

Herbert Allen—for Defendants on Challenge—Direct

Mr. Gladstein: I wanted it to appear in the record—

The Court: It may appear in the record that he is not a Negro.

Q. Mr. Allen, I would like to ask you the race to which you belong.

The Court: Well, you claim that Jews have been deliberately excluded. That is the point of this question?

Mr. Gladstein: One of the questions.

The Witness: I decline to answer, your Honor.

Mr. Gladstein: Will your Honor direct the witness to answer?

Mr. McGohey: I object to that, your Honor, for the same reason again, your Honor, unless there is some foundation shown—

The Court: I think that is so.

Mr. McGohey: —that there was such inquiry by the clerk.

The Court: Whether he a member of one race (1409) or another, unless there is something to indicate that the process of selection has been based on that I am very reluctant to permit general questioning of every juror on that subject.

Mr. Sacher: If your Honor please, I would like to invite your attention to the case of *Patton vs. Mississippi*.

The Court: What is the citation of that? If you gentlemen have the official reports instead of the unofficial report it would be a little more helpful to me.

Mr. Sacher: The *Patton* case is 332 U. S. 463.

The Court: Let me glance at it again before you start telling me about it.

What is the part of the case that you desire to direct my attention to?

Mr. Sacher: I want to direct your Honor's attention to the proposition that in the *Patton* case it was permitted to the objectants for the defendant

Herbert Allen—for Defendants on Challenge—Direct

in that case to challenge the grand jury, the composition of the grand jury on the basis that for 30 years no Negro qualified elector had ever been called for jury service. What we want to establish here is, on the basis of practice, that a systematic exclusion of certain groups in the community exists.

(1410) And all I am saying, your Honor, is the following: that *Patton vs. Mississippi* as well as a number of other cases, including *Norris vs. Alabama*, as well as the *Powell* case, have uniformly held that the existence of systematic exclusion of certain groups of the community may be established by the facts and not by proof either of a statute, which prohibits the inclusion of the proscribed classes nor by direct evidence of expressed intention or confession by a clerk or an officer.

The Court: Let me ask you something, Mr. Sacher. Just how is the jury commissioner supposed to know whether a prospective juror is or is not a Jew?

Mr. Sacher: I will tell you how he knows.

The Court: Now they don't—

Mr. Sacher: I will tell you how he knows.

The Court: —ask such question on the questionnaire.

Mr. Sacher: I will tell you how a lot of anti-Semites know. No. 1, we are going to prove to your Honor that down on the East Side, where we have the largest aggregation of Jews in this city, there has not been a Jew called from that area since God-knows-when. So, that is one large area of Jews, poor Jews, working class Jews in particular who are immediately excluded.

(1411) The Court: All right.

Mr. Sacher: That is item 1.

The Court: I sustain the objection. And until such proof—

Mr. Sacher: I also will say to your Honor—

The Court: Would you mind reserving your comments for just a moment?

Mr. Sacher: Oh, I am sorry.

Herbert Allen—for Defendants on Challenge—Direct

The Court: I will await the proof from those responsible for the operation of the system under the statute, namely, the jury commissioner, the clerk and the deputy clerk until I rule with finality on this. At the moment I sustain the objection.

Mr. Sacher: May I then request your Honor that you instruct the witness to remain available for return to be examined on these questions as to which you are suspending judgment, so to speak?

The Court: I am not inclined to make such a direction because it seems to me unnecessary.

Mr. Sacher: Does your Honor say then that we will be put to the trouble of running up to Fieldston again or to 30 Broad Street to serve subpoenas?

The Court: Well, I think, Mr. Sacher, that the better procedure here would have been to call the jury commissioner, the clerk and deputy clerk, but (1412) you desire not to do that.

Mr. Sacher: Your Honor, you didn't call the clerk and the deputy clerk in the Fay case.

The Court: I did not call anybody in the Fay case.

Mr. Sacher: Of course not. And for the same reason that you didn't call him, we didn't call him.

The Court: I had nothing to do with the trial in the Fay case.

Mr. Sacher: Well, I don't think you would have called him if you had anything to do with the trial. You were too good a lawyer to do any such thing.

The Court: Well, it is quite flattering to have you keep talking about me as a lawyer, and I am glad to hear your comments on the subject as long as they are favorable. And if not I will preserve my equanimity in any event.

Mr. Sacher: I respectfully except to your Honor's refusal to instruct the witness to return in the event that your Honor changes your ruling as to the admissibility of the question.

The Court: Very well.

Mr. Isserman: If the Court please, I again find myself in the position of being precluded from mak-

Herbert Allen—for Defendants on Challenge—Direct

ing any statement of objection or statement of opposition (1413) or argument before your Honor rules. There is no one at this counsel table that speaks for me or for my clients.

The Court: Well, you have been doing pretty well speaking for them yourself.

Mr. Isserman: And, your Honor, by ruling before counsel have a chance to state their position and by ruling after one counsel has done so has precluded me thus far from stating my position on behalf of my clients, and the rulings you have made in respect to those clients I wish to state on the record are rulings which deny us due process of law. I state for the record now—

The Court: I will treat your argument, that is the one you are about to make, as in effect an application for reconsideration of the ruling I have made. So you may proceed to state the reasons for your objection.

Mr. Isserman: I ask your Honor to withdraw your ruling before I argue the point.

The Court: The application is denied.

Mr. Isserman: Now if the court please, the challenge we have filed in this case charges a systematic and deliberate inclusion of certain groups in the community and the exclusion systematically and deliberately of other groups in the community. One of the elements of proof that the defendants are required to establish is the fact of exclusion and inclusion in accordance with (1414) the allegations of our challenge. In other words, we have the burden of showing a pattern exists, a pattern which includes certain elements of the community and a pattern which excludes certain elements, groups and classes in the community.

It has been held that the persistent and continuous repetition of a pattern in the composition of juries is by itself evidential on the question of the deliberateness of that systematicness of that exclusion.

Now, through the questions put to this witness we are establishing the fact of discrimination and

Herbert Allen—for Defendants on Challenge—Direct

the fact of inclusion of particular groups over others and the exclusion of particular groups as against others. It is necessary and material for us to establish that pattern. Thereafter in our order of proof we will bring in additional evidence to show the deliberate creation of that pattern and the fact that such a pattern as we have indicated exists in our challenge could not be the result of random selection, could not be the result of selection from voters' lists truly representative of a cross-section of the community.

Now what your Honor's ruling, which your Honor is now reconsidering, does is to preclude us from setting up the pattern of discrimination in an effort to compel us first to call hostile witnesses on the question (1415) of their intention or even on the question of the method of selection.

Now we take it we have a right to determine our order of proof and to establish the pattern which exists before we put in the evidence which indicates that pattern could not exist under a proper system of jury selection, but is the result of deliberate and systematic attention to the inclusions and exclusions.

Because of that, and because of your Honor's precluding the establishment of the pattern to the questions asked of this witness to show that he is in the favored economic class, as indicated in our challenge, and to indicate his status, economic status in respect thereto and to show the other elements of our challenge, we say that your Honor is denying us due process of law in our presentation.

Mr. Gladstein: May I resume the questioning?

Mr. Isserman: Has your Honor ruled on the question of reconsidering?

The Court: I have reconsidered the ruling and I adhere to my former ruling.

Mr. Gladstein: I will ask the Court whether at the conclusion of my questioning other counsel will be permitted to question the witness on behalf of their clients?

Herbert Allen—for Defendants on Challenge—Direct

(1416) The Court: I see no reason to deny them that privilege. I have already indicated that I am hopeful if, as and when we get around to impaneling a jury that we will be able to develop some mode of proceeding without any direction from me that will make things a little easier. I have been inclined to be more lenient in a proceeding such as this, where you have no jury present, than I think would be proper later. But I feel as I have in all other cases, that if you give counsel reasonable accommodation that things will work themselves out.

By Mr. Gladstein:

Q. Mr. Allen, are you a member of any private clubs or societies or associations?

Mr. McGohey: Objection.

The Court: Sustained.

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

Q. Is any member of your family? A. Not to the best of my knowledge.

Q. Any of your partners? A. Not to the best of my knowledge.

Q. Will you enumerate the directories in which your name is listed?

Mr. McGohey: Objection.

(1417) The Court: Sustained.

Q. To your knowledge.

The Court: Sustained.

Q. Is your name listed in any directory of corporation directors, sir, to your knowledge?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Is your name listed on any college or university alumni list, to your knowledge? A. Well, unfortunately

Herbert Allen—for Defendants on Challenge—Direct

I did not have the privilege of an education that you seemingly had. I had to work my way up in life. No.

Q. Your answer is that you are not so listed; is that right? A. That is right.

Q. Does your wife have a separate source of income, sir?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Does she have separate ownership of property?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Does your wife have an interest in your firm?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Is your wife a member of the jury lists of this court?

A. She is not a member of any jury list.

Q. Are any of your partners, to your knowledge?
(1418) A. To the best of my knowledge, no.

Mr. Gladstein: I have no further questions for myself, your Honor.

Mr. Sacher: I have just one or two questions, your Honor.

The Court: You may ask them.

By Mr. Sacher:

Q. You say that you are one of the partners in the firm, Mr. Allen? A. That is correct.

Q. What title, if any, do you have in the firm which describes your position in it? A. Strictly a partner.

Q. I am sorry. A. Just a partner.

Q. Just partner? A. That is correct.

Q. Is that a limited partnership or general partnership? A. General partnership.

Q. What duties do you perform in the firm?

Mr. McGohey: Objection.

The Court: Sustained.

Colloquy of Court and Counsel

Mr. Sacher: May I be heard very briefly?

The Court: Yes, you may.

Mr. Sacher: I mean, one of the bases of our challenge here is the occupational distribution of those who are on the jury list, and how are we going—

(1419) The Court: Well, if he does not fit into a classification it is just going to be too bad—

Mr. Sacher: No.

The Court: I think I have heard enough to indicate—

Mr. Sacher: I want to know what he does because, as a matter of fact, in the Fay case that was just the trouble with what was proved there, that you didn't show what the actual occupations of the people were. And what we are trying to show is the actual occupations so that they can be slotted with the census classification. Now, that is what we are aiming to do. The fault was found in the Fay case that they failed to do it there, and we are trying to remedy it here. Therefore, that is material and necessary.

(1420) The Court: You are not going to be able to remedy it by that question because I sustain the objection.

Mr. Isserman: If the Court please, before your Honor—

The Court: You can reopen the matter of consideration when I hear from Mr. Isserman who doubtless is about to add something of importance in just a moment.

Mr. Isserman: I object to your Honor's remark. I think it is sarcastic. It doesn't show the respect that this Court should show to counsel. I object to it.

The Court: Well, I intended no disrespect to counsel. I will listen to what you have to say.

Mr. Isserman: I once more object to your Honor's ruling on matters affecting the clients I represent in this proceeding before hearing my position in respect to those matters. Your Honor this time I

Colloquy of Court and Counsel

believe was aware of the fact that I was about to rise when Mr. Sacher finished, but nevertheless your Honor ruled. And I object to your Honor's ruling before hearing argument and the position of my clients.

The Court: I really had forgotten momentarily the fact that you commonly do add your bit to the discussion and I am going to hear what you have to say on the subject.

Mr. Isserman: I did not add my bit to the discussion, your Honor. I think that characterization (1421) is inaccurate. What I am doing is, stating the objections of my clients to the position taken by your Honor which does not allow them to prove their case in this proceeding.

Now I would like to call to your Honor's attention specifically to a paragraph in the Fay case:

"The proof that laborers and such were excluded consists of a tabulation of occupations as listed in the questionnaire filed with the clerk. The table received in evidence is set out in the margin. It is said in criticism of this list that it shows the industry in which these persons work rather than whether they are laborers or craftsmen; that is, 'mechanics' may be and probably are also laborers; 'bankers' may be clerks. Certainly the tabulation does not show the relation of these jurors to the industry in which they were classified, as, for example, whether they were owners or financially interested, or merely employees. It does not show absence or exclusion of wage earners or of union members, although none listed themselves as 'laborers,' for several of these classes are obviously of the employee rather than the entrepreneur character."

The purpose of this question which I adopt as a question that I would have asked this witness is to bring out the proprietary character of the interest of the (1422) witness in his firm, to bring out the fact of his actual occupation in that firm,

Colloquy of Court and Counsel

to establish the exact nature of that occupation, to indicate whether it is supervisory or executive under the Census classifications or whether it is not.

On a prior occasion when I was not allowed an opportunity to address you, your Honor did not allow the question as to whether the witness's—

The Court: I do not remember that I ever prevented you from addressing the Court.

Mr. Isserman: You have ruled a number of times before I had a chance to raise my objection, and I would like to advert to that for a moment, if I may.

The Court: Well, I think not.

Mr. Isserman: Well, then, I will re-ask the question when the time comes.

The Court: No. You may pursue that question. All I am saying now is that I don't remember precluding you from making argument.

Mr. Isserman: I might say, your Honor—

The Court: And I do remember giving you numerous opportunities to argue at great length. And all I am trying to say now is that whatever you have to add you may add, and I do hope that you not interpret that into a statement to the exact contrary of what I am trying to give (1423) you the opportunity to do.

Mr. Isserman: No, I was merely stating, your Honor, what had happened, that the only opportunity I have had on these questions to state my position was after your Honor's ruling.

Now your Honor on certain occasions, with great deliberateness, states that he will hear from counsel one at a time and *seriatim*, and so on. But in effect, on these objections, on rulings on these questions, your Honor has seen fit to rule without hearing from counsel. Now, if I may, I would like to go back to a previous question, or I will reserve that until another time.

The Court: No, I am not going to have any of these reservations. Whatever you desire to say with respect to this question or any of the previous

Colloquy of Court and Counsel

questions or any of my prior rulings, you may do so.

Mr. Isserman: All right. On the basis of the Fay case and the other cases I object to the refusal of this Court to allow this witness to state whether he is on salary or whether he is a wage earner, or whether he receives no compensation for his work. A direct question was put asking him if he was on salary. There was objection, and the objection was sustained. And I say that the Court's ruling in that respect prevents the (1424) development of evidence which is necessary under the cases of the United States Supreme Court dealing with the unlawful exclusion of classes from a jury.

And therefore I ask your Honor at this time to reconsider your ruling on that particular question as well.

The Court: You are an active partner, are you not?

The Witness: Very definitely, your Honor.

Mr. Gladstein: Your Honor, may I be heard?

The Court: First, I had better rule—well, maybe there will be a number of other arguments, so that I will consider that there is now before me an application to reconsider my ruling in sustaining the last objection, and will hear further argument from anyone who desires to address themselves to the subject.

Mr. Gladstein: I desire to bring to the Court's attention a case that I think has not heretofore been mentioned and which to the best of my knowledge has not yet been reported in the advance sheets.

This case, your Honor, is entitled International Longshoremen's and Warehousemen's Union vs. Ackerman, who was the Attorney General of the Territory of Hawaii. I have a copy of the opinion in the office, an extra copy, and I will be very happy to supply that to the Court (1425) this afternoon.

This decision is by a statutory three-judge court of the United States, with Circuit Court Judge Biggs of the Third Circuit acting as the senior

Colloquy of Court and Counsel

or chief judge of the three-judge court. The other two members of the Court were federal district judges. As you recollect, your Honor, they were Judge Metzger of Honolulu, and Judge Harris of San Francisco.

This Court was convened to pass in Honolulu upon the question of the validity or invalidity of a grand jury chosen to act upon and which did act upon and indict certain working men in the Territory of Hawaii. A challenge to that grand jury and the system from which it sprang was filed and evidence was adduced in support of that challenge.

The Court: How long did it take to take the proof in that case on the challenge?

Mr. Gladstein: Witnesses were put on the stand, the members of the grand jury—

The Court: I mean how long did it take?

Mr. Gladstein: Your Honor, I don't recall.

The Court: You were in the case, weren't you?

Mr. Gladstein: My office was involved in the case and I too, but I don't recall all of the—

The Court: You don't remember how long?

(1426) Mr. Gladstein: I beg your pardon?

The Court: If you had been there a month I think you would remember it.

Mr. Gladstein: Well, practically every time I am there on litigation it is just about that, just about a month, that is correct.

The Court: Am I to take it that it really did take about a month to try that?

Mr. Gladstein: No, this particular challenge did not. It took a good deal less than a month. But I have difficulty in recalling exactly how long. However the record will show.

The Court: Maybe about four or five days.

Mr. Gladstein: I think that was it, about a week. However, certain admissions were made and stipulations were made which cut short the necessity of putting on evidence. However, a portion of the evidence consisted of putting on those who had been serving consistently on the grand juries and who had been returning the indictments.

Colloquy of Court and Counsel

Now, the thrust of the challenge that was filed was similar in certain respects to that involved here. It was claimed there that a systematic exclusion had been taking place whereby the grand jury, and the system of the grand jury had become the organ of a particular group which was defined as the employer-entrepreneur group and (1427) their salaried employees, their salaried, as the Court calls it, their salaried non-labor employees. And on page 92 of the decision of that three-judge court—

Mr. McCabe: Perhaps it would help the Court if I can hand him this copy.

The Court: That is an excellent idea, Mr. McCabe. Thank you.

What page is that?

Mr. Gladstein: At the top of 92. I wanted to call your Honor's attention to one paragraph in the opinion of Judge Biggs.

The Court: I have it.

Mr. Gladstein: In which he says, "There was evidence which we believe to be credible"—

The Court: Wait a minute. "There was evidence"—I am looking for those words.

Mr. Gladstein: Perhaps yours is a different copy.

The Court: No. It is the top of the page. I have it.

Mr. Gladstein: "There was evidence which we believe to be credible and from which we find that 84 per cent of the persons who were selected and listed for grand jury service in 1947 came from the ranks of the employer-entrepreneur group and their salaried (non-labor) employees. The record demonstrates also that all other (1427-A) groups in the community, including labor, had approximately but a 16 per cent representation on the 1947 grand jury list."

I may say, your Honor, that the representation of manual workers on any jury list in this court has been less than 16 per cent, a good deal less than 16 per cent in this district.

Colloquy of Court and Counsel

(1428) The Court: Now, you don't think for a minute that it is already clear that this witness is of the "employer-entrepreneur" group, do you?

* * *

Mr. Gladstein: Well, I will take a stipulation from the United States Attorney on that, that this witness is a member of that class which is known and referred to in the United States Census tables as the group of executives, directors, proprietors.

The Court: Well, I did not quite ask you that. I thought possibly you would take the position that although it is evident to me and possibly to others here that he is of the "employer-entrepreneur" group, that you might feel that additional questions were essential to make that fact manifest; and I inquired of you to ascertain your feeling on the subject.

Mr. Gladstein: Well, your Honor, as you know, the question that Mr. Sacher put to the witness is a question in which he used the words of art that had been passed upon by the courts, and the question of relating a person by the title of his occupation or the duties of his office to a particular industry has been regarded as (1429) very material to any inquiry. It is not a question of whether I personally think the record clearly shows that this man is a very wealthy banker. I don't suppose anybody could have much doubt about that.

The Court: No, I did not say that. You read from this case—

Mr. Gladstein: Yes.

The Court: —which had indications of the importance to establish that certain people were of the "employer-entrepreneur" group, and others were manual laborers, and I think that is quite right. I also thought that it was already pretty clear that this witness is not any manual laborer, and that he is a part of the "employer-entrepreneur" group.

Mr. Gladstein: Very well.

The Court: But as you say, you desire to address yourself to the subject further, and you may do so.

Herbert Allen—for Defendants on Challenge—Direct

Mr. Gladstein: Well, I have only this to add, In the Hawaii case we were permitted to establish by evidence of the grand jurors themselves the precise relationship of the grand jurors to the industry or the portion of the industry in which they were profitably engaged or gainfully occupied, and I may say, your Honor, that in page 98—

The Court: Now, we have finished with page 92, (1430) haven't we?

Mr. Gladstein: Well, I just wanted to call your Honor's attention to the fact that the ultimate finding of Judge Biggs and the other two judges in the three-judge court was, as he said, that there had "been a deliberate, substantial exclusion of wage earners and a deliberate, substantial weighting"—this is very interesting and important language, your Honor—"a deliberate, substantial weighting of the grand jury list in favor of business men in the instant cases, really the employer-entrepreneur group, which includes the Haole group of Maui County."

In that case the Court held—I know your Honor will be interested in the opinion—the court held that the grand jury of Maui County in Hawaii was illegally composed; ordered the indictments quashed, and ordered a cessation of the kind of system that had been in practice in Hawaii.

* * *

By Mr. Sacher:

Q. Mr. Allen, do you know Mr. A. Vere Shaw? A. Never heard the name before.

(1431) Q. Do you know Mrs. St. Clair? A. I do not.

Mr. Isserman: If the Court please—just a moment, Mr. Sacher—there is a motion pending before your Honor that your Honor has not ruled on, and that was a motion to reconsider your position on the question which had been asked.

The Court: Perhaps I inadvertently omitted to rule on that, and I now do so. I think perhaps I had better have the reporter read back to me so

Colloquy of Court and Counsel

that I am sure just what it is that I am ruling on there.

Will you read back and find what Mr. Isserman was arguing and referring to? I don't like to make rulings unless I know just what I am ruling on.

The Reporter: Your Honor, the other reporter has that part.

The Court: Very well, we can patiently wait a moment or two until we see what Mr. Isserman said.

(The reporter returned to the courtroom.)

The Court (Addressing reporter): Now there is a question as to some motion that Mr. Isserman made. Will you read me the last comments that were addressed to me by Mr. Isserman? I think he was arguing with respect to a question that had been addressed to the witness.

Mr. Sacher: I can tell you what that question is, your Honor. The question is, "What are the duties (1432) that you perform?" and you said Mr. Isserman's argument would be regarded as an application for reconsideration by you of your ruling.

The Court: Do you agree to that, Mr. Isserman?

Mr. Isserman: It was that; and then I raised a second question, if your Honor will recall, about your Honor's denial to ask this witness whether he was on salary or not. You remember I went back to that question as well, and your Honor then said you were reconsidering, and every counsel who desired to argue could argue.

The Court: Well, I have given reconsideration to both points, and I adhere to my former ruling.

Mr. Gladstein: There are no other questions by counsel of this witness.

* * *

*Herbert Allen—for Defendants on Challenge—Cross
Cross examination by Mr. McGohey:*

Q. You told us that some time within about a year, you thought, you had come down here and signed a questionnaire? A. That is correct.

Mr. McGohey: Now, may I have this paper marked (1433) for identification, please.

The Court: That will be marked Challenge Exhibit A.

(Marked Challenge Exhibit A, for identification.)

* * *

(1434) *By Mr. McGohey:*

Q. Mr. Allen, I show you this paper and ask you if that is your signature? A. That is correct.

Q. Does that refresh your recollection now as to the time you came down and signed it? A. I see the date, yes.

Q. And with your recollection now refreshed, will you tell us when it was that you came down? A. I see October 16, 1947. I was a few months out. Two months out.

Q. Now, is the part of that paper which bears characters in blue pencil in printing—was that your printing? A. That is, sir.

Q. And then your signature is down here (indicating)? A. Yes.

Mr. McGohey: I offer it in evidence, your Honor.

Mr. Isserman: No objection.

(Challenge Exhibit A for identification received in evidence.)

The Court: Now, I always like to see exhibits as they are received, and I will hand it back to you in (1435) just a moment.

(Challenge Exhibit A handed to the Court.)

Mr. McGohey: May I proceed in the meantime, your Honor, or do you prefer that I wait?

The Court: Yes, you may.

Herbert Allen—for Defendants on Challenge—Cross

By Mr. McGohey:

Q. Mr. Allen, in addition to the questions which appear on that form, did the clerk ask you any other questions? A. Absolutely none, to the best of my knowledge.

Q. Did he ask you what the assessed valuation of your house was? A. Well, frankly, I didn't look at that paper other than the date. I would say no, offhand.

Q. Did he ask you what the size of your house was? A. Definitely not.

Q. Did he ask you anything about the nature or extent of your firm's real estate holdings? A. He did not.

Q. Or of the extent or nature of the firm's stock-holdings? A. He did not.

Q. Or of its bondholdings? A. No.

Q. Or the extent or nature of any interest that the firm might have? A. No.

Q. Did he ask you anything about the size of the income of the firm? A. No.

Q. Did he ask you anything about your own income? (1436) A. No.

Q. Did he ask you anything about your wife's income? A. No.

Q. Did he ask you what religion you belonged to? A. Definitely not.

Q. Did he ask you what race you belonged to? A. No, sir.

Q. Did he ask you what political organization you belonged to? A. No, sir.

Q. Did he ask you whether you belonged to any club? A. No, sir.

Q. Did he mention any club of any kind? A. No, sir.

Q. Did he mention any private organization of any kind? A. No, sir.

Q. Did he ask you whether you were paid by the hour? A. No, sir.

Q. Or by the week? A. No, sir.

Q. Or by the year? A. No.

Q. Did he ask you whether you were a director of any corporation? A. No, sir.

*Herbert Allen—for Defendants on Challenge—Redirect
George R. Ashley—for Defendants on Challenge—Direct*

Q. Did he ask you what your net general worth was?
A. No, sir.

Q. Did he ask you any other question except those which appear upon that form? A. Absolutely none.

Mr. McGohey: I have no further questions.

(1437) *Redirect examination by Mr. Gladstein:*

Q. In other words, he asked you nothing, is that right?
A. Absolutely nothing.

Mr. Gladstein: That is all.

The Court: Any further questions?

Mr. Gladstein: No further questions of Mr. Allen.

The Witness: Thank you very much.

(Witness excused.)

* * *

(Recess to 2:30 p. m.)

(1438)

AFTERNOON SESSION

GEORGE R. ASHLEY, called as a witness on behalf of the defendants on the challenge, being first duly sworn, testified as follows:

Direct examination by Mr. Sacher:

Q. Mr. Ashley, where do you live? A. 353 West 56th Street, in New York City.

Q. What is your business or occupation? A. I am a salesman, connected with a flooring company.

Q. What is the name of that company? (1439) A. Compolite Company, Incorporated.

Q. In what capacity are you employed by that company? A. Well, I just told you. I am a salesman.

Q. Do you have any men operating under you? A. Yes.

Q. How many salesmen do you have charge of? A. Oh, two salesmen and an estimator and other detached sales programs.

George R. Ashley—for Defendants on Challenge—Direct

Q. What kind of programs? A. Detached sales programs; men working independently.

Q. Are you not, in fact, the sales manager of that firm? A. I guess you could say so. I am still a salesman.

Q. You meant you yourself are engaged in the making of sales as well as supervising the work of the other salesmen you refer to? A. That is right. Exactly.

Q. Do you have any financial interest in the firm? A. No. I am an officer of the company. I have a financial interest to that extent.

Q. What office do you hold in the company? A. Vice-president.

Q. And how long have you been vice-president of that company, Mr. Ashley? A. I can't answer, I don't know. I would say five years.

Q. Are you paid by the month, the week or the hour? A. Not on any of those bases.

Q. Will you please tell the Court on what basis you (1440) are paid for your services? A. Well, pretty much on the basis of what the business will stand.

Q. You mean you have no fixed compensation, is that it? A. That is right.

Q. Is there any specified portion either of receipts, gross receipts, or net receipts on which you are paid? A. No.

Q. That is a corporation, is it not? A. That is a corporation.

Q. Do you hold any stock in the corporation? A. I guess so. It is a closed corporation. I must have been assigned stock to hold the office.

The Court: You mean qualifying shares?

The Witness: That is right.

Q. Do you receive any drawing account? A. Well, define the term.

Q. Well, do you receive any money at all from the corporation for your services? A. Yes. I said so.

Q. And at what intervals do you receive such money? A. Well, I receive a certain stipulated amount monthly and otherwise twice annually.

George R. Ashley—for Defendants on Challenge—Direct

Q. Do you own any real property, Mr. Ashley? A.
No.

Q. Do you own any personal property? A. Yes.

Q. Do you own more than \$10,000 of property?

(1441) Mr. McGohey: I object.

The Court: Sustained.

Q. Do you own \$250 of property? A. Yes.

Q. Can you tell us whether the monthly payments which you receive from the corporation are in excess of a thousand dollars a month?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Will you tell us what the amount of the monthly payment is that you receive from the company?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Will you tell us whether your rent is more than \$200 a month?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Will you tell us whether your rent is less than a hundred dollars a month?

Mr. McGohey: Objection.

The Court: Sustained.

Q. How long, Mr. Ashley, have you been on the jury list, if you know, in this court? A. In this—I have not been called by the federal government before.

Q. When did you first file a questionnaire with the clerk of this court, the jury clerk? A. I can't (1442) tell you exactly; probably a year ago.

Q. Now, you are described on the list of the clerk of this court as a sales manager. A. That is fair enough.

George R. Ashley—for Defendants on Challenge—Direct

Q. And you have already said that that description of your occupation is accurate, is that right? A. That is right.

* * *

(1443) Q. Mr. Ashley, do you own any stocks in any corporation other than the one by which you are employed? A. No.

Mr. McGohey: Objection.

The Court: He has already answered it. I will let the answer stand.

Mr. McGohey: I did not hear the answer.

The Witness: No.

Mr. Sacher: Your Honor, I should like to withhold my examination of the witness until the questionnaire arrives. I imagine it will be momentarily.

The Court: I think you had better exhaust whatever questions you have. It seems as though this would be a rather prolonged affair.

Mr. Sacher: No, it is not, it will not be prolonged.

The Court: You will proceed with your questions.

Mr. Sacher: If it please your Honor, pending the arrival of the questionnaire I have just one more question to put to this witness, and I would like to preface that question with the following statement that I make to both the Court and the witness, and that is: That is quite abhorrent to me and the other counsel and all the defendants in this case to inquire of any person as to what his race, religion or political (1444) beliefs or opinions or affiliations are, but in view of the charge made in this case in the challenge which is now being tried that there has been systematic exclusion of citizens who are Negroes and who are Jews and who are the poor and who are manual workers, etc., it becomes necessary to put the following question to the witness, and I hope he will take no umbrage at my putting it and the Court will not.

Q. I ask you, Mr. Ashley, whether or not you are a member of the Caucasian race? A. I believe so.

* * *

George R. Ashley—for Defendants on Challenge—Direct

(1445) *By Mr. Sacher:*

Q. Now, Mr. Ashley, I observe that on your questionnaire that you are also described as a sales manager. Can you tell me how much the gross sales of your firm are, annual sales?

Mr. McGohey: Objection, your Honor.

The Court: Sustained.

Q. I notice that you were qualified—you filed this questionnaire which has just been handed to me by the United States Attorney, on April 3, 1947; is that correct? A. If it says so, I assume it is.

Q. And you say this is the first time that you have been called for service? A. In the United States court.

Q. I notice from your questionnaire also that you have served as a juror in the New York County Supreme Court, New York Supreme Court, is that right? A. That is right.

Q. Is that in Kings County or New York County? A. New York County.

(1446) Q. And in the Court of General Sessions? A. That is right.

Q. Now for how many years had you served as juror in either of these courts before being called as a juror in the Southern District? A. Well, quite a number.

Q. And when you filed this questionnaire— A. 40 years—

The Court: Just a second.

(To witness.) About 40?

The Witness: I am 53—30 years.

Q. 30 years? A. Yes.

Q. And for the first time during those 30 years you were called here for this current panel, is that correct? A. That is correct.

Q. Now did you indicate to the clerk that you desired service to be delayed, that is, your jury service to be delayed for any period of time? A. I indicated to the clerk that I preferred not to be called at all.

Q. Did he ask you that question or did you volunteer it? A. I volunteered it.

George R. Ashley—for Defendants on Challenge—Direct

Q. What if anything did he say to you about that? A. He said he would put my name in the barrel.

Q. In the barrel? A. That is right.

Q. Did he say that he would call upon you only after the expiration of some long period of time? (1447) A. He didn't say anything to that effect. He simply said he would put my name in the wheel.

Q. Did you file—make any request of anyone when you received notice to appear in this court for the current panel to be relieved of service at this time? A. That is right.

Q. To whom did you make application? A. I made application through a lawyer that our organization is associated with and asked him if he could have the thing deferred.

Q. And I notice you are here today. A. You—

Q. Solely pursuant to subpoena; is that right? A. That is right.

Q. Were you excused from service on this panel? A. I understand I was excused from service.

Mr. Sacher: That is all I have with the witness, your Honor.

Oh, I do have just one more question, if I may.

Q. Are you a member of the blue ribbon panel jury in New York County? A. No.

Mr. McGohey: I object, your Honor.

Mr. Sacher: All right, I will take the District Attorney's objection. I withdraw the question.

Mr. Gordon: He answered the question.

(1448) *By Mr. Isserman:*

Q. Mr. Ashley, is your income under \$3000 per year?

Mr. McGohey: Objection.

The Court: Overruled.

Mr. Isserman: Will your Honor hear me on the objection?

Mr. McGohey: He overruled it.

The Court: I overruled the objection.

Colloquy of Court and Counsel

Mr. Isserman: Oh, I am sorry.

Mr. Sacher: We are unaccustomed to that.

A. No.

Q. Is your income under \$5000 per year, Mr. Ashley?

Mr. McGohey: Objection.

The Court: Overruled.

A. No.

Q. Is your income over \$10,000 per year, Mr. Ashley?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Is your income over \$6000 per year, Mr. Ashley?

Mr. McGohey: Objection.

Mr. Isserman: Will your Honor hear me, if your Honor is going to sustain the objection?

The Court: I will hear you before I rule.

Mr. Isserman: If the Court please, under the challenge that we have filed it is our contention (1449) that there has been favored in the selection of the—in the selection and establishment of the jury lists the class of the rich, propertied and well-to-do and that there has been a discrimination by deliberate and systematic exclusion of persons who are of the depressed or low economic status.

The Court: Frequently described by you as the poor.

Mr. Isserman: Well, as the poor. But we say that the discrimination isn't limited as between the poor on the one hand and the extremely wealthy on the other.

The Court: Where do you say I should draw the line? \$5000 you say now, because the man is still poor, even though he is receiving more than \$5000, so you argue by inference. Now, what is the figure that you claim is the reasonable dividing line to segregate the rich from the poor or to segregate the class that you claim have been discriminated against and excluded?

Mr. Isserman: May I have just a moment?

Colloquy of Court and Counsel

If your Honor please, I checked with my colleagues for a moment to ascertain if their view is at least substantially the same as mine. We take this position: we do not say that either on salary or income there is a specific line under which one group is poor (1450) and another group is rich. However, we do say this, that the national income of this country according to Federal Reserve figures which will be offered here through a person qualified to testify concerning the same, shows the distribution of income among the population and the distribution of wealth among the population in a number of groups ranging—I think the general classification is ten groups, ranging from the very low incomes to incomes over a certain level.

And we say that the selection here has been predominantly out of the groups in the upper levels of income wholly out of proportion with the figures on income if the selection were made on a basis without discrimination and without systematic discrimination. And we say that because our study indicates as set forth in our challenge that it is not one panel that is involved but in every panel which we have examined, as contained in our challenge, the same pattern repeats itself.

Now if your Honor will give me a few minutes I would like to refer to that portion of our challenge which *prima facie* sets forth the contention we make in respect to the selection of persons out of the upper income levels or groups as against the (1451) discrimination against those persons in the lower income levels and groups.

Now may I have a moment for that purpose?

The Court: Yes. Bear in mind however in conferring with your colleagues that what I would like to have you tell me is, what is the dividing line. My inclination at the moment is to permit questions as to whether the person's income is below \$5000 a year or over \$5000 a year. So that when you get through conferring you tell me what is the figure. that you think should be used.

Colloquy of Court and Counsel

(1452) Mr. Isserman: I think it might be advantageous if we had a very short recess so we can get together and discuss this.

The Court: Well, I can sit here very pleasantly while you confer, and I will be reading that case that Mr. McCabe furnished me a copy of, and the witness will just relax for a few moments, and you may confer.

(Defense counsel conferred.)

The Court: Poke them, Mr. McCabe, and let us get going.

Mr. Isserman: Well, if your Honor is directing us to stop the conference—

The Court: Well, all right.

Mr. Isserman: Well, it is not all right, but we are subject to the Court's control, of course. We will proceed if the Court wants us to.

The Court: No. If you really need to confer longer, do it. I was watching, and I thought you were pretty near through.

Mr. Isserman: I don't know how the Court could have gotten that observation. We were talking—

The Court: You fellows are right on top of my nose here. I thought you were just about through, but if you are not go back and get your heads together and confer some more.

(1453) Mr. Isserman: Actually we were not through.

Mr. McCabe: The jury can't agree, your Honor.

The Court: There is not any jury here. Mr. Isserman can relax and just confer, and pretty soon we will get that figure.

(Defense counsel confer further.)

The Court: Well, Mr. Isserman, you have now had 15 minutes of conference, which I think will have to suffice.

What is the answer?

Mr. Isserman: If the Court please, the dividing line which your Honor suggests is an artificial line

Colloquy of Court and Counsel

and not in accord with a true measure of economic status.

Now, it is our contention that we have a right to fix the economic status of the individual. In some case he is a propertied individual or the executive of a large corporation; in another case he may be one of the salaried employees of such large corporation, in accordance with the language in the Honolulu decision. What we would like to do, and what I am trying to do with this question is to establish within some reasonable range the economic status of the individual. That is not to say that I am concerned with asking him how much money he has in the bank to the last dollar or how much real estate he owns to its last item of valuation, but I am (1454) trying to fix it within a range, and the answer as to one individual, his economic status might be fixed by the \$5,000 question, in the case of another individual it might be fixed by a figure far above that; and it cannot be that one question on income is permissible according to some judgment that any person here makes, including your Honor, and that the second question on income above that is not permissible.

I would like to call to your Honor's attention that your Honor allowed the question as to \$3,000. Your Honor allowed the question, I believe, as to four; then your Honor allowed the question as to five.

The Court: No, I allowed the question as to three, and I allowed the question as to five, and as I listen to you I am getting more and more disposed to let the matter rest there, but I will hear you further.

Mr. Isserman: And apparently there seems to be, at least in your Honor's mind, some approach to the fact that the effort to find a man's income range above \$5,000 is something which may not be done. There is no authority—

The Court: I have an administrative problem too, you know, which is becoming more and more

Colloquy of Court and Counsel

pressing as this proceeding drags on so slowly. And taking everything into consideration I am a little bit disposed (1455) to rule, but I think perhaps I will listen until you have concluded your argument first.

Mr. Isserman: Well, I was going to say that the limitation of the range of the question to \$5,000 is an artificial limitation which does not fix the economic status of the individual. I know of no decision of the United States Supreme Court dealing with this problem which states that if a person has an income of less than \$5,000 he is in one economic strata or class in a community, and if he has an income of over that sum that he is in another.

Now, what we are trying to show here is the preponderance of the persons with the highest and largest incomes on this jury by deliberate selection.

The Court: Well, if he has an income of over \$5,000 I would be disposed to infer that he was not poor, and that is what you are urging upon me, that the poor and the Negroes and the manual workers, and laborers, and the Jews have been deliberately and persistently and intentionally excluded.

Now, I am a little bit inclined to think that if a man has an income of over \$5,000 a year, he is not poor.

Mr. Isserman: At the same time, if your Honor please, that is a narrow, and, I believe, unduly restrictive (1456) interpretation of our challenge—

The Court: Well, the law is just one long series of drawing lines of distinction and discrimination, and I have that problem now, but I will listen to whatever you may care to add.

Mr. Isserman: I would like to call to your Honor's attention that in the Federal Reports discussing such questions as consumer financing, there are gradations that go to 7500 and over for that purpose, showing the different percentages of the community where incomes range from one figure up

Colloquy of Court and Counsel

to 7500 and over. But our point here is not only that; it is the point that the wealthiest class of the community has been preponderantly placed upon these juries, and to show that a man has an income of \$5,000 or over does not make that point. It makes it in part but it does not make it completely, your Honor, and we say that if we are allowed to pursue the question, again within some reasonable range and not down to the last either million dollar or \$50,000, or to the last dollar, but within a reasonable range, we might be able to establish that the evidence that we seek to produce will become clear on this record. We do not think that a \$5,000 line is in itself conclusive of any issue in this case as we present it.

The Court: All we are talking about is the (1457) pending question, you know.

Mr. Isserman: That is correct.

The Court: I will sustain the objection.

Mr. Crockett: Am I to understand, your Honor, from your ruling that you are holding that all questions which have for their purpose to find out if the witness has income in excess of \$5,000 will not be allowed?

The Court: Well, it might depend somewhat on the individual situation, but in general I think that when it has been established that a person's income is over \$5,000 a year, that is enough to warrant the argument that he is not one of these poor people that have been deliberately considered one way or another. I won't say that there may never be a case as to any of these witnesses, but in general I agree with your statement of what my ruling is.

Mr. Crockett: I should like to ask further if the Court's fixing of the maximum at \$5,000 represents gross income or net income.

The Court: Well, I wasn't thinking in terms of gross and net income. I was thinking of earnings, really, earnings and income that the person had of a net character. I had not intended to rule on anything that involved the distinction between the gross income and net income.

Colloquy of Court and Counsel

(1458) Mr. Crockett: So that the question put to the witness might very well be phrased so as to inquire if his net income is in excess of \$5,000? Would that question be permissible?

The Court: I have no objection to that. That is what I really meant.

Mr. McCabe: Might I just enlighten myself a little further, your Honor? As I understand it, you are trying to fix a numeral limit as addressed only to the position of whether a person is in the wealthy class or the non-wealthy class.

The Court: No, I look at it the other way around. As I see it, the question before me is whether the poor, the manual workers, the proletariat, the Jews, the Negroes, and whatever else may be included that I may have forgotten, are excluded. I do not see my problem as to be who was put in but who was excluded, because the charge is that these people have been deliberately and intentionally discriminated against by excluding them, and I am trying to make rulings which will limit the proof in some reasonable way so that you will be able to prove your charge if the facts warrant it.

Mr. McCabe: So that I assume that if nobody with an income of less than \$5,000 was found to be on the list, then that would bear out the assumption that (1459) the poor were excluded; is that logical, your Honor?

* * *

The Court: Well, it does not sound like logic to me.

Mr. McCabe: Well, I was going to pursue it a bit further, because I did not agree with it. I was distinguishing between your Honor's logic and mine. What I meant to pursue was, that I would not agree with that proposition because—

The Court: Well, I don't really ask you to agree—

Mr. McCabe: We are trying to arrive at a basis.

The Court: I have already arrived at a ruling on this question. Now it may be that you take the

Colloquy of Court and Counsel

position that Mr. Isserman did a little while ago that I was ruling too fast because I did not give you a chance, but I notice you all conferred together, and I inferred that when he spoke he was the spokesman of the group on this particular occasion. I had no intention to prevent your urging whatever reasons you desire to urge on me, but I do think that he was acting as the spokesman of the group after all this discussion where you had your heads together there.

(1460) Mr. McCabe: I am still trying to define somewhat the limits of your Honor's interpretation of that discussion.

The Court: Well, I am not disposed to make any further—

Mr. McCabe: May I make one point, your Honor, and then I think you will agree that there is some point to it. My point is this, that I do not agree at all that we can fix a numeral figure of salary which will form a good dividing line. I say that there are many persons whose present income is below \$5,000 whose interests nevertheless are those of the wealthy and the propertied. The mere fact that their present income happens to be below \$5,000 is—I mean, I agree that the numeral figure may be one of a number of criteria, but certainly not even the most important. Because my point is that the person, be he a salaried employee of a large corporation, may very well be so completely beholden to the interests of that corporation that he identifies himself thoroughly with the expressed ideals of that corporation.

Just take, for instance, an employee of the McGraw-Hill Company. The fact that he got a salary somewhat less than \$5,000 I do not think would put him in the class of those whose economic outlook or (1460-A) whose economic philosophy would be at variance with that expressed by that of his employer. An employee of the National Association of Manufacturers might very well be drawing a salary which would, under the arbitrary rule which we are just toying with here—I don't say we are

Colloquy of Court and Counsel

setting it up arbitrarily, but we have tried to come around—

The Court: You are certainly toying with it all right.

(1461) Mr. McCabe: Well, maybe it will be like my grandchild—when she toys with toys there isn't much left of the toys after about ten minutes.

The Court: Well, I seem to be surviving all right.

Mr. McCabe: But I just want to make that point clear, that I am not agreeing that the presence on the jury of a number of persons whose income is below or well below the \$5000 sum you have set precludes in any way their being in the class which we claim can be designated as the well-to-do and the propertied—

The Court: I am not disposed to make any further explanation of my ruling, and I think the additional questions, if any, had better be put to the witness.

Mr. Crockett: I do not believe it is necessary to claim an exception to your Honor's ruling, is it?

The Court: I do not think so. I think the rules provide that where an objection is made an exception is automatically noted. Isn't that so?

Mr. Shapiro: That is correct.

The Court: I have ruled that where one makes an objection the benefit of the exception that the statute or the rules deem to have been made inures to the benefit of all, unless some particular counsel for some reason (1462) desires not to take advantage of it and make such a statement on the record.

Mr. Isserman: If the Court please, I take it that any other question as to income above the \$5000 figure would be subject to the same ruling by the Court?

The Court: I think so, in the form just put. I have sustained two of them. And if you make it fifteen or twenty, twenty-five or thirty, a million dollars, two million dollars, ten million dollars and so on, I am going to sustain objections right on down the line.

George R. Ashley—for Defendants on Challenge—Cross

Mr. Isserman: In view of your Honor's statement to that effect I will not pursue the question of this witness any further, and simply note my objection that your Honor's ruling prevents us from establishing the grounds of our challenge.

* * *

Cross examination by Mr. McGohey:

Q. Mr. Ashley, I show you Government's Exhibit B (1463) for identification and ask you if that paper bears your signature? A. It does, yes, sir.

Mr. McGohey: I offer it in evidence.

Mr. Isserman: No objection.

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

* * *

Q. It appears from this Exhibit B in evidence, Mr. Ashley, that you swore to this on April 3, 1947, before the deputy clerk of the court, Mr. Joseph F. McKenzie; is that correct? A. It must be so, yes, if it says so.

Q. Now, on the part above your signature there is some writing, that is, printing in blue pencil. Was that printing inserted by yourself? A. Yes, that is my printing.

Q. By the way, did you fill that questionnaire out and swear to it before Mr. McKenzie here in this building? A. I imagine so. I guess it was this building.

Q. Do you know Mr. McKenzie? A. I don't believe I would know him if I saw him.

Q. Now at the time you answered these questions were you asked any questions in addition to those which appear on the exhibit? A. None, except possibly—I have been asked this question on various occasions, (1464) I have qualified on a few occasions for jury. It may have been that he asked me when I wanted to serve.

Mr. Sacher: I object to what it may have been, your Honor.

The Court: All right, if he is just guessing; leave out the guesses and tell us your best recollection as to whether there were any other questions.

George R. Ashley—for Defendants on Challenge—Cross

Mr. McGohey: Well, if your Honor please, probably I can speed it up by withdrawing the question and asking the witness specific questions.

Q. Were you asked by the clerk at the time you signed this exhibit in evidence anything about your religion?

Mr. Isserman: If the Court please, I object to that question on the ground that it is not cross of anything elicited on direct examination.

The Court: I thought you said that all Jews had been excluded.

Mr. Isserman: The witness was asked no questions about his religion, your Honor.

Mr. Gladstein: That is not the full answer to your Honor's question.

The exclusion based upon racial discrimination, upon political grounds, upon geographical, social and economic grounds is not achieved by having the deputy clerk ask the man those questions. That is not how (1465) discrimination is practiced or effected. That discrimination—just a moment, your Honor, I wish to give the answer to your Honor's question.

The Court: Sometimes you gentlemen go on and on and I forget what I was going to ask you. But it is all right.

Mr. Gladstein: I remember very well the question.

The Court: I will try to remember it. In fact, I think I have forgotten it now.

Mr. Gladstein: I remember very well the question, and I wish to complete the answer.

That discrimination is practiced before this man is ever asked to come into the deputy clerk's office. That is the important point. Naturally nobody is going to ask him questions such as those that Mr. McGohey is putting to the witness. People who discriminate on racial grounds, on social grounds or economic grounds or any kind of grounds don't do it in the way that would make it possible for a witness to get on the stand and say, "Yes, I was asked this, that or the other."

George R. Ashley—for Defendants on Challenge—Cross

And the only reason we have asked any questions and the only reason we will ask questions of any of the jurors on this subject is not because we have any interest in their religion or their race or (1466) their politics, but because we know from our study of what has been taking place here in New York that the interest and the practice of discrimination stem from the clerk's office, but they practice it cleverly, not by asking questions of a witness in the manner that Mr. McGohey is just doing.

The Court: My conception of the duty of a judicial tribunal is to hear one side and to hear the other side. You apparently desire that Mr. McGohey should not put in his side. I understand the questions that he is addressing to the juror are questions tending to establish the negation of your charge. And so I permit it.

By Mr. McGohey:

Q. Were you asked any questions by the clerk as to your political affiliation? A. No.

Q. Were you asked any questions by the clerk as to your clubs or associations? A. No.

Q. Were you asked any questions by the clerk about your stock interest in your firm? A. No.

Q. Were you asked anything about the method of how your salary was paid? A. No.

Q. Were you asked any questions about how much real property you owned, if any? A. No.

Q. You were asked a question if you had \$250 in (1467) property of any kind, were you not? A. Yes.

The Court: That is on the questionnaire.

Mr. McGohey: That is on the questionnaire.

The Witness: I believe it is on all of them and always has been.

Q. But you weren't asked any question beyond that, were you? A. No.

Q. Were you asked whether your income was paid monthly or yearly? A. No.

George R. Ashley—for Defendants on Challenge—Redirect

Q. Were you asked what its amount was? A. No.

Q. Were you asked how much rent you paid? A. No.

Q. Were you asked whether you own any stock in any companies other than the one by which you are employed? A. No.

Q. Were you asked anything about the gross income of the firm by which you are employed? A. No.

Q. Were you asked whether you work by the hour or by the day or by the week? A. No.

Mr. McGohey: I have no further questions.

Mr. Sacher: I do have one.

Redirect examination by Mr. Sacher:

Q. Do you know of any sales managers that are paid by the hour?

Mr. McGohey: I object, your Honor.

The Court: Sustained.

(1468) Q. Did you describe yourself on that exhibit as a sales manager? A. If it says so—

Mr. McGohey: The exhibits speaks for itself.

Mr. Sacher: Doesn't he know.

The Court: Objection sustained.

Just a second.

The Witness: I don't know. I might describe—

The Court: Now, now, Mr. Witness.

The Witness: All right, sir.

The Court: We all get talking here, but I take precedence.

Mr. Sacher: May I put the question, your Honor?

The Court: Yes, you may.

Q. Mr. Ashley, did you or did you not represent to the clerk that you were a sales manager? A. If it says so, I did.

Q. No, I don't want to know if it says so. I want to know whether you told the clerk that you were sales manager. A. Let me see it.

Q. What is that? A. Did I tell him?

Q. Yes. A. No.

George R. Ashley—for Defendants on Challenge—Redirect

Q. Did you hand him that paper? A. Sure.
Q. Does the paper bear your handwriting on there?
A. Yes. That is what it says, and it says that, and so—
Q. It says what? What is "that"? A. Sales manager.

(1469) Mr. Sacher: That is all.

A. (Continuing) And I signed it.

Mr. McCabe: May I ask one question?

By Mr. McCabe:

Q. Mr. Ashley, do you have any knowledge as to whether or not the clerk through any inquiry that he had made prior to your appearance before him was aware of any of the details of your income or occupation?

Mr. McGohey: Objection, your Honor.

Mr. McCabe: I am asking him whether he knows or not.

The Court: I will overrule that.

(To witness) Did you ever hear of the clerk or anyone from this court snooping around trying to find out what your income was?

Mr. McCabe: That is not the question.

Mr. Crockett: I object to the manner in which the Court is putting the question to the witness.

The Court: We will have it just the way the question was asked then.

Q. (Read.)

Mr. McGohey: If the Court please, for the record, I did not know—I withdraw the objection. The question is, "Did he have any knowledge". I withdraw the objection.

A. No knowledge.

Mr. McCabe: That is all.

(Witness excused.)

* * *

Anthony Anable—for Defendants on Challenge—Direct

(1470) ANTHONY ANABLE, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Gladstein:

Q. Mr. Anable, where do you live, please? A. 155 East 72nd Street, New York City.

Q. How long have you resided there, sir? A. October, 1941.

Q. Is this a residence which you own or in which you rent? A. Which I rent.

Q. You reside there with your family, do you? A. Yes, I do.

Q. What is your business? A. I am connected with the Dorr Company, engineers, of New York City. We are a firm of chemical and metallurgical engineers.

Q. What is your connection with that firm, sir? A. My particular position is director of personnel and public relations.

Q. Does the directorship of public relations include the handling of advertising and matters of that sort? A. Indirectly it directs an advertising department; the actual work is done by a man with the title of (1471) advertising manager.

Q. And he is your subordinate? A. On an advisory basis, yes.

Q. In other words, your position is such that several departments are under your supervision, is that correct? A. I don't believe that is exactly correct, no.

Q. How many employes are under your supervision? A. Well, directly, only my secretary, one. My function is a staff function, it is a staff position, staff position rather than a departmental line position.

Q. How long have you been with that company? A. 26 years in April. I joined them April 1923.

Q. Do you hold a financial interest in the company? A. I have a very small stock interest.

Q. Are you an officer of the corporation? A. No, I am not.

Q. Do you own real estate? A. I do.

Q. Do you own securities? A. I do.

Anthony Anable—for Defendants on Challenge—Direct

Q. Are you listed, to your knowledge, in any directory of engineers, sir? A. Yes.

Q. For how long, to your knowledge? A. I would say 15 years.

Q. Do you receive your income from the Dorr Company on a monthly basis, weekly basis, daily basis, hourly basis, or how? A. On a monthly basis, payable semi- (1472) monthly.

Q. Do you receive a bonus or other emolument at some other prearranged periods? A. I do. I am entitled to a bonus when the company's earnings are such as to permit a bonus to be paid.

Q. Is the rental for the place where you reside, sir, more than \$100 a month?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Is it more than \$200 a month?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Is it less than \$200 a month?

Mr. McGohey: Objection.

The Court: Sustained.

Q. When did you first qualify as a juror, sir? A. To the best of my knowledge it was in 1937 or 1938.

Q. And you have been in the jury lists since that time? A. That is correct, sir.

Q. And you have served as a juror from time to time; is that so? A. That is correct.

Q. On an average, could you tell us how often you have been called? A. I believe it has been every year, except 3½ years when I was absent on military service (1473) during the war.

Q. Now at the time you first qualified, did you hold the same position with the Dorr Company that you now do? A. No, I did not.

Q. What was your position then, sir? A. The position then was advertising manager.

Anthony Anable—for Defendants on Challenge—Direct

Q. And as advertising manager did you have employes under your supervision? A. I did.

Q. How many? A. Three.

Q. And then subsequent to 1937 I take it what happened was that you received a promotion or you advanced yourself to a higher financial or economic status with the company; is that right, sir? A. That is correct.

Q. What in general is the scope of the company's operations? A. The company's business is conducted on an international scale. We do basic engineering work in our fields in practically all the civilized portions of the world.

Q. Let me ask you this, sir: how many employes generally would the company have in that kind of operation? A. At the present time about 380, 380.

Q. Are the headquarters located in New York? A. Yes, sir, they are.

Q. At the place where your office is located, sir? (1474) A. That is correct.

Q. So that your position is such that you are in the central office, is that right? A. Yes, sir.

Q. What in general, Mr. Anable, is the nature of the personnel duties that you perform? A. The duties are many and varied. They are essentially the selection and training of new technical personnel, new engineering personnel for our concern, the administration of basic personnel policy applying to all people, and of course with the personnel committee, deciding upon rates of compensation, promotion and so on. I think they are the duties usually associated with the position of personnel director.

(1475) Q. I understand from the answers you have given thus far that your source of income is partly from private sources, from securities and such that you possess, and partly from the compensation that you receive from your corporation; is that correct? A. That is correct.

Q. Now, at the time that you qualified as a juror you answered certain questions on a questionnaire, isn't that right, sir? A. Yes.

Q. And to the best of your knowledge you answered all the questions truthfully, is that right? A. That is correct.

Anthony Anable—for Defendants on Challenge—Direct

Q. And if it appears on that questionnaire that in response to the question concerning your occupation you said advertising manager, that would be a correct description of that job at that time, isn't that right? A. Yes.

Q. Is that right, sir? A. Yes.

Mr. Gladstein: Will you stipulate, Mr. McGohey, that on the January 17, 1949, panel Mr. Anable's occupation is set forth as advertising manager?

Mr. McGohey: Let me look at it, will you, please?

Mr. Gordon: That is right.

Mr. McGohey: Yes, I will stipulate that that is the way it appears on the panel.

(1476) Q. Before you came into the courtroom—

Mr. Gladstein: Oh, let me ask for the questionnaire, if I may, will you, Mr. McGohey?

(Mr. McGohey hands to Mr. Gladstein.)

Q. I will ask you this: Have you ever served as a member of a grand jury of this court? A. I have served as a grand juror of the County of New York.

Q. Of the Federal Court? A. No, the State Court.

Q. Was that service as a grand juror in the State Courts prior to the time that you began serving as a juror here? A. No, subsequent thereto.

Q. Now, before you came into the courtroom a statement was made that I want to repeat for your benefit—and I trust the Court will permit me to do that. The nature of the case we are involved in, sir, is that we are required much against our will to ask a question that we would prefer not to. That question has to do with whether or not the witness in the chair is a member of the Caucasian race. I will ask you to state for the record, please, whether you are. A. I am.

Mr. Gladstein: I have no further questions.

Mr. McCabe: I should like to ask one question, your Honor.

The Court: You may do so.

Anthony Anable—for Defendants on Challenge—Cross(1477) *By Mr. McCabe:*

Q. Mr. Anable, you stated that the duties of your position as personnel manager were those ordinarily connected in the public mind with that title. May I ask you whether the personnel, the employees of the Dorr Chemical Company with whom you deal are a technical staff, engineers—in what classification would you put the employees of the Dorr Chemical Company with respect to whom you exercise your duties as personnel manager? A. Well, the classification is known as technical administrative or professional.

* * *

Q. Mr. Anable, subsequently to your having filed that questionnaire that I believe was in 1939, were you ever called upon to requalify and file another questionnaire? A. No, sir.

* * *

(1478) *Cross examination by Mr. McGohey:*

Q. Mr. Anable, I show you this paper marked Government's Challenge Exhibit C for identification, and ask you if that contains your signature? A. Yes, sir, it does.

Q. And is the rest of the questionnaire filled out in your handwriting? A. Yes, it is.

Mr. McGohey: I offer it in evidence.

Mr. Gladstein: No objection.

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

* * *

Q. Now, Mr. Anable, I show you this paper marked Government's Challenge Exhibit C-1, and ask you if that bears your signature? A. It does.

Mr. McGohey: I offer it in evidence.

Mr. Isserman: No objection.

Mr. Sacher: What is it?

(Paper handed to Mr. Sacher.)

Mr. Sacher: No objection.

(1479) (Government's Challenge Exhibit C-1 for identification received in evidence.)

Anthony Anable—for Defendants on Challenge—Cross

By Mr. McGohey:

Q. Now will you look at Government's Challenge Exhibit C-1 in evidence. Does that refresh your recollection now, Mr. Anable, as to whether or not you did or did not come in and requalify as a juror? You might look at the other paper attached to it also, Mr. Anable. A. Yes, it does.

Q. And you did come in and sign that paper on the date that it bears? A. I did.

Q. Namely, October 28, 1941? A. Yes, sir. Correct.

The Court: That had slipped your mind?

The Witness: Yes, it had, apparently.

Q. Now, do you recall how many times you actually served as a juror in this court? A. To the best of my recollection I have been a member of the County Grand Jury panel since 1941 or 1942, and consequently have not served in that court in the interval.

Q. You have not served in the County Court or you have not served in this court? A. In this court because of prior duty as a grand juror. I would say it is between two or three times.

Q. That you served in this court? A. That is my personal recollection.

(1480) The Court: Prior to 1941 or 1942?

Q. That would be prior to 1941 or 1942? A. Yes.

* * *

Q. I show you this paper marked Government's Challenge Exhibit C-2 for identification, and ask you if that bears your handwriting? A. It does.

Q. And is that a letter which you wrote? A. Yes, sir, it is.

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

Mr. Sacher: No objection.

(Government's Challenge Exhibit C-2 for identification received in evidence.)

Anthony Anable—for Defendants on Challenge—Cross

Q. Now Mr. Anable, this letter marked Government's Challenge Exhibit C-2 is a letter dated January 6, 1949, addressed by you to Mr. William V. Connell, the clerk of this court? A. Yes, sir.

Q. In that letter you asked to be relieved of jury service in this court, did you not? A. I did.

Q. Upon the ground that you have been for some years serving as a member of the grand jury in New York County? A. Yes, sir.

(1481) Q. Have you been advised by Mr. Connell whether or not you have been excused? A. I had no word at all.

Mr. McGohey: I ask your Honor to take judicial notice of the fact that this is a record of the court and that there appears in the upper righthand corner the word "Off" and the initials JCK underneath it.

The Court: I take such judicial notice.

Mr. Gladstein: Mr. McGohey, would you mind explaining what the word "Off" and the initials stand for?

Mr. McGohey: I assume they mean that he is off the list and excused by JCK, Judge John C. Knox, in accordance with the request that he made.

Mr. McCabe: That is, excused for this term only?

Mr. McGohey: Oh, no, excused from jury service. Off the list.

Mr. Sacher: What is the date of that annotation, Mr. McGohey?

Mr. McGohey: There is no date on the annotation.

Mr. Sacher: What is the date of the letter?

Mr. McGohey: The date of the letter is January 6th, and it appears to have been received—there is no receipt stamp on it.

* * *

(1482) *By Mr. McGohey:*

Q. Mr. Anable, at the time you signed the questionnaire, Government's Challenge Exhibit C, which by its terms you executed back in April 1939, were you asked by the clerk any questions other than appears upon that questionnaire?

Anthony Anable—for Defendants on Challenge—Cross

Mr. McCabe: I would like to repeat the objection to that, your Honor, simply on the ground that the establishing of a negative by Mr. McGohey now where the positive has not been attempted to be established by us is irrelevant and immaterial.

The Court: Overruled.

A. I have no recollection.

Q. At the time you signed Government's Challenge Exhibit C-1, which appears to have been on October 28, 1941, were you asked by the clerk any questions other than appear upon that?

Mr. McCabe: If your Honor please, I would like to object to that question simply to show that by not objecting to that we are not waiving our objections, and in order to save time I would accept your Honor's ruling now as applying to that question every time it is asked by Mr. McGohey, it can be taken that we object to it (1483) solely on the ground, as I say, that he is attempting to establish the negation of a proposition that we have not attempted to establish.

The Court: Overruled.

Mr. McCabe: And that may go to this entire line of questions, your Honor?

The Court: I am reluctant to make general statements like that. I have understood the law to be that if a ruling is made and the ruling is erroneous, it is entirely unnecessary for counsel to keep repeating the same thing all the way through the trial, and it may become highly improper for him to do it.

As to this particular matter I should think your point was plainly made, but I am a little reluctant merely because of the confusion that may result if I say that every time another question is brought up of the same character you have the same ruling, because then we get into an argument, perhaps, later, as to whether the question is the same or different,

Anthony Anable—for Defendants on Challenge—Cross

and so on. But I think you have made your point very clearly, and you know I said a few moments ago that it seemed to me that your objection in effect was no more or no less than saying that you wanted to put in your case but that you did not want the District Attorney or the United States Attorney to put in the case on the other side. However, I think the record will (1484) indicate from this colloquy between us pretty clearly what your position is.

Mr. McCabe: I hope I don't have to restate my position, but I certainly do not wish to interfere with the United States Attorney putting in his case.

The Court: I think it is quite unlikely that you should have occasion to do it, Mr. McCabe. It seems to me that you stated your position so clearly that there can be no misunderstanding of my ruling.

Mr. McCabe: It was brought forth by the fact of what your Honor said the other day that sometimes when an error long persists it acquires a certain—

The Court: I don't remember saying that. What I did say was that in the matter of due process of law that if a statute has its roots away back, even in the Colonial period, and follows up through and pervades the entire legislative history of the United States, that that is a significant circumstance as bearing upon whether the existence of such a statute today violates the 14th Amendment. I did not mean to say, nor do I say now, that an error made by a Judge by constant repetition evaporates and becomes of no consequence.

Mr. McCabe: I think the Supreme Court has said that sometimes when it is acquiesced in by counsel he is taken to have waived the objection. That is what I mean. I do (1485) not want to be put in that position.

The Court: I do not think anybody will understand that you are acquiescing.

*Anthony Anable—for Defendants on Challenge—Redirect**By Mr. McGohey:*

Q. Mr. Anable, either in 1939, at the time you signed Challenge Exhibit C, or in 1941, when you signed Challenge Exhibit C-1, were you asked by the clerk how much rent you paid? A. No.

Q. Were you asked anything about what stock interest, if any, you had in your firm? A. No.

Q. Were you asked how your salary was paid? A. No.

Q. Were you asked how much your salary was? A. No.

Q. Were you asked whether you owned any real property beyond the question of \$250 there in the questionnaire? A. No.

Q. Were you asked whether your income was paid monthly or yearly? A. No.

Q. Were you asked whether you owned stock or bonds or securities of any kind? A. No.

Q. Were you asked what race you belonged to? A. Not to my recollection.

Q. Were you asked what religion you professed? A. No.

Q. Were you asked anything about your political beliefs? A. No.

(1486) Q. Were you asked whether you belonged to any political party? A. No.

Q. Or any political club? A. No.

Q. Were you asked whether you belonged to any kind of club? A. Not to my recollection.

Q. Were you asked how many employees you supervised? A. No.

Q. Were you asked any of the details of your business or how you executed them? A. No.

Mr. McGohey: I have no further questions.

Mr. Gladstein: May I ask a question or two.

Redirect examination by Mr. Gladstein:

Q. Mr. Anable, is it true that on neither of the occasions when you signed the two documents that Mr. McGohey has shown you, that is, in 1939 or in 1941 on re-qualification, were you asked anything whatsoever by the

Donald S. Ashbrook—for Defendants on Challenge—Direct

clerk except to fill the questionnaire out; isn't that correct? A. My recollection is that I was asked no questions.

Q. Yes, and you had no conversation or discussion on either occasion? A. I am certain that I was not asked the certain specific questions that the gentleman asked me.

Q. Now, let me ask one further question: In 1941 on the occasion when you requalified, as appears from (1487) Challenge Exhibit C-1, was your position that of advertising manager then? A. That is correct.

* * *

DONALD S. ASHBROOK, called as a witness on behalf of the defendants on the challenge, being first duly sworn, testified as follows:

Direct examination by Mr. McCabe:

Q. Mr. Ashbrook, I shall put a few questions to you: Where is your residence? A. 145 East 92nd Street.

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

Q. Do you own the apartment or rent it? A. I rent it.

Q. What is your business, Mr. Ashbrook? A. Textile business.

Q. And are you connected with any firm? A. Yes, the Decorative Fabrics Company. That is a Rhode Island corporation.

Q. How long have you been connected with Decorative Fabrics Company? A. About ten years.

Q. And in what capacity are you now connected with it? A. I am president of it.

Q. President? And have been president how long, Mr. Ashbrook? A. About that same length of time.

(1488) Q. Did you organize the corporation? A. Yes.

Q. And prior to organizing the Decorative Fabrics Company, what had been your business? A. I was always in the textile business. I managed a plant down in New England.

Donald S. Ashbrook—for Defendants on Challenge—Direct

Q. And is the Decorative Fabrics Company located in New York in so far as their administrative offices are concerned? A. No. Their selling offices are in New York. Their administrative offices are in Rhode Island.

Q. Is it a manufacturing Company? A. Yes—well, it is a service organization. That is, we finish goods for converters.

Q. And what is the nature of the goods you finish? A. Well, they are low-priced goods—we flock print; that is our principal business. Flock printing is putting a small design on to a piece of cloth.

Q. And that is cottons only or rayons also? A. Well, rayons, also, but cottons principally.

Q. Would you care to tell me the approximate gross amount of business you do during the course of the year? A. I should say it was somewhere between maybe one hundred and fifty and two hundred thousand dollars.

Q. Now, Mr. Ashley, in addition to being president of the corporation, are you a holder of stock in the (1489) corporation? A. Yes.

Q. Are you a majority stockholder? A. Well, the stock is pretty evenly divided.

Q. As between you and an associate? A. Yes.

Q. And is that associate a relative of yours? A. No.

Q. But it is a close corporation? A. Yes.

Q. How many employees do you have, Mr. Ashley? A. Well, normally we have about 20, 25 employees.

Q. And those are the workers who do the actual processing? A. Yes.

Q. And do you have a selling force in addition? A. No, we just have one man located here in New York, the New York office, who does the selling.

Q. And your business is of a supervisory and directing nature, I assume? A. Yes.

Q. Now Mr. Ashley, may I ask you whether your income is derived as a salaried officer of the corporation or from a division of profits in the nature of a stock dividend? A. Salaried officer.

(1490) Q. Is that salary paid on an annual, semi-annual or monthly basis? A. Yes, it is paid—it is paid so much per week as a matter of fact. I draw a check each week.

Donald S. Ashbrook—for Defendants on Challenge—Direct

Q. You draw a check or direct somebody to draw a check each week? A. Yes.

Q. Is that a regular amount? A. I can't get you.

Q. Is that the same amount each week? A. Yes.

Q. Unless it is something unusual. A. Yes.

Q. In addition to that at the end of the year if business is good is there a distribution in the form of a bonus? A. Yes, in case of good business, yes.

Q. I don't want to ask whether the textile business has been good or bad; I understand it varied somewhat in the last six months or seven months. A. Yes, it has very much.

Q. Some of my best friends in Philadelphia are in the textile business. I hear that once in a while.

Now, Mr. Ashbrook, in addition to the securities you own in the Decorating Fabrics Company do you have any other stock holdings?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Do you have any holds of bonds or debentures or other securities?

(1491) Mr. McGohey: Objection.

The Court: Sustained.

Q. Do you have a car, Mr. Ashbrook?

Mr. McGohey: Objection.

A. No.

The Court: Sustained.

Mr. McCabe: I suggest, as to some of these questions, we have been through this before, and there are objections, and put them just to get them on the record; so that it won't be necessary to answer until his Honor has ruled on Mr. McGohey's objections.

Q. Now may I ask you, Mr. Ashbrook, whether your salary, even though computed on the weekly basis, falls into a practice of less than five hundred dollars a year?
A. (No answer.)

Donald S. Ashbrook—for Defendants on Challenge—Direct

The Court: Well, I understand what you mean, Mr. Ashbrook. I will sustain the objection.

Mr. McCabe: You have sustained the objection?

The Court: (To witness) You get over \$5000 don't you?

The Witness: Yes.

Mr. McCabe: Well then I did not get the answer.

The Court: He says "Yes."

Mr. McCabe: But from the smile I assume it was yes.

(1492) The Court: He gets over \$5000. That is the figure that I have been ruling as the one that you can ask to see if persons receive more than that.

Q. Do you get over \$6000 a year, Mr. Ashbrook?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Do you have any income, Mr. Ashbrook, other than that which is derived from your business?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Now, Mr. Ashbrook, this may seem like another silly question and in view of our arguments here it may seem strange coming from us and we are reluctant to ask it, but I do wish to get on the record some question as to your race.

A. Are you a member of what we call the Caucasian race?

A. I didn't get that.

Q. Are you a member of what we call the Caucasian race?

A. Oh. Yes.

Q. Thank you, Mr. Ashbrook.

* * *

Q. For how long a period if you recall has your (1493) name been on the list of persons in this district qualified to serve as jurors?

A. Well, I don't remember exactly, but I should say six or eight years.

Counsels' Additional Statements and Preliminary Motions

Q. And when you were called did you come down to either this court house or some other office and sign a questionnaire? A. Yes.

Q. We will probably have that here in a moment. And after having signed that questionnaire were you called to serve as a juror? A. Yes.

Q. Do you recall approximately how many times you served as a juror in the United States District Court here? A. Well, as far as my recollection goes, twice.

Q. And when was the last time, if you recall, prior to your being called here? A. Well, I couldn't give you an exact date. It may be three or four years ago.

Q. You put it beyond two years? A. Yes.

Q. You are not tied down to— A. I should say it was beyond two years.

* * *

(1496) (Adjourned to Wednesday, January 26, 1949, at 10:30 a.m.)

(1497)

New York, January 26, 1949;
10.30 o'clock a. m.

* * *

Mr. Sacher: Your Honor, last Thursday we spent a full day, I think, in the discussion of the question revolving around Mr. McGohey's motion to dismiss that portion of this proceeding which concerns itself with the application to dismiss the indictment on the ground that the grand jury was illegally composed and constituted. And at that time your Honor on more than one occasion gave all and sundry here assurance that you would hear the proofs, all the proofs in connection with our attack upon the grand jury and its composition, and that you would withhold a decision on Mr. McGohey's motion until the proofs were in.

The Court: Just a second.

Mr. Sacher: As a matter of fact, at pages (1498) 1342 to 1343 the following colloquy took place between your Honor and Mr. Isserman.

Counsels' Additional Statements and Preliminary Motions

The Court: Now, Mr. Sacher, if you are going to go from fact to fact and point to point, it is a little hard sometimes for me to follow you so that I can say what may be applicable; and I think it would help me if before going through a long rigmarole and then coming to a motion, you would make the motion first so that I could understand the applicability of the references to the record which you are about to make.

Mr. Sacher: Well, I think I should then say to your Honor that the occasion for my rising to speak this morning comes from the fact that Messrs. Crockett and McCabe visited your Honor on Monday afternoon at about 4.15 to discuss a matter, and in the course of your conversation with them you informed them that you wanted a memorandum of law on Mr. McGohey's motion by this morning. And, as I understand it, Mr. Crockett requested, in view of the change, the drastic change in the timing of that memorandum, that your Honor permit us to have until Thursday morning because of the absence of Mr. Gladstein, and today we suffer an additional absence, namely, Mr. Isserman, who is in Washington arguing this morning before the Circuit Court of Appeals, to give us until tomorrow morning, (1499) perhaps, so that we might have the assistance of Mr. Gladstein—

The Court: If that is what it is all about I will grant your motion now, and you may give me the memorandum tomorrow morning. If you had said that in the first place you would have saved yourself all that trouble.

Mr. Sacher: Well, the only thing was that they asked you for it and you told them that it was in order for them to have it in here this morning.

The Court: Yes, I did. I thought it was well for me to have it, and I did not understand that Mr. Crockett and Mr. McCabe raised any question about it. We had no reporter present, and while they did say something about perhaps having a little more time, it did not seem to be a matter of importance to them; but as it now is stated by you to be a matter

Counsels' Additional Statements and Preliminary Motions

of some consequence, I grant the additional leave, and the memorandum may be given to me tomorrow.

Now, I may say that my reserving decision on Mr. McGohey's motion until I took the proofs—I did not mean to hold myself down to taking all the proofs or any certain part of the proofs. I noticed myself from reading the record that one of the counsel for the defendants—perhaps you, Mr. Sacher—changed (1500) my formula a little bit later on and said until all the evidence was taken. I did not say that, and all I say now is that I have reserved decision on the motion, and I will hear so much of the proofs as I think necessary before I decide that motion. It may well be that I will wait until the proofs are concluded, but the unusual way in which this matter is going and the great amount of repetitious argument and the manner in which the proof is being offered makes my task in the exercise of my discretion a little difficult, but I will try to do the best I can.

Mr. Sacher: I would like to assure your Honor that so far as we are concerned we regard this challenge as being of such profound significance for democracy and democratic institutions in our country, that we have no desire to delay the most expeditious presentation of all of the evidence which has a bearing upon the composition of the grand and petit juries in this court; and consequently I want to say just the following in that connection: We called your Honor's attention to the fact that we were being very definitely guided by what the Supreme Court said in the Fay case solely because the Court there had indicated what it regarded as failures of proof the supplying of which was necessary in order to make out a case.

(1501) Now we are prepared to recommend certain procedures to your Honor for the shortening of the hearing, if that becomes a matter of concern—

The Court: It better come pretty fast—
Mr. Sacher: What is that, your Honor?

Counsels' Additional Statements and Preliminary Motions

The Court: —because the shortening of procedure is something I have been giving quite a little thought to in the two days that we have not been hearing the proceedings.

Mr. Sacher: Well, we have too.

Now, I should say to your Honor that your request on Monday for a memorandum came to us as a distinct shock, for the following reason: On Thursday you did say—and it wasn't a twist by a lawyer of words that your Honor had uttered, but it was a concurrence by your Honor in the words of that lawyer—and it wasn't I—that you would hear all the proofs. Now if you have the patience to listen I have a brief excerpt or two to read to you—

The Court: Well, if it seems to you that I have been impatient I think you are probably getting an erroneous impression. The record I think will indicate the contrary.

Mr. Sacher: Well, may I then just read this to you very briefly: At page 1342 while Mr. Isserman (1502) was arguing your Honor said:

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

Mr. Isserman replied:

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

to which your Honor said:

“Well, you were arguing that I should take the proof as though I had still left that matter open, and I ruled this morning that I would take the proof but I reserved decision on the motion.”

Mr. Isserman said, “Oh.”

Counsels' Additional Statements and Preliminary Motions

Then your Honor said:

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

The Court: Now, that is just exactly what I say now; and the part of the record that you did not read was the part where you said that I had agreed to (1503) hear all the proof, with the word "all" in quotes and the emphasis on the word "all." That I did not say—

Mr. Sacher: Can your Honor refer me to a page reference on that?

The Court: That I did not say, Mr. Sacher, and I think one thing that ought to gradually percolate in the minds of counsel for the defense is that just because they keep saying things and making assertions, however extravagant, does not prove what they assert, and I do not feel that I am under some requirement of constantly debating with counsel every statement that they make, but I tell you now, mere assertion of counsel proves nothing.

Mr. Sacher: I would just like to say to your Honor that it is interesting, but I did not invoke the subject to which you refer in the first place, and in the second place it was not I who made it but Mr. Gladstein who made it. And if you want to I will show it to you at page 1346 of the record.

The Court: I am not disposed to enter into any controversy with you, Mr. Sacher.

Mr. Sacher: Very well.

Now I should like therefore to make the following observation. We actually started with the presentation of proof on Friday morning. We had (1504) just one day's session of the presentation of evidence. At the opening of the afternoon session I informed your Honor that we had issued subpoenas for members of the grand jury which had returned the instant indictment, and I stated to your Honor that to serve their convenience we would, if, as and when these jurors appeared, call them to the stand

Counsels' Additional Statements and Preliminary Motions

and out of order, so to speak, in relation to the petit jurors. And then—this is Friday afternoon—and then on Saturday night the Chief Judge of this court saw fit to go to Uniontown, Pennsylvania—I understand it is not too large a community, and while the members of that Bar there are undoubtedly important lawyers, he took that occasion to deliver himself of the following statement concerning the operation of the jury system in this district—

The Court: May I ask you, is this argument addressed to some motion you are going to make? Or is it just a little general talk?

Mr. Sacher: No, it is going to be addressed to a motion that I am about to make.

The Court: Then I think it would help me if you would make the motion first and then let me hear the argument so that I can know to what the argument is addressed.

Mr. Sacher: Now if it please the Court, I (1505) do not ordinarily mind requests such as your Honor is making but I think—

The Court: Well, your minding is not a matter of consequence.

Mr. Sacher: I think you will give me credit for not concerning myself too often with irrelevancies in the argument of a motion. And if your Honor would be kind enough to indulge me for just a couple of minutes, not long—

The Court: No, at this time I will not.

Mr. Sacher: Well, if you will not, your Honor, then you oblige me to say right at the threshold that the motion in support of which I now address myself is a motion which declares that the Chief Judge of this court is riding circuit and is riding herd over these defendants by traveling throughout the country making speeches defending, justifying and arguing for the legality of the jury system in this court; that your Honor, who is an associate of the Chief Judge, and who was assigned by the Chief Judge to hear this challenge as well as to try this case, cannot but be concerned with the views expressed by the Chief Judge.

Counsels' Additional Statements and Preliminary Motions

And we respectfully submit that in light of all that has transpired since Friday afternoon our (1506) announcement that we were going to call the grand jurors—and I might say parenthetically that out in the hall, if they have all responded to the subpoenas served, there must now be 17 members of the grand jury which indicted these defendants, and we intend to call them fast, today, this morning if they are here.

We announced in this court that we would call these grand jurors on Friday afternoon. On Saturday night the Chief Judge of this court declared himself in the following words, as reported in the New York Times: "I am told"—

The Court: Just a second. What is the motion?
Mr. Sacher: Well, the motion is—

The Court: You said you were going to tell me, and I haven't heard yet what the motion is.

Mr. Sacher: It is a very short motion, but it takes a little time.

The Court: Well, whatever it is, you are going to make it before you make the argument.

Mr. Sacher: Very good. I am not going to repeat what I have said, but bearing in mind what I have said, based on those facts and on the fact that your Honor suddenly reverses the course which you had indicated on Thursday and demanded a memorandum this morning as an (1507) order of the Court, we say that all of that establishes once again that your Honor entertains a bias and a prejudice in this case which disqualifies your Honor from acting. I want to make in—

The Court: This is another motion to disqualify me?

Mr. Sacher: That is correct. And it is also a motion requesting a reconsideration of the motion which we made at the commencement of this challenge for the disqualification of all of the judges of the Southern District and to invite a judge who has no interest in and who has at no time participated either by action or in action in the administration of this nefarious jury system.

Counsels' Additional Statements and Preliminary Motions

The Court: Now what are the new points that you desire to bring to my attention to indicate that I am disqualified?

Mr. Sacher: The new points that I desire to call to your Honor's attention are the following: I submit that the insistence upon a memorandum, whether it be this morning or tomorrow morning is not of any great moment, but the insistence on a memorandum at this time would mean only one thing, your Honor. You could not have requested a memorandum for the purpose of supporting your original disposition and ruling (1508) to permit us to adduce the proof.

The Court: I like to study the matters before I rule, Mr. Sacher. And the purpose of the memorandum was, as is usual in trials, for counsel to submit to the Court the authorities on which they rely, and I study those things, I read them. And that is what I wanted the memorandum for.

Mr. Sacher: But, your Honor, you indicated in the course of your remarks requesting the memorandum that you would attach value to that memorandum in the context of the proof that would be adduced. And there is a great deal of proof that has to be adduced here to enable your Honor to pass on these questions. For instance, may I just give you a few points before—

The Court: You may make extended argument on the subject now that I know that you are making another motion to disqualify me and for a ruling that all of the judges of this district are disqualified. I will listen to what you have to say on the subject.

Mr. Sacher: For instance, we have made the point that what led us to make the investigation which we did and what put us on the track to make this investigation was the Toland Report which is Exhibit C annexed to the challenge. That is a question of fact I assume under the charge made by the District Attorney (1509) or, rather, the motion made. That leads to the question of due diligence. The next item which we stress with equal force is that the jury clerk of this court solemnly assured

Counsels' Additional Statements and Preliminary Motions

one of the counsel in this case, and indeed assured the United States Attorney as well, and misled both our counsel and the United States Attorney when he represented to both of them that jurors were selected in this court by a random picking from voting lists in the area from which jurors are selected. We have denied that. And that is a question of fact.

And I respectfully submit to your Honor that where a memorandum has to lean, in part at least, but in substantial part at that, upon the resolution of disputed questions of fact it would necessarily require that the memorandum should be read in the context of the facts as they are ultimately decided by the Court. So that these are at least two questions of fact which your Honor would have to pass upon in the light of the evidence adduced before you and which cannot help you at this moment in deciding whether you should cut us off in the presentation of our proof in regard to either the grand jury or the petit jury.

The Court: Well, I haven't cut you off yet.

Mr. Sacher: That is what I dread, your Honor.

(1510) The Court: That is what is worrying you.

Mr. Sacher: That is what I dread, your Honor, the cutting off. The request for the memorandum became the sword of Damocles here. Because, after all is said and done, judges do not ask for memoranda unless they are pretty near the threshold of decision. And if you are near the threshold of decision then may I respectfully suggest—

The Court: Let me tell you I am on the threshold of some decision but not on the subject that you are talking about. I am not thinking at all at this time of deciding Mr. McGohey's motion now. That is what appears to be giving you concern.

Mr. Sacher: It does.

The Court: But I am thinking of using certain means of shortening this proceeding here and I am thinking very definitely, and I did before I came in

Counsels' Additional Statements and Preliminary Motions

here this morning, of not having any more jurors called as witnesses at all, either grand jurors or petit jurors until in my discretion, and I might as well make the ruling now, although I will hear argument on it—I intend in the exercise of my discretion to regulate the order of proof and to require you to call those persons delegated by statute with the duty of making this jury system function; that is to say, the jury commissioner, the (1511) clerk and the deputy clerk. And I am not going to permit you to indulge in this roundabout way of coming in now without any proof of consequence whatever. You have to go ahead with those who know about how the jury system functions. I will hear your protests *seriatim et singulatim*. And I might say, as the reporter, evidently, always get that wrong, that is s-e-r-i-a-t-i-m and a little e-t, and then s-i-n-g-u-l-a-t-i-m. It means one after another and one at a time.

So you may proceed in the customary manner, *seriatim et singulatim*.

Mr. Sacher: Your Honor, I take it that what you have just spoken of is all an interlude which I may for the moment by-pass in the argument of my motion?

The Court: Yes. I thought you might as well have the benefit of my thinking on the subject in this brief recess of two days that we have had, and you may come back to the argument of the question of disqualification of myself and the other judges in this district.

Mr. Sacher: Now—

The Court: You may not any longer speculate as to what it is I am thinking about because I was not thinking about what you thought I was thinking about when I asked for the memorandum.

(1512) Mr. Sacher: As a matter of fact I think your thoughts are worse than what I thought, your Honor.

The Court: That often happens.

Mr. Sacher: I would like to read into the record what Judge Knox has been saying for God knows

Counsels' Additional Statements and Preliminary Motions

how many years and what he saw fit to repeat and declare last Saturday night before the Bar Association of Uniontown, Pennsylvania. Here is what he said.

Mr. McGohey: May I be permitted to make an interruption, your Honor?

I object to the introduction of any evidence from the files of newspapers relating to what Judge Knox said.

The Court: This is not evidence. This is just argument by Mr. Sacher.

Mr. McGohey: I understood him to be offering the paper. I am sorry.

Mr. Sacher: No, I did not offer the paper.

The Court: No.

Mr. Sacher: I have already made a request of Judge Knox's secretary to be good enough to let us have a copy of the entire text of that speech so that we can offer it then in evidence. But at this moment I am making the argument, and I should like to read—

The Court: Well, I will tell you right (1513) now that until such time as questions are addressed to Judge Knox on the witness stand I shall receive no such papers as that in evidence, so you might just as well save your time in offering it. And I won't receive any newspaper clippings either.

Mr. Sacher: Well, as your Honor himself observed, I am not offering any newspaper in my argument.

The Court: That is right. You are just making an argument, as we say, in extenso.

Mr. Sacher: With an offer to prove, in other words I want to say, what I am ready to prove in support of this motion, so that your Honor may give consideration to it in that context and see whether you will take evidence in support of the motion.

The Court: I will listen and I will give the matter consideration.

Mr. Sacher: Here is what the Chief Judge said:

"I am told from time to time that the selection of jurors should be a democratic process and that

Counsels' Additional Statements and Preliminary Motions

persons who serve in the United States District Court for the Southern District of New York are hand-picked. If this be a valid indictment of my conduct, I cannot do otherwise than admit my guilt. Nevertheless, unless restrained by an authority that I cannot resist, jurors in (1514) my district will continue to be hand-picked."

The Court: But you read a statement almost word for word like that about four or five days ago, and mere reiteration—

Mr. Sacher: That is one thing. It was bad enough for the Chief Judge to have said it then, but while your Honor is sitting here hearing this very challenge you are called upon to decide whether or not the hand-picking is legal or not, your superior in this district, the man who assigned you to try this very challenge, he is the man who virtually tells you and the rest of the world how this must be decided. And what he really says to you is, "Judge Medina, join me in resisting all of the forces except those that we can't resist in the effort to democratize the jury system in the Southern District of New York."

The Court: I would not so interpret it. He never talks that way to me. And I don't think he meant any such thing as that. He is fully cognizant of my competence here. And I would not take orders from anybody as to how I should conduct a trial. Judge Knox least of all would not attempt to give me such orders. But I do not see any such interpretation possible from what you say there.

Mr. Sacher: Your Honor—

(1515) The Court: Why don't you get around to calling your witnesses and get the facts out?

Mr. Sacher: You see what is bothering us and what has bothered us and what we are really justified in fearing is that the calling of the witnesses is precisely what your Honor won't permit. You have said as much this morning. You are saying that you are going to dictate to us whom we should call; you

Counsels' Additional Statements and Preliminary Motions

are serving notice on us that we have got to take the fellows who are being hand-picked by Judge Knox and call them as our witnesses to testify in this case. And I say to your Honor that that is not the way we are going to develop the truth.

We are going to cross-examine those people, yes, but we will not permit ourselves to be deprived of the opportunity to present the evidence which will show that the grand jury is dominated by big business, by Wall Street, in this very court, and that the petit jury panel is similarly dominated by big business. And we say to your Honor that the way to prove that it is so dominated is to show who is on the grand jury, who is in the Federal Grand Jurors Association, who is it that makes the recommendations to the clerk as to who should get on and who determines who gets on both the grand jury and the petit jury lists here.

(1516) And we say that if your Honor permits us to do so we will prove right from the grand jurors themselves and the petit jurors that they are big business, that they themselves placed themselves on the grand jury. And how are the working people and Negroes and Jews and all of the oppressed people in our City to get justice when big business sits in the grand jury room and decides whether they have or haven't committed crimes, and when they sit in the petit juries, the trial juries to decide whether or not a plaintiff who sues for personal injuries should or should not get damages?

In other words, the point we are making here is that we must be afforded the opportunity to prove these facts. And I respectfully submit to your Honor that despite your assertions to the contrary, and we all know that these matters of leaning, bias, etc. are, as your Honor had occasion to observe some days ago, matters that are not always matters of which we are totally conscious. As the psychoanalysts have it, they fall too much into the subconscious. So here, while I am not in a position to take direct issue with your Honor as to your state

Counsels' Additional Statements and Preliminary Motions

of mind, what I am submitting here is the following: That to the world at large it must be inconceivable that a judge (1517) who has been assigned to a specific task, notably the determination as to whether or not the jury system in this district is or is not democratic, will run counter to those long and strongly expressed anti-democratic sentiments which Chief Judge Knox has expressed both at Bar Associations, before the Congress of the United States, before the Judicial Conferences of Senior Judges and everywhere where he has had occasion to do it.

And in these circumstances we say that since the question involved is of such profound gravity, since it concerns the very administration of justice in this district and concerns the democratic character of it, why should not the judges of this district be willing to place the determination of the matter in the hands of a judge who will be free from all participation and interest and influence in the operation and administration of that system so that there need be no suspicion about the correctness, the integrity and the seriousness and sincerity of any disposition that is made here?

I respectfully submit to your Honor that the judges of this court must be like Caesar's wife in at least one respect, that they too must be above suspicion.

The Court: You can't be like her in all respects.
(1518) Mr. Sacher: No, heaven forbid. But the point is that fundamentally, since you are being called upon to pass upon the character of this jury system, we respectfully submit that in the circumstances, the fair, the appropriate, the thing that is just to the administration of justice itself, is to permit an outsider to come in and to pass upon this with the utmost expedition, so that we will be able to get a determination in the first instance that will rest upon all of the material and relevant testimony on the subject, and that is all we are interested in.

The Court: Let me ask you a question: When does Mr. Gladstein's plane get in? I thought maybe—

Counsels' Additional Statements and Preliminary Motions

Mr. Sacher: No, your Honor, this is not related to the plane or not the plane. I have to keep my feet firmly on the floor and not to get up in the air on this subject. We are ready to call witnesses right now, but we deemed it necessary at the first opportunity after your Honor had given indication of changes in conduct which we could not explain on any basis other than a change in your disposition to treat the matter before you, that we thought it necessary to lay this before you at the first opportunity, and that was this morning.

The Court: Is it desired that other counsel address me on the subject?

(1519) Mr. Sacher: I think they do.

Mr. McCabe: If your Honor please—

Mr. McGohey: Pardon me, might I interrupt a moment?

If your Honor please, this has nothing to do with the argument. But I think that one of the defendants is not here.

I would like to inquire, is the defendant Gates here?

Mr. Sacher: Yes, he is.

Mr. McGohey: Now, the other thing, your Honor, is this. It came out that Mr. Isserman is not here. I think that there should be a waiver on the record by the defendants whom Mr. Isserman represents so that there will be no question hereafter that some proceeding in the case was taken during his absence.

The Court: I am sure that it is quite agreeable to them to proceed in his absence.

Mr. McGohey: I would just like the record to show that.

The Court: Who are the clients of Mr. Isserman?

Mr. Crockett: Your Honor, I would like to state that so far as I am concerned, I would like the record to indicate that I only represent two of the defendants and no others, so it certainly would not be quite agreeable (1520) for anyone to assume that because of the absence of counsel that I am pitching

Counsels' Additional Statements and Preliminary Motions

in to represent defendants who are not represented here by counsel.

In that connection I have here a telegram that I received this morning—

The Court: Just a moment, Mr. Crockett. Who are the defendants represented by Mr. Isserman? Would you mind standing up?

(Defendants Green and Williamson rose.)

The Court: Is it agreeable to you that these proceedings be had in his absence?

Mr. Green: It is unless there is some very important question coming up and which we have guarantees that our rights are defended.

The Court: So that you protest against our proceeding further today due to his absence?

Mr. Green: I do.

The Court: Do you do so also?

Mr. Williamson: Yes. I think the same policy should have been followed in reference to Mr. Isserman that was followed in reference to Mr. Gladstein.

Mr. McGohey: Now, in view of the statement by the defendants as to the protection of their rights, I should like to inquire of the Court as to whether there is any record that Mr. Isserman was excused from (1521) attendance this morning.

The Court: Well, Mr. Isserman communicated with me, not personally but through my secretary, when we had the two-day adjournment as to whether I would not grant a further adjournment, because he had this case in the Circuit Court of Appeals in the District of Columbia, what is now called the Court of Appeals; and I indicated that I did not think that that should be done, but we should go ahead today, and I understood that he acquiesced in that, and that our proceeding here today was with everybody's knowing the fact that he was away and that he would be back here tomorrow.

Now, if we are going to have counsel who ask leave to absent themselves and without getting such leave

Colloquy of Court and Counsel

then do absent themselves, and then their clients protest the further proceeding in the case in their absence, I suppose I will be faced with a situation that I will be very reluctant to do anything about. And it is my disposition to see how we can do about having someone represent these men here today.

After all this not the trial in chief. This is the preliminary challenge, and the situation is a little bit different. I suppose I should take it under advisement. I do not want to act hastily about it. I must say that my study of this record in this interval (1522) has indicated to me, has for the first time put in my mind the thought of a series of concerted and deliberate moves to delay the case. I am exceedingly reluctant to take the view that any lawyer would do that, and even press by this occurrence this morning—

Mr. Sacher: I would like to deny that we have ever done it or that we are doing it now, your Honor.

The Court: I have put that thought from my mind for the present, but I will say that it is a rather difficult situation that has been brought up here by the conduct of counsel.

Mr. Crockett: If the Court please, I should like to read into the record a telegram which came to me this morning from Mr. Isserman.

The Court: You may do that.

Mr. Crockett: I understand, your Honor, that you also received the same telegram from Mr. Isserman this morning.

The Court: Well, I have not looked through my pile of mail and telegrams this morning. I do not say it is not up there, but I really have not read it.

Mr. Crockett: The telegram is as follows:

This telegram by the way is dated January 26 at 12.49 a. m.—

“On my behalf please read following telegram sent to Judge Medina into record: ‘Re: US v. Foster. Actively engaged tomorrow (Wednesday) (1523) morning’”—

Colloquy of Court and Counsel

"Actively engaged tomorrow (Wednesday) morning (11.30 a.m.) in US Court of Appeals District Columbia Circuit Case #9813 for respondent whom I have represented in said case for over 18 months, long trial and many issues on appeal. Herewith renew request for one day adjournment originally made by phone Jan 24th after notice from Washington counsel when you denied appointment for discussion in presence of US Attorney. Deplore"—

The word here is spelled "D-e-p-e-t"—

"Deplore absence but conceive duty to client requires presence in Appeals Court. Case was previously scheduled Jan 17, but adjourned at my request because of this trial. Call attention to Court's statement at close of Friday session that Court will defer to attorneys' engagements in appeals cases of long standing.' Abraham J. Isserman, Attorney for Gilbert Green and John Williamson."

In that connection I should like to remind the Court that your Honor stated the other day that it was not only expected that a District Court would give way (1524) to a Circuit Court but that it was more or less required that that be done. I do not purport to be quoting your Honor directly, but that is the sense of what the record indicates. I understand from Mr. Isserman that he did contact your Honor's office, more or less just as your Honor has indicated, and requested that he be given an adjournment of just one day in this matter. I know as a fact that he did talk with the clerk of the Circuit Court of Appeals in Washington and had his case down there postponed from January 17th so as not to conflict with his activities in this case. Under the circumstances I would like to suggest—I do not offer it as a motion—but I certainly do suggest to the Court the propriety of adjourning this proceeding until tomorrow morning, at which time Mr. Isserman will be back.

Colloquy of Court and Counsel

The Court: Do you really think any prejudice will come to Mr. Green and Mr. Williamson by proceeding today, with so many of you counsel here to carry on—

Mr. Crockett: Your Honor has just made one ruling which I think most certainly will prejudice those defendants in the absence of their counsel, and that was your Honor's ruling in effect directing the method by which we shall proceed to try this challenge. I certainly (1525) do expect to be heard on that, and I am sure that if Mr. Isserman was here he would want to be heard on it. It goes to the fundamentals of this whole case.

The Court: I think we can profitably spend the rest of the day listening to the arguments that the rest of you lawyers have to make on the matter that I have, as you say, indicated what I would rule. And then Mr. Isserman, when he gets back tomorrow, will let us have his views, and I shall make no ruling in the matter until I have heard what he has to say. You know what I am contemplating. You each will doubtless desire to argue at some length about it. You also each of you desire to argue at length on the matter of a motion to disqualify me and the other judges, so that we can spend today listening to your arguments, which surely cannot prejudice the two defendants whom Mr. Isserman represents, and then tomorrow we will hear what he has to say.

Mr. Crockett: My suggestion, your Honor, has to do with even the propriety of continuing in this proceeding with two defendants who are not represented here by counsel. I could cite to the Court some cases in support of the position I take, but I do not believe it is necessary. So far as the argument is concerned, I think the Court is aware that my arguments are usually pretty short and to the point, though I must confess (1526) they have not been any too convincing to your Honor—

The Court: Yes, much better than Mr. Sacher and Mr. Isserman who have been—well, shall I say, prolix and vociferous and repetitious, but all in good

Colloquy of Court and Counsel

taste, and I have listened, although I must say, as I said a few moments ago, that the thought has finally entered my mind that all this business that has been going on is just a series of wilful and deliberate maneuvers for delay.

Mr. Sacher: I resent that and I want to deny it once again. I want to say that the Court's assertions, unfounded in evidence, are entitled to no more weight than lawyers' statements are, and I want to deny as unequivocally as I know how this statement, and I want to say, your Honor, that we want no more talk or argument this morning. Let us have the witnesses. We want to call them, dispose of them, call one right after the other, as expeditiously as possible.

The Court: Now, let me see if I understand that. You say let us go ahead, call the witnesses at once. Mr. Crockett says no, we must not go further because Mr. Isserman is away. Mr. Isserman's two clients say "We protest and desire to have no further proceedings in the absence of our counsel."

Mr. Sacher: If you will give us a little time (1527) I think we can straighten that out and come to your Honor with a unified decision on the matter.

The Court: Now you are talking. If you can in the course of a short recess get yourselves organized here, which I think is a very sensible thing to do, talking with the clients of Mr. Isserman, perhaps we can go ahead, so I will take a ten-minute recess.

Mr. Sacher: Thank you.

(Short recess.)

Mr. Sacher: We have arrived at an agreement, your Honor, that Mr. McCabe will state to the Court.

The Court: Good.

Mr. McCabe: I should like to say at first to your Honor that in consultation with Mr. Green and Mr. Williamson we learned from them that there was no intention, even though caught in a dilemma, no

Colloquy of Court and Counsel

intention on Mr. Isserman's part to leave them unrepresented in any portion of the trial which seemed predictable as other than what might be called a routine matter, if anything in this trial can be called a routine matter.

When court concluded on Friday there was a witness on the stand with whom we were just about to finish, as I recall it, and the way we were going then it seemed that with a quickening tempo we would continue along the lines that we were going. As a matter of fact, (1528) we had discussed that, that a continuation of inquiry of jurors must be conducted in—I think someone used the words "a staccato fashion," which would develop the facts very quickly for the record and get the juror on and off the stand, and it was with that feeling that Mr. Isserman received the phone call from Washington saying that his client, in whose case he had been engaged for some 18 months, absolutely insisted on his presence, and the court would no longer—

The Court: His client insisted?

Mr. McCabe: What?

The Court: His client insisted, you say?

Mr. McCabe: His client down in Washington insisted that he should not be abandoned there, and Mr. Isserman then went with that feeling. So that the clients now say that that is agreeable to them. That is, if no momentous decisions are to be taken, then they feel that they would be content to waive their right to have counsel here. But if, however, some decision were to be taken by your Honor which would alter the predicted course of the trial, then they felt that their interests would be prejudiced by the absence of counsel.

The Court: Suppose, Mr. McCabe, that following the usual *seriatim et singulatim* procedure, each counsel after asking me for leave to absent himself, and having me deny (1529) such leave, proceeds to absent himself, and that keeps up—what am I to do?

Colloquy of Court and Counsel

Mr. McCabe: Those are situations which would have to be met, and met when they arose, your Honor. I can say that there is no desire on the part of counsel to delay the matter. I was able, as I explained to your Honor, to have the Supreme Court of Pennsylvania waive my appearance there because I had been engaged in this trial for a number of days. And I believe that that circumstance is not likely to arise. If it arises it can be met—

The Court: But we have had it twice here already, and by a curious coincidence, one right on top of the other. Now, I might continue to go on, and all I desire to do here is to rule justly and after proper consideration, and I cannot help saying that it seems to me that with the legal talent still here, and Mr. Gladstein's arrival being a momentary affair, and he being the one who was apparently taking the lead on this, that no conceivable prejudice could come to Mr. Isserman's clients by proceeding the rest of the day.

Now, the last thing I desire to do is to make any ruling which would prejudice in the slightest degree any one of the defendants. But, on the other hand, we must make some progress.

(1530) Mr. McCabe: I am very anxious to make progress, your Honor, so much so that I would not even consider the suggestion which to me was implied in your Honor's prediction that the rest of the day might be taken up with argument; although I had something to say with regard to Mr. Sacher's motion, I am perfectly willing to waive that, and I believe that Mr. Crockett is also. We are the ones who are anxious to get down to business. We are anxious to get the witnesses on that stand. We have, I believe, 17 witnesses subpoenaed—

The Court: Well, that looks a little like the thing that happened the other day when, after it was evident that my being sworn as a witness would instantly and automatically disqualify me, then counsel asserted that they would waive the point after it had been clear that a waiver would be of no moment, and this looks like the same sort of thing to me.

Colloquy of Court and Counsel

Mr. McCabe: Our desire to call witnesses, your Honor, looks like a delaying movement?

The Court: No. I say, no kind of waiver by you could have any effect on the two clients, the two defendants here who are not represented today, and it is idle to say that you want to cooperate in that respect if they do not.

(1531) Mr. McCabe: They do. They have said that, your Honor.

The Court: Well, if they are willing to cooperate and go ahead, let us go ahead.

Mr. McCabe: Let us get a witness on the stand and see how far we can go, your Honor.

The Court: All right, we will resume with the witness who was on.

Mr. McGohey: Are you finished?

Mr. McCabe: Yes.

The Court: Yes, Mr. McGohey?

Mr. McGohey: Pardon me, your Honor. Before that is done I should like this consent which Mr. McCabe offers on behalf of the defendants represented by Mr. Isserman, namely, the defendants Green and Williamson, to state their agreement on the record.

The Court: Yes.

Are you in agreement with Mr. McCabe's statement? I will address myself to Mr. Green and Mr. Williamson. Do you say "Yes" to that, each of you?

Defendant Green: Mr. McCabe spoke my mind. We consulted with him during the intermission.

The Court: So you both agree to do what he suggested?

Defendant Green: Yes.

(1532) (The defendant Williamson nodded.)

The Court: Very well.

Mr. McGohey: Now, if the Court please, I think we need the same thing from the clients represented by Mr. Gladstein. It is true that he announced in court on Friday afternoon the necessity for his

Colloquy of Court and Counsel

absence on Monday and Tuesday, and the representation that he would be here as early as he could after the landing of his plane. But so that there may be no question about that, I think—

The Court: I understood everybody acquiesced in that.

Mr. McGohey: I should like that to be clear by the clients.

The Court: Yes. Which are the clients of Mr. Gladstein? I take it they are the two sitting right behind—

Mr. McGohey: That is the defendant Thompson and Hall (indicating).

The Court: Yes. Do you both agree that the proceedings that we may take now and such as we have already had in the absence of Mr. Gladstein is satisfactory to you?

Defendant Hall: In the same way as they explained.

The Court: You acquiesce in Mr. McCabe's (1533) statement?

Defendant Hall: Yes.

The Court: I take it you both do that?

(The defendant Thompson nodded.)

Mr. McCabe: May I say I am not at this time entirely clear, and the thought comes to my mind because of your Honor's use of the expression "the rulings already made."

The Court: No, the proceedings. I had reference to our going ahead this morning without Mr. Gladstein, as it was my understanding that everyone agreed, including all the defendants, when we had our last session, that even though he did not get here until a little late this morning it would be perfectly all right to go ahead in his absence. That is what I meant.

Mr. McCabe: Now, your Honor, I believe there was some discussion which came up during Mr. Sacher's original motion in which your Honor indicated that your Honor was considering the exercise

Colloquy of Court and Counsel

of your Honor's thoughts concerning a regulation of the order of proof.

The Court: Yes. I have made no ruling on that, but I thought, as Mr. Sacher had evidently wholly misunderstood what I intended by calling for the memorandum—I thought it was only right for me to indicate just what was in my thoughts in the matter. I have made no ruling on (1534) it yet, but I have thought about it a good deal, and my thoughts have followed the line that I indicated.

Now, do you suppose, Mr. McCabe, that it is now all right and that nobody objects to proceeding in the matter in which you now propose to proceed?

Mr. McCabe: I do.

Mr. McGohey: If the Court please, I think there is pending before the Court Mr. Sacher's motion to disqualify himself—that is, the Court should disqualify himself, and I suggest that that motion should be determined before we proceed with witnesses.

The Court: I think maybe they would rather have more ample argument on that after Mr. Gladstein and Mr. Isserman get back.

Is that your position, Mr. Crockett?

Mr. Crockett: That is right.

The Court: It is unlikely that I shall rule differently from what I already have in the matter of my disqualification which has come up so many times. Offhand it seems as though the new grounds were almost frivolous, this matter of the memorandum and so on, but I will withhold ruling on that until Mr. Gladstein and Mr. Isserman have returned so that as that came up in their absence, they may have opportunity to address such argument to me on the subject as they wish. And I better make a little (1535) note that I have that matter pending lest that be lost in the shuffle.

* * *

*Donald S. Ashbrook—for Defendants on Challenge—Direct,
Cross*

DONALD S. ASHBROOK, resumed the stand.

Direct examination continued by Mr. McCabe:

Q. Mr. Ashbrook, I have only one other question to put to you—and I think your Honor will see that it is along the line of expediting the inquiry—Mr. Ashbrook, when you filed your questionnaire for qualification for service as a juror, did the clerk or the Jury Commissioner put any oral questions to you beyond the matter which was contained in the written questionnaire? A. Well, I don't think so. It has been six or eight years ago. My recollection is that I was not asked any questions.

* * *

(1536) *Cross examination by Mr. McGohey:*

Q. I ask you to look at this Government's Challenge Exhibit D for identification, and ask you if that is your signature that appears thereon on the lower righthand side? A. That is, sir.

Q. And did you fill out that questionnaire, or the original of which that is a photostat? A. I did.

Q. At the time that appears on the document? A. Yes.

Mr. McGohey: I offer it in evidence.

Mr. McCabe: No objection.

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

* * *

(1537) Mr. McGohey: It appears that this was sworn to before the clerk on the 22nd day of July 1940.

By Mr. McGohey:

Q. Mr. Ashbrook, at the time you appeared before the clerk and filled out that questionnaire, were you asked any questions by the clerk or by any other official of this court about your race, your religion, your political affiliation, your social connections, or your financial worth?

Donald S. Ashbrook—for Defendants on Challenge—Direct

Mr. McCabe: That is objected to, your Honor. The witness has stated that he has no recollection of having been asked anything. It was for the purpose of shortening the examination, and obviating the necessity of going through that rather long question that I put the question to the witness. As I said, I am perfectly willing to stipulate for other witnesses in the interest of shortening the inquiry that each witness if asked that question would answer No, that he was asked no questions.

(1538) The Court: Relative to those subjects.

Mr. McCabe: Relative to those subjects.

Mr. Sacher: Any subjects.

Mr. McCabe: Any subject. He was not asked anything.

Mr. McGohey: Your Honor—

The Court: I will overrule the objection unless you desire to take the stipulation.

Mr. McGohey: Your Honor, I would like to get that answer, the answer to my question from this witness, and then I shall take up the question of the stipulation with future witnesses after.

The Court: Very well. Objection overruled.

* * *

A. No, I was not.

* * *

Mr. McGohey: Pardon me, Mr. Sacher.

Now, if the Court please, I will accept a (1539) stipulation now if counsel desire to offer it, that any other juror witness if asked this question, "When you were questioned by the jury clerk or other officials of this court in filling out your questionnaire were you asked any questions about your race, religion, political affiliation, social connection or financial worth?"—that the witness would answer to that question "No."

Mr. Sacher: That stipulation is not the one we want to make. We are willing to stipulate with you that each juror will say that the Commissioner and the clerk asked him no questions about anything.

Mr. McGohey: I decline the stipulation, if your Honor please, and reserve the right to ask the question.

* * *

Thomas Hill Clyde—for Defendants on Challenge—Direct

THOMAS HILL CLYDE, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Sacher:

Q. Mr. Clyde, you were a member of the grand jury which served from June 1947 to December 1948? A. I was.

Q. You were a member of the grand jury, were you not, who indicted the defendants William Z. Foster (1540) and eleven others? A. Yes, sir.

Q. Where do you live, Mr. Clyde? A. 139 East 79th.

Q. What is your business or occupation, please? A. Investment counsel.

Q. And where is your office, please? A. I am not employed at the moment.

Q. Are you self-employed when you are? A. No.

Q. Are you employed by brokerage firms? A. No.

Q. By whom are you employed when you are employed? A. I was employed by Scudder, Stevens & Clark.

Q. What was that name again? A. Scudder, Stevens & Clark.

Q. When did you enter their employ, please? A. In 1942.

Q. And how long did you continue in their employ? A. Until last summer.

Q. And have you been employed at any time since the summer of 1942? A. I was employed with them for five-odd years. I was out for physical reasons.

Q. And you were employed in the capacity of investment counselor? A. That is correct.

Q. And will you describe briefly what the duties and functions of an investment counselor of that firm were? A. Well, I was a consultant—could you repeat that question?

(1541) Q. Yes. Would you be good enough to tell us what the duties and functions—

The Court: I think that is what puzzled him. You wanted to know what he did, not what the firm did.

Thomas Hill Clyde—for Defendants on Challenge—Direct

Mr. Sacher: No. He said he was an investment counselor, and I am asking him what the duties and functions of an investment counselor are.

The Court: Then you want to know about the general subject and not what he did.

By Mr. Sacher:

Q. Do you have that clear now, Mr. Clyde? A. You want to know what the firm did?

Q. What the firm did and what you did. A. Well, the firm advises clients on the handling of their investments, and I had various functions at various times.

Q. Did you hold an office in the firm? A. No, I did not.

Q. In what capacity were you employed? What was your official title and what were your official duties with the firm? A. Well, I was an assistant consultant, and I interpreted the policies of the firm for the clients.

Q. And I take it you dealt exclusively with rich people—that is, people who had investments concerning which they wanted advice, is that right?

Mr. McGohey: I object to that, your Honor.
(1542) The Court: Sustained.

Q. What kind of people did you do business with?

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

Q. Did you give advice concerning the investment to be made by those who consulted your firm? A. Not personally.

Q. Did you submit data on which advice was given by members of the firm?

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

Q. Well, tell the Court, please, won't you, what you actually did in that firm? A. Well, I was an assistant consultant. I assisted in writing letters containing the policy of the firm to the clients. I on occasion had personal contacts with the clients, but very rarely.

Thomas Hill Clyde—for Defendants on Challenge—Direct

Q. You are a member of the Princeton University Club, aren't you? A. I have been for two or three months.

Q. You are in the Social Register in New York, aren't you? A. That is correct.

Mr. Sacher: That is all.

Mr. Crockett: I have one or two questions I should like to ask the witness, your Honor.

The Court: You may do so.

(1543) *By Mr. Crockett:*

Q. Mr. Clyde, are you a director in any corporations? A. Yes.

Q. Will you name the corporations in which you are director? A. Well, it is the apartment house in which I live. The exact name I don't recall.

Q. Any other corporations? A. No.

Q. That apartment house is located at 139 East 79th Street, isn't it? A. That is right.

Q. Do you own any shares of stock in the corporation that has charge of that apartment house? A. Yes, I do.

Mr. Crockett: That is all.

Mr. McGohey: I do not have the original of which this is a photostat, your Honor, but it could be procured from the clerk's office if there is any demand for the original of the paper I am about to have marked in evidence.

Mr. McCabe: There is one question we wanted to get on the record with regard to each of these witnesses to whom it was appropriate—

The Court: Now, you are not going to ask that question about whether he is white or not, are you?

Mr. McCabe: I think the record should show it, your Honor.

The Court: Well, go through that long rigmarole (1544) but it seems to me the silliest thing. Why don't you just note in the record that he is white instead of going through that long question? I think that is silly, I really do.

Mr. McCabe: The Supreme Court has overruled both of us on that, your Honor, and it said that neither you nor I can testify, and if we want it on the record we have to have it from the witness.

The Court: Maybe there is something in that.

*Thomas Hill Clyde—for Defendants on Challenge—Cross,
Redirect*

By Mr. McCabe:

Q. You are a member of the Caucasian race? A. Yes.

Mr. McCabe: It seems silly to all of us, Mr. Clyde, but I say it is the Supreme Court's fault, not ours.

The Court: Well, thank you, Mr. McCabe, I am glad to have you confirm me on that, but it really does look silly, no question about it.

* * *

Cross examination by Mr. McGohey:

Q. I show you this paper marked Government's Challenge Exhibit E for identification, Mr. Clyde, and ask you if that is your signature there on the lower lefthand side? A. Yes.

Q. Did you execute that before the clerk on the date (1545) which appears there down in the lower righthand corner? A. I did.

Mr. McGohey: I offer it in evidence, your Honor.

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

By Mr. McGohey:

Q. Mr. Clyde, at the time you appeared before the jury clerk and executed the paper which you just looked at, Government's Exhibit E, were you then asked by the jury clerk or any other official of this court any questions about your race, your religion, your political affiliations, your social connections or your financial worth? A. No, sir.

Mr. McGohey: I have no further questions.

Redirect examination by Mr. Crockett:

Q. Mr. Clyde, I noticed on the exhibit which you just identified near the bottom the endorsement "Eligible for grand jury." Was that on the document when you signed it? A. I couldn't remember. It is ten years old. No, I am sure not.

*Thomas Hill Clyde—for Defendants on Challenge—
Redirect*

Q. Had it been on there you would remember it? A. No, I will take that back, because I would not know whether I would remember that for so long.

Q. Did the clerk ask you any questions concerning (1546) your availability for grand jury duty? A. I couldn't remember. I don't quite understand the question.

* * *

By Mr. Sacher:

Q. Mr. Clyde, I notice on your questionnaire, in response to the question, "Have you ever served as a trial juror?" your answer is "Yes." And then the next question is, "If so, in what court?" and your answer is, "Special Sessions, New York City."

(1547) Is that correct? Do you recall that, or do you want to look at it? A. To the best of my memory it is.

Q. What is that? A. To the best of my memory it is.

Q. Don't you know there are no juries in Special Sessions; that Special Sessions is a three-judge court where there are no juries? Don't you know that? A. No.

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

Mr. Sacher: That is all.

The Court: You might have got the name of the court wrong.

The Witness: Yes.

Mr. Sacher: What is that?

The Court: I said he might have got the name of the Court wrong.

Mr. Sacher: Oh, he certainly did. He certainly did. That is the least you can say about it apart from the fact that he did not know where he was.

Mr. McGohey: I object, your Honor, to this line of counsel cross-examining his own witness.

The Court: Well, I think this hardly rises to the dignity of cross-examining his own witness. I think he has drawn his attention to the fact that there is an erroneous statement in there, and I do not take it as an (1548) attempted impeachment of the witness, but, rather, as going to the question of the accuracy of his recollection generally.

* * *

*Thomas Hill Clyde—for Defendants on Challenge—
Redirect*

By Mr. Sacher:

Q. On how many grand juries have you served since you qualified for service in the Southern District of New York? A. I believe four.

Q. Four? A. I believe so.

Q. In what years, will you tell us? A. Well, this would be a guess, but I would say in either 1939 or 1940, 1942 and 1945.

Q. And then in 1947-1948? A. There may only have been three occasions, I wouldn't recollect.

(1549) Q. Did you ever serve on a petit jury? A. Never.

Q. Were you ever asked to qualify for petit jury service? A. No.

Q. Did the clerk tell you that you would be called only for grand jury service? A. I don't believe he told me.

Q. But that was the only type of service that you have ever rendered so far as jury service is concerned, is that right? A. No, I was in either Special or General Sessions for the State.

Q. Was that on grand jury service too? A. No. That was on—I was only on a panel I believe. That is not correct. I have been on a petit jury in the New York State—

Q. By the way, you were born in 1912, weren't you? A. That is correct.

Q. So that when you were first called for the performance of an important function of grand juror in 1939 or 1940 you were all of 27 or 28 years old, is that right? A. That is correct, if that was the first year I served.

* * *

(Witness excused.)

*Alexander Abrahams—for Defendants on Challenge—
Direct*

(1550) ALEXANDER ABRAHAMS, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Crockett:

Q. Mr. Abrahams, will you give us your address? A. My business address or home address?

Q. Your home address. A. 2121 St. Raymond Avenue.

Q. Will you repeat that?

The Court: St. Raymond?

The Witness: St. Raymond.

Q. 2121 St. Raymond. Is that a private dwelling or an apartment house? A. That is a—I occupy an apartment in the Parkchester Development.

The Court: Where is that, St. Raymond Avenue? In the Bronx?

The Witness: In the Bronx, in Parkchester.

Q. What is your occupation? A. I am a certified public accountant.

Q. Are you in business for yourself or is that a partnership? A. No. For myself.

Q. Where is your office located? A. 570 Seventh Avenue, New York.

Q. How long have you been a certified public accountant? A. Oh, almost 20 years.

(1551) Q. During all of that period you have practiced as a certified public accountant? A. Yes.

Q. You are a member of the present jury panel for this term? A. I was selected, yes, that is right, on this panel.

Q. But I understand you have been excused? A. I have been excused, yes.

Q. When did you first qualify for jury service? A. Well, I don't understand that.

Q. Well, when were you first called down and asked to fill out a questionnaire with reference to jury service? A. Well, I think about almost ten years ago.

Q. That would be roughly 1938 or 1939? A. Well, I wouldn't know for sure. I couldn't remember that exactly.

*Alexander Abrahams—for Defendants on Challenge—
Direct*

Q. But you did fill out a questionnaire? A. Yes.

Q. Did you have any conversation with the clerk at the time, that you can recall? A. None at all.

Q. Now how many times have you served on a petit jury since you filled out the questionnaire? A. Well, I served in 1944.

Q. Any other times? A. No; I have been called since then but I have not served.

Q. When were you called? A. Well, usually every year or two thereafter.

(1552) Q. Have you ever been called to serve on a grand jury? A. No, I haven't.

Q. Are you listed in any business directory, Mr. Abrahams? A. Not that I know of.

Q. Have you ever been asked to come in and requalify for jury service? A. I don't think so.

Q. I have one question that I must ask you, Mr. Abrahams, and I regret to do so, but I think you like myself dislike the idea of ever having to take into consideration one's race or color, but under the circumstances of this case I must for the record indicate that—what your race is. Will you state it? A. I am white. Is that what you mean.

Q. That satisfies the record, thank you. A. Is that all you want to know?

By Mr. Sacher:

Q. Are you a director in any corporation? A. Not that I know of.

Q. Were you ever a director in any corporation? A. No.

Q. How about Abrahams & Company, is that a corporation in which you were a director? A. No.

Q. Have you ever been listed in the Directory of Directors? A. No.

Q. Are you sure now or are you in doubt? Because our information indicates you were. A. If I was listed (1553) I wouldn't know about it.

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

* * *

*Alexander Abrahams—for Defendants on Challenge—Cross
Cross examination by Mr. McGohey:*

Q. You said that when you came down here and filled out the questionnaire you had no conversation whatever with the clerk. Do you mean that you didn't say a word to each other at all; is that what you mean? A. It is ten years ago. How would I know?

Q. Well, that is all right; I am just trying to find out if you are now saying that there was no word passed between you at all. You didn't mean that, did you? A. Well, when you say no word, he probably said "Hello" to me.

Q. Something was said between you, back and forth, I assume? A. Nothing of any consequence.

Q. Well, that is all right. A. And I might—

Q. I mean, you didn't intend to convey, did you, that there was no word at all between you and that— A. Well, there might have been; there might have (1554) been a greeting, if that is what you mean.

Q. —and that you mechanically signed—

The Court: Well, such conversation as there might have been on different subjects you have no recollection of what it might be?

The Witness: That is right. I wouldn't attach any particular significance to anything. He might have told me to sign it or something like that.

Q. Now when you were filling out that questionnaire when you were down before the jury clerk, did he or any other official of this court ask you any questions about your race, your religion, your political affiliations, your social connections or your financial worth? A. No, it wasn't anything.

* * *

(1555) *By Mr. McGohey:*

Q. Mr. Abrahams, I show you this paper just marked Government's Challenge Exhibit F for identification and ask you if that is your signature in blue pencil here in the lower lefthand side? A. Yes, that is my signature.

(1556) Q. Did you execute it at the time that appears in the lower righthand side? A. Well, evidently. It must have been.

Arthur S. Heiman—for Defendants on Challenge—Direct

Mr. McGahey: I offer it in evidence, your Honor.

No objection I take it?

I offer it in evidence, your Honor.

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

* * *

(Witness excused.)

ARTHUR S. HEIMAN, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. McCabe:

Q. Where do you live, Mr. Heiman? A. 101 Central Park West, New York.

Q. Did you formerly live at 303 Central Park West? A. I did not.

Q. Your address seems to be listed in the records (1557) as 303. But it is 101, at any rate? A. Correct.

Q. Mr. Heiman, you are a qualified member of the grand jury panel for the Southern District of New York, is that correct? A. I am, sir.

Q. Am I correct in saying that you served on the grand jury which was in session and that you participated in the indictment of William Z. Foster and others? A. Yes, sir.

Q. 101 Central Park West, is that an apartment? A. Yes, sir.

Q. You rent your apartment there? A. I do, sir.

Q. Do you own any portion or any interest in that apartment building? A. I do not, sir.

Q. What is your occupation, Mr. Heiman? A. I am a rayon converter.

Q. And with what firm are you associated? A. My own.

Q. What is the title under which that firm does business? A. Arthur S. Heiman, Inc.

Arthur S. Heiman—for Defendants on Challenge—Direct

Q. I take it from that that you are either the principal stockholder or the owner of all of the stock of the corporation? A. I am the principal owner.

Q. Is that what we call a closed corporation, a family corporation, Mr. Heiman? A. It is, sir.

Q. Are the other stockholders members of your (1558) immediate family? A. They are, sir.

Q. How long have you been engaged in that business? A. For myself, going on 12 years.

Q. Prior to that were you also engaged in the textile or rayon industry? A. I was, sir.

Q. Where does your company carry on its business? A. 1412 Broadway.

Q. How many employes do you have? A. I have 11, thereabouts.

Q. What? A. About 11.

Q. It varies from time to time, I suppose? A. That is correct.

Q. Are you a director in any other corporation? A. Yes.

Q. Would you mind telling us what other corporations? A. Well, I am a director in a corporation called Ash Manufacturing Corporation.

Q. What do they manufacture? A. Well, they do not manufacture anything; they handle a different type of textiles than Arthur S. Heiman does.

Q. Are you a stockholder in that corporation also? A. Yes, sir.

Q. Are you one of the principal stockholders in that corporation? A. I am, sir.

Q. Is that likewise a family corporation? A. Yes, sir.

(1559) Q. Are there any other corporations? A. Yes, there is; there is one that has just been formed called the Fylon Corporation. That is not operating as yet.

Q. That is likewise a family corporation? A. Yes, sir.

Q. Do you have any real estate holdings, Mr. Heiman? A. I do not, sir.

Mr. McGohey: I object. Well, he has answered.

Q. By the way, would you care to tell me, I will ask you the capitalization of Arthur S. Heiman & Company?

Arthur S. Heiman—for Defendants on Challenge—Direct

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

Q. When did you first qualify for grand jury duty, Mr. Heiman? A. I can't give you the exact date; it is some years ago.

Q. Have you served previous to your service on this grand jury? A. Yes, sir. Once before.

Q. Just once before. Do you recall when that was? A. It probably was three or four years ago.

Q. At the time you were qualified as a grand juror were you asked any questions at all by either the clerk, the deputy clerk, or the jury commissioner? A. I don't believe I was.

Q. Were you told at that time whether you were being qualified for grand jury duty or for petit jury duty? A. No, I don't believe I was.

(1560) Q. No discussion— A. No.

Q. —concerning that at all? A. As a matter of fact I think I only filled out the blank and that was all there was to it.

Q. Were you ever called upon to requalify, Mr. Heiman? A. I was not, to my best recollection. I don't remember it.

Q. Have you ever served on a petit jury in any of the other courts of this district or state? A. I have, sir.

Q. Do you recall the title of the court in which you served? A. I do, sir. It was just the Supreme Court, a number of times.

Q. The Supreme Court of the County of New York, State of New York? A. And State of New York.

Q. You say a number of times? A. Yes.

Q. Could you be a little more specific, Mr. Heiman? A. No, I could not.

Q. Would it be five times or twice or eight times? A. Well, it was more than two and probably less than eight. Somewhere in that vicinity.

Q. Have you ever served as a petit juror in the district court, this court here? A. No, I have not, sir.

Q. Now, Mr. Heiman, in order to make it a matter of record I ask you whether you are a member of the (1561) Caucasian race? A. Pardon me?

Arthur S. Heiman—for Defendants on Challenge—Cross

Q. Are you a member of the Caucasian race?

The Court: Are you a member of the white race?

The Witness: I take it I am, yes.

The Court: That is what I thought.

Q. That is a question which we have to have in the record in view of the inquiry being made, Mr. Heiman.

By Mr. Crockett:

Q. Are you a member of an organization known as the Federal Grand Jurors Association? A. I am, sir.

Q. You said you are? A. I am, yes.

Q. How long have you been a member of that Association? A. I think from the first time that I served as a Federal grand juror, which was as I say three or four years ago.

Q. Do you know the names of the officers of that Association? A. No, I don't.

Mr. McGohey: I object to that, your Honor. I don't see its relevance or materiality.

The Court: Sustained.

Q. One further question, Mr. Heiman. Have you any knowledge as to the way in which your name came to appear on the grand jury list? A. I have none whatsoever.

* * *

(1562) *Cross examination by Mr. McGohey:*

Q. Mr. Heiman, would you look at Government's Exhibit G for identification and tell me if that is your signature down in the lower lefthand side? A. It is, sir.

Q. Now, looking at it—

Mr. McGohey: Well, I will offer it.

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

Q. Now looking at Government's Exhibit G in evidence Challenge Exhibit G in evidence, does that refresh your

Arthur S. Heiman—for Defendants on Challenge—Redirect

recollection of the time that you came down and qualified, Mr. Heiman? Do you see the date that that was sworn to? A. 15th day of December, 1943.

Q. 1943. A. Yes.

Q. And your address on there is stated to be 101 Central Park West, is it not? A. Yes, sir.

Q. And that is your address now? A. It is, sir.

Q. And that was your address in 1943, at the time you filled out that questionnaire? A. That is correct, sir.

Q. All right. May I have it, please? A. (Handing to Mr. McGohey.)

Q. Now at the time you came down and filled out this questionnaire were you asked by the clerk or by any (1563) official of this court any questions as to your race, your religion, your political affiliations, your social connections or your present financial worth? A. I was not, sir.

* * *

Redirect examination by Mr. Sacher:

Q. Will you please tell me in what circumstances you became a member of the Federal Grand Jurors Association?

Mr. McGohey: I object, your Honor.

The Court: Sustained.

Q. Have you kept yourself in good standing since you joined?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: If the Court please, the challenge here makes certain charges concerning the role and the influence of the Federal Grand Jurors on the selection of members of the grand jury as well as the petit jury, and I submit those questions fall within the scope of the challenge. I ask your Honor respectfully to reconsider its ruling in the light of those observations.

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

(1564) Q. Who asked you to join the Jurors Association?

Arthur S. Heiman—for Defendants on Challenge—Redirect

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

Q. When did you join the Grand Jurors Association?

Mr. McGohey: Objection.
The Court: Sustained.
Mr. McGohey: I think it is already in the record.

Q. Did you join the Grand Jurors Association before you served on any grand jury or after?

Mr. McGohey: Objection.
Mr. Sacher: I think that is very—
The Court: Well, it is already in the record.
He said that he became a member after he first served as a grand juror.

Q. Is that your testimony? A. That is correct, sir.

Q. What is that? A. That is correct.
Q. That is correct.

The Court: Perhaps you didn't hear that.

Q. Did you become a member of the Grand Jurors Association prior to your service on the grand jury which indicted these defendants?

The Witness: Shall I answer that question?
The Court: Yes.

A. I did not.

Q. So, did you join the Federal Grand Jurors (1565) Association then after you joined in the indictment of these defendants? A. That is not correct. I said I joined the Federal Grand Jury Association after my first service.

Q. That was prior then to your service on the grand jury which indicted these defendants, is that correct? A. That is correct, yes.

* * *

(Witness excused.)

* * *

Henry J. Hauck—for Defendants on Challenge—Direct

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

Direct examination by Mr. Sacher:

Q. Mr. Hauck, where do you reside? A. North Tarrytown, New York, Van Tassel Apartments.

Q. You have served as a grand juror, have you, in the Southern District of New York? A. Yes.

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

Q. How long have you served as a grand juror in the Southern District of New York? A. You mean, how many years altogether?

Q. Yes. A. I would say about six or eight.

(1566) Q. On how many different grand juries have you served? A. I think it is three.

Q. I take it you are a member of the Federal Grand Jurors Association? A. No.

Q. You are not. What business are you engaged in, Mr. Hauck? A. Retail jewelry.

Q. Is that a business which you own yourself? A. I am a part owner.

Q. Where is that business located? A. 607 Fifth Avenue, New York City.

Q. That is right up here near what? A. 49th Street and Fifth Avenue.

Q. What is the name of the firm, Mr. Hauck? A. Raymond C. Yard, Inc.

Q. Are you an officer in that corporation? A. I am.

Q. What offices do you hold? A. I am secretary and treasurer.

Q. Do you hold stock in the corporation? A. I do.

Q. Do you hold a majority of the stock? A. Minority.

Q. Is it a substantial interest in the business?

Mr. McGohey: I object, your Honor.

The Court: Sustained.

Q. How long have you been secretary-treasurer of that corporation? A. I was secretary originally, which was

Henry J. Hauck—for Defendants on Challenge—Cross

(1567) 27 years ago, and secretary and treasurer since 1943.

Q. Are you a member of the board of directors of that corporation? A. I am.

Q. Are you a director of any other corporation? A. I am not.

Q. Do you hold any stocks or securities other than those which you hold in the Raymond C. Yard, Inc.? A. 10 shares of Consolidated Edison.

Q. Mr. Hauck, in this case we are raising the question that members of the Negro race have been discriminated against in the matter of jury service, and it therefore becomes necessary to ask you formally for the record whether you are a member of the white or what is called the Caucasian race. A. I am a member of the white race.

* * *

Cross-examination by Mr. McGohey:

Q. Mr. Hauck, I show you this paper marked Government's Exhibit, Challenge Exhibit H for identification and ask you if that is your signature that appears on that paper? A. That is my signature.

Mr. McGohey: I offer it in evidence.

(Government's Challenge Exhibit H for (1568) identification received in evidence.)

* * *

Q. Mr. Hauck, at the time you signed that you signed it down in the office of the clerk of the court here, did you? A. I believe so.

Q. At the time you did that were you asked by that clerk or by any other official of the court any questions with respect to your race, religion, political affiliations, social connections or financial worth? A. None.

* * *

*Henry J. Hauck—for Defendants on Challenge—Redirect**Redirect examination by Mr. Sacher:*

Q. Did he ask you anything at all? A. He gave me a card to fill out, as I recall, and on that was my full name, residence, business address, telephone numbers; and I think if I remember correctly on the bottom: was I ever convicted of a felony or a crime. That is all I remember. There may have been more than that.

Q. Was there any conversation between you and the man who handed you that card, or the clerk of the court? A. No, sir.

* * *

(1569) Recross examination by Mr. McGohey:

Q. Do you mean that there was no conversation whatever between you and the clerk? A. The only thing I recall is I received a notice to qualify, and I went down there and he asked me if I would fill out that card.

Q. Yes. A. That is only my recollection. Which I did.

Q. And then when the card was filled out what happened? A. I don't recall anything.

Q. Well, by card—

The Court: You mean, if there were some questions on different subjects you might not remember those I take it?

The Witness: No.

Mr. Sacher: I object to the form of the question, your Honor. The witness has testified that there was no conversation.

The Court: I don't understand it as meaning literally—

Mr. Sacher: I do.

The Court: —that both stood there as (1570) dummies.

Mr. Sacher: I do, your Honor, and I think—

The Court: Well, that is utterly—

Mr. Sacher: And I think it is an improper characterization of the witness's testimony, and I move to strike it out.

The Court: Motion denied.

Mr. Sacher: Exception.

Henry J. Hauck—for Defendants on Challenge—Recross

By Mr. McGohey:

Q. Mr. Hauck, when you say you filled out a card and that that is all there was to it, do you mean that you filled out that form which you just looked at, Government's Exhibit H? A. That is it.

Q. That is what you meant by the card? A. Yes.

Q. Now, did you intend to testify now, in 1949, that in 1943 there was nothing—

Mr. McCabe: That is objected to. The form of the question is objected to. The question is, what he intends to testify.

Mr. McGohey: I will withdraw the question, your Honor.

Q. Is it your testimony now that in 1943 there was not a thing except the signing of that paper?

Mr. Sacher: I object to the question on the ground that it has been answered.

(1571) The Court: Overruled.

Mr. Sacher: Exception.

Mr. McGohey: Now may we have the question?

Q. (Read.) A. All I recall is they asked me to fill this out.

Q. Yes. You don't say now that there was no conversation of any kind between you and the clerk?

Mr. Sacher: I object to that as leading; I object on the ground that it has already been answered, et cetera.

The Court: It is leading.

(To witness) The impression on some of the lawyers here is that you meant to say that when you came in there nobody said a word, that you were just handed this questionnaire—

The Witness: Oh, no.

The Court: —and that was signed. What really happened as far as you can recall?

The Witness: As near as I can recall I presented my—whatever it was, the summons or slip, and then the clerk asked me if I would fill this out,

C. Benjamin Brush—for Defendants on Challenge—Direct

which I did, and then handed it back to him. Now he may have said, "Thank you"; he may not have. I wouldn't remember.

The Court: So as I said, the fact that some conversation on different subjects might have been (1572) had, you just don't remember?

Mr. Sacher: I object to the question on the ground that it assumes a set of facts not in evidence. The witness does not say that there was conversation on any subject. The witness has just testified to precisely what he remembers as having taken place.

The Court: Objection overruled.

Mr. Sacher: Exception.

* * *

The Witness: I don't remember anything other than what I told you.

* * *

(Witness excused.)

* * *

(1573) C. BENJAMIN BRUSH, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Crockett:

(1574) Q. Mr. Brush, you reside at 40 Maywood Road, New Rochelle, New York? A. I do, sir.

Q. How long have you lived there? A. About 21 years.

Q. Do you own your home or do you rent? A. My wife owns the home.

Q. Your wife owns the home? A. Right.

Q. Do you own any interest in any real estate?

Mr. McGohey: I object.

The Court: Sustained.

Q. What is your occupation, Mr. Brush? A. I am a free lance engineer.

C. Benjamin Brush--for Defendants on Challenge—Direct

Q. How long have you been a free lance engineer? A. About four or five years.

Q. Will you tell the Court what you mean by free lance engineer? A. I am an engineer by profession and I take odd jobs when I get them.

Q. What do you do? A. What do you mean, what do I do?

Q. What is the nature of your work? A. Engineering work.

Q. There are different kinds of engineers. What I want to know is specifically— A. Civil engineer.

Q. What did you do—

The Court: You don't do mechanical work, is that what you mean?

(1575) The Witness: I am a civil engineering graduate, if that is what you want.

Q. Do you have a firm? A. I do not.

Q. Do you have any employes? A. I do not.

Q. Are you connected with a company known as Saw-mill Supply Company? A. I have worked for them.

Q. When last did you work for them? A. I did a small job for them last spring.

Q. Had you worked for them prior to that time? A. I had.

Q. When? A. Two years prior to that.

Q. That was a small job also? A. Right.

Q. What was the nature of your work the last time you worked for them? A. I was marking steel for a demolition proposition to be re-erected in another spot.

Q. Do you have any interest, financial interest in Saw-mill Supply Company? A. I do not.

Q. Do you have any financial interest in any corporation? A. I do not, not now.

Q. When last did you hold stock in a corporation? A. In what corporation?

Q. Any corporation. A. Well, I have some stock in various general companies, if you want to call it that.

Q. What are the names of the companies?

Mr. McGohey: I object.

(1576) The Court: Sustained.