cards?

Mr. Isserman: No. I am referring to the cards containing the histories of the persons who have been (4136) marked inactive, one after the other.

The Court: I have tried to take down your motion carefully as you make it and it has to do with the history cards of all jurors, grand and petit, on the active files; the questionaires for those same persons, and 2 x 4 white cards as used by the clerk's office in connection with qualification of those same jurors. Now you seem to be bringing in a new subject. Is that so?

Mr. Isserman: No, what I am trying to talk about now is the inactive.

The Court: So you say in effect, even though we are not asking for those cards there is something about those that have a bearing?

Mr. Isserman: No. We are asking for the inactive files but for a different reason.

The Court: I say you did not ask for the inactive files before and I ask you now shall I add that to your motion?

Mr. Isserman: Yes, if your Honor please.

The Court: Because I put three things down, and none were inactive files. So now we will have all the inactive files. Now tell me the argument on that.

Mr. Isserman: Now in the inactive files we (4147) desire the history cards, questionnaires and white cards on the person who have been marked off the active jury list since January 1, 1938.

Those cards will establish the dates said persons were marked off, the reasons therefor, and will indicate that large numbers of qualified non-exempt persons were marked off in the course of a requalification process commenced approximately in 1938, notwithstanding the fact, as is the clerk's testimony, that the requalifying questionnaires were received by mail and were judged upon mail receipt only, and that those questionnaires indicated in many cases no grounds for disqualification and that the actual reason for marking those cards off was based upon the occupational qualification of the person so marked off or upon his national origin, and that in such process of requalification substantial numbers of persons were marked off the active list solely because they were manual workers.

The said history cards will also indicate that many persons were placed in the inactive list by reason of their cards being marked "Deferred" and that such marking was not based upon any ground for disqualification, but, in fact, persons whose cards were so marked were in fact qualified to serve as jurors, and that the said cards were so marked solely because (4148) those persons were manual workers or because of national origin of such persons who were deemed undesirable by the jury clerk of this court.

Now the analysis of those history cards, and I am now referring to the analysis of the cards in the active files and inactive, along the lines indicated will show that the disproportion contained in the 28 panels analyzed were not happenstance or random disproportions but were the result of a deliberate design, and necessarily cloaked, from the methods employed in the selection of jurors for qualification as revealed by the records in the period covered by this request.

Now one further point on our request for examination: there has been evidence that there is a file in the clerk's office containing communications from the Federal Grand Jury Association, and correspondence with that Association by the clerk or persons in the clerk's office. We ask for leave to examine those letters.

The Court: That is a fifth part of the motion now?

Mr. Isserman: Yes.

The Court: Correspondence files showing communications with Federal Grand Jurors Association?

Mr. Isserman: The actual name, your Honor, is (4149) the Federal Grand Jury Association. Such letters would indicate the lists of specific names submitted by the Federal Grand Jury Association to the clerk for the Federal grand jury panels and from those letters and study of the qualification questionnaires and history cards it would be indicated that said lists were names that were used to a very susbtantial degree and that the said lists of names so arranged were not representative of a cross-section of the community but contain the vice I have previously referred to, and that the use of those lists and recommendations, with a very special emphasis on the grand jury, although it affected the petit jury panel, played a substantial part in creating the disproportions as evidenced in the study of the 28 panels we have made.

Now, if the Court please, in connection with this request—

The Court: Are your colleagues going to be heard on this too?

Mr. McCabe: I don't care to be heard on it.

The Court: All right. You may go ahead. Apparently they are not going to argue this, but you are going to argue it on behalf of all, so that is all right.

Mr. Isserman: That is the case. It may be somebody may have a small point to supplement.

(4150) The Court: Yes. You may go ahead.

Mr. Isserman: Now, your Honor, we are fully aware of the fact that this request, this motion, embraces a large number of documents, and a large quantity of documentary—

The Court: A large part? It is everything in the clerk's office.

Mr. Isserman: That is true. I don't know that it is everything but it is a substantial portion of his records, and we say for the reasons indicated that in order to fully establish the facts that an examination of this material is necessary. We believe that the size of the inquiry would be different if it were a small community, but because of the size of the community I mean it is creating an exceptional condition from the standpoint of the normal procedures in the examination of such records and marking them in evidence; that that exceptional condition is enhanced because it does involve records of the office of the clerk which are used in selection of jurors for this court.

By reason of those circumstances we urge that the interests of justice would be served, without any undue burden upon the clerk's office which would prevent the functioning of that office, and in accord with practice in such cases in both criminal and civil litigation, (4151) that your Honor refer the examination of those records to a master before whom the examination could take place under such terms and such conditions as would facilitate the procedure. We call your Honor's attention to Rule 57(b) of the Rules of Criminal Procedure—

The Court: Just a moment. Wait until I find it. (After examining.) Do you interpret that as authorizing me to refer this entire matter to a master and go ahead with the main trial in the meantime?

Mr. Isserman: If your Honor please, I interpret that merely in the light of Rule 5305 of the Rules of Civil Practice. Rule 57(b) allows the use of Rules of Civil Practice when they do not conflict with the Rules of Criminal Procedure and Rule 5305 allows references to a master to hear evidence and report findings and conclusions of law to the Court. Now we ask that such reference be had for the purpose of the examination of these records.

The Court: I have been looking for 5305 in the Rules of Civil Procedure but I find there is a 52(a), (b), (c), (d) and (e), but I find no 53(o) whatsoever.

Mr. Isserman: 5305? Apparently there is a misprint or typographical error in my memorandum.

The Court: Either that or something has been left out of my book.

(4152) Mr. Isserman: No, that is hardly likely.

The Court: I think it is very improbable. You may take your time to find out just which one it is, and if you desire I will hand you my book and you look at that, the Rules of Civil Procedure, and you probably will find the part you have in mind quickly.

Mr. Isserman: I think that would be helpful.

(Handed.)

The Court: I think it is just the letter that has been mistaken.

Mr. Isserman: My reference is, your Honor, to Rule 53(b) rather than 5305. I think it was just a typographical error.

The Court: What do you say about my power to send this to a master and go ahead with the main trial in the meantime?

Mr. Isserman: Well, if the Court please, our application is limited to the examination of the clerk's

records which is a time-consuming process and distinguished from the evidence which your Honor would hear on matters not relating to the documents.

The Court: Yes, but you see I have, ever since last August when this matter first came before me, been impressed with the fact that the charge in the indictment of organizing a group to teach and advocate the overthrow (4153) of the Government of the United States by force and violence was something that the interests of everyone, the defendants and the public and the Government, required to be disposed of with expedition, and that thought has contantly recurred to me as we have been going ahead here to see if there is some way of by-passing this matter that we are now engaged in. I am interested in examining into it because it seems to me that that interminable delay in this proceeding is not in the public interest or in the interests of the defendants. If there is any such conspiracy as is charged, which I do not say there is and I do not say there is not, but that is the indictment and that is the charge.

Mr. Isserman: If the Court please, we have to make the distinction between interminable delay and the time required to establish facts in a situation, particularly where we are dealing with a complexity of matters.

The Court: But let's suppose for the sake of argument that there were such a conspiracy going on, just assume it for the purpose of argument, is it conceivable that the law must stand by, going on month after month with such an interrogation as we have here while the conspirators, if there be such, proceed to consummate the conspiracy? Is it conceivable that can be so?

(4154) Mr. Isserman: Well, if the Court please, It is conceivable because of the fact that the essential consideration of the Court is with justice, and if justice and examination of the facts requires an extensive proceeding, then the proceeding must be extensive. Subject to expedition.

The Court: This is the fifth or sixth week. I have lost track of the number of weeks.

Mr. Isserman: If your Honor please, in a small case in New Jersey which was again adverted to the other day, that went to a master.

The Court: That went to a master, but you see here you have the situation where you made your challenge last fall. Every effort was made by the United States Attorney to expedite and go ahead instead of having a master appointed and then go ahead with it, but you withdrew the challenge and then on the eve of the trial you put it in again.

Mr. Isserman: Your Honor, the papers show that that was required because of the fact that in our investigation of the challenge a series of facts continued to be developed which we did not have in our possession and which we were led away from by statements made by the clerk, and we have taken only those steps—

(4154-A) The Court: You could not have known when you withdrew the challenge about the things you were going to discover later, but you withdrew it.

Mr. Isserman: If the Court please, we knew there was a technical reason for the withdrawal of the challenge. We had no jury.

The Court: Well, it looks like to me—

(4155) Mr. Isserman: We have no jury panel, and our challenge—

The Court: —as though you are just stalling around.

Mr. Isserman: Your Honor, there is one case in which successive challenges were made and the final one wasn't made and it was held inadquate. We have to challenge a jury which we are called to face trial with.

The Court: Anyway, you make an additional motion in the alternative that a master be appointed to go over all these records and report.

Mr. Isserman: Under such formulation as the Court will direct.

Mr. Gladstein: Will your Honor permit an interruption at this point?

The Court: Just a minute until I get this down. All right, Mr. Gladstein.

You haven't finished, have you, Mr. Isserman?

Mr. Isserman: Well, I am substantially through.

Mr. Gladstein: I would like to interrupt, if I may, your Honor, because the thought is in your Honor's mind, that I would like to address myself to —your Honor, I have the impression from the question you just put to Mr. Isserman regarding the question of whether or not this matter should be referred to a master, and that (4156) we then proceed in the meantime to go ahead with the trial of the charges contained in the indictment—I have the impression that the proposal that a master should be appointed because of the character of the evidence, the documentary character and the great volume of it appeals, as it should appeal, to the Court as a most expeditious and sensible way—

The Court: No, I didn't say I like the idea, and I have grave doubt as to whether in a criminal case it is a proper thing.

Mr. Gladstein: It is.

The Court: I do not want anything said to be misunderstood on that, due to my ignorance and lack of information—I am not at all sure about that. You will remember that Mr. Isserman referred me to a rule of criminal procedure, 57(b), which doesn't specifically provide for any masters but merely says:

> "If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Now I immediately thought of the possibility of in some way going ahead with the main trial and not having this preliminary proceeding go on month after month which I have been trying to find some solution for (4157) for some time here, ever since I made that finding about the delay. Now I do not say that I am in favor of this master thing. I do not even know right now whether it is lawful for me to appoint one.

Mr. Gladstein: Well, I think it is, but in any case, the proposal is made, subject, of course, to your

Honor's determination as to whether the Court has power to accept such proposal. The proposal is made for the purpose of expediting the processing of the documentary matters and materials which are needed to fulfill and complete the case of the defendants on the challenge.

The Court: Usually the appointment of a master means about two years' delay.

Mr. Gladstein: Well, your Honor has the choice as to who the master shall be, I take it, and we do not choose the master, and I suppose the master has power to arrange for the hours of the day or night during which witnesses will be heard or documents will be examined. I want to say for myself—

The Court: Well, it is not practicable to go ahead with the trial because you have the same lawyers appearing before the master.

Mr. Gladstein: Well, I was just going to say, there is not only the practicable question but the defense (4158) of the defendants requires that their attorneys represent them in a basic matter—

The Court: Yes.

Mr. Gladstein: —but there is more than that. I want to say something apart from the practical character, that it would be incorrect for the Court to pose the question as to why you cannot go ahead with a master on the challenge and in the meantime go ahead with this. Your Honor says that this case ought not to be delayed, that it is the right of the Government to try people who are charged, but your Honor must not forget that that right is bottomed upon a very basic constitutional condition which is this: We are never in such a hurry to try people that we forget the injunction contained in the Constitution which says you don't try people before an unfair tribunal, you do not try them before a kangaroo court—

The Court: That is right.

Mr. Gladstein: —and you do not try them before a packed jury, and therefore your Honor—

Mr. Gordon: Please.

Mr. Gladstein: And therefore if, as we assert, the fact, and a finding be made supporting that fact, that there cannot be a lawful jury chosen because of the nature of the system by which jurors are selected here in (4159) the Southern District of New York, then it is quite obvious that the Court has no authority, has no power, and it is wrong for the Court to say, "Well, we will go ahead with the main trial regardless of what the Constitution says, regardless of the fact that the Constitution says you do not have to stand trial on illegally brought indictments, and so on."

The Court: Let me ask you a question: suppose that after five or six weeks of listening to evidence, including evidence of the man who has been actually running the system, and hundreds and hundreds of exhibits brought from the files, I become pretty well convinced that the charges that are made just aren't true, and that they are not substantiated, is there no way I can put a stop to the thing? Is it to go on as long as the ingenuity of counsel can think of something new, of some new material to ask for and some new witnesses to bring in? Mustn't perhaps there come a time when the volume of proof already in is sufficient to say, now if the defendants are right, they claim this and that, but doesn't it seem to me, can't I put a stop to it? Isn't it conceivable that such a time could be reached?

Mr. Gladstein: May I suggest that your Honor formulates the question incorrectly. The real question (4160) to be answered is this: Do not defendants have a right, and is it not the function and duty of the Court to join in defending and protecting the exercise of that right, to put in all evidence that is material and competent and which tends to prove the charges which they make? And so long as they are not offering testimony that is merely cumulative, that is, cumulative to an extent where the Court may say, in the exercise of its discretion, that it doesn't have to hear any more of that particular type of testimony. Here we haven't been faced with that issue. There is, as a matter of fact,

a right to any litigant to produce proof not only that attests to a fact but also some corroborative proof. If, for example, an issue be joined in a case as between the credibility of one witness on one side and another on another side, it is the right of either litigant to produce a reasonable amount of corroborating testimony to support the evidence given by the witness.

The Court: Well, let us be specific. You take this matter of the women. You come in here and there is all this big hullabaloo that the women are excluded, the women are excluded. Now we have got books and records and everything else here, and there are thousands of women, and despite that, you and Mr. Isserman said this morning, "Oh, no, your Honor, there (4161) is discrimination there, we must go on, we must go on." Well, how could it be possible with such proof as we have got here of the most conclusive character that there isn't any discrimination against women? How can it be that we have to go on week after week listening to proof that in the end is going to show the same thing that we have already got here?

Mr. Gladstein: May I perhaps remind your Honor of what our position is, both with respect to the exclusion of women and with respect to other exclusions?

What we said that was wrong must be rather sharply differentiated from what we have never said was wrong. We have said that there is Negro exclusion but we have not asserted that not one single Negro has ever been serving upon a jury. To the contrary, we have asserted that precisely for the purpose of protecting the discrimination which was being put over, certain token representation, a few selected Negro people were brought into the jury system to give it—and I make no pun—protective coloration, and therefore the intent—yes, the intent exists, and it is an illegal intent, and the illegal result which exists exists despite the fact that there is this token representation, and we assert that the existence of token representation is neither an an-