# INDEX*



* This index applies only to Volume IV. A complete index of the entire Joint Appendix is printed in a separate volume.

## Trial Testimony

*(T-1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Cr. 128-87 etc.

UNITED STATES OF AMERICA

vs.

WILLIAM Z. FOSTER; EUGENE DENNIS, also known as Francis X. Waldron, Jr.; JOHN B. WILLIAMSON; JACOB STACHEL; ROBERT G. THOMPSON; BENJAMIN J. DAVIS, JR.; HENRY WINSTON; JOHN GATES, also known as Israel Regenstreif; IRVING POTASH; GILBERT GREEN; CARL WINTER; and GUS HALL, also known as Arno Gust Halberg.

Before:

HON. HAROLD R. MEDINA, *D.J.*,
*and a Jury.*

New York, March 7, 1949;
10.30 a. m.

*Appearances*:

JOHN F. X. MCGOHEY, ESQ., United States Attorney, For the Government;

By John F. X. McGohey, Esq., U. S. Attorney, Frank H. Gordon, Esq., Irving S. Shapiro, Esq., Special Assistants to the United States Attorney, Edward C. Wallace, Esq., Special Assistant to the Attorney General, Lawrence K. Bailey, Esq., Attorney, Department of Justice.

(T-2) UNGER, FREEDMAN & FLEISCHER, ESQRS., Co-counsel for Jacob Stachel, Carl Winter, William Z. Foster, Eugene Dennis and Henry Winston;

Abraham Unger, Esq., and David M. Freedman, Esq., of Counsel.

* Figures in parentheses indicate pages of stenographic minutes.

HARRY SACHER, ESQ., Attorney for Irving Potash, Benjamin J. Davis, Jr. and John Gates.

ABRAHAM J. ISSERMAN, ESQ., Attorney for Gilbert Green and John B. Williamson.

LOUIS F. MCCABE, ESQ., Attorney for William Z. Foster, Eugene Dennis and Henry Winston.

RICHARD GLADSTEIN, ESQ. (of the California Bar), Co-counsel for Gus Hall and Robert G. Thompson.

GEORGE W. CROCKETT, JR., ESQ. (of the Michigan Bar), Co-counsel for Jacob Stachel and Carl Winter.

MARY M. KAUFMAN, ESQ., Attorney for Gus Hall and Robert G. Thompson.

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(T-3) The Court: Now are all the defendants here?

Mr. Sacher: They are, your Honor.

The Court: From now on there will be no absenteeism on the part of any of the defendants. They must be here at all times during the continuance of the trial, and I have one or two things that I want to say here.

Mr. McCabe: May I interrupt your Honor?

The Court: No, you just wait a moment, Mr. McCabe.

With regard to these proposed questions, I received the Government's proposed questions promptly; I was inconvenienced a great deal by not receiving the defendants' questions until some time Saturday, but I have spent the intervening time working over them and I have made certain omissions and revisions in both the questions submitted by the Government and those submitted by the defendants, and have made up a number of questions of my own which I am confident will cover the entire field satisfactorily so that we may obtain fair and impartial jurors.

There has been sub-joined to the defendants' questions a request later to submit a supplemental list. That request is denied. I shall permit either side in the course of the questioning of the jurors to submit questions in writing

that may be suggested from time to time by something said by some of the jurors in response to my questions, and then when I receive such questions (T-4) in writing from either side I shall rule on them.

Now, Mr. McCabe?

Mr. McCabe: Yes, your Honor. My reason for interrupting was that I wished at this time to renew and repeat a motion which has heretofore been made and denied, that is, the motion that your Honor now disqualify himself from further proceeding in this case. It has seemed to me that the circumstances which arose during the course of the trial of the challenge more than justified our allegation that your Honor's state of mind was not one of detachment and freedom from bias. I felt that that developed and progressed through the trial, and was demonstrated fully in the circumstances surrounding the conclusion of the trial of the challenge, the cutting off of evidence and the refusal to hear oral argument, the necessity for which I think appeared in the opinion which your Honor filed.

I have gone through the transcript not in great detail but in sufficient detail it seemed to me to demonstrate fully that your Honor deprived us of the right to present our argument fully and fairly to the extent of occupying the time necessary to develop our point. I developed some quotations, and I do not wish, of course, to burden this argument with a repetition of those (T-4-A) quotations at this time which indicate both the bias which your Honor showed, the sarcastic approach which your Honor adopted towards the argument of counsel and toward our evidence. Your Honor's cutting us off in our proof and directing the order of proof seemed that your Honor was quick to jump upon the slightest mote in the eye of any defense counsel, witness—

(T-5) The Court: Do you think you need to elaborate very much longer, Mr. McCabe?

Mr. McCabe: No, I do not, your Honor.

The Court: Because I want to indicate to all counsel now that I am not going to permit any more lengthy arguments or repetitious arguments during this trial when I have the jury present. I shall expect counsel to make argument when the Court desires argument, and when I feel sufficiently informed to rule the matter will rest there.

Mr. McCabe: I am complying with your Honor's and I shall be very brief in making this presentation which I feel needs to be made at the outset, and I wish to say something which has not been perhaps entirely clear from the record; that our position, maintained throughout this case, has been that the matters charged in the indictment are not at all justiciable before a jury of twelve persons in a criminal court, in accordance with our insistence that the rights of freedom of speech and freedom of assembly guaranteed by the Constitution, mean more than the hiring of a hall or the distribution of pamphlets. They include the right of a political party to organize on a firm and permanent basis and a continuous contention for acceptance in the market-place, the sole forum having the constitutional powers to deal with questions of that sort, and that is the American (T--6) people. And in that respect having been brought into a trial which we submit is entirely improper it becomes important that the Judge trying the case be free from even the suspicion of bias, and the jury before whom we are compelled to try the case is one likewise free from that taint, and then for that reason we urge now, up to the last minute, that you withdraw from the trial of this case so no one can say even under the rules which we are compelled to abide by the trial, which we do not think should be held, that at least limits the fear that they are present, so that the rights to be freed from this trial and the rights not to have this matter decided in the criminal courts will not be beclouded by other issues.

The Court: Am I to regard your motion or motions, as including, 1, a motion that I disqualify myself and, 2, a motion to dismiss?

Mr. McCabe: No. I directed my motion entirely, your Honor, to the request, suggestion and motion that your Honor disqualify himself.

The Court: Do your colleagues do more than indicate their adherence to your views and the fact that they join in the making of the motion?

Mr. McCabe: I think they will indicate that.

Mr. Crockett: On behalf of the clients I (T-7) represent, your Honor—

The Court: By the way, Mr. Crockett, when I say that each of the defendants are deemed to have joined in the motion I think it were unnecessary thereafter for counsel to get up and say merely that they join in. You know I said earlier in the case, and I repeat now, that any motions made may be deemed to be made on behalf of all of the defendants; that any rulings made by me as to any of the defendants may be deemed to have been excepted to by the counsel for each and every one of the defendants, and I think really unless you have something to add the mere statement that you join is superfluous in view of my statement. However, you may be brief.

Mr. Crockett: I fully concur with the Court's observation and I must say I only address the Court because I interpreted your Honor's remarks a few minutes ago that you wanted each one of us to indicate for the record—

The Court: No, I merely wanted to avoid reaching a determination of the motion and then have someone come afterwards and say he had not had his say even earlier and say that I decided the motion before you had an opportunity to have your say. If you have anything to add I shall hear it. If it is just repetition of what (T-8) Mr. McCabe has said I would rather not.

Mr. Crockett: I have no additional arguments to those made by Mr. McCabe.

The Court: The motion is denied.

Mr. McCabe: May I hand up a written brief in support of that motion, your Honor (handing). Here is a copy for the United States Attorney (handing).

May that be marked as a defendants' exhibit?

The Court: No. I see no occasion for marking briefs any more in this case than any other. If you desire me to examine it and give the matter further consideration I shall do so.

Mr. McCabe: Yes. It was for the purpose of avoiding taking up time in oral argument that I refrained from reading passages which I think should be in the transcript.

The Court: Yes, Mr. Sacher.

Mr. Sacher: May it please the court, since we last met here there has transpired an event affecting this case which I respectfully submit requires a dismissal of the

indictment. The event to which I specifically refer is a press conference held only a few days ago, last Wednesday or Thursday, I believe March 3, 1949, by the President of the United States. The day before Mr. William Z. Foster and defendant Eugene Dennis had (T-9) jointly issued a statement to the people of the country and to the press in which they outlined their position on the questions of peace and war. In the course of that statement those two gentlemen had occasion to make their observations concerning the danger which our country now faces in regard to war.

I shall not burden your Honor with a reading of the statement in full but I should like briefly to summarize it, if I may.

That statement, in brief, alleged that the threat of aggressive war—

The Court: You mean the statement by the defendants Foster and Dennis?

Mr. Sacher: By Foster and Dennis, and I am giving your Honor the background of the President's statement in this context: the statement asserted that the threat of aggressive war and the instigation and commencement of war emanates from Wall Street and its cartel connected trusts; that the Communists join with millions of other patriotic Americans in opposing those who seek a new world war; that they strive for peace and friendship between the nations, the Soviet Union and new democracies in Eastern Europe and all other people, and that they would oppose an aggressive (T-10) imperialistic war as destructive of the interests of the American people and would endeavor to bring such a war, if it should come to pass, to a speedy conclusion on the principles of a democratic peace; that the Communist Party will work with all those who seek peace, democracy and social progress and that the American people should return our country to the peace policies of the late Franklin D. Roosevelt, the grand design and cornerstone of which is firm American-Soviet friendship.

On the following day the President of the United States was met by newspaper men at his usual newspaper conference and he was asked for comment on the state-

ment issued by Messrs. Foster and Dennis. His first response, as reported in the New York Times of March 3, 1949, and this was one of the unusual situations in which the President authorized direct quotation of himself, he said as follows, and I quote:

> "I have no comment on the statements by traitors."

Later that same morning he modified that statement as reported in the New York Times and the following statement by the President is also reported in the same paper,—the statement, again quoted with authorization, reads as follows:

> "The question was whether I had any comment to make on what had been said by the Communist (T-11) leaders of this country as to what they would do in case of attack by Russia, and I said that I had no comment to make on such statements by traitors."

I submit, your Honor, that this statement coming as a culmination of statements made by the President of the United States over a period of approximately five or six months, ranging from the presidential election campaign last fall down to the present time represents such an incitement of the community and represents so unconstitutional an invasion of the constitutional rights of these defendants as to make a lawful trial of this indictment utterly impossible. The constitutional provisions on which we rest are the Fifth and Sixth Amendments. The Fifth, as your Honor knows only too well, provides that no person shall be deprived of life or liberty without due process; and so far as the Sixth is concerned, it provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. I submit to your Honor that the two or three essentials of a trial upon accusation provided for by the Sixth Amendment have been made impossible by the President's unconstitutional statement. I say unconstitutional, your Honor, because I believe that the word "traitor" can have but one (T-12)

significance in the context in which it was uttered. The President could have meant nothing less than that these defendants are traitors to their country. Traitors are those who levy war against their country, or who aid and abet their enemies, giving them aid and comfort.

In the context of the indictment in this case, which charges nothing more than the exercise of the rights guaranteed by the First Amendment, namely, the rights and freedoms of speech and of press and of assembly, the President has given not only to this indictment but to the statement of the defendants, of which I gave your Honor the quintessence, a sinister meaning going far beyond that which is contained within the indictment.

Now the President of the United States speaks from a high eminence. It may seem a little bit like supererogation to have to quote an Englishman as to the position of the President—

The Court: Well, I do not think you need argue too lengthily about it. I think I understand your point.

Mr. Sacher: But I shall be happy, your Honor, to expedite my argument. I would like to call your attention to one or two other items which shape and give content and significance to the charge which the President made on the eve of this trial. I think (T-13) in that connection it is worthy of notice that last September, on September 28th, while he was touring the country in the course of his campaign, the President took occasion—

The Court: Well, I do not desire any details of that kind. The motion is denied.

Mr. Sacher: Well, your Honor, I should like then to note my objection to your Honor's insistence on denying motions before you have heard the full argument, and I have an objection to being limited.

The Court: Well, I have heard the gist of it already.

Mr. Sacher: Well, I do not think, your Honor, that has been made clear, that what is involved in this application is that the President of the United States who himself controls the Executive arm of the Government under whom the Attorney General of the United States of America, and the United States Attorney for the Southern District of New York, function, has committed an act which if

committed by the Attorney General or by the United States Attorney would call for the most drastic remedies in the situation, and I therefore say that when the President of the United States has resorted to unconstitutional conduct which makes it impossible for these defendants to have the kind of a trial (T-14) guaranteed by the Fifth and Sixth Amendments, then I submit to your Honor to dismiss this indictment and say that such interference by the Executive with the judicial processes of the country and with the enjoyment of those basic rights guaranteed in the Fifth and Sixth Amendments must bring the consequences which such statements necessarily entail, and I therefore urge upon your Honor the absolute necessity, if constitutional government and constitutional administration of justice is to prevail, the necessity of dismissing this indictment at the present time.

The Court: Motion denied.

(T-15) Mr. Crockett: If the Court please, I have a motion that I should like to address to the careful consideration of your Honor. It is a motion grounded upon the provisions of the Sixth Amendment to the Constitution, and in effect I move on behalf of the defendants whom I represent that the indictment herein be dismissed for the reason that there can be no speedy and public trial of the issues in this case by an impartial jury at any time within the foreseeable future, and therefore with proper regard for the mandate of the Sixth Amendment to the Federal Constitution, requires that this indictment be dismissed.

In support of this motion I should like to direct the Court's attention to the following facts upon which I shall comment but briefly. The first, of course, is the public utterances made by the President to which Mr. Sacher has just alluded. The statements of the President are the subject of an affidavit by the defendant Eugene Dennis, which I should like to file in support of the motion I am now making.

The second point with which I should like to address myself has to do with certain happenings of more or less recent nature, which I respectfully submit have so prejudiced the minds of prospective jurors here in the Southern District of New York that it will be impossible (T-16) to impanel an impartial jury within the foreseeable future.

The Court: Before you proceed further, let me see the affidavit so that I may look at it.

(Mr. Crockett hands paper to the Court.)

Mr. Gordon: We do not seem to have a full copy of that affidavit, your Honor.

Mr. Sacher: The affidavit is full, your Honor. What are missing are newspaper clippings, and they are described and I imagine easily obtainable.

The Court: Is it desired that I postpone consideration of this until the Government has copies of the full affidavit, Mr. McGohey?

Mr. McGohey: No, I do not think so, your Honor. I would just like to call the Court's attention to the fact that we do not have the complete document. Perhaps when your Honor is finished with it I can have it.

The Court: Yes, I will hand it to you.

Mr. McGohey: Thank you.

The Court: (After examining) Was this statement by Foster and Dennis the first to be disclosed in this edition of the Daily Worker, Thursday, March 3, 1949?

Mr. Sacher: No. It was distributed for all the press simultaneously.

The Court: I thought this clipping was put in—

Mr. Sacher: As a matter of fact, I am informed (T-17) it appeared in the metropolitan press the night before it appeared in the Daily Worker.

The Court: (After further examining) Very well, Mr. Crockett, you may proceed.

Hand this to Mr. McGohey (handing to clerk).

Mr. Crockett: The motion which I have just made to the Court is not predicated alone upon the statements made by the President; it is also predicated upon the statements made by various other high Governmental officials, which I submit have so prejudiced the minds of the people in this district that it will be impossible to obtain a fair and impartial jury. I refer specifically to a statement made by the Attorney General on the day following the President's inaugural address, which was January 21, 1949, at which time he stated, and I quote:

> "The Department of Justice is ever watchful of this potential danger threatening the personal liberty and security of every American citizen as well as the safety of the nation."

That statement was made against the background of the preceding statement by the Attorney General to the effect that the Communist Party seeks to undermine our democratic institutions.

In addition, therefore, to these official statements emanating from high governmental sources, we have also (T-18) had a recent report of the Un-American Activities Committee which was dated December 31, 1948, and which stated to this effect, "The evidence now before us establishes beyond a doubt that espionage and treasonable activity against the United States is in fact the primary purpose of the organization."—the "organization" having reference to the Communist Party. Obviously such statements coming from the Government itself command some attention on the part of the citizens. It might therefore be assumed that given wide publication that these statements did receive in the metropolitan press, they have been generally read by all persons who might later present themselves before this Court as prospective jurors. In addition to that, the statements are themselves obviously false. Compare, for example, the statement made by the House Un-American Activities Committee with the fact that in the history of the American Communist Party not a single member has ever been indicted, let alone convicted, for any treasonable conduct, and yet here we have an official agency of the Government saying that the purpose of the Communist Party is to resort to espionage and to treasonable activity.

Now in addition to these prejudicial statements by governmental agencies, I should like to call the Court's attention to a series of nightly anti-Communist radio (T-19) broadcasts by Mr. H. R. Knickerbocker over Station WOR in this city, which purport to be authoritative broadcasts of what transpired here in this courtroom, and yet I submit that any fair-minded persons who compare the copy of Mr. Knickerbocker's broadcast with the copy of the official court record in this case cannot help but be impressed to

the extent to which he varies from the truth. While I take personal exception to some of his characterizations of my conduct and the conduct of my clients, I will grant to him the same rights that I grant for myself, and that is the right to freedom of speech. I do not propose nor do I think that this Court has the authority to place limitations upon the boundaries of fair comment under which Mr. Knickerbocker purports to speak. I suggest, however, that the Court is confronted, because of these broadcasts, because of these official governmental statements, with a dilemma. On the one hand we must recognize the requirements of free speech and free press in so far as the reporters who are in attendance at this court are concerned. On the other hand, we have to recognize the requirement that these defendants be tried, if at all, before a jury uninfluenced by public propaganda. Somewhere in between those two points this Court must decide what, if any, action shall be taken to uphold both (T-20) aspects of this constitutional problem. Obviously, as I said at the outset, you cannot curtail the right of these gentlemen to make their comments. It necessarily follows that we must, of necessity, wait until sufficient time has elapsed to allow the public consciousness to be cleared from these prejudicial comments before it will be possible to get a fair trial.

The Court: You and your colleagues have a way of going on at such length that I forget what the motion was. Now what is the specific motion that you are arguing—to dismiss the indictment?

Mr. Crockett: The specific motion that I am arguing now is that the indictment be dismissed—

The Court: That is what I thought.

Mr. Crockett: —because under the mandate of the Sixth Amendment to the Constitution, these defendants are entitled to a speedy trial before an impartial jury, but I am projecting, and what I firmly believe is that at no time within the foreseeable future can we get an impartial jury, and therefore at no time within the foreseeable future can we have what the Constitution requires, a speedy trial. The point of my other example, for example, a reference to Mr. Knickerbocker and to various statements emanating from high governmental authorities is intended to indicate just how the minds of the people (T-21) in this district have been prejudiced.

Now the third source of prejudice that I should like to mention is the constant stream of anti-Communist newspaper and radio editorial comment. I am sure this Court is aware that even today there is comment in the paper about an indictment against some alleged spies of a foreign agent. There has been a tendency on the part of the press, which I have no doubt your Honor has noticed, that in reporting any such thing that refers to foreign allegiance or to spies and so forth, to link in the same story references to this particular case. The obvious purpose, of course, is to create the impression in the public minds that these defendants are being tried for something that is treasonable, for something that purports to link them with some foreign agent. As a matter of fact, there appears a full page cartoon, I recall, in the Journal-American for—I shall mention the date later. The Court probably saw it, a full page cartoon—

The Court: How long do you think you will take with this argument, Mr. Crockett?

Mr. Crockett: I doubt if I shall be more than seven more minutes, your Honor.

The Court: All right.

Mr. Crockett: This cartoon appeared in the Journal-American for January 18, 1949—

(T-22) The Court: I do not think I want to hear any more argument on it, Mr. Crockett. You made so many motions, you and your colleagues, about the press and about this alleged propaganda against the defendants, and so on, and it is really a renewal of the same motions that I have denied repeatedly before.

Mr. Crockett: Well, will the Court permit me to just enumerate the occurrences that I desire to refer to?

The Court: No, I do not think so. I find that at the slightest opportunity we have these long arguments that I cannot help but feel are meant for purposes outside the court rather than to influence the Court in its decision, and it seems to me that unless there is something different in character from what you have already adverted to, it may be omitted. Now if it is just the sort of thing that you have already spoken of, and it is merely an accumulation of further instances, I do not think that I require to have it, unless it is something of a different character than you

pressed upon me earlier, not only on former occasions but earlier this morning, why, I will hear it. I do not desire to cut off argument that is to the point but I do feel that there must be some point at which this repetition must cease.

Mr. Crockett: May I ask if the Court would (T-23) consider repetitious if I address myself to the recent statements of Francis Cardinal Spellman to more than two million Catholics in this district, statements which called upon them to mobilize a crusade against Communism generally and against all Communists? I suggest that the character of the statement—

The Court: Well, there is no jury before me, you go ahead and argue in extenso.

Mr. Crockett: I do not wish to argue—

The Court: You may take hours if you choose.

Mr. Crockett: I have no desire to speak hours, but I indicated before I might readily conclude my remarks within seven minutes.

The Court: Well, go ahead and do it then.

Mr. Crockett: I have already referred to the statement made by Cardinal Spellman. I am sure that everyone who lives in the jurisdiction of this court has either seen or read that statement or heard it over the radio or seen it in the local theatres.

The Court: Well, I happen to be one of the ones who hasn't. You assume everybody has seen it.

Mr. Crockett: Well, I think your Honor is an outstanding exception.

The Court: I happen to be one.

Mr. Crockett: I am sure your Honor is the outstanding (T-23-A) exception, and I can refer to the issue of the New York Times—

The Court: Perhaps I have been kept so busy with the conduct of this trial that I haven't had an opportunity to read it, but that is neither here nor there.

(T-24) Mr. Crockett: The statement made by Cardinal Spellman was on February 6, 1949, and your Honor will find it reported in the February 7th issue of the New York Times. The point that I wish to make in connection with that statement is that a very large portion of the population here in the Southern District of New York belong to the Catholic faith. I think that any remarks ema-

nating from the head of the Catholic Church in this area is bound to command themselves certainly to the attention of those people who live in this section and who adhere to the Catholic faith. I wish, however, to emphasize one point, that I believe might be overlooked, and I think should not be overlooked, and that is when the Cardinal speaks on a political subject he is not necessarily speaking as a voice of the Catholic Church from a spiritual point of view. Obviously in commenting upon the trial of Cardinal Mindszenty he was dealing with a political topic. Yet he spoke from the background of his spiritual position, from the pulpit of St. Patrick's Cathedral, dressed in the robes of his church. Under such circumstances while there might be some Catholics in this district who might not be inclined to follow purely political advice, when that advice is given in the context of a spiritual pronouncement, the effect upon the Catholics of this district is bound to be (T-25) obvious. I shall not enlarge upon a similar incident which was the recent statement by Bishop De Wolf who, your Honor will recall, as head of the Protestant Episcopal Diocese of Long Island, in which he similarly called for a crusade against all Communists and necessarily against those Communists who are defendants in this case.

The burden of my remark, if I may summarize it very briefly, is that the prejudice created, the animosity which has been engendered in the minds of the public in this district is such that at no time within the foreseeable future can we say that assuming there is no more of these occurrences, the minds of the people will be sufficiently clear that we will be able to get an impartial jury to judge the issues in this case, and since that is true, it necessarily follows that it is impossible to obtain for these defendants a speedy trial before an impartial jury to which they are entitled under the Sixth Amendment of the United States Constitution.

Now in support of my argument I should like to offer to the Court at this time the affidavit of defendant Benjamin J. Davis and ask that it be marked as an exhibit to my motion, and I also have a copy here for the Government (handing).

The Court: Do you have any more affidavits that are in support of this motion, besides this one?

(T-26) Mr. Crockett: I have no more at this time your Honor.

The Court: Have any of your colleagues got affidavits that they want to submit in connection with this motion?

(No response.)

The Court: I may say for the purposes of the record that the affidavit which was handed up to me a few moments ago, and which I read, is the affidavit of Eugene Dennis sworn to the 7th day of March, 1949, with two newspaper clippings as exhibits attached thereto.

Mr. McGohey: May I ask your Honor what was the date of the jurat? What date was it sworn to?

The Court: The 7th of March.

Mr. McGohey: The 7th.

The Court: We will take a short recess.

(Short recess.)

(T-27) The Court: I have read this affidavit of Benjamin J. Davis, Jr. sworn to the 7th day of March, 1949, and the transcripts thereto annexed. Is there something additional to be said? If no, this motion is denied.

Mr. Crockett: If the Court please, I should like to move at this time that the trial of this case be continued for the period of 90 days, and in support of that I re-offer the affidavit of the defendant Benjamin Davis.

I have only one argument I should like to address to the Court and that is it might very well be that at the expiration of the 90-day period the Court would be in a better position to assess the extent to which the minds of the public have been influenced by the wave of propaganda to which I have referred and therefore to determine whether or not it will be possible in the future for these defendants to obtain a speedy trial before an impartial jury, and I respectfully submit the trial should be continued for the period of 90 days.

Mr. Gladstein: May I say something on that point?

The Court: Yes.

Mr. Gladstein: I gather from your Honor's remarks this morning the Court regards speed as something of a virtue—

(T-28) The Court: Well, I don't know. A good many people have different opinions on that. You have always been arguing, you and your colleagues, that I have been rushing you to trial. It has not seemed that way to me.

Mr. Gladstein: That is a matter of opinion.

The Court: And I suppose you and I cannot be expected to agree on that.

Mr. Gladstein: Certainly on that I think the facts are with us. But my point is this: whatever virtue may attach to your Honor's desire to speed, I think more important, and which your Honor must agree, is the necessity for a court to take that time to give thoughtful, considered, judicious appraisal of the motion which, on this phase, is obviously not capricious and which raises a fundamental point, a point as to which any court should be eager to examine all the facts and the evidence and circumstances said to support that point.

The Court: You mean the motion to continue?

Mr. Gladstein: Yes, your Honor, and I want to address myself to one point of fact in that regard, and that is the statement last week of the President of the United States. Now, your Honor, I won't speak of another question of fact except that in connection with my argument in support of the motion for a continuance.

I do not see how it is conceivable, I do not (T-29) see how anyone in the wildest stretch of imagination could conclude these 11 men, with the two I represent, could possibly get a fair, dispassionate consideration from 12 people, all or most of whom unquestionably have read or heard of the statement of the President, the President of the United States, who took this unique occasion to publicly point his finger at 11 men who are on trial charged with having formed a political party and with peacefully advocating the doctrines of that party, men not charged with treason, with espionage, with sabotage, or anything of that sort—

The Court: You always leave out, you and your colleagues leave out the part about overthrowing the Government of the United States by force and violence. Other people are going to remember about that. There is no

use always using the words that leave out that vital and central fact.

Mr. Gladstein: Then I will put it in, Judge.

The Court: I don't think you should just leave it out every time, because that is what the case is about.

Mr. Gladstein: The charge is that these 11 men formed a political party which was to teach the doctrines of Marxism and Leninism, including, according to the indictment and according to the construction of the United States Attorney, advocacy of the duty or necessity (T-30) of overthrowing the Government by force. That is the charge. It still is a charge with respect to, and not entirely confined within, the realm of spoken and written ideas, and nothing more, not a word is contained in the indictment charging that these men did anything by way of an attempt, by way of conduct or in any other manner to actually overthrow the Government of the United States.

Nor is the charge that of treason, a well defined charge in our statutes and in our Constitution. Nor is there any other claimed offense.

My point is this: when men are charged, based upon a construction of their statements, which they deny, the validity of which they deny, a construction which they claim to be false, but regardless of that, when the charge against them is merely that they have said things upon which the Government places an onerous and odious construction, and that is the charge that they have said something, now the President of the United States takes advantage of all of the media of public communication and of his high office, knowing that this case is pending for trial, and as I say pointing his finger publicly at this case, says of these men that they are traitors.

Now I think no one, no one who is honest with (T-31) himself, no one who is capable of grasping the realities of life, as every judge ought to be, could justifiably—

The Court: I think I know something about them, but not too much.

Mr. Gladstein: I am here to urge perhaps some light that will perhaps make larger the point of information and the grasp that the Court may have of those realities.

Your Honor, you have tried lawsuits. I have tried lawsuits. Nobody who has ever tried lawsuits can deny that far, far less is needed to make impossible an administration of a fair trial than what has just occurred in this case.

If the United States Attorney alone, if Mr. McGohey sitting here had had the temerity last week to make a statement to the press that he was about to go to trial against 11 men whom he called traitors, that, in line with established decisions, long tradition and good old-fashioned logic and American principles of justice would require that there be no trial at this time.

(T-32) How monstrous it is for us to pretend, Judge, that we can get twelve people here today under these circumstances to sit in judgment upon eleven men, who though not charged with being traitors, have been called traitors by the President of the United States?

Consider for a moment the pressure upon the minds of the prospective jurors; consider what happens to those minds. Those minds are closed to any real possibility of the reception of a favorable appeal from the defense. Their consciences are closed.

Moreover, those twelve men sitting in the jury box are aware, keenly aware by this last act of the President of those intangible but tremendous pressures which have been brought to bear upon them. What, in effect, the President has said is that he, representing the Government of the United States, expects, because of his characterization of the defendants here that the twelve men and women who compose the jury shall return no other verdict than guilty.

The Court: Don't you realize that you are just repeating what your colleagues have said, Mr. Gladstein?

Mr. Gladstein: No, I think I am not.

The Court: If that is not repetition, then I have just lost all meaning of the term. You are putting it in slightly different words.

(T-33) Mr. Gladstein: Different words convey different ideas.

The Court : I happen to be of the opinion that a jury, a fair and impartial jury, can be chosen. That remains to be seen.

Mr. Gladstein: And I am trying to urge upon your Honor that upon a good look at the situation this Court should come to the conclusion a fair and impartial jury cannot be chosen at this time, and I want to say in my judgment, looking at it down here, and I am not arguing on the motion to dismiss but on the question of continuance, looking at it from here, not in the chambers in which perhaps for some necessity a federal judge must seclude himself to look at it, from here, your Honor, the President's statement, the weight that attaches to that statement, the communication of that statement to the potential jurors all add up to one thing; they virtually guarantee the impossibility of securing twelve persons, unprejudiced by the impact of that remark.

And in conclusion I urge your Honor to give consideration to this: It is not just a question of the eleven defendants, or the two I represent. There is more to it than that. If this kind of thing can happen to eleven men because they are Communists it can happen to anybody. If we are going to establish the proposition (T-34) as a precedent that you have to go to trial—

The Court: Now, Mr. Gladstein, I have said two or three times already, and I am going to say to these jurors, so there won't be any misunderstanding, these men are not being tried because they are Communists generally, or because they are members of the Communist Party in general. They are charged here with a specific charge; to form a Communist Party to advocate the destruction of the United States Government by force and violence, and that is the charge, and there is no use saying that they are being tried because they are Communists, because they are not, and every juror that comes in here is going to understand that, so there is not any possibiliy of misunderstanding. And this idea of being tried by way of guilty by association is going to be plainly explained. There is nothing of that in this case whatsoever. These individuals, as such, each one separate from the others, is being charged specifically with a crime involving a specific intent, and if you think there is going to be some misunderstanding during this trial about what these mean are charged with

and what they are being tried for, you will find that you are very much mistaken, because that I am going to make plain to these jurors and everyone that is concerned.

Mr. Gladstein: I assumed that that would be (T-35) true, your Honor.

The Court: You speak as though it were just the contrary to what I have stated.

Mr. Gladstein: No, I certainly went on the original assumption, which required no fortification that the Court would question the jury, the prospective jurors, or in questioning them would certainly not depart from the contents of the actual indictment. I assumed that.

The Court: That is a good assumption.

Mr. Gladstein: My point is even after assuming that and regardless of what the Court says, regardless of what the Court asks, regardless of what information the Court seeks to communicate to the prospective jurors as to their sworn obligation to be free from bias and free from prejudice, that knowing in the course of a trial the jurors will be called on to pass on a variety of matters, including such things as credibility, my point is they are being brought into this jury box at a time when they are fresh from receiving the impact of the universal communication by the President in which he has called these defendants traitors.

The Court: All right. I don't want to hear any more. The motion is denied.

Mr. Crockett: Might I say, your Honor, that if your Honor charges the jury in the words which your (T-36) Honor expresses, as I got them—

The Court: If there is some little difference between that and the indictment you can take it from me now I will read the indictment so there won't be any little variety of a comma being left out or some little words I inadvertently dropped out. I am going to read it exactly from the indictment. So you need have no concern about that.

Now let us have the jurors.

Mr. Isserman: If the Court please, I have a motion to make. I might also have it noted for the record, and it is my understanding that the public have been excluded.

The Court: Yes, the jurors are going to take up all the room.

Mr. Isserman: But at this point we are not at that stage and I would like to object to the exclusion of the public.

Mr. Gladstein: May I interrupt Mr. Isserman to make the statement for the record that I deem the order of the Court—I was not aware the Court had made an order but I have observed since the proceeding began that over ten per cent of the seating capacity of this courtroom is vacant.

The Court : We are waiting for the jurors to come in.

(T-37) Mr. Gladstein: But in the meantime this is supposed to be a public proceeding and I object to that order of the Court which excluded the public.

The Court: You say there are no members of the public here? I deny that.

Mr. Gladstein: Well, there are some 20 or 30 representatives of the press seated in that portion of the courtroom that was assigned to them.

The Court: Aren't they members of the public?

Mr. Gladstein: They may be, but there is good authority, your Honor, that simply having the press present does not make a proceeding a public trial and I want to object to whatever the Court made that accounts for the fact that ever since that time this morning we have not had a public proceeding. Everything that happens in a case in the federal court is entitled to be public.

The Court: The proceedings are void in your opinion?

Mr. Gladstein: I say this, your Honor has denied us, since the proceeding began, the benefit of a public trial and I object to it.

The Court: I have not denied anything.

Mr. Gladstein: Your Honor has not permitted the public to be present.

The Court: I don't know where you get that. (T-38) Naturally they could not bring the jurors in here without some place for them to sit.

Mr. Gladstein: I understand from your Honor's statement that for the purpose of leaving room for prospective jurors the public has been excluded up to the present time.

The Court: I had not excluded the public but if you want me to bring them in and then send them out again as soon as the jury come in I will do that. It seems to me silly, but if you think it is important—

Mr. Gladstein: I think it is important at every stage of this proceeding, and any proceeding the matter should be thoroughly public.

The Court: The more confusion you get the better you like it, but it did not seem to me to be—

Mr. Gladstein: The more the public is in attendance, as Judge Cooley had occasion to observe, the better type of justice the defendant can get.

The Court: How long do you lawyers expect to take with additional motions, because if it is going to be some little time I will let the public come in.

Mr. Isserman: I think it will be some time.

The Court: You will be about how long?

Mr. Isserman: I said it would be some little time. I have a motion which goes to the indictment which I would like to argue fully and which raises matters (T-39) not heretofore argued.

The Court: Bring the public in. Tell them, however, they will have to go out as soon as the jurors come.

Mr. Saypol: There are no public out there.

Mr. Gladstein: I think it should be stated that this morning the press, the Times and the New York Herald-Tribune—

The Court: Don't tell me about the press. We are not running this court by the press.

Mr. Gladstein: I wish to say Mr. Saypol issued a public announcement to the effect that the public would not be admitted and did not call your attention to the fact that there is none of the public outside.

The Court: I do not want to hear this constant reference to the press. I am running this court and not the press.

Go ahead with your motion. If there are any members of the public outside, show them in. If there are not, that disposes of it.

Mr. Gladstein: May I take a moment to inform the Court that I have been advised by someone associated with the defense that guards in this courthouse excluded mem-

bers of the public from getting through the corridor and to this courtroom since early this morning and that accounts (T-40) for the fact there are no members of the public outside in the corridors immediately adjacent to the courtroom. I think in all fairness Mr. Saypol should have advised the Court of that fact as long as he indicated the fact that people were not waiting.

The Court: Which remark, based on the information of one of your colleagues, is on the record. There is nothing I can do about that.

Now we will hear from Mr. Isserman.

Mr. Isserman: If the Court please, I desire to move on behalf of my clients to dismiss the indictment on constitutional grounds; on the ground that the indictment fails to charge an offense against the United States.

The Court: I do not desire to hear argument on that. I have studied very carefully Judge Hulbert's opinion and the papers submitted to him, including the briefs, and I am of his opinion.

Mr. Isserman: If the Court please, I am addressing myself to grounds which were not submitted to Judge Hulbert.

The Court: If you have grounds that were not urged before Judge Hulbert I will hear them, but the grounds alleged before him were argued very extensively. I know the motions were other motions besides the motions to dismiss the indictment for constitutional grounds, but the motions in all took three solid days of argument before Judge (T-41) Hulbert. I have studied everyone of those papers, including the briefs with utmost care and have read the cases, and I agree with Judge Hulbert's conclusion. Whether in the view of such evidence as may be adduced during the trial I shall have the same view of the constitutionality of the law as applied to the evidence actually produced is something different, but as far as the matter stands now I have given it the most careful study and all I am hearing is something new that was not argued before Judge Hulbert.

Mr. Isserman: In the first place, I would like to make my motion as such without argument in its entirety, and then I will confine my argument to that part of the motion

which has not been argued or ruled upon by Judge Hulbert.

The Court: Very well.

Mr. Isserman: I move to dismiss the indictment on the following grounds:

That the indictment fails to set forth any offense against the United States.

That this Court has no jurisdiction to proceed to a trial of the defendants on the indictment herein;

That the indictment herein was returned by the grand jury solely as the result of undue and unlawful influence and pressure exerted upon said grand jury;

(T-42) That the indictment herein was returned by a grand jury selected illegally and in a manner not calculated to obtain and not resulting in a body or group truly representative of the community;

That the said grand jury were not impartial and fair in their determination to return the indictment herein and to compel defendants to stand trial under the alleged indictment would deprive them of their liberty and property without due process of law under the First and Sixth Amendments of the United States Constitution;

That the provisions of the statute under which the indictment is laid, Title 18, U. S. Code, sections 10, 11 and 13, as applied and construed and on their face are unconstitutional and void in that they constitute a Bill of Attainder in violation of article 1, section 9, clause 3 of the Constitution of the United States;

That the provisions of the said statute are unconstitutional and void on their face, and as construed and applied to the indictment in this case, in that Congress was without power, express or implied, under the Constitution to enact said provisions;

That the provisions of said statute are unconstitutional on their face, and as construed and applied in this case, in that they deprive the defendants of freedom of speech, press, assembly and the right to petition for (T-43) redress of grievances guaranteed to the defendants by the First Amendment of the Constitution of the United States;

That the provisions of said statute are unconstitutional and void on their face, and as construed and applied in

this case to this indictment, in that they deprive the defendants of the freedom of association and the political and personal rights and liberties guaranteed to the people by the Ninth and Tenth Amendments to the Constitution of the United States.

(T-44) The provisions of the said statute on their face and as construed and as applied in this case are so vague, indefinite, ambiguous, arbitrary, capricious and unreasonable as to fail to define an offense constitutionally and as to fail to apprise the defendants of the nature of the matters declared unlawful thereby, and otherwise to deprive the defendants of their liberty and property without due process of law, in violation of the Fifth and Sixth Amendments of the Constitution of the United States.

That the indictment fails to allege any overt act in violation of the provisions of said statute and of other statutes in such case made and provided, and in accordance with the provisions of law.

That the indictment fails to allege all of the elements of the alleged offense as required under the provisions of the First, Fifth and Sixth Amendments to the United States Constitution, and as required by the statutes and law applicable to the indictment.

That the indictment is void under the First Amendment because on its face it establishes that no clear and present danger arising out of the alleged acts of the defendants of any substantive evil exists. The indictment is void because of vagueness, uncertainty, ambiguousness and indefiniteness. It does not (T-45) inform the defendants of the nature of the accusation against them as required by the provisions of the Sixth Amendment of the United States Constitution, and to compel the defendants to stand trial on the same, denies them due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

The indictment is void under the First Amendment in that it imposes a previous restraint upon publication by seeking to punish the defendants for an alleged agreement or conspiracy to teach and advocate certain alleged principles and charges no overt act of any kind whatsoever.

Now in the argument before Judge Hulbert, the position of the defendants and the grounds upon which they urged their argument is thus summarized by the Court, and I am reading from Judge Hulbert's opinion—

The Court: Now you have gotten through with your motion. This is argument.

Mr. Isserman: I am indicating the area covered by Judge Hulbert, and the area not covered.

The Court: I say, have you finished your motion?

Mr. Isserman: That is correct, I have finished my motion.

The Court: So that you are proceeding with the argument and you are going to make it plain to me that (T-46) what you are arguing is new matter.

Mr. Isserman: That is correct. The decision of Judge Hulbert confined itself substantially to the unconstitutionality of the statute as distinguished from the charge now made as to the unconstitutionality of the indictment.

Judge Hulbert held or summarized the defendants' position as follows:

"The defendants have moved"—that is on page 8 of Judge Hulbert's opinion.

The Court: I have it right before me.

Mr. Isserman: "The defendants have moved to dismiss the indictments contending that the statute under which they were returned is unconstitutional. Their argument is that the statute"—

The Court: You do not need to read any further. You say that he did not pass on the indictment but only on the statute?

Mr. Isserman: I think that he passed on the one allegation that the indictment did not allege any overt acts, which is one of the grounds urged.

The Court: I find no justification for that. Inevitably he passed upon the indictment. That is what the motion was.

Mr. Isserman: Well, if the Court please, the (T-47) grounds which he did not cover in his opinion are the following: grounds were not urged at that time. They were not covered at that time, and under Rule 12(2)(b) we may urge the invalidity of the indictment on constitutional grounds at any time in this proceeding.

Now the grounds which were not covered before Judge Hulbert was the fact that the indictment fails to allege all of the elements essential to the description of the offense as required by law, that the indictment is void because of vagueness and ambiguity, that the indictment is void because on its face it is—

The Court: I do not find any 12(2)(b). You have the reference wrong.

Mr. Isserman: I am talking about the Rules of Criminal Procedure.

The Court: You are talking about the Rules of Criminal Procedure, yes, and the subdivisions of Rule 12 are (a) and (b).

Mr. Isserman: Well, (b)(2).

The Court: Well, that is a little different. So I can find it—12(b)(2), now let me read it before you proceed.

Mr. Isserman: I thought that is what I had said.

The Court: (After examining.) I do not see (T-48) anything about any constitutional point there. You told me that that provides that any constitutional question can be raised at any time no matter how many previous motions have been made, and I just do not see it in 12(b)(2).

Mr. Crockett: If the Court please, it perhaps means any jurisdictional point raised.

The Court: Well, that is obviously a little different from the question of constitutional sufficiency.

Mr. Isserman: "The lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

The Court: All right. All that means is—

Mr. Isserman: The grounds that I urge are—

The Court: All that means is that you can move to dismiss the indictment for general sufficiency or lack of jurisdiction at any time, and you have already done it and now you are repeating it, and it is all right.

Mr. Isserman: If the Court please, I am not repeating it, and I am moving to dismiss the indictment because it doesn't charge an offense. I base my motion on constitutional grounds.

Now I was giving the third ground which was not covered by the argument or ruling—the argument before and the ruling of Judge Hulbert.

(T-49) The Court: Let me get them straight. The first one was that you say he only considered the statute and not the indictment, and I ruled that he couldn't have decided a motion to dismiss the indictment without considering the indictment. Now what was the second one?

Mr. Isserman: Yes, but, if the Court please, the statement which I make is that the motion that his ruling was on was a motion to dismiss the indictment on the provisions of the statute, and I now desire to argue that the allegations in the indictment, which are something separate, are insufficient and do not charge an offense committed against the United States, and no such argument was made before Judge Hulbert and no such ruling was made by Judge Hulbert.

The Court: It seems to me it was necessarily considered but, however that may be, perhaps—

Mr. Isserman: It could not have been considered—

The Court: Perhaps there is some little twist to it that is different.

Mr. Isserman: It is not a matter of a little twist; it is a matter of fundamental constitutional principles.

The Court: All right, let us have it.

Mr. Isserman: Now I would like to be allowed to present my argument.

(T-50) The Court: You are going to present it and I am following it closely. So far I haven't seen the slightest thing that was new. Maybe you will come to it.

Mr. Isserman: Only because your Honor hasn't allowed me to continue.

The Court: Only because what?

Mr. Isserman: Your Honor hasn't allowed me to continue.

The Court: Well, I say so far, as I have been listening intently, I haven't seen anything that wasn't present before Judge Hulbert, but perhaps you will come to it.

Mr. Isserman: Now the first item that was not before Judge Hulbert is that the indictment fails to allege all the elements of the offenses required by law.

The second item which was not before Judge Hulbert is that the indictment is void because of vagueness and uncertainty.

The third item that was not before Judge Hulbert is that the indictment is void because on its face it establishes that no clear and present danger of any substantive evil arises out of any of the alleged acts of the defendants.

The fourth ground which was not before Judge (T-51) Hulbert is that the indictment is void under the First Amendment in that it imposes and on its face, from its face it is clear that it imposes a previous restraint upon publication, none of which was before Judge Hulbert.

Now in respect to the last point, which I will argue first, the basic case is the case of Near v. Minnesota, 283 U. S. 697. In that case it was held that even though a newspaper had previously published or had been in the habit of publishing scandalous and libelous matter, that it was not subject to injunction under the state law as to future publications because such restraint upon future publications violated the First Amendment.

Now looking at this indictment, we find only that there was an alleged agreement or conspiracy of the defendants to organize a party to teach and advocate certain doctrines alleged in the indictment to be doctrines which stood for the overthrow of the Government of the United States by force and by violence. The essence of the indictment is not any utterance, is not any principle which was adopted, is not any matter which was taught or matter published by the defendants but an agreement to publish certain matters and to advocate and to teach certain things. This indictment charges only that the defendants agreed to teach something, (T-52) and agreed to advocate something by organizing the Communist Party. Thus we have prior to publication, prior to utterance, prior to the making of any statement, prior to the issuance of any doctrine a charge of crime. That is made evident by the fact that in the indictment there is not a single allegation of an overt act. Every one of the alleged specifications under the indictment are couched in the future, that the defendants would convene a meeting; that the defendants would cause certain resolutions to be adopted; that the defendants

would issue publications; that the defendants would teach and advocate certain principles.

Therefore, before a single utterance and before a single publication, the defendants are brought to trial for their agreement or conspiracy, as the indictment calls it, and that means that persons are being put in jeopardy and brought to trial for utterances not yet made, for publications not yet issued, and merely because they agreed that they would teach and advocate certain ideas and certain documents.

The Court: Now let me ask you something, Mr. Isserman. Do your colleagues desire to be heard on this motion of yours or will you be the spokesman for all?

Mr. Isserman: I do not know; I am carrying the (T-53) ball, as the statement goes.

The Court: Well, you see, I will allow you a certain time on that, and if your colleagues desire to be heard, why then we will split the time up. We must accordingly know now whether having taken three days on the arguments before Judge Hulbert you are the only one to argue or whether the others desire to argue also, and if I do not hear any statement by your colleagues that they desire to argue, I will take it that you will present the argument by yourself.

Mr. Gladstein: Well, speaking for myself, Judge—

The Court: All you need to do is say that you want to argue.

Mr. Gladstein: I did not want to say that at all.

The Court: I see.

Mr. Gladstein: But perhaps we would save time if your Honor permitted me to say what I would like to say.

The Court: Well, you always like it a little bit different, and you may have your way.

Mr. Gladstein: Thank you. Well, I wanted to say that I do not know and I can't know because I have planned to make no argument on this question—

The Court: All right.

(T-54) Mr. Gladstein: —and therefore I will want to—

The Court: All right, I will hear defense counsel jointly or severally or any way that they desire in the time be-

tween now and one o'clock, which is almost fifty minutes, to present whatever they desire to argue on this motion.

Mr. Isserman: If the Court please, I desire to object to the need of arguing against a deadline on a matter of vital importance.

The Court: Well, you know—

Mr. Isserman: Because, after all—

The Court: —it has already been argued for several days before another judge.

Mr. Isserman: Your Honor, these are matters which were not raised before that judge. They are matters which were not required to be raised before that judge. They are matters which we have a right to raise before you at this time, and furthermore, if we are correct, as the cases indicate we are, this trial should not have proceeded.

The Court: Well, it is going to be one o'clock just the same.

Mr. Isserman: Now if the Court please, the vice of the first ground which I have mentioned, in the (T-55) fact that this is an effort to punish publication for speech or teaching or advocacy before the event takes place, will be emphasized by my argument on the succeeding points.

The second point that I desire to argue is that the indictment is void on its face because it fails to allege essential elements of the crime which is sought to be charged. Now it is fundamental that a court lacks jurisdiction to proceed with an indictment unless an indictment charges all the necessary elements of a crime. In that connection the cases hold that it is not sufficient under a variety of different circumstances merely to follow the language of a statute which is general in its terms. The leading case on the subject which has been followed dozens of times—in fact I believe it has been cited over 120 times, not always on this proposition but in most cases on this proposition, is United States v. Carll, 105 U. S. 611, in which the Court stated that in an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the events intended to be punished, and the fact that the statute in

question, read in the light of the common (T-56) law and all other statutes on like matter enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all of the facts necessary to bring the case within that intent.

In the case of United States v. Hess, which follow the Carll case, in 124 U. S. 483, it was held that no essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital.

Now there are a number of cases, leading cases, including Pettybone v. U. S., 148 U. S. 197, Keck v. U. S., 172 U. S. 434; the Cruikshank case—U. S. v. Cruikshank—your Honor is undoubtedly familiar with that—in 92 U. S. 542, which bear upon and support this proposition.

In the Cruikshank case it was held that it was an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but that it must state the species, it must descend to particulars. An (T-57) agreement is made up of acts and of intent, and these must be set forth in the indictment with reasonable particularity of time, place and circumstance.

Now in that case, your Honor, the question was whether the defendants had deprived a person of rights granted or secured by the Constitution. The indictment was couched in the language of the statute, and the court pointed out that all rights are not so granted and secured, and whether one is so or is not is a question of law to be decided by the court and not by the prosecutor. Therefore, held the court, the indictment should state the particulars to inform the court as well as the accused. It must be made to appear, that is to say, appear from the indictment without going further, that the acts charged will, if proved, support a conviction for the offense alleged. I have numerous cases which apply this principle in varying fields, but in view of your Honor's time limitation I cannot take time now to develop the parallel of the application of this doctrine—

The Court: You know, Mr. Isserman, you are arguing a question of law. This talk about limitation of time, you and I know, your colleagues know, that in an appellate court, in many appellate courts you wouldn't have this much time to cover the whole case, let alone one point, so don't make statements that are so absurd.

(T-58) Mr. Isserman: Well, the situation, if the Court please—

The Court: You have plenty of time to argue the point, so go ahead and do it.

Mr. Isserman: In the appellate court there is a record before us, and there is a different situation.

Now we say that the indictment in this case does not allege all of the elements present because it does not allege that a clear and present danger either exists in respect to the alleged advocacy or teaching, either as a conclusion, merely by a statement to that effect—

The Court: Is there any case that holds that in these cases, cases of this type, there must be an allegation of clear and present danger in the indictment?

Mr. Isserman: I will get to that, your Honor—which we hold—

The Court: Well, is there such a case?

Mr. Isserman: There are some cases, your Honor.

The Court: I would like to know what they are.

Mr. Isserman: I will get to them. They are in my argument.

The Court: You mean you will come to them after you do something else. Well, go ahead and do it.

Mr. Isserman: Well, I am beginning to develop my argument—

(T-59) The Court: All right, go ahead. I am getting used to it. When I ask counsel for something they say no, they want to go their own way, so you may do it.

Mr. Isserman: Well, I will call your Honor's attention to the cases if your Honor wants them now, but it will take me a few minutes to find them.

The Court: Well, that is what I want. I do want them now.

Mr. Isserman: In the first place—

The Court: I just need the citations; I can read them myself. You can argue about them afterwards, but the

cases that hold that in cases of this type there must be in the indictment a specific allegation of clear and present danger, that is what I want.

Mr. Isserman: All right. I call attention, in answer to your Honor's question, to Fontana v. U. S., 262 Fed. 283; to U. S. v. Korner, 56 Fed. Supp. 242, supporting the same principle—

Mr. McGohey: What was the last page number?

The Court: 242—56 Fed. Supp. 242.

Mr. Isserman: —and to the case of Hartzell v. U. S. 322, U. S. 680, which does not refer to indictments but refers to legislation.

The Court: You may proceed.

Mr. Isserman: Now if the Court please, we have (T-60) indicated that the indictment does not contain any allegation as to the existence of a clear and present danger, although we would argue that that allegation by itself without any specification as to the nature of the clear and present danger would be insufficient. Nor does the indictment allege—

The Court: You say not merely that they must allege that but that an allegation that there is a clear and present danger is not enough, that there must be particulars and details of it?

Mr. Isserman: Yes. It would obviously not be enough, your Honor, because the clear and present danger doctrine, as developed by the United States Supreme Court, is not a hard and fixed rule but was described, as your Honor will recall, in Bridges v. Wickson as a working principle merely and not as any fixed standard. I will give you the citation for that case in a moment.

The Court: In your judgment must there be an allegation of assembled forces under arms in order to have a clear and present danger?

Mr. Isserman: I am sorry, I did not hear the remark.

The Court: I say, is it your view that in order to have a clear and present danger there must be allegations and proofs of assembled forces under arms? In other (T-61) words, as applied to these cases, must there be proof or allegations in the indictment that the defendants and their followers have assembled together under arms? Is that your contention?

Mr. Isserman: That is not my contention, your Honor, nor is it the position of the Supreme Court in respect to—

The Court: Well, what do you say is the type of thing that must be shown here?

Mr. Isserman: Well, I would like to refer to the case of Bridges v. California, 314 U. S. 252, when the Supreme Court said in 1941 the following:

> "What finally emerges from the clear and present danger cases is a working principle that a substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the farthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law abridging the freedom of speech or of the press. It must be taken as a command of the broadest scope that explicit language read in the context (62) of a liberty-loving society will allow."

Now turning—

The Court: Just a second. I would be interested to know what you think has to be shown to make a clear and present danger.

Mr. Isserman: If the Court please, that is a problem that the Government was faced with in this case and could not meet. We say the indictment shows nothing.

The Court: I suppose you prefer to remain silent on that.

Mr. Isserman: No, if the Court please. The only reason I remain silent is because understanding the Supreme Court position on the clear and present danger doctrine, and the fact that no limits have been stated with any precision, I cannot be more precise than the Supreme Court has been in many cases, but I do not want to say this, that the first time that the doctrine was announced in the Schenck case, the Supreme Court says that the words used must be used in such circumstances and must be of such a nature as to create a clear and present danger.

The Court: Incidentally, was there an allegation in the Schenck indictment of a clear and present danger specifically? I thought not.

Mr. Isserman: The point was not raised in that case but in the dissenting opinion—

(T-63) The Court: Well, was there such an allegation?

Mr. Isserman: I cannot say.

The Court: I do not think so.

Mr. Isserman: I cannot say at this point, your Honor.

The Court: And that is the very case that initiated, as I understand it, this doctrine of clear and present danger.

Mr. Isserman: That is right, and the doctrine developed—

The Court: So it seems to me a little queer that the cases that you cite are so specific on the necessity for such an allegation when the Schenck case, according to my recollection, had no such allegation.

Mr. McGohey: May I be of such help to your Honor?

The Court: Yes.

Mr. McGohey: I may suggest that there was no allegation set forth in the indictment in the Gitlow case.

Mr. Isserman: We will get to that.

The Court: That is what I thought.

Mr. Isserman: If the Court please, the principle was developed by the Supreme Court which struggled with it through a number of cases, and the development of those cases showed clearly the necessity for making such an (T-64) allegation. Now the clear and present danger doctrine provides that the words must be used in such circumstances and must be of such a nature as to create a clear and present danger, and therefore we say that had the indictment contained the allegation merely, that it would have been insufficient. We say that in order to meet the test which we say that the Government could not meet in this case because the indictment alleges no overt act, was to set forth the words used and the circumstances under which they were used to indicate the facts of a clear and present danger. Now the importance of that—or before I get into the importance of it, I would like to call the Court's attention to this fact, that in the Gitlow case which Mr. McGohey mentioned, there was a dissenting opinion, and in that dissenting opinion Justice Holmes said the following—and the reason that I quote is because at a subse-

quent time, in the case of Thomas v. Collins, just recently, Justice Rutledge made the square holding that the clear and present danger doctrine, which was the dissenting opinion in the Gitlow case, was adopted by the Supreme Court as its own.

Now in that case Justice Holmes said:

"If the publication of this document"—

and I call the Court's attention to the fact that in the (T-65) Gitlow case the document was some 29 pages of printed material which was set forth in the indictment at length in haec verba—

The Court: You can assume that I know these cases backwards and forwards because I have been studying them very carefully, and you may proceed on that assumption; if you would rather not, then you may go ahead.

Mr. Isserman: I will proceed on that assumption.

The Court: But I tell you that I have been studying them with the utmost care.

Mr. Isserman: All right. Now in the dissenting opinion in the Gitlow case, Justice Holmes said:

> "If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more."

This indictment does not even allege publication of words or utterances or teachings, and it alleges no (T-66) facts, no language, and no circumstances.

Now in the development of the doctrine, we found the court holding in Bridges v. California that the clear and present danger doctrine, that out of those cases emerged the clear and present danger theory as a working principle by which it would be determined under those cases, and our

position is, if the Court please, that with those allegations in this indictment under all the circumstances of this case and under the law, the indictment could not possibly be a valid indictment; but our position is further that when those allegations on any interpretation of these cases, without the allegations of clear and present danger, and of the acts and words which were uttered and taught and advocated, and without any allegation and setting forth of the circumstances under which they were uttered, this indictment must fall and cannot be sustained.

Now it is interesting to note that in the Hartzell case which I have already mentioned, Justice Murphy said the following—he was writing for the Court and said that any legislation punishing the making—

The Court: Let me interrupt you a second. There is something I meant to mention this morning. From the way I have proceeded with all my other cases, (T-67) when I write an opinion, if there is any fact in there which by inadvertence is incorrect, I welcome any opportunity to correct it, and I did so much working with the adding machine, adding and making up those figures there, that if either side has any suggestion that some figure or some other fact in there is inadvertently in error, I shall welcome any suggestion about that before I send it in to the West Publishing Company for publication. I do that in all my cases. There is nothing different about this, and whether you care to avail yourself of that opportunity or not is immaterial.

Mr. Isserman: Now if the Court please, in the Hartzell case, Justice Murphy held that any legislation restricting the right to speak and write freely required two major elements in order for an offense to be constituted. One of these elements was a specific intent to bring about the substantive evils; the second was the meeting of the clear and present danger rule, which was characterized as follows:

> "The second element is an objective one consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent."

(T-68) And "Both elements must be proved by the Government beyond a reasonable doubt,"—that appears on page 1236.

Now under the Sixth Amendment and under the Carll case and the other cases that I have cited, where in order to make valid a statute or to complete the definition of an offense, recourse must be had to law, common law or statute, outside of the statute under which the indictment is laid, there must be sufficient pleadings of the elements of the offense which are required to make valid the charge under the statute.

Now in this case the mere utterance of words under all of the Supreme Court cases cannot be punished. The mere teaching of words cannot be punished.

Even under the cases as they stand it is necessary to prove the existence of clear and present danger from the aspect of the words uttered and the circumstances under which they were uttered. In this indictment there is no such allegation whatever, no allegation of clear and present danger, no allegation of facts and circumstances from which clear and present danger can be inferred. In fact, if the Court please, in the Government's brief—

The Court: You mean the one submitted to Judge Hulbert?

(T-69) Mr. Isserman: In the Government's brief submitted before Judge Hulbert—

The Court: Well, I thought these were new points.

Mr. Isserman: Yes. I am referring now to the Government's brief and to an assumption which the Government made there to highlight this point.

The U. S. Attorney said on page 8:

> "Assuming arguendo that the clear and present danger doctrine is applicable to this prosecution, the test should only be applied after the evidence has been presented. In any event we submit it is impossible to conclude that the allegations of these indictments"—

here it is one indictment now—

> "accepted as true for the purpose of this action, viewed in the context of world events do not charge clear and present danger to the Government of the United States."

In other words, the allegations of this indictment viewed by themselves, viewed within the four corners of this indictment, cannot and do not meet any test under the clear and present danger rule. Mr. McGohey says in order to do so they must be viewed in the context of world (T-69-A) events. Well, if the context of world events is to be brought into this case, then it should be set forth in the indictment, and we are entitled to know what world events, what proof do we have to meet, what is the context of which Mr. McGohey speaks so that we would know the nature of the accusation and be prepared to meet the issue as we know we can. Even in the argument—

(T-70) The Court: How many times in your view, Mr. Isserman, have counsel before a trial actually commences and the evidence is taken, to renew a motion to dismiss the indictment for general insufficiency as a matter of law—they can keep it up for no matter how many times?

Mr. Isserman: I do not know the answer here. The point I make is that in every case, and I have tried—

The Court: Because I do not like to keep saying it, but I recognize as you go along so much of the material that was before Judge Hulbert—you make the motion once, you make the motion twice, and each time you say whether a person moves to dismiss an indictment for general insufficiency, that must necessarily raise the whole question, whether it is within the four corners of the indictment, that there are statements sufficient to constitute a crime. Now that was decided by Judge Hulbert, and it seems to me—of course, I told you to go on and I will listen but it seems to me that there must be some time when just repeating the same thing must stop.

Mr. Isserman: Well, if the Court please, it is not repetition, and I am constrained to say that if these matters were argued before Judge Hulbert, that they were not—they were not argued before Judge Hulbert.

The Court: I cannot recall the details of what (T-71) is in those briefs but the substance of it seems clear to me.

Mr. Isserman. And there is nothing in Judge Hulbert's opinion, which your Honor looked at this morning,

which contained any rule, and I ask your Honor to give it the consideration it deserves.

Mr. McGohey: If your Honor pleases, I participated in all of the arguments before Judge Hulbert. I haven't heard anything that was not argued fully during that three-day period, and the briefs will show it.

The Court: Well, you have 20 minutes.

Mr. Isserman: The statement is simply untrue and not based on the facts, your Honor.

The Court: Well, it is in accordance with my recollection from reading the papers. I didn't hear the oral arguments, of course.

Mr. Isserman: I have the briefs here. I would be perfectly willing to allow anyone to examine them. They are not even raised. It could be done under this indictment at any stage of the proceeding. Your Honor has done it in cases where your Honor appeared in—

The Court: You have made it in one motion before the evidence was taken, and then you make it after the evidence is in, but I suppose it is permissible to renew it, just as it is a motion to dismiss the complaint (T-72) for failure to state a cause of action or claim for relief, but that is all right, you go ahead and I will listen.

Mr. Isserman: Now if the Court please, not only does the indictment fail to allege that a clear and present danger exists, not only does it fail to allege facts and circumstances in the language used which would at least support such an allegation, but from the very face of it the indictment shows that no clear and present danger as required by the Supreme Court cases could possibly exist on the very face of it. The reason why I say that is in order to indicate the existence of a clear and present danger there must have been teaching, advocacy and utterance, and it must have been done under circumstances of one kind or another upon which is predicated the existence of the clear and present danger.

This indictment charges no utterance of any words; it charges no advocacy in any language; it charges no advocacy or utterance of publication in any place; it doesn't charge it in any circumstances. In other words, the indict-

ment stops there, as I mentioned under my first point, with an agreement which is called the conspiracy to advocate and teach certain ideas in the absence of any allegation of action or overt acts in respect thereto, and there is a complete failure and an (T-73) impossibility of establishing clear and present danger under any circumstances. This indictment is an effort to punish activity and teaching and advocacy before it takes place.

Now my final ground for urging the dismissal of the indictment goes to the ground that the indictment is vague and ambiguous and uncertain, and does not apprise the defendants of that with which they are charged.

Mr. McGohey: If your Honor please, that was certainly argued before Judge Hulbert, and it is in the notice of motion.

Mr. Isserman: It was in the notice of motion and—

The Court: I feel myself that it is largely repetitious but I think it is better if I just listen.

Mr. Isserman: Well, your Honor wasn't there and it is not repetitious, and it is new matter.

Mr. McGohey: Would your Honor care to look at the notice of motion (handing)?

Mr. Isserman: I said it was not argued before Judge Hulbert, and I maintain that position, and Judge Hulbert did not rule on it, and if he did it would make no difference.

The Court: Go ahead, go ahead.

Mr. Isserman: The indictment is vague and ambiguous, (T-74) uncertain, a violation of the Fifth and Sixth Amendments to the United States Constitution, and does not apprise the defendants of the nature of the accusation against them.

I wish also to call to the Court's attention that I make this argument within the framework of a previous denial of the bill of particulars, so that we have the indictment before us in its naked form without any explanatory matter or specification which might have come to its aid by way of particulars. However, the ambiguity which I refer to is one that could not be cured by particulars. In the first place, in every one of the cases which I have examined, the Gitlow case, the Schenck case, the Abrams case, and

the other cases involving speech which reached the Supreme Court, the Supreme Court had before it—

The Court: Incidentally, the notice of motion among other things sets forth the claim that the indictments or the indictment "is so vague and indefinite as to fail to apprise a reasonable person of the nature of the acts declared unlawful thereby."

Just what you said wasn't in there.

Mr. Isserman: If your Honor please, I ask that your Honor's remark be stricken or that it be withdrawn because I didn't say it wasn't in there. I said that the (T-75) matter was not argued before Judge Hulbert and Judge Hulbert did not rule upon it.

The Court: Then you are in effect saying that although it was before him and that the papers covered it, nothing was said within your hearing that you remember.

Mr. Isserman: That is not what I am saying, if the Court please, and I prefer to proceed with my argument rather than answer this colloquy.

The Court: I know, you always prefer—

Mr. Isserman: May I proceed with my argument?

The Court: All right, go ahead.

Mr. Isserman: Every one of the indictments—

Mr. McGohey: Pardon me, if your Honor please, I just cannot resist this. Here is my brief in which this point was actually argued. It did come before Judge Hulbert and there is the point in my brief to show that we certainly considered it and answered it and briefed it (handing to the Court).

The Court: You see, Mr. McGohey, Mr. Isserman uses the word "argued" in a sense different from what others might consider it to be. I think he means that he did not orally say anything about it, and although it was all in the briefs and in the motion papers and before the Court, still he feels justified in saying that it wasn't argued. I think that is what he means.

(T-76) Mr. Isserman: I think the Court is incorrectly stating my position.

The Court: Well, what do you mean?

Mr. Isserman: It was not only briefed, your Honor—it was not argued and it was not ruled upon by Judge Hulbert. May I proceed with the argument?

The Court: No, you may not.

Mr. Isserman: Your Honor has limited me and I would like to proceed.

The Court : When you started—you have finished your argument, Mr. Isserman. You are through. Will you please desist? The other time will be taken by your colleagues. I will have no shouting at me in this court.

Mr. Isserman: I object to the ruling of your Honor—

The Court: No.

Mr. Isserman: —and the interference of your Honor with my argument, by allowing Mr. McGohey to interfere with my argument and not allowing me to finish.

The Court: Very well.

Mr. Isserman: And I will state that your Honor's conduct is a denial of due process to my clients.

The Court: Very well.

Mr. Sacher: May I address the Court rather briefly on this subject. I would like to address myself (T-77) to the point which Mr. Isserman made and which I simply want to underscore briefly, namely, as to the necessity that the indictment should plead, if it is possible to so plead, that there is imminent danger of a substantive evil which the Legislature—the Congress in this case—has the power to avert and avoid and legislate against. The point I would like to make on that score, your Honor, is the following: It seems quite clear that unless the standard of pleading and proof is such as to require the pleading and proof of the imminent danger we are speaking of, that is, imminent danger of substantive evil, it rests within the power of the Legislature to virtually repeal the First Amendment, and the reason I say that is this, because if it were still the law, which it is not, namely, that stated in the Gitlow case, that the enactment of an anti-speech statute by the Legislature carries with it the presumption that the Legislature found and assumed or assumed the existence of a substantive evil or the imminent danger of a substantive evil—if that be so, and if it be not necessary for the prosecution to plead and prove the existence of such imminent danger, then I submit that we might as well forget the first amendment because the

prohibitions against it will then survive only so long as the Congress sees fit not to invade (T-77-A) those inviolate precincts which are made inviolate by the First Amendment. Now the question has been raised as to whether it is necessary to plead it.

(T-78) I do not mean to infer or imply that your Honor has indicated that it is necessary to prove it, but assuming for the moment, just arguendo, that your Honor did intend to indicate that proof of clear and present danger might have to be made at the trial, then I respectfully submit that if it has to be proved it has to be pleaded because I think it is elemental law, Hornbook law, that anything that constitutes the essential elements of a crime must be adequately pleaded in the indictment if the indictment is to be deemed to state the elements of an offense and to be sufficient within the law.

Therefore I respectfully submit that in the light of the decisions which came long after the Gitlow case, and which represented the doctrine of the Gitlow case, and I refer to Thornhill vs. Albany and I refer to the cases Mr. Isserman cited, and I refer to the whole line of the recent free speech cases, I maintain that in each instance where a statute is directed against press and speech that the statute has no validity and that the indictment in a given case has no sufficiency, basing the sufficient allegation on the facts and circumstances which would present the clear and present danger.

Your Honor raised the question with Mr. Isserman, what would have to be pleaded in such an indictment, and I respectfully submit to your Honor that only in the realm (T-79) of the imaginary can I conceive that the facts pleaded in this indictment could require anyone to say anything about imminent danger. There just ain't none and therefore there is no occasion to challenge the defense here to exhibit its ingenuity by trying to concoct some. I am sure if there were some the able pleaders in the United States Attorney's office would have pleaded it. Not having done so I think the inference is more compelling there is no such imminent danger and the Government just cannot prove it.

Mr. Gladstein: If your Honor please, you will recall you asked me whether I wanted to argue and I said to your Honor I could not possibly know until Mr. Isserman was finished whether I would want to add argument. I could not, as you see, by cutting short Mr. Isserman's argument on the question of the vagueness of the indictment, I could not know what I now know that it is necessary to make that argument, even though Mr. Isserman is prepared to make it. I am not even prepared to do it, but as he has been prevented from doing so I will make an effort to present that.

The point, in essence, is derived from the charge in the indictment that, among other things, the agreement of the defendants embraced the notion that they would advocate the doctrines of Marxism and Leninism or Marxist (T-80) and Leninist principles. That was not defined in the indictment. It was left general, and no effort was made by the United States Attorney to indicate what there was about those principles of Marxism and Leninism which constitute the basis for any charge.

I think the exact portion, your Honor, is to be found in that part of the indictment which is section 9. There it said:

"It was further a part of said conspiracy that said defendants would punish and circulate, and cause to be published and circulated books, articles, magazines, and newspapers advocating the principles of Marxism-Leninism." Period.

Mr. McGohey: No. There is no period, your Honor. Read paragraph 2 of the indictment.

The Court: I think he was reading from paragraph 6.

Mr. Gladstein: No. I said paragraph 9. I said it was 9.

Mr. McGohey: Yes, but Marxism and Leninism as used in paragraph 9 can only be understood if you read the language in paragraph 2.

Mr. Gladstein: Well, that sounds like argument, but the indictment does not say that.

The Court: Have we an important point now?

(T-81) Mr. Gladstein: I think the points we urged upon the Court have been important from the first, your Honor.

The Court: I see. Let me get that again.

Mr. Gladstein: No. 9?

The Court: No, the point you were arguing.

Mr. Gladstein: My point is very simple. It is charged, among others, that as part of the conspiracy the defendants were going to publish documents advocating the principles of Marxism and Leninism, and I said "period," and that is what it is. It has a period there.

The Court: It says " and assembly of persons dedicated to the Marxist-Leninist principles of the overthrow and destruction of the Government of the United States by force and violence."

Mr. Gladstein: Where are you reading from?

The Court: I am reading from paragraph 2. And these other paragraphs that were referring to the Marxist-Leninist principles necessarily must mean the same thing as in the previous paragraph.

Mr. Gladstein: Oh, is that so? If that is true then are we to understand that wherever Marxism and Leninism is here referred to that means to advocate the doctrine that embraces one thing, and one thing only, the forcible and violent overthrow of the Government?

(T-82) The Court: Well, maybe so.

Mr. Gladstein: Apparently, so, your Honor has interpreted what I regard as an ambiguous indictment.

The Court: I have not intended to make any determination of this. We are just arguing as we went along and you lawyers are quick to call it a decision and to place some finality on the comment made in the course of discussion, but I say now I am not interpreting it or making any final ruling on it at all.

Mr. Gladstein: But even if what the Government had in mind was to narrow the compass to what it regarded as principles of Marxism and Leninism, allegedly advocating the overthrow by force of government, that too is left in a vague, indefinite state by the condition of the indictment.

Now I will say briefly in support of the position there that our Supreme Court has recognized that the subject of Marxism is a rather many sided and extremely profound and difficult body of doctrines, and in the decision of the United States Supreme Court in the Schneiderman case Justice Murphy's opinion refers there to a passage found in one of the writings of Lenin, and the quotation states:

> "Marxism is an extremely profound and many sided doctrine."

And then the Court says:

> "In the first place, this phase of the Government's (T-83) case is subject to the admitted infirmities of proof by imputation. The difficulties of this method of proof are here increased by the fact that there is, unfortunately, no absolutely accurate test of what a political party's principles are. Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written. Philosophies cannot just be studied in vacuo. Meaning may be wholly distorted by lifting sentences out of context, instead of construing them as part of an organic whole. Every utterance of party leaders is not taken as party gospel. And we would deny our experience as men if we did not recognize that official party programs are unfortunately often opportunistic devices as much honored in the breach as in the observance. On the basis of the present record we cannot say that the Communist Party is so different in this respect that its principles stand forth with perfect clarity, and especially is this so with relation to the crucial issue of advocacy of force and violence upon which the Government admits the evidence is sharply conflicting. The presence of this conflict is the second weakness in the Government's chain of proof. It is not eliminated by assiduously adding further excerpts from the documents in evidence to those culled out by the Government."

(T-84) My point is in the light of this decision by the United States Supreme Court the indictment is fatally defective as vague and ambiguous and not setting forth clearly that which a defendant is entitled to know when it merely uses that general statement that the defendants are accused of agreeing to advocacy of doctrines of Marxism and Leninism without specification as to what those doctrines are.

What I wanted to address myself to very briefly was only one thing, and that is this: I want your Honor to give consideration to the fact that nowhere in this indictment is it charged that the defendants after agreeing to form a political party did any of the things which are said in the indictment that they agreed that they would do. That is to say, it says that they would do this and would do that and would do the other, but there is no allegation that they did after the formation of the political party.

Now I raise this question again: Let us assume that the Government offers in evidence, A, an agreement to form a party and, B, the formation of the party, and C, that the agreement or agreements of the defendants that they were going to do or would do some time one, two, three and four, and suppose the Government ends its case at that point, I assert at that point the (T-85) Government has no case and the indictment plainly would have to be dismissed and a charge given to the jury for a directed verdict of not guilty because nothing has been proved.

Now if it then be said by the Government, "Well, it is true that all that we have proved is that they would have done certain things, now let us prove that they did do certain things; they did, let us say, for example, distribute the Communist Manifesto which I think has been distributed in this country for over one hundred years—

The Court: Your time is up.

Do you desire to say anything in opposition, Mr. McGohey?

Mr. McGohey: No, I do not.

The Court: Motion denied.

* * *

(T-86) AFTERNOON SESSION

The Court: Now I have given further consideration to that motion made by Mr. McCabe this morning and have read his brief which was submitted, and I adhere to my conclusion and deny the motion.

Mr. McCabe: If your Honor please, in some part of this morning's proceeding when the attention of your Honor was called to the fact that the public was being excluded and there was some discussion about the need of the seats for prospective jurors, my recollction is that your Honor made a direction that the general public should be admitted.

The Court: I repeat it now.

Mr. McCabe: And I took that up with the Captain of the guard and he said Mr. Saypol's orders were that the general public should not be permitted to enter the courtroom, and I discussed that with Mr. Saypol and I asked him whether he knew of your Honor's orders, and he said—

The Court: Are there people out there waiting to get in?

Mr. McCabe: I don't know, your Honor.

The Court: If there are any of the public waiting to get in I direct that they be brought in. Of course, some of them may have to go out again in order to accommodate the jurors here, but I will permit the public (T-87) to come in at all times.

Mr. McCabe: Yes, for instance this morning a sister of one of the legal assistants here had come from a distance hoping to be present for a short time at the trial and was denied admittance.

Mr. McGohey: With respect to that, your Honor,—Will you pardon interrupting, Mr. McCabe?—I am informed, and I know it to be the fact, that on either Friday or Saturday Mr. Saypol communicated with Mr. Crockett or Mr. McCabe, or both, and informed them in view of the fact that a large panel of jurors was to be here, a large part of the court would be required for the accommodation of the jurors and that it would be necessary to restrict the number of people who could come in, but that two or more rows of seats would be available for the defendants' friends.

I certainly assume that would include friends of the attorneys, and they were not used this morning apparently.

Mr. McCabe: Apparently that was not communicated to the Captain of the guards, and may I say that the corridor outside is so thoroughly blocked off that even counsel were stopped today by some guards who had not been here before and did not recognize counsel, so that apparently there is a real curtain of uniformed officers to prevent the possibility of the general public being outside the courtroom.

The Court: I do not think there is any curtain (T-88) of officers out there at all. Go out and see for yourself, Mr. McCabe. You have a moment. Go out and look and see if there is a curtain of officers.

Mr. McCabe: I protest at what happened—

The Court: I thought you said they were there now.

Mr. McCabe: No, your Honor. I said I did not know who were there. I said one explanation, if there are none out there now, one explanation would be the fact that the guards were preventing people from entering the corridor which leads to this courtroom.

Mr. Crockett: May I say, your Honor, Mr. Saypol did call me on Saturday and informed me that the 30 passes which had been made available to the defendants for the use of relatives—

The Court: I do not desire to hear anything further. I have given no directions that the public be excluded. I have ordered today twice that they be admitted. Now if there is anything further to it I wish you would submit it to me in writing.

Mr. Crockett: I merely wanted to correct the impression that many left—I don't think he intended to represent it, but I want the record to show that Mr. Saypol talked with me. He did not tell me all of the public would be excluded. He told me instead the defendants (T-89) having access to 30 seats, would be limited to ten seats. The point made this morning was there have not been any seats available for the use of their friends, and so forth—

The Court: I have been thinking for some time of the things that have occurred here during the past several

weeks, and I should think that one row of those seats for the defendnts' relatives would be sufficient. This idea of bringing in a lot of people that say they are friends, and perhaps they are, to fill up a large portion of the available seats, I am not sure that is a wise thing. Now it may be there is some way of designating the relatives so that they may be sure to come in and get a seat. I think that is only reasonable. But however that may be there is nothing to keep anybody out of the courtroom now and I intend that there shall never be during the entire continuance of the trial. At the same time it is essential that the jurors have seats to sit in when they are waiting to be called, and it is not feasible to just bring in a few jurors at a time, so I think you will have to leave that to my discretion.

Mr. Crockett: May I comment on one other point. It frequently happens that I like to return from the lunch hour early in order to go over certain memoranda (T-90) before court convenes. Today I was told that no one would get admittance to the courtroom. I could not come in. My briefcase was in here and I had to go all the way around to try and see your Honor before I was permitted to come in.

The Court: I see. You have just told me that you had to come up and speak to me?

Mr. Crockett: No, your Honor, you misheard me. I did not say that. I said I insisted on speaking to your Honor and only at that time was I put in touch with the captain of the guard so I could come in. I arise only to suggest it would be very convenient for counsel if we were able to come back a few minutes before court convenes to go over the matters we have to address the Court about properly.

The Court: Mr. Crockett, I have been trying cases now before I went on the bench for some 35 years in many courts. I have found it customary everywhere during the luncheon recess to have the courtroom locked. I waited outside many a time to get in. I don't see why the arrangements that are commonly and customarily made in these matters should be changed. If there is some special accommodation you require in some other part of the building I will try to arrange that for you.

Mr. Crockett: I am not objecting to the courtroom (T-91) being locked. Obviously I am not making such objection, but my only point is it seems to me after approximately six weeks in contact here in this court there are certain of us associated with the defense who should be recognized even by the guard and we might be permitted to come in and go over the documents and exhibits to be used in connection with this case.

The Court: That is the very thing I was never allowed to do and I don't see why you should be.

Mr. McGohey: May I say, your Honor, at the beginning of the trial your Honor—and when I say beginning of the trial I mean beginning of the trial on the challenge question—a question was raised for accommodation of the counsel and defendants and I represented to the Court then a room would be made available in the building and it was made available and still is, and as far as I know regularly used by defense counsel. It is on the fourth floor of this building and it is a substantially large room.

The Court: Very well. Let us have the jurors come in.

Mr. Isserman: I do not know if the Court ruled on the last motion I made.

The Court: Yes, I did. I denied it.

Mr. Gladstein: Could I interrupt to say I have (T-92) had someone go into the corridor, although Mr. McCabe may have misunderstood a question the Court asked, and I am told at the present time there are three guards stationed immediately outside of the courtroom doors and four who were stationed at the mouth of the corridor that leads to this courtroom and all have advised that as of this moment their orders are not to permit any members of the public into the courtroom.

The Court: It is funny how some get in. I see them back there.

Mr. Gladstein: I can explain how that happened.

The Court: It seems as though one thing always leads to another. Either the public is excluded or not. I have not excluded the public and my orders I think will prevail here.

Now, Mr. Isserman?

Mr. McCabe: Mr. Saypol apparently had another idea. I asked if he was familiar with your Honor's directions and he said, "Yes. I am responsible for preserving order here. If the Court wishes to overrule me, all right," and his orders as of this minute prevail.

Mr. Isserman: If the Court please, I desire to renew, without argument, the previous motion made before Judge Hulbert for a bill of particulars, with special reference at this time to particulars as to what the (T-93) defendants conspired to teach and advocate; what the alleged Marx system and its principles of the overthrow of the United States are, and what principles of Marx are referred to in paragraphs 6 to 9 of the indictment, without waiving the other particulars requested.

To compel the defendants to stand trial without an order to furnish the defendants with the particulars heretofore and presently requested is to deny the defendants due process of law under the Fifth Amendment to the United States Constitution and deprives them of the right to know the nature of the accusation against them as guaranteed by the Sixth Amendment to the United States Constitution.

Mr. Gladstein: If your Honor please, I wish to file a challenge to the array of jurors on a motion to quash and dismiss the petit jury panels of March 1, 1949, and March 7, 1949. I notice it says "8th" on the face of the document but I assume that can be deemed to be corrected to say the 7th, as I am advised by the clerk of the court that the jury which your Honor was calling for a moment ago is the petit jury panel of March 7, 1949.

Will you give this to the Judge, please (handing)? And I have a copy for Mr. McGohey (handing). And I wish to call attention—

The Court: You better wait until I read it first.

Mr. Gladstein: Very well, your Honor.

(T-94) The Court: I do not wish to hear argument on it, Mr. Gladstein:

Mr. Gladstein: I simply wanted to say this: When I handed your Honor the papers it was 17 minutes to three. When your Honor just put the papers back on his desk and looked up indicating he had read the papers it was, and is, 15 minutes to three. It seems to me, your Honor, I should be permitted to point out the respects in which

this challenge presents new matter to which the Court's attention has not heretofore been called. Moreover, this is a challenge—

The Court: Did you hear me say I did not desire to hear argument, Mr. Gladstein?

Mr. Gladstein: All right. Then I desire to put in evidence, and I want to call two witnesses whom I have under subpoena.

The Court: Let us hear what Mr. McGohey says first, and I will rule on it now.

Mr. McGohey: If your Honor please, I have read these papers substantially and I find that there is contained in these papers the same kind and substance of challenge that we have been trying for seven weeks, and indeed, I find that in the notice of motion it says, "That said challenge and motions will be based on all the records, papers and files in this proceeding, the affidavit (T-95) of Henry Winston filed herewith, and evidence to be introduced at the hearing of the challenge and motions, and some memorandum of authority."

I take it there is included in the description all of the evidence and all of the charges and all of the testimony we took during seven weeks. I understood that challenge to go to the whole system of offering jurors here and to the whole system of list of names that have been and are compiled in the jury clerk's office pursuant to that system, and I take it that that challenge included any jury drawn prior to the time that the challenge was made or drawn while the challenge was in progress, or that would be drawn in the future from jurors whose names had been placed in the jury files in accordance with the system which was under the challenge. I therefore submit that to make the motion now made is merely a repetition of the motion we have been considering for seven weeks and which your Honor, after consideration denied with an opinion. I am opposed to the taking of any testimony or spending any more time on the challenge and I urge that it be denied.

The Court: Both for the grounds mentioned and others I overrule the challenge and deny the motion.

Mr. Gladstein: May I point out that there is nothing in the record at the present time to show that (T-96) the March 7, 1949, panel was drawn in the same manner and from the same group of names from which prior panels have been drawn, and I would desire to have evidence on that score and if it be the fact that the March 7th panel was drawn from the same file—

The Court: Mr. Gladstein, do you remember I said I did not desire to hear argument on this?

Mr. Gladstein: That is on behalf of the challenge.

The Court: If you persist I shall not try to stop you.

Mr. Gladstein: No. I am trying to reply to Mr. McGohey's point. I do not want the record left in the condition where it may later be argued that we failed to establish that the March 7th panel was drawn in that particular manner, and the sources from which the names came, and I desire to put Mr. McKenzie, who is under subpoena, and Mr. Duncan, the jury commissioner, who is under subpoena, on the witness stand, and I ask leave to put them on now, and if it develops that names on the March 7th panel were drawn from the same file of jurors, then to the extent that we have already put in evidence on that subject I certainly would not want, and would not attempt, to go through the process of putting on similar evidence. I do reserve the right to put on evidence as to evidence (T-97) concerning this petit jury panel which is here now, and I certainly have the right, I submit, to call these witnesses to establish just how the people who are on this panel happen to get there, including all of the presidents and officers here of fantastically large numbers of corporations—

The Court: Mr. Gladstein, what do you think the Court should do where an attorney is repeatedly told to desist from argument and he continues? Do you desire me to make some sort of brawl out of this proceeding? I am accustomed to having attorneys treat my directions with respect.

Mr. Gladstein: I would like a ruling on my right, and I would like to have the record show I desire now to have the court attache call Mr. Duncan or Mr. McKenzie, I don't care which, first to the stand at this time.

The Court: But the challenge has been overruled and your motions have been denied.

Mr. Gladstein: Has your Honor ruled I am prevented now from putting on the testimony of these witnesses?

The Court: I certainly have. You are not going to have any more testimony about the jury system. We are going ahead with the trial, Mr. Gladstein.

Mr. Gladstein: But, your Honor, may I have a ruling? Is it your Honor's ruling that I am now prevented, (T-97-A) despite my offer to introduce evidence, from putting on testimony concerning the March 7, 1949, panel?

The Court: I have ruled, Mr. Gladstein, that the challenge and motions that you have just submitted to me are respectively overruled and denied and the incident is closed.

(T-98) Mr. Gladstein: I now have a motion to make—I assume that that means that your Honor has forbidden me to offer evidence?

The Court: I do not know why you talk about forbidding. You have a queer way of talking, you and your colleagues here. It seems strange to me. I don't understand it.

Mr. Gladstein: Well—

The Court: Go ahead with your next motion.

Mr. Gladstein: Before I make this next motion I would like to have permission, your Honor, to arrange, now that the Court has ruled upon the challenge and written an opinion last week—I would like to have permission to arrange for the copying of various portions of Exhibits 303 to 308. May that be arranged?

The Court: Well, that will be taken care of in due time. I see no occasion for doing that now.

Mr. Gladstein: Now, I also desire to move now for reconsideration of the original challenge which your Honor disposed of in a decision rendered on Friday of last week. Your Honor's decision concludes with the direction that findings be submitted, which of course is correct, inasmuch as that is the trial, that is, the hearing of the challenge is a trial. Now I have not been served nor so far as I know have any of the defense (T-99) counsel been served with proposed findings by Mr. McGohey's office, and I would want to have the opportunity to address myself to such proposed findings and to submit counter findings.

The Court: Orally?

Mr. Gladstein: No, in writing, in writing. I would want to be able to propose counter findings.

The Court: I know of nothing to prevent you from submitting such findings as you desire to submit.

Mr. Gladstein: But I am not in a position to do so until they have been submitted by Mr. McGohey. It seems to me the orderly procedure should be that those findings should be made and that matter should be determined before we embark on any further proceedings in the matter.

The Court: That will not be done.

Mr. Gladstein: Now at this time I wish to move for a severance of the case, of these defendants and request the Court to order the severance of each and every of 10 of the cases of the defendants, and order that the trial, if it proceed at all, proceed against one only of the defendants. I base this upon the provisions of Rule 14 of the Federal Rules of Criminal Procedure, the section which deals with relief from prejudicial joinder. That section provides that:

> (T-100) "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires."

The grounds for my motion and for the request that this Court exercise the rights set forth in Rule 14 are these:

A joint trial of these defendants at this time and in the circumstances in which this case is about to commence would make it impossible for the defendants jointly and severally to receive a fair and impartial trial. That is true for the following reasons: First, the concept of a joint trial of 11 defendants lends support to an illusion which has been created and fostered by representatives of the Government, by the press and the radio, of a purported conspiratorial character of the defendants.

The Court: That has a reminiscent sound.

Mr. Gladstein: Of what?

The Court: You know, you have been making various motions of that kind, you know.

Mr. Gladstein: I have made no motion nor has (T-101) anyone except Mr. McGohey ever made a motion for a severance, and his motion was quite different.

The Court: No, I mean this so-called conspiracy by the Department of Justice, and so on and so on.

Mr. Gladstein: Oh, I don't retract from that, your Honor.

The Court: I didn't say you retracted. I say that is what is coming up again.

Mr. Gladstein: Well, that is the first point in support of my motion, that there has been a concert of action on the part of press, radio, Wall Street as represented by the United States Chamber of Commerce, the National Association of Manufacturers—

The Court: You will remember, Mr. Gladstein, that sometime, I think last November, I wrote an opinion on that subject about this so-called conspiracy.

Mr. Gladstein: Last November?

The Court: Yes. Do you remember what I put in that opinion?

Mr. Gladstein: I do not regard your determination of a question even similar to this last November as foreclosing us from raising—

The Court: You may go ahead.

Mr. Gladstein: —from calling attention to a fact in March 1949 if that fact be relevant to the motion (T-102) I have made.

The Court: Proceed. You are bringing the same thing up again and again, and making out that it is different when it turns out to be the same. I don't know, but I will listen to you. It seems to me that it is the same thing that you were arguing last November, although not then for a severance. But, however, give me your other grounds.

Mr. Gladstein: I want to say before passing to the other grounds that it is different only in the sense that the matter of which we complained last November not only has not subsided but to the contrary there has been an aggravation of the condition existing, culminating only three or four days ago in the statement, to which your Honor's

attention has been called this morning, by the President of the United States.

Now the second point in support of this motion is that this Court in the rulings that it has made since the commencement of the hearing on the challenge, and in the observations which the Court has made in these proceedings, all of which have been publicized widely, have further tended to create the atmosphere of a conspiratorial group of joint defendants being tried, and to that extent makes impossible the reception by any one of these defendants of a full and fair and impartial trial so long (T-103) as he is joined in this case with the other defendants.

The Court: Do you have written motion papers there in connection with this?

Mr. Gladstein: No, your Honor. I have some notes but no written motion papers, and I make this motion orally, and I would like to come in a few moments to some authorities to which I want to direct your Honor's attention.

My third point is that in this case the requirement that these 11 defendants stand trial jointly necessarily, of course, places them in the position, a position which is unfair in the sense that no one of them can properly in his self-interest exercise challenges, peremptory challenges in such manner as benefits his case, because any exercise of peremptory challenge by a particular defendant may be beneficial or harmful to one or more of the other defendants.

Fourth, and quite basic—and some of the cases that I want to direct your Honor's attention to in a few moments deal particularly with this point—the holding of a joint trial creates the serious danger of confusion and misapprehension of the issues by the jury and the possibility of prejudice to some of the defendants through the introduction against others which is not properly admissible as to them.

(T-104) Finally, because of the nature of this case in which the charge is one that involves the realm of ideas and doctrines, it would be impossible for a jury to give individual consideration to each of the defendants in a personal way, although it will not be denied, I think, that every single person who is accused is entitled to

have his case personally, individually and separately considered and decided by a jury.

Now it is pretty well settled that the fundamental test applicable in determining whether defendants jointly indicted are entitled to a severance is whether a separate trial will assure to each accused a fair trial and to promote the due administration of justice and of the courts. The authorities are unanimous that questions of additional cost or expense or delay versus expediency are entirely secondary to the basic consideration that every single person must individually and personally be secured a fair trial that the Constitution commands. Now this basic test was set forth by Judge Cook in a decision in New York to which I desire to call your Honor's attention—

The Court: You do not need to cite cases on such elementary propositions. These conspiracy trials go on all the time, and I do not want to hear any more argument on it. The motion is denied.

(T-105) Mr. Gladstein: Now, your Honor, I want to call your Honor's attention to the fact that the Second Circuit Court of Appeals, of this circuit, and other courts, the Supreme Court of the United States, state decisions in New York, have recognized that in matters of this kind, cases of this kind, it is not a discretion—

The Court: Do you realize that I just told you that I do not want to hear any further argument on it?

Mr. Gladstein: Because of your Honor's direction which I construe as a requirement that I be seated and proceed no further with my motion for a severance, I am required to do that, and I reserve the right, of course, to file, as I will, a full motion for severance and supported by such arguments—

The Court: No, you won't file any such formal motion. You can just let the matter rest where it is. The motion for a severance is addressed to the discretion of the Court. I am familiar with the authorities on the subject. I don't need any argument on the law. You have stated such facts as you relied on and I see no occasion for putting in any written motion papers.

Mr. Gladstein: But your Honor cannot cite properly that I have cited such facts as I want to rely on because you haven't given me—

(T-106) The Court: Well, you are arguing on the law, and I am beginning to get the same sort of impression I got after two or three weeks of that other proceeding there. Now I have denied this motion and I do not desire to hear any further argument. I do not like to be unpleasant to lawyers and tell them to sit down and do things like that. I don't act that way. It is contrary to my nature to do it, but when I tell a lawyer I don't desire any further argument, why I expect him to desist, and you would be surprised to see how many times you and your colleagues have utterly disregarded such instructions by me.

Mr. Gladstein: I was not going to disregard them; I simply wanted the record clear that my restraint and my refraining from continuing was based upon my construction of your Honor's statement as a direction and a ruling to sit down and not continue with this presentation.

The Court: Well, I don't regard it as "restraint" when a lawyer obeys a direction of the Court. I have never known any of you gentlemen particularly to restrain yourself in this case, but possibly the time will come when you will.

Mr. McCabe: If the Court please, I should like to make a motion which is in the nature of a time-saving motion. Your Honor may recall that—

(T-107) The Court: You are all right, Mr. McCabe.

Mr. McCabe: Now, your Honor, I have a smile for your Honor—

The Court: I know you cannot help smiling, and neither can I. If it is a time-saving motion, I will need some smelling salts.

Mr. McCabe: I have been thinking for some time—it has been running through my mind that verse of Ralph Hodgson, which starts out:

> "Time, you old Gypsy, why hurry away?
> Put up your caravan, just for one day."

He describes all that he would do if Time would only stay for a while, and he realizes that Time isn't going to stay and he says, to emphasize the passage of Time:

"Last week in Babylon,
Last night in Rome,
Morning, and in the crush
Under Paul's dome;
Under Paul's dial,
You tighten your rein,
Pause for a moment
And then off again.
(T-108) Off to some city,
Yet blind in the womb,
Off to another
'Ere that's in its tomb.
Time you old Gypsy,
Why hurry away?
Put up your caravan,
Just for one day."

I thought of that all through here. Your Honor mentioned 35 years of practice. I have had 26 years of practice, and time has gone on. The world hasn't—

The Court: Yes, we are old men.

Mr. McCabe: I felt age creeping up on me at the time I started this case, but, I say, this case is an important case, your Honor. This case will be mentioned years from now—

The Court: What are you working up to?

Mr. McCabe: Just what will be mentioned about this case, will be the fundamental principles involved and not a few hours more or less; not the fact that the time the old Gypsy wasn't able to stay, that we weren't able to do as the Legislature does in the closing hours, stop the clock. Now I say, to come back to what I rose to say, I had suggested that inevitably in the trial of this case there would be documents introduced. I have (T-109) no doubt—

The Court: I suspect that.

Mr. McCabe: Yes. I have no doubt that, for instance, if we introduced the Declaration of Independence, I have no doubt there will be phraseology in that document which will be completely new to many persons here, and there

will be a hurried comparison of the document which we introduced with that of an official document. There will be documents introduced by the Government which will—I mean we almost concede offhandedly that there are authentic documents, but there are different editions, and so comparisons will be necessary. Now I had suggested that, in the interests of saving time, we agree on standard editions of various standard documents.

The Court: Now that sounds pretty good.

Mr. McCabe: The classics of Marxism and Leninism. I do not think the Government will be giving away any deep-dyed secret if they say, "Now we may have occasion to quote from State Revolution", and "Here is the edition we have." Instead of holding up a jury for two weeks while we check every word in it to see if it is OK, let us agree on the edition, and it is for that purpose that I move that there be some sort of comparison of exhibits so that we may agree on what editions could be used.

(T-110) The Court: Do you suppose it would be possible to get up a small committee with one representative of the defendants and one representative of the Government who could take charge of that matter?

Mr. McCabe: Well, I suggested it last November, I think it was, your Honor.

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

Mr. McGohey: That was suggested, your Honor, last October, as Mr. McCabe says, before Judge Hulbert, and I declined it then as I am constrained respectfully to do now, your Honor. I do not believe that there will be any question about the authenticity of the documents or the sources from which they came, but the disclosure and discovery of those at this time, in my opinion, would be a disclosure of the Government's evidence far beyond the text of the documents themselves.

The Court: Now let us suppose, Mr. McGohey, that we pick a jury and we get started and then you offer in evidence some ponderous document, and then the defendants say that they do not know whether they are going to object or not because they would have to look it over and see what was in it, and all this and that, and in many cases there might be some controversial element about it that

would entirely justify counsel in wanting to check it over. (T-111) Now isn't there some way that, as we proceed, we can avoid the delay that would be necessary to check papers, or do you think they ought to be taken subject to correction or something like that?

Mr. McGohey: I think they have to be taken subject to correction, your Honor, and I anticipate that as we go along, the copies as they are going in, will be copies of what is coming in from the witnesses who will be available for both the Court and the defense counsel.

Mr. Sacher: I would like to make it quite clear, your Honor, speaking on behalf of my clients, that I am going to request that whenever an exhibit is offered that that exhibit stand as the exhibit and its authenticity and competency be proved. I am not going to do their work of taking what they offer in evidence to check for authenticity. They are either going to establish it or else we are going to object to its being admitted.

Mr. McGohey: Oh, your Honor, I hadn't thought that that is what we were talking about at all.

The Court: No.

Mr. McGohey: Of course I anticipate that every document I will offer will have to be authenticated. I expect it will be.

The Court: Well, let us wait until we get (T-112) started, and then if there is any possibility of saving time, why I will be glad to tender my good offices to assist in the matter. At the present time, why, we will have to let the matter rest there.

Mr. McCabe: Now, if your Honor please, I would like to address myself to another motion, and that is that the Government supply counsel for the defense with a list of witnesses that it proposes to call. The reason for that, your Honor, is that we are now—

Well, there was one laugh in the court, and I get a loud belly laugh from Mr. Gordon—

The reason for that is that we are about to proceed, I think, to the selection of a jury. In the normal questioning of prospective jurors there will be asked the question, "Do you know counsel for the defendants?" or "Do you know any of the defendants?" In a case of this sort I think it is very important to be able to inquire of the jury

whether they know any, say, major witnesses to be called by the Government. It will be—it might very well be a source for a mistrial for some witness whose credibility is a crucial point in the case, who is discovered to be a relative or a friend or a neighbor of one of the jurors. Now I do not think that the Government is going to give away any terribly deep-dyed secret if they reveal the (T-113) names of their witnesses. Either the witnesses are reputable witnesses, known witnesses; they exist or they don't exist, and we make that request in the interest of preventing anything which might result in a mistrial and the waste of all the work that we put in here.

The Court: Well, if there is any objection to that I will deny the motion.

Mr. McGohey: It is objected to, your Honor.

The Court: That motion is denied.

Mr. McCabe: Now, your Honor, I have a third motion which I would like to make as long as I am on my feet. Your Honor—excuse me. (Conferring with Mr. Isserman.)

Oh, Mr. Isserman reminds me that when I rose he thought I was going to address myself to the motion for a severance, and that before I make these motions, which would imply that the motion for a severance was completely ended, that he desired to ask leave to be heard on that, so I yield to him.

Mr. Isserman: If the Court please, I won't be very long, but I would like on behalf of my clients to move for a severance as to each of them on the grounds urged by Mr. Gladstein, and on the further ground that the experience thus far has indicated that I have not been able, on behalf of my clients, because of the rulings of (T-114) the Court, in view of questioning or argument by other counsel, to either complete the questioning of witnesses in accordance with the need I felt for those clients, to make my motions and to argue on those motions, to the degree that I felt was necessary. I myself believe, with all due respect to the Court, that much of the difficulty stems from the Court's desire for haste and the Court's impatience with counsel. I have had the experience in the course of the challenge—

The Court: My impatience with counsel?

Mr. Isserman: If the Court please, that is my opinion.

The Court: Well, if I have been impatient then I just do not understand the meaning of the word.

Mr. Isserman: Well, I have been examining the record and my own sober conclusion is that one of the difficulties has been the Court's impatience with counsel. Now I have had the experience of being denied the right to cross-examine. I have had the experience of being required to state my position after rulings by this Court, and in general I have felt that, on behalf of my clients, the fact that other defendants are involved under these circumstances, and I say again under the Court's apparent impatience in refusing to consider or in refusing to allow for the fact that I independently represent my (T-115) clients, and I desire independently to argue for my own clients and to question for my clients, that under those circumstances a fair trial with the remaining defendants, without severance in this case, is indicated as an impossibility, and to compel my clients to proceed without severance on this occasion and under these circumstances is to deny them due process of law.

The Court: Motion denied.

Mr. Crockett: May I assume for the record that a similar motion on behalf of my clients would also receive similar treatment, your Honor?

The Court: If it is based on the same grounds, yes.

Mr. Crockett: It will be based on the same grounds as those advanced by Mr. Gladstein and also those advanced by Mr. Isserman.

The Court: Yes. I will deny such a motion.

Mr. Sacher: I should like to have the record show, your Honor, that I move similarly on behalf of the three clients I represent.

The Court: The same ruling.

Mr. McCabe: And I assume the same ruling applies?

The Court: Yes, if the motion is made on the same grounds it will be the same ruling.

Mr. McCabe: Now your Honor may recall that at (T-116) some time early in the proceedings the motion for continuance was based upon the illness of William Z. Foster, one of the defendants whose case has been severed by direction of your Honor in this trial, and there was some question as to the absolute necessity of his testi-

mony and the probable need for taking it by means of deposition outside of the courtroom. I should like now to move, and in this case I am authorized by counsel for each of the other defendants, to state that the defendants above severally move through their respective counsel that the testimony of William Z. Foster be taken on behalf of said defendants on written interrogatories in the manner provided in civil actions, and this motion is made in accordance with the Rules of Criminal Procedure, 15(a), 15(b), 15(d) and 15(e).

* * *

(T-118) I should like to hand up a written motion to that effect to your Honor and incorporate the affidavits referred to.

The Court: Just hand it up, Mr. McCabe.

(Mr. McCabe hands to the Court.)

The Court: Mr. McGohey and I can read it at the same time.

(After examining.) Well, you practically read it.

Mr. McCabe: Yes.

The Court: I think you read it almost word for word.

Mr. McCabe: Yes. I paraphrased it in the interest of saving time.

The Court: Mr. McGohey, what do you say to that?

(T-119) Mr. McGohey: Well, my first observation, your Honor, is one of amazement, that it should now be urged that Mr. Foster is unable to give such aid as he needs to the defendants in view of the fact that he and Mr. Dennis made a statement on behalf of the Communist Party last Thursday. Apparently from what we heard this morning he joined with Mr. Dennis in sending a joint open letter to the President as late as last night. It would seem to me that a person capable of giving the time and mental attention—and I suppose emotional attention—that would be required for the preparation of last week's statement and last night's letter would be well able to have furnished such evidence as he is able to furnish, as the defendants might require.

Now I call to your Honor's attention that as far back as last November when this question came up, the question of the availability of the defendant Foster to be on trial, and we had the examinations by the doctors, that your Honor indicated that—

The Court: In the opinion.

Mr. McGohey: In the opinion—well not only in the opinion but at some time during the argument of the motion before your Honor, and again in the opinion, that if the testimony of the defendant Foster was believed by his co-defendants to be of importance, that there was (T-120) a procedure provided by law under which his testimony could be taken, and that it should be taken because at that time your Honor was fixing the case, putting the case down for trial for January 17th, and that date fixing occurred after your Honor had asked me whether or not I would be ready to go to trial and to move a severance as to the defendant Foster if he was then unable, so that it was perfectly clear in everybody's mind what the purpose and what the direction of the Court was, that the case was being put down to be tried beginning January 17th, that if on that date the defendant Foster was not ready to go to trial the Government would move to sever against him, and that if in the meantime his testimony was to be taken by deposition, the proceeding should be started then so that it would be concluded in time for the commencement of the trial.

(T-121) When we came here on January 17th I did move for the severance of the defendant Foster and that severance was granted. I oppose any delay at this time for the taking of the depositions and I certainly oppose the taking of any depositions after the end of the Government's case.

Mr. McCabe: If your Honor please, I am likewise amazed that the representative of the United States Government in this Southern District of New York would think that any American, even on his death bed, would fail to rise to answer the epithet hurled at him by the President of the United States in his use of the word "traitor." I know I would have to be a great deal more ill than even Mr. Foster is to refrain from using my last bit of strength in order to answer a scurrilous charge of that sort if it were hurled at me.

Mr. McGohey: I think that has nothing to do with the matter before us and was dragged in simply because it seemed the smart thing to say. Your Honor will probably remember at the time this first came out there had

been no severance as to Foster and therefore the question of taking his depositions out of court was not in order. Now as to taking his depositions in the last few minutes, what would be the nature of the depositions?

The Court: What is it you are supposed to have, (T-122) you and your colleagues taking an hour and a half a day talking to him before? Don't you remember how it was pointed out you could see him only so long every day and you were doing all you could by being there with him and getting all the information from him and so on and so forth? I remember that. Surely—

Mr. McCabe: Does your Honor think I have forgotten it because I am the one who was thus restricted in conferring with him, and many of my colleagues have not been able to exercise their rights of conferring with him. But after all, that goes to the general preparation of the case. The basis of the testimony is to be directed toward particular matters adduced by the Government and the Government has been very wary unless we get the slightest inkling of these deep conspiracies they are going to prove. They are afraid we would learn anything about their case. I say without being afraid at all we are justified in exercising our discretion in not answering beforehand questions and accusations which we think may be put to us. There is no reason in the world why we should be required to accept what the Government is going to say.

The Court: I will take that motion under advisement.

Mr. McCabe: May I say, your Honor, that that motion was not directed toward the question of delay nor would it entail any unnecessary delay or, at any rate, any extensive (T-123) delay. There is no reason why the taking of the testimony of witnesses by means of interrogatories under such conditions as your Honor would dictate in the interest of expedition and of the due regard for Mr. Foster's health.

The Court: I will take that under advisement. What is your next motion?

Mr. McCabe: I say that could go on during the presentation of the case of the defendants. That is my motion.

Mr. Crockett: If your Honor please, I have a motion to make pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

The Court: This must be almost a world's record of motions. What is the Rule 16?

Mr. Crockett: Rule 16. And in connection with my motion I have here a document which I should like to pass up to your Honor and have marked for identification in order that I may refer to it.

The Court: Yes, that may be marked. You don't want me to look at it yet, do you?

Mr. Crockett: I have no objection, and I will state for the record it is a receipt that was given to my client, Mr. Carl Winter at the time of his arrest when the FBI agents in Detroit, Michigan, took over an automobile in which he was riding. As a matter of fact, he was (T-124) driving and they took certain books and pamphlets and documents.

The Court: Good heavens, did he have all those things with him?

Mr. Crockett: Most of these are one-page documents that were included in the brief case. The last group at the bottom of the page, your Honor will notice, item 35, refers to one set of twelve volumes of selected works of Lenin.

The Court: It seems a lot of documents for a man to be carrying around. But at any rate it may be marked.

Mr. Crockett: Thank you. In connection with these documents, at the end of the list, these volumes of books I understand from my client, and I represent to the Court, they were wrapped in brown paper and were being returned to the book store in Detroit.

As to the other documents, as I pointed out, they are copies of letters or memoranda, and so forth, that were included in the briefcase.

I make this motion, as I said at the outset, pursuant to Rule 16 of the Federal Rules of Criminal Procedure. However, my first motion is that those documents be ordered returned to my client for the reason that they were improperly seized at the time of his arrest. (T-125) They were properly in his possession. By that I mean that his possession of them did not constitute any evidence under the law and therefore they can only have been taken for evidentiary purposes, which I submit is not proper in the absence of a search warrant.

The Court: He had them with him?

Mr. Crockett: He had them in the briefcase and the briefcase was in the car in which he was riding, and there was no search warrant.

The Court: Was this arrest after he had been indicted?

Mr. Crockett: That is right.

Mr. McGohey: On a bench warrant, your Honor.

The Court: Let me hear Mr. McGohey on that.

Mr. McGohey: If your Honor please, the rule that Mr. Crockett first stated he was making his motion under requires, or provides, rather, that upon motion of a defendant at any time after the filing of an indictment of information the Court may order the attorney for the Government to permit the defendant to inspect or copy or photograph designated books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process upon a showing that the items sought may be material to the preparation of his defense and that the request is (T-126) reasonable and that the order shall specify the time, place and manner of making the inspection and taking copies or photographs, may prescribe such terms and conditions as are just.

I am willing to provide the counsel with a copy of each and every paper taken from the defendant as the Rule suggests and the Court may direct.

The Court: Including those twelve volumes of Lenin?

Mr. McGohey: I am not going to give him copies of the books because I have not the facilities for making copies of the books but they are standard books; the writings of Lenin.

The Court: Let me ask, Mr. Crockett: If you get copies of all these documents except the books, will that suffice?

Mr. Crockett: Yes, your Honor, and incidentally in connection with what Mr. McGohey says I should like to point out I stated at the outset I wanted first to contend that the seizure of those was illegal and to request an order from the Court directing all of those documents to be returned to my client. I don't know what your Honor's ruling will be on that, but I will state in the event that request is denied then I propose to follow up under Rule 16.

(T-127) The Court: Where is the illegality if a man is arrested under a bench warrant after he has been indicted and he has a mass of documents like that in his possession as they would be in the automobile? What is wrong with it?

Mr. Crockett: Well, your Honor, the bench is not in itself a search warrant but it is an order to take possession of the defendant, but it does not embrace an order to take possession of everything within the immediate vicinity of the defendant unless it happens to be some tools that were used in connection with some offense, like where you break into a house and a person is accused of counterfeiting and you find machinery. Under those circumstances the courts are unanimous you can take the paraphernalia you find in cases like that, but here when you arrest a man and go through his car and take out his briefcase and take whatever is in the briefcase I suggest the Rule requires a search warrant which was conspicuously absent in this case.

Mr. McGohey: If your Honor please, I call your attention to that part of the rule which gives the Court a discretion to make an order and one of the bases upon which that discretion is exercised is the showing that the items sought may be material to the preparation of the defense and that the request is reasonable. Now (T-128) there has been no showing that any of these items is necessary to the defense. There is simply the statement they were in the possession of the defendant at the time he was arrested.

The Court: Are these documents very bad, or just ordinary literature or what?

Mr. McGohey: Many of them, your Honor, we would contend, since Mr. Crockett drew the analogy of the tools of a crime, that they were part of the very teaching and advocacy that is the subject of the indictment.

Mr. Gladstein: That is not the subject of the indictment at all and there is not a word in the indictment.

The Court: Have you seen these papers, Mr. Gladstein?

Mr. Gladstein: No, but I have seen this list and I know this: that the United States Government, through Mr. McGohey, the FBI or anyone else, has no slightest right to

indulge in an illegal search or seizure of the person or property of any person and it is absurd for Mr. McGohey to say in argument on this point that Mr. Winter was engaged in the commission of an offense at the time that he was arrested, because that is not charged. Now the only time the officers of the law—

The Court: Is not the conspiracy a continuing one?

Mr. Gladstein: It is not charged at that time (T-129) or place the defendant engaged in anything that constituted any act for which this man was indicted.

The Court: I will take this under advisement. I do not feel I know enough about that to decide that offhand and I will take any memoranda at the opening of court tomorrow morning.

Mr. Crockett: I do want to make one point clear, your Honor: that Mr. McGohey still insists he misconstrue what I am asking.

The Court: You moved under that rule.

Mr. Crockett: No, I did not move under the rule. I thought I made it clear when I got up. I said I wanted to make a motion under Rule 16, but I preceded that by a motion for an order directing that these documents which were illegally seized from my client be returned, and then I stated in the event the Court overrules that motion I intended to move under Rule 16 for permission to examine those documents and, if necessary, make copies. I have not even seen them.

The Court: In other words, if your first motion is denied, then you move under Rule 16?

Mr. Crockett: I hope that won't induce your Honor to deny my motion.

The Court: No. I wanted to get it clear. I thought you were moving under Rule 16.

(T-130) Mr. Crockett: Rule 16, that is right.

The Court: All right. I will take that under advisement.

Mr. Gladstein: I may say in that connection, your Honor, that if at any time in the proceedings the United States Attorney offers in evidence, not only any of the documents, whatever they may be, that were illegally seized from Mr. Winter, or any counterpart, against either of my clients, I shall object to the introduction to attempt to in-

troduce evidence obtained only through a method that violates constitutional guarantees.

The Court: You see, Mr. Gladstein, I would like to know more about it and I am going to study the authorities and decide whether it was an illegal seizure or whether it was not, so I do not think it profitable to discuss that matter further.

Are there any more motions?

Mr. Sacher: I do have a couple of motions and I think they will take a few minutes, so if your Honor wishes to take a recess now—

The Court: Yes, we will take our recess now, but we are going to start this afternoon. Don't let those jurors go away.

(Short recess.)

(T-131) The Court: All right, Mr. Sacher.

Mr. Gladstein: Your Honor, before Mr. Sacher presents the motion he wants to address himself to, may I advert for one moment to something I asked the Court before, and which your Honor has said would be taken up later. I am referring to the request that we be given opportunity to examine and make copies of Exhibits 303 to 308 on the challenge. I want to say this: I think that without delay, your Honor, we should have access to those documents in order to enable us to prepare findings to be submitted to the Court in the light of the direction of the Court that findings be submitted based on the decision that your Honor announced last Friday, and in order to enable us—

The Court: Well, they are up in my chambers with the other exhibits and they are available for somebody to look at when they want to, and as to this matter of photostating I have in mind the insinuation that one of you defense made the other day, that I would do away with some of those papers if you did not photostat them right away, and I did not like that, so they are going to stay up there for a little while and when it is necessary to have them photostated they will be photostated.

Mr. Gladstein: Do I understand we can make copies or have somebody arrange—

(T-132) The Court: You can have somebody look at them just as you can have somebody look at all the exhibits. They will be put somewhere where available but I did not like that insinuation that in some way or other I would be capable of suppressing evidence and destroying exhibits and doing things of that kind. I did not like it at all.

Mr. Gladstein: I think your Honor made that remark while I was making a request.

The Court: You have been insinuating so many things I thought that is what you meant.

Mr. Gladstein: I think I stated for the record, and you will find it in the record that I meant no such insinuation.

Mr. McCabe: I do not like to labor the question, but as I entered the courtroom there was a very decent appearing person attempting to gain admittance. He said he had come from outside of the State, I believe, to observe part of the trial, and the captain of the guards, with the utmost good nature, said, "I have my orders not to admit anyone. I will be glad if I get the change of orders to admit you."

The Court: You go out and see if you can find him while Mr. Sacher is making his argument.

Mr. McCabe: I hate to miss any point of Mr. Sacher's argument.

(T-133) The Court: You see, Mr. McCabe, I am not a policeman and supposed to go out in the street and get a man and lead him in by the hand. I say if there is such a man as you describe, you could go and I will see that he gets in. That is what I am talking about. I am not trying to make a policeman out of you or anyone else but I find these matters of letting somebody in or keeping somebody out when we have got so many other things to do here are a little beyond what I think a judge should be called upon to do, but however that may be whatever is said leads to something else, as I have found here, so that I seek to put an end to this matter by giving permission if you choose, to go and find the man and bring him to the door and I will see that he gets in. If you do not choose to do it that is very well with me.

Mr. Gladstein: Wouldn't it be simpler if the Court had its own attache give orders at the courtroom door to counteract—

The Court: I have already given directions to let people in who desire to come in, but I have found you gentlemen for the defense make so many statements that turn out, when we come to examine matters, not to be so.

Mr. Crockett: May I call the captain of the guard?

The Court: No, you won't call the captain of the guard and we won't have any testimony taken here. We are (T-134) through with all that.

Mr. McCabe: Your Honor, if he disregards some direction of your Honor's there is considerable comment made on it, and when the guards and Mr. Saypol and everyone disregard your Honor's order then it is something—

The Court: You know, Mr. McCabe, I am beginning to get the impression that you gentlemen are trying to keep talking so long this afternoon that we won't have any jurors in, but I will let you know now we are, so if you talk on for half an hour or longer you are going to start having the jurors come in just the same.

Mr. McCabe: I thought that was obvious.

Mr. Gladstein: And I think I should let the Court know when I make our motions it is to make a serious motion.

The Court: Some have not sounded very serious.

Mr. Gladstein: And our expectation is our motions will receive serious attention.

The Court: That is what they have been receiving.

Mr. Gladstein: And as far as the hours are concerned the Court, your Honor, will recall in our desire to introduce more evidence on the question of the challenge last week and the week before we requested that the hours of hearing be lengthened and we announced our being prepared to spend time in evening sessions because of your Honor's (T-135) limitation of our right to put in evidence and you made it impossible for us to do so within the time limit, and I want to object for the record to the characterization your Honor has made that it seems to your Honor that we are speaking about these matters simply for the purpose of using up time. Judge—

The Court: If this has not been stalling this afternoon I never observed it in my life.

Mr. Gladstein: Then I want to say I will stall in an effort to get for my client the constitutional right to a public trial which we have not had today because first, by

virtue of an order either from your Honor or from Mr. Saypol people were excluded and, secondly, your Honor made an announcement here in court countermanding the order that excluded the public and here we are at four o'clock and people are still being excluded, and I say that what your Honor has done today, either directly, indirectly, actively or passively, constitutes a denial of a public trial and I object to it and I ask a voiding of the proceedings since this morning and an opportunity to make in public every motion that I desire to make in the interests of my clients.

The Court: Mr. Gladstein, that word "indirectly" I consider offensive and not respectful to the Court.

Mr. Isserman: If the Court please, I object to your Honor's characterization of the conduct of counsel (T-136) as stalling and also respectfully object to the Court's remark about misrepresentations. I was at the door only a few minutes ago and heard the captain of the guard tell Mr. McCabe, "My orders are my orders, and I admit no one." But I call this to the Court's attention in view of the fact that the courtroom is as empty as it has been all day.

The Court: Mr. Sacher?

Mr. Sacher: May it please the Court, I have two applications to address to the Court which I think are of imminent importance and I would appreciate it if the Court would grant me a little time to develop the grounds in support of them.

The first motion is an appeal to your Honor's discretion under Rule 24(b) which has to do with the matter of the peremptory challenges.

The Court: No. I will hear no argument on the number of peremptory challenges. I have given that a great deal of consideration and I told you gentlemen at a conference with you a week or two ago what I will do, and I am going to rule they have ten joint challenges, and ten joint challenges only, except for the additional peremptory challenges provided in case of alternates, and I do not care to hear any argument. I have considered the matter and I have determined that I will allow ten peremptory challenges to be used jointly by the defendants (T-137) and no additional except in the cases applicable where alternate jurors are selected.

Mr. Sacher: Now, if your Honor pleases—

The Court: I don't want to hear any argument.

Mr. Sacher: I know, but for heaven's sake, this is not a trial. This is not due process. You get up to make a motion and you say you have considered it and you have decided it. The least we are entitled to is to discuss and reason with your Honor. What is the difference whether we pick a jury tonight or tomorrow?

The Court: You cannot talk over every detail of the trial.

Mr. Sacher: It is not a question of the detail. I really have what I regard as my basic considerations. I am not concerned with number qua number. I would lkie to advance a theory of the cases which we believe constitutes a philosophic and legal justification—

The Court: I do not desire to hear argument on it, Mr. Sacher.

Mr. Sacher: Mr. Isserman reminds me my motion has been denied before I even made it.

The Court: I have decided on the number of peremptory challenges I shall allow.

Mr. Sacher: That may be, but may I state for the record—

(T-138) The Court: I ought to know something about this case after listening to it all this time.

Mr. Sacher: But I would like to place a motion on the record on behalf of the clients I represent, that your Honor exercise the discretion authorized by Rule 24(b), more particularly the last sentence of that subdivision which reads: If there is more than one defendant the Court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

The Court: I have considered that part of the rule and I deny your motion.

Mr. Sacher: I next move—

Mr. Isserman: I have something to say on this motion and I object to your Honor's ruling on a motion which appeals to your Honor's discretion and which is based upon facts to be placed before your Honor for the exercise of that discretion, and my objection is that we were not allowed to place before your Honor those facts upon which a proper exercise of discretion could be based. The Court's

failure to allow us to present to the Court the facts upon which such exercise of discretion should be based constitutes a denial of due process.

Mr. Gladstein: Your Honor, I object to the ruling you have made and I submit that what you have done in (T-139) preventing the making of the motion and the assignment of reasons in support of it constitutes an abuse of the Court's discretion, and in view of the conduct of the Court, this summary disposition of the motion for a granting of additional peremptory challenges, I desire in the light of these new developments, to make my motion for severance which I was prevented from stating the facts on in the light of this new fact, and I want to move now that in so far as the two defendants I represent are concerned, their cases, and each of their cases, be severed from the cases of each and all of the others, particularly for the reason that the Court, without hearing any argument of the facts in support, preventing any such presentation, has now ruled that all of the defendants jointly shall have no more than ten challenges.

The Court: Motion denied.

Mr. Crockett: If the Court please, I should like to call attention to the conference in your Honor's chambers to which your Honor recently referred. My recollection is that that conference was attended by Mr. McCabe and myself, and it was at that conference, I think your Honor will recall, when your Honor first brought up the matter of the number of challenges. At that time I distinctly recall a statement by your Honor that you had not foreclosed your mind on the question of granting (T-140) additional challenges, and that you would be open to oral discussion of the matter. I suppose, in view of your Honor's ruling I am to conclude that your Honor no longer has that frame of mind.

The Court: My recollection differs from yours, Mr. Crockett.

Mr. Crockett: Under the circumstances I think I am justified in relying on my own recollection. I should like at this time to move for a severance as to my clients, because I consider now under due process of law that between them they will not have at least one challenge each.

The Court: Motion denied.

Mr. Sacher: I next move the Court for the following relief: First, that counsel for the defense be permitted to conduct the voir dire of the jurors. After all is said and done, your Honor, we are sitting up here, and I notice there is maybe room for 100 or 150 people. I do not envisage I am going to sit here and have your Honor ask questions to people sitting in the back of me and know whether they are the type of juror I want to have in this case.

The Court: You are going to see all the jurors that questions are addressed to sitting right in the jury box and under oath when I address the questions to (T-141) them.

Mr. Sacher: As I understand, you will address questions to only some twelve people at a time?

The Court: Except for the matter of the first question I desire to ask which will have to do with whether the delay of the trial will occasion some hardship. What I am first going to do is find those people who cannot serve for any prolonged period and that particular question I intend to ask of the group as sitting in the courtroom. Except for that I will only address those who are sworn and sitting in the jury box.

Mr. Sacher: I respectfully submit, your Honor, that in this case it is appropriate that there should be direct examination by counsel themselves instead of through the Court. Among the reasons that I have to advance in support of that proposition are the following: As I envisage this case this is fundamentally comparable to the so-called criminal libel or seditious libel cases in which I regard the function of the jury to be to decide the law as well as the facts as they do in criminal libel and seditious libel cases, and in those circumstances I think it is of the utmost importance that there should be an immediate and direct contact between counsel and jurors.

In that connection I should like to observe (T-142) that Judge Knox had occasion to say in his book "a Judge Comes of Age" the following at page 250: Speaking of the trial of Attorney General Daugherty he said the first day was entirely spent in selecting a jury.

There is really nothing funny about this.

The Court: I was just thinking it was only a little while ago you were talking about Judge Knox's book in a rather different way. But you can do that. That is all right.

Mr. Sacher: But this is a statement of fact.

The Court: I am not going to stop smiling when I see some occasion to smile just because Mr. Sacher does not like it.

Mr. Sacher: It is not the smile. I welcome smiles. I indulge in them a good deal, but I don't think you ought to treat this argument with levity because I think it is an important question.

The Court: You know, Mr. Sacher, this matter of permitting counsel to interrogate the jury is something that judges of experience have some basis for deciding whether they want to permit it to be done or not. After what I have heard in these last seven weeks I have completely determined, and no amount of argument is going to change my mind, that there are not going to be any questions asked by any of you lawyers addressed to any of the jurors. (T-143) I was thinking at one time of permitting you each to interrogate them as to certain matters. Now that I have what I have seen here, I have determined, in the exercise of my discretion, that it would be most unwise for me to permit that to be done. The matter would go on for so long a time that it might be, I don't know how long, but we would never select a jury. We would only get into interminable wrangling and discussion and long arguments and all sorts of improper questions, and I will not just allow it.

Mr. Sacher: I would like to get on the record what Judge Knox said.

The Court: All right. Go ahead and put it on.

Mr. Sacher: He is here referring to the trial of Attorney General Daugherty. He says the first day was entirely spent in selecting a jury; that this trial was infinitely more important than the average criminal case was, so that accordingly we allowed the opposing counsel to interrogate the prospective jurors at great length. 43 men were examined before the jury was completed.

Now if there is no class justice in this court then I say that the importance of these cases and the importance of

these defendants is as great as the Teapot Dome Daugherty who was tried in this case, and if (T-144) Judge Knox could give Daugherty the opportunity, and his counsel the opportunity, to interrogate jurymen, then we, the counsel, and these clients of ours, are entitled to the same treatment. (T-145) And when last year or the year before, when Lustig was tried here for robbing the Government of some $2,000,000, Lustig was given the opportunity, and Mr. Stryker who represented him was given the opportunity to examine the jurors directly.

Now all I have to say to your Honor is this: if your sole objection to permitting us to examine the jurors directly is your concern with time, then I respectfully suggest that you—

The Court: If what I said a moment ago looked as though I was talking about time, I will correct it now. What I was referring to was the conduct of you lawyers who have been representing the defendants here. That is what I was talking about.

Mr. Sacher: Now, your Honor—

The Court: The record on that speaks for itself.

Mr. Sacher: —one thing that seems clear to me—I do not think that we will accomplish anything by a tug-of-war on words, with your Honor constantly telling us something about our conduct and our continuing to deny it—frankly, I don't know what your Honor is talking about, I really don't, and all I want to suggest to you is that you must bear in mind that when you deny us the opportunity to examine the jurors you are not punishing counsel; you are punishing these 11 men whose liberty (T-146) is at stake, and therefore I respectfully suggest that if you have any complaint or grievance against us, then we have to bear the consequences of that, and I do no think it would be proper, nor would it be just, I submit, to visit the consequences, assuming there were any impropriety of conduct—and I can only repeat that I am not aware that a single one of us was guilty at any time of any knowing impropriety—assuming all that to be so, I respectfully submit to your Honor that a proper concern for the defendants in this case requires a direct examination by counsel of the jurors. In that connection let me say this, I think there are very few cases within your Honor's knowl-

edge or within the history of this court in which defendants came in under so heavy a burden of attack from every governmental source in the country, and to say that in this situation you won't give, you won't have any flexibility at all, you won't grant a single peremptory challenge in excess of that which the law expressly requires, and you won't give us an opportunity to examine jurors directly, I respectfully submit that when you say that you are not showing the concern which your Honor stated you would have in regard to the proper presentation and defense of this case. In that connection I would like to make this observation: when you bear in mind the (T-147) President's reference to the defendants in this case of the other day, and the recency of it and the freshness of it, your Honor knows that you are not going to explore the effect of that on jurors with one or two isolated questions. It may require a considerable amount of probing. It may require a considerable amount of interrogation.

Now we are not concerned with the consummation of time. We never have been. If we have consumed time, it has been only because it was necessary to do so in the proper presentation of the case, and so even today there isn't a single motion that we have laid before your Honor, bearing in mind the magnitude of the case, its importance in the history of our country—let us not forget that, the importance of this case in the history of our country, and not only for the present but for posterity. It may not be of any great moment whether your Honor does, for your own convenience or ours, give us more challenges or not, whether you permit direct examination of jurors or not, but I say to your Honor that the outcome of this case will determine the rights and liberties of American people for a long time to come, and we can afford, in an issue of that cruciality, to deviate—to deviate in fact in the manner in which far less consequential cases, that is, far less consequential to the people, to the community, where (T-148) allowances have been made. After all is said and done, to whom did it matter whether Daugherty, Fall of the Tea Pot Dome scandal, or Lustig with the $2,000,000 or more that he took from the Government—

The Court: I do not desire to hear further argument about it.

Mr. Sacher: Well, I do not know why your Honor stopped me just after I mentioned Daugherty and Lustig.

The Court: No, it had nothing to do with that.

Mr. Sacher: Well, if it has nothing to do with that—

The Court: But I have told you that I have determined the matter. Now your going on talking for another half hour or so isn't going to affect it at all. I feel that I have taken everything into consideration that deserves consideration, and that I am going to exercise my discretion in the way that I said I would, so I do not want any further argument on it.

Mr. Sacher: May I, however—

The Court: You will postpone further argument on everything else and we will call the jurors in now.

Mr. Sacher: I wish only to place one observation on the record, your Honor, in the light of your attitude this afternoon, in the light of your repeated announcement (T-149) of predeterminations in advance even of the making of motions and the hearing and consideration of evidence, I enter upon this trial with the greatest and profoundest of misgivings for the rights of my client—my clients, rather, and I urge upon your Honor that whatever has heretofore been done by your Honor has ceased, and that at least from here on out these defendants get a fair public trial, and that all of their rights be sedulously respected, not the least of which is that they be afforded the right of representation by counsel, and I want to take exception on the record to your Honor's conduct of today on the ground that you have violated another of the constitutional rights of these defendants by denying them, through your conduct, the assistance of counsel which the Constitution gives them.

The Court: Are there any more motions which we can hear tomorrow? I am desirous now of calling in the jurors and starting?

Are there to be other motions that you desire to present tomorrow?

Mr. Isserman: I have an objection that I wish to make—

The Court: Well, I am talking now about motions. Are there any more motions?

Mr. McCabe has one.

(T-150) Mr. McCabe: No, I have no other motion.

The Court: Then please answer my question. Is there anyone here who has any more motions to make?

Mr. Crockett: I have one motion to make, your Honor.

The Court: All right.

Mr. Crockett: And that motion is in the nature of a motion for a rehearing because I was deprived of an opportunity to state in reference to questioning jurors on the voir dire. I do not want to make an extended argument on it; I merely want to call the Court's attention to the argument that I addressed to your Honor this morning concerning the prejudicial climate under which this case is being tried, the need, I think, for exercising extreme caution here in the exercise of jurors, and especially am I disturbed by your Honor's suggestion that you propose to call in 12 jurors at a time, have them take their chairs and put questions to them in the presence of the other jurors who presumably will be occupying these 70 vacant seats here. Now I know from ordinary human experience that very frequently when I am waiting to be questioned about something and someone else is on the spot answering the questions at that time, I am in a position to decide how I want to answer the questions, (T-151) and my decision might determine whether or not I will be acceptable as a juror or not acceptable as a juror, so I am suggesting that if your Honor insists on going through with the voir dire without permitting us to ask questions, that at least we call in just 12 prospective jurors at a time and let your Honor question them.

Mr. McCabe: May I say this, your Honor—I rose, first of all, not to argue—

The Court: First, I will deny Mr. Crockett's motion. I have given the matter reconsideration and I deny it.

Mr. McCabe: In support of Mr. Sacher's arguments and the arguments which, and the discussions which we had once on this subject, I should like to file for the record the affidavit of S. Stansfeld Sargent, associate professor of psychology at Barnard College—

The Court: Is this a motion?

Mr. McCabe: No.

The Court: Then I won't hear it.

Mr. McCabe: I would like, your Honor—

The Court: Bring in the jurors.

Mr. McCabe: I would like to file these affidavits.

The Court: You file them afterwards.

Mr. Crockett: But I have one more motion to (T-152) make.

The Court: Make them all you want tomorrow, but the jurors are coming in now and I am going to start.

Mr. Crockett: I have to make a motion today, not tomorrow. It affects Mr. Davis—

The Court: This is not a motion that he is making at all. Mr. McCabe has just stated that he has none.

Mr. McCabe: I wish to say something before the jury comes in. If your Honor insists on denying to counsel the right to put questions to the jury then I respectfully request on behalf of my clients, Eugene Dennis and Henry Winston, the right to examine, face to face and put questions to the jurors who are being called to try them in this case.

The Court: You may file the affidavit.

Mr. Isserman: If the Court please—

The Court: No, the jurors are coming in and I am going to proceed, to find out which of them will be unable to serve.

Mr. Isserman: If the Court please, I have a motion to make in connection with the examination of jurors. I have an objection to state on the record to the Court's intended conduct or questioning of jurors in respect to hardship, and I would like an opportunity, before the (T-153) Court commences that questioning, to complete my motion in respect to the jurors and to state my objection.

The Court: All right, go ahead and state it.

Mr. Isserman: My motion is—

Mr. Gladstein: We have prospective jurors, your Honor. May the record show that—

The Court: The jurors are walking in; certainly I directed them to come. What is the matter with that?

Mr. Gladstein: No, no. I am simply pointing out that the motion that is being addressed to the Court is one that is not ordinarily addressed in the presence of prospective jurors.

The Court: Well, if Mr. Isserman has anything further to say he will say it with the jurors here. I see no harm in it.

Mr. Isserman: If your Honor please, the subject matter of my objection goes to the intended questioning of the jurors, and I ask that the objection be heard out of the presence of the jury.

The Court: Motion denied.

Mr. Isserman: If the Court please, I object to the denial of the motion on the ground that the Court's failure to hear me at this time is a denial of due process.

The Court: Well, I said I would hear you.

Mr. Isserman: The nature of the objection is such, (T-154) your Honor, that my clients would be prejudiced if the argument is in their presence.

The Court: Very well.

Now, ladies and gentlemen, I desire to address to you generally the question—

I will wait until they all come in.

(Prospective jurors took seats in the courtroom.)

The Court: Now ladies and gentlemen, there is a question that I have thought it wise to put to you all in the beginning here so that we might dispose of this particular matter with the convenience of all.

Now this trial may last several weeks, perhaps as much as two months or more. Is there any reason why you should not serve because of some family or business hardship which might be caused by your attendance as a juror for so long a period?

Now those of you who would answer that question in the affirmative may step up and take the jury box and I will pass upon the validity of your excuses.

(Prospective jurors step forward.)

The Court: Yes; what is the difficulty that you have?

Prospective Juror: Well, I have a youngster going to school and I feel that it might be a little hard for me if it lasts too long. The only thing is the time element. (T-155) If we were permitted to leave at a certain hour it wouldn't be too hard, but if we sat very late I think it would be difficult.

The Court: Well, the court sessions here will probably end at 4.30. I gather that would make it difficult for you?

Prospective Juror: Yes, it is.

The Court: You may be excused.

Prospective Juror: Thank you.

Mr. Gladstein: Your Honor, may we have the lady's name?

The Court: What is that?

Mr. Gladstein: May we have the lady's name?

The Court: Yes. I was just telling Mr. Borman to get the name and then the cards of the jurors thus excused will be kept separate here.

Mr. Gladstein: I simply wanted to make a notation of them.

The Court: Well, I have no objection to your doing that.

Mr. Gladstein: So that we will know because the jury panel itself sets forth the names, of course, of the prospective jurors.

The Court: Yes.

Mr. Gladstein: To check against that.

(T-156) The Court: You may do that.

Mr. Borman, as each juror is excused you may permit Mr. Gladstein to copy from the card—and I think those of you who are waiting in the aisle there might just as well relax and go back to your seats because we will not be able to get very far this afternoon.

You may be excused.

The Clerk: Mrs. Hannah D. Feldman.

The Court: Yes, sir.

Prospective Juror: I am the only key man in my little business—

Mr. Isserman: If the Court please, we would like to hear him.

(Record read.)

The Court: Speak up. It is a little difficult for people not used to talking in court to make their voices come out loud enough for everyone to hear.

Prospective Juror: As I said, I had a very capable assistant who left me a few weeks ago which leaves me

the only key man in my business, and if I have to serve for three or four or five weeks it would be a very bad thing for me, exceedingly bad.

The Court: Very well, you may be excused.

The Clerk: What is your name?

(T-157) Prospective Juror: Ralph M. Low.

The Clerk: Ralph M. Low.

The Court: Yes.

Prospective Juror: May I come up to you and explain.

The Court: You see, everything here has to be taken down in writing and explained for everyone to hear. It is one of those things—

Prospective Juror: I understand.

The Court: —that is a little difficult sometimes, but we must all be patient and do the best we can. Now if you feel that there is some reason that you have that you would like to speak to me about privately, I will ask counsel if they will consent to that.

Mr. McGohey: I shall certainly consent, your Honor.

Mr. Gladstein: No objection.

The Court: Very well, you may come up here.

Prospective Juror: Thank you.

(Conference between Court and prospective juror off the record.)

The Court: This lady is excused.

The Clerk: Your name, please?

Prospective Juror: Regina W. Frieber.

The Clerk: Regina W. F-r-i-e-b-e-r.

(T-158) The Court: Now it is the hour for adjournment. There is something I would like to say to all of you jurors, and that is that these things all involve a certain amount of time-taking and inconvenience, but I think if everybody, as I said before, just relaxes a little bit and tries to be patient, that we will find everything will work out all right without any undue inconvenience, at least without any great inconvenience. So we will adjourn now until tomorrow morning at 10.30.

The Clerk: Court is now adjourned until tomorrow morning at 10.30.

Mr. Sacher: Will your Honor be good enough to wait? I have an application to make.

The Court: Yes. The jurors may pass out and then I will hear the application. It has nothing to do with the jury.

(Prospective jurors left the courtroom.)

Mr. Sacher: What I have in mind, your Honor, is this: Mr. Davis has a councilmanic meeting tomorrow and I was wondering whether in the meantime, since the jury has not been sworn—

The Court: No.

Mr. Sacher: Whether you will let him attend that meeting.

The Court: No.

(T-159) Mr. Sacher: It is rather crucial, for this reason, that I understand that proceedings are being undertaken in the Council dealing with his tenure there, and it is of the utmost importance that he attend. Now if he can arrange—

The Court: Let us see what Mr. McGohey says about that.

Mr. McGohey: If your Honor please, one of the things that I am sure is going to come up in this trial, as it does in every other, is whether or not a prospective juror knows any of the defendants. Therefore under the circumstances I do not and cannot consent to the absence of any defendant during this drawing of the jury.

Mr. Crockett: May I suggest, your Honor, that Mr. Davis being one of two Negro defendants, and also a member of the City Council of the City of New York, in all probability any prospective juror who knows Mr. Davis would not have to see Mr. Davis physically to be able to identify him as Mr. Benjamin Davis. Now if the situation is as your Honor has had it stated to you, that the only Negro Councilman in the City of New York is having his right to office being challenged tomorrow, I think the least that we can expect is that the Court will allow him to waive his constitutional right to be present here in order to be present at the (T-160) meeting of the City Council of the City of New York, on tomorrow, especially when, and

I do represent to your Honor at this time, there is no objection on the part of any of the other defendants.

The Court: The application is denied.

Now if there are any more motions I will hear them now so that we can go on tomorrow with the continuance of the examination of the jurors.

Mr. McGohey: Well, may I make this observation with respect to the argument just made by Mr. Crockett, and that is this, that I am sure that if requests were made—there has been no suggestion that such a request has been made, but if a request were made by Mr. Davis or anybody representing him to the City Council, I am certain that the City Council would hold its hearings and will hold those hearings at such a time and in such a place and in such a manner that Mr. Davis will have the fullest opportunity to protect his rights in the proceedings which are said to be pending there, in such a way that they would not interfere with the conduct of this trial.

The Court: What time do they anticipate having the hearing?

Mr. Sacher: They go into session at 1.30, so if Councilman Davis can be here in the morning and get (T-161) off for the afternoon session, I do not believe it will place any great burden on the prosecution.

The Court: We might start late in the afternoon, later than usual.

Mr. McGohey: You mean the Council meeting?

The Court: You see, the Council meeting is at 1.30.

Mr. McGohey: Would your Honor suggest that I communicate with the President of the City Council to ascertain whether or not that might be done?

The Court: Yes.

Mr. McGohey: I shall be glad to do it.

The Court: See whether it is going to be reasonably anticipated that if we start at 3 o'clock or even as late as 3.30, after the luncheon recess, that whatever matter is coming up that he is interested in will be over.

Mr. Sacher: There is only one other consideration, your Honor, and that is that he represents his electorate there, too, and he would like to function in the City Council for the one day in the week that he functions.

The Court: You see, Mr. Sacher, when we have a criminal case like this it is indispensable that the defendants be in court all the time during the trial, and that is what we have to do. I am not going to (T-162) make any change about that. I have been most liberal in what I have allowed during these preliminaries because I could see no inconvenience resulting from doing that, but with the start of the trial it is entirely different.

Mr. Sacher: But, your Honor, the rules state—

The Court: I am willing to consider a reasonable adjournment for a part of tomorrow to give him an opportunity to be there for whatever this matter is going to be. It cannot take all day.

Defendant Davis: Your Honor, may I speak?

The Court: Certainly, yes, you may speak.

Defendant Davis: There isn't a certainty that tomorrow these possible proceedings of expulsion will begin, but there is pending in the Council an action which if decided upon and acted upon tomorrow, could have the same effect of depriving me of a part of my rights as a City Councilman. Also I cannot say for certain that this proceeding will begin tomorrow or that anything will be introduced in the Council, but I cannot say for certain that it would not.

The Court: Why don't you let Mr. McGohey find out?

Defendant Davis: Well, it is according to the rules of the Council—there is no way that anybody can find out just what it is going to take up, what is (T-163) going to be taken up tomorrow at the City Council.

The Court: Well, I will leave the matter as it is now and see what each of you are able to inform me before the close of the morning session tomorrow.

Defendant Davis: Your Honor—

The Court: We will take under advisement the possibility of having no afternoon session tomorrow should something be reported to me that makes that seem desirable.

Defendant Davis: But, your Honor, this is a continuing threat over my status in the Council of the City of New York, and I am sure that your Honor and Mr. McGohey either would not desire to bear any responsibility for any action being taken in the City Council without my presence,

and I can certainly give no guarantees that such action might not take place without my presence.

The Court: Well, we will see what is reported tomorrow. I do not like to make a determination now that will have any finality about the whole trial. On the other hand, I am quite made up in my decision that we will have no proceedings whatever of this trial without the presence of each and every one of the defendants and the possibility of some intermission, some adjournment, something of that kind, if it isn't too much, I will consider, but I will not consider going on with any (T-164) proceedings whatever in the absence of any of the defendants; so both of you, that is, Mr. McGohey and—

Who was it that made the application here? Was it Mr. Sacher?

(Mr. Sacher rises.)

The Court: If you will take the matter under advisement and do what you care to do and then just before luncheon tomorrow we will take it up again.

Very well.

Mr. McCabe: Your Honor, in the confusion before the jury was brought in, I had made a motion that my clients be permitted to examine the jurors on the voir dire. I do not know whether your Honor ruled on that motion.

The Court: That your client be permitted to?

Mr. McCabe: Yes. Inasmuch as your Honor had expressed some concern over quote what has gone on here end of quote, you had determined not to allow counsel to question the jurors on the voir dire, and I then requested on behalf of my clients that they be allowed themselves to put the questions.

The Court: What is the rule? Have you got the number of it there, Mr. McGohey?

Mr. McCabe: It is in Rule 15, I believe.

Mr. Gordon: 14(a).

Mr. McCabe: Yes; 15 is the depositions.

(T-165) The Clerk: 24(a) and (b).

The Court: Yes, here it it. As I read Rule 24, subdivision(a), places it entirely in the discretion of the court, whether the court will do the examining of the jurors or

prospective jurors, or whether the parties or their attorneys be permitted to do it.

Mr. McCabe: Yes.

The Court: And I have, after giving the matter careful consideration and thinking of this additional suggestion that you have made, decided that I will conduct all the examination of the prospective jurors myself unless something should develop that I do not anticipate at the moment that might lead me to make some different ruling later on, but at present thinking I am going to do all the questioning myself.

Mr. McCabe: I handed up, your Honor, in support of the motion made by Mr. Sacher, an affidavit by Mr. Sargent and supporting affidavits by several other psychologists and psychiatrists, and I ask that they be marked as exhibits.

The Court: Yes. Let me see those affidavits.

Do you have them there, Mr. Borman?

The Clerk: No, I have not.

The Court: I think perhaps they are on the table in front of Mr. McCabe.

(T-166) Mr. McCabe: I believe Mr. Shapiro passed them up. I gave them copies.

The Court: Let me just glance at this a moment, Mr. McCabe.

(Examining.)

Are these both to illustrate that this kind of a case just can't be tried before a jury? That is the point, is it?

Mr. McCabe: No, your Honor. They go to this point, that, A, prejudice does exist, and in a case of this sort, inasmuch as the jury panel does consist to a great extent of those in more favored classes, that convervatism, rather, is the rule, and prejudice against, let us say, a radical group might be more prevalent.

B, that the question of prejudice is very easily denied by anyone. Anyone denies that he is prejudiced. It is very hard for anyone to admit that he has a prejudice, and it can be very often brought out only by an eye-to-eye and face-to-face questioning in which the prejudice may not be fully revealed but it may be drawn some way to the surface so that it may be recognized by counsel and guide

them in the exercise of peremptory challenges, and in the unanimity of questioning of a group, it is so easy for one just to remain silent when asked; it is very different (T-167) when the question is put to him as an individual. I think you and I have had some discussion on that at one time. How easy it is for a person to refuse to volunteer from a group, from the back row of a group, that he is prejudiced. He just remains silent. He may be pondering over his answer to the question and may be actually considering admitting prejudice when the next question is asked, and that is an easy avenue for him to remain silent.

The Court: Let me ask Mr. McGohey a question.

Mr. McGohey, I am rather impressed with the merit of this suggestion that instead of having a large mass of jurors in the back of the room, that we put a sufficient number to fill the jury box and question that group and then as it needs to be refilled, call others in? Now what do you think about that?

Mr. McGohey: Will your Honor pardon me just a moment?

The Court: Certainly.

(Mr. McGohey confers with Mr. Gordon off the record.)

Mr. McGohey: Your Honor, I don't know how that could be practical. What we started to do this afternoon was to take people on the panel and put 12 in the box and find out, first of all, who has the time (T-168) to serve in what may be a long case. Now I assume that after some people get excused there are going to be people put into the box here and asked certain questions. Well, you might find that eight of those people or five of those people were satisfactory, but then you would have to go and get all the rest of the panel, the whole panel to do that, and sift through them that way until you got—until you completely purged the panel of persons who would be unacceptable for one reason or another, under the questions that the Court might ask, and then as those people who were found to be acceptable, then you would put their names in the box in the wheel and draw all over again. It seems to me that that would be a very long process if you were to follow that.

The Court: You see, the point is made by someone of counsel for the defense here that it isn't quite fair to have any questions put in a way that a large group sitting in the back of the room may hear them. In the first place, they say "We have a right to observe the demeanor of the persons to whom the questions are put," and they say also that if there are a lot of them sitting in the back of the room they may have a lot of time to think about questions that are put to some of the others in the box, and there might be a variety of reasons. Now I know that it is done all the time.

(T-169) On the other hand, though it might take longer and be a rather exhaustive process I am wondering if there is not something in what they say.

Mr. McGohey: Yes, but don't you come to the point where any counsel has any questions he wants to address all jurors in the box, or any one juror in the box, I understand your Honor's ruling to be counsel could get up a question which your Honor could ask.

The Court: Yes, but you see they are going to be looking at these how many seats in that box?

Mr. McGohey: 15.

The Court: They will be looking at those 15 people there and they cannot be looking at the 40 or 50 more that are in the back of the room, and I feel a little concerned about that.

Mr. McGohey: Maybe we are talking about two different things. I was under the impression all the time you were just going to talk to twelve jurors at a time. In other words, I understood your program to be this: that you were going to canvass the panel to find out who believed he or she could not serve at all.

The Court: That is right.

Mr. McGohey: And those that could not were to be allowed out and then you would have a panel from which a jury would be drawn. The only way, I suppose, you can (T-170) do it is to take a number of twelve people in the box from the wheel.

The Court: Yes, I think perhaps we are talking at cross-purposes here yet. All I am talking about is having 15 in the jury box and questions addressed to them and a

whole lot more setting in the back of the room and hearing these questions and counsel not observing those people, and they perhaps thinking about them and wondering what they are going to say, and all I was suggesting and trying to get your reaction on, is whether it would not be something that would be well all around to put 15 in the box and then call in from outside additional ones as some one might be excused from those sitting in the box and not have the 40 or 50 sitting in the back of the room.

Mr. McGohey: I see what you mean. Then ask those questions all over from the people that come in?

The Court: That is right. That is all I am talking about.

Mr. McGohey: Of course, we only put twelve in the box and alternates are drawn separately.

The Court: I do not see that there is any objection to putting more in, would you, Mr. Gladstein, if we start with 15? Would you have any objection?

Mr. Gladstein: No. It was a funny thing I was just whispering to Mr. Sacher you first off have to choose (T-171) twelve and the alternates after. I think the rule does require that.

The Court: It is true that the alternates have to be chosen afterwards because the challenges applicable to the alternates can only be used as to the alternates, so I guess he is right. We have to just put twelve there.

Mr. McGohey: It is not a question of calling people in and putting them on. They have to be called out of the wheel. We all understand that.

The Court: Yes, I know.

Mr. McGohey: That means as each new person goes into the box, one or two or whatever it is, you have the constant repetition of the questions of the Court to each one.

The Court: It seems to me it is better to do that than to have the inconvenience, or whatever it might be called, of having a lot of prospective jurors sitting in the back of the room and speculating on the answers to the various questions. I think it is better. That is what we will do.

Do I understand any counsel for the defendants object to my first eliminating those who cannot serve because