

1927

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Now will you tell us whether or not that page contains entries indicating the selection of names of (3854) potential jurors from sources other than voters registry lists in Manhattan and Bronx? A. It says on March 3 150 notices were mailed from the Manhattan Telephone Directory.

Q. Is that the only one? A. There is another on March 19.

Q. How many mailings on March 19? A. 50.

Q. So that makes a total of 200 sent in March 1947, is that right? A. That is correct.

Q. Now will you be kind enough to turn to page 3 of Exhibit 179 and tell me what month and what year that page has reference to? A. April 1947.

Q. That is just two months prior to the drawing of the jury which indicted these defendants, is that right? A. That is correct.

Q. Will you look at that page and tell us whether it contains entries indicating that sources other than the voters registry lists were consulted in respect to the selection of names of potential jurors for the month of April or in the month of April 1947? A. It does.

Q. Will you please read or tell us how many such sources there are on that page, such other sources? A. On April 2, 1947, 175.

Q. Will you be good enough to take this piece of paper and calculate the total number for me, Mr. McKenzie, (3855) on that page?

The Court: How many were there on that first page, 250?

Mr. Sacher: 250, your Honor. And 200 on the second.

The Court: 200 on the second page?

Mr. Sacher: Yes.

The Court: Now is he on the third page?

Mr. Sacher: He is on the third, your Honor. It is the third page of Exhibit 179.

The Court: Yes.

A. On April 2, 175.

Q. Of what? 175 from all sources? A. From the Manhattan Telephone Directory.

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Mr. Crockett: Is that the address telephone directory?

Q. That is the address telephone book, isn't it? A. Yes.

The Court: All the references are to that book, as I understand it.

Mr. Sacher: That is right.

The Witness: On April 11, 100; on April 14, 200; on April 25, 200; on April 30, 100.

Q. Will you now tally the result? A. 775.

Q. I show you your affidavit of October 6th, which is (3856) Exhibit 227, and ask you to tell the Court whether you made any mention of names selected from the Manhattan Telephone Directory in that affidavit? A. When this affidavit was made?

Q. Yes.

Mr. Gordon: Just a minute. Answer the question, please.

The Court: Yes.

Mr. Gordon: Did you make any mention of it in the affidavit?

The Witness: No, I did not.

Q. Now is it correct to say, Mr. McKenzie, that all of the entries on all of the pages in Exhibit 179 are in reference exclusively to mailings of jury qualification notices to potential jurors in Manhattan and the Bronx? Will you be good enough to look through that? It should not take you too long. A. For the year of 1947?

Q. Yes, and 1948, for that matter, if the Court has no objection. A. In other words, was any jurors listed here other than—

Q. Manhattan and Bronx. A. Manhattan and Bronx?

Q. Yes. A. In the month of January it is just the list of registered voters—

Q. Look, you don't mean just the registered voters (3857) because you testified a few minutes ago it was 250—

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The Court: Both counties, Manhattan and Bronx.

A. In January—

Mr. Gordon: Now, your Honor, Mr. Sacher is now deliberately misstating the witness's testimony, or perhaps accidentally doing so—

The Court: I thought it was accidental. I really do.

Mr. Gordon: But he is arguing with the witness.

Mr. Sacher: He thinks when you go after me he is entitled to go after me too. Now two big men going over one little fellow, it just ain't sportin'.

Mr. Gordon: May I state an objection without interruption? And then I will sit down.

The Court: Yes, you may.

Mr. Gordon: I object to the statement of counsel that the witness just testified that he selected jurors during the month of January from the Manhattan Telephone Directory when it appears that after this detailed analysis and examination that the 250 names he was talking about were on February 26 and February 27, which is not the month of January.

The Court: That is right.

Mr. Gordon: And I object to continuing this, your Honor, unless we get to some point, because it (3858) seems to be irrelevant and simply time-consuming.

Mr. Sacher: Time-consuming, yes, but not irrelevant.

The Court: Well, Mr. Sacher, you have asked him to look through the book and see whether there were notices sent in 1947 and 1948 to any prospective jurors residing elsewhere than Manhattan and the Bronx.

Mr. Sacher: If your Honor is willing to take my statement for it, I will give it to you. I have looked through the book and—

The Court: No such thing?

Mr. Sacher: No such entry. And subject to correction—

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The Court: That is a good way to do that. We will leave that subject to correction and pass on to something else.

Q. Now would you be kind enough to add up the total number of names selected on pages 1, 2 and 3 from the Manhattan Telephone Directory, Mr. McKenzie? You had 250—do you want to write them down on a little slip of paper?

The Court: I have got them here. It is 625.

Mr. Sacher: Oh no, your Honor. Your addition—

The Court: Well, page 1, 250; page 2, 200; page 3, 175.

Mr. Sacher: 775.

(3859) The Court: Oh, I thought it was 175.

Mr. Sacher: 775.

Mr. Gordon: Are we just adding them all?

Mr. Sacher: Yes, just as Mr. Wilkerson was asked to add up, we are asking Mr. McKenzie to add up.

The Court: Now, if you are going to do that sort of thing I am going to put a stop to this, Mr. Sacher:

Mr. Sacher: All right, I withdraw it.

The Court: Now, you know, it is all right to be indulgent but I am reaching the point where I don't want those cracks and comments.

Mr. Sacher: All right. They are no reflection on your Honor, you know that.

The Court: I know, but it is disturbing to the dignity of the Court and the proceedings here—

Mr. Sacher: I shall refrain.

The Court: —and it is so unnecessary to do it.

Mr. Sacher: I shall refrain, your Honor.

The Court: Now, he is looking through there now and he is going to give us the figures.

A. That is for the first three pages?

(3860) Q. Yes. A. The total of the three combined, 1200.

Q. You are 25 shy. A. 25 shy?

1931

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Mr. Sacher: Is your Honor willing to take my figures?

The Court: Yes.

Mr. Sacher: 1225.

The Court: It is 1225 according to my calculation. So, let us take it at 1225 and proceed.

Q. Now, where did you select the names of my countrymen, the Westchester jurors, Mr. McKenzie? A. From the Directory of Directors.

Q. And in what years did you select Westchester jurors from the Directory of Directors? A. Back in 1940 and possibly 1941, the latter part of 1947, and the early part of 1948, I believe.

Q. Now do you mean that between 1941 and the latter part of 1947 you did not send out a single notice to potential Weestchester jurors; is that what you are telling this Court? A. Say, from the period of time I came back from the armed forces—

Q. That was April 1943, we know that; yes. A. After April and the middle—after April 1943 we only sent out from the list of registered voters, unless an individual name was submitted and that resided in Westchester County it went out.

(3861) Q. What is that? A. If the name resided in Westchester County it was sent out.

Q. But you have testified several times now that you never got a name of a registered voter from Westchester County because you didn't have a true— A. I don't mean he is a registered voter; I am talking about the individual name.

Q. Where did you get individual names between the time you came back in April 1943 and the latter part of August 1947? Where did you get the names in that four and a half year period? Where did you get them from?

The Court: For Westchester.

Mr. Sacher: For Westchester, your Honor.

A. There were no names other than the volunteer or a name that would be submitted on an individual; but, in

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other words, the only two books we worked on was one for Manhattan and one for Bronx.

Q. I am trying to find out from you whether you took the name of any Westchester resident from any book source between April '43 and the latter part of August 1947. A. That I do not know.

Q. Isn't it the truth that you continued to get names of Westchester potential jurors from April 1943 to the latter part of August 1947 in the identical way in which you always took their names before April 1943 and in the (3862) identical way you always took them after the latter part of August 1947, namely, from the Directory of Directors? A. That is not so, definitely not.

Q. Well, I ask you then, name some source from which you got names of Westchester residents? A. From April 1943 until February—

Q. The latter part of August 1947. Where did you get Westchester names from? A. We did not secure any names for Westchester from 1943 down until the time of '47.

Q. Do you mean that in that four and a half year period you didn't get any additional Westchester jurors; is that what you mean? A. If an individual letter was sent in and the man's name was—

Q. Did you get any individual letters? A. I may have, I don't know.

Q. No. Did you? A. Anyone could have—

Q. No. A. I don't know.

The Court: He says he doesn't know.

Mr. Sacher: That is it, just say no.

Mr. Gordon: I am going to object, your Honor, to this method of cross-examination. And may I take this opportunity to say that Mr. Sacher said he would give your Honor his word that in this book, which is Exhibit 179, there are no notices sent to anybody outside of the Bronx or New York County, or Westchester I think (3863) he included—

The Court: No, not of Westchester.

Mr. Sacher: No.

1933

Colloquy of Court and Counsel

The Court: The statement, as I understood it, was that no notices were sent to anyone outside of Manhattan and the Bronx.

Mr. Sacher: Mr. Gordon has discovered some 20 notices sent to Putnam County, where the Governor of the State lives.

Mr. Gordon: Now wait a minute. Now I take it that Mr. Sacher—

Mr. Sacher: If you regard that as material, I made an error.

The Court: Now Mr. Sacher, you are taking control again, aren't you? It is really amusing—you just get a little opening and then you are spread-eagling all over the courtroom. It is simply wonderful.

Mr. Gordon: Your Honor, Mr. Sacher made a representation which you said you would take subject to correction.

The Court: I did say that.

Mr. Gordon: I am not saying that the number of names as to these other counties was large, but I am saying that if your Honor will look in the book you will see that the fact is that there were notices sent not only (3864) to Putnam County but a few as well to Orange and Rockland Counties, and you will find it on page 4 and page 19.

Mr. Sacher: Let me tell the Court how many there are on each page.

The Court: Mr. Sacher—

Mr. Sacher: Oh, I am sorry.

The Court: You know, it is a funny thing, but it may be that there are lots of other people the same way—the word "accuracy" does not seem to mean to some people to get a thing exactly right; if it is a general, vague figure that is more or less the same that means accuracy. Now to me, accuracy means but one thing.

Mr. Sacher: I love it.

The Court: And you made the statement which now seems to be erroneous, and the particulars in

1934

Colloquy of Court and Counsel

which it is erroneous are for me to determine as to what their weight may be.

Mr. Sacher: I shall wait for the determination.

The Court: So let us not blow it all up into a big controversy, but let me look and see what the book shows. I may say, too, that I do not see how the defense can blow hot and cold; on the one hand, if no notices are sent to certain districts that is supposed to be discrimination, and then if there are other districts and there are no notices sent to them, although it does not seem to be (3865) in the same category as the others, then there is something wrong about it.

Mr. Sacher: Oh, I am objecting; I am a resident of Westchester and I want to know why my county was discriminated against here.

The Court: Well, that is the place where you were telling me earlier that all the rich people were. And I don't know—

Mr. Sacher: Yonkers ain't too rich, your Honor!

The Court: Well, as far as I can see it is not going to be possible for people who are running a jury system to send out notices in equal number to all the different districts that may be in such a very large place as the Southern District of New York. And when you point out that no notices were sent to Westchester I think to myself: Well, that is the same sort of thing perhaps that no notices were sent to other districts, and some time I suppose somebody is going to ask him why, and we will see what his reason may be.

But let me look at the book here and see what I find.

Oh, yes. On page 4 there are some in Putnam.

Mr. Sacher: How many?

The Court: A relatively small county. And there are two pages of ten each.

(3866) Mr. Gordon: Mr. Sacher knows it, your Honor. He has Exhibit 182, which was prepared for the defense by the witness yesterday morning and handed to him.

1935

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Mr. Sacher: Mr. Gordon is wrong. I don't have that exhibit. And if I had it maybe I wouldn't have made this minuscule error.

The Witness: Your Honor—

The Court: Everybody will get into this in a minute. I never saw anything like it.

Now, let me see about the others.

Mr. Sacher: Mr. Gordon not only reads my mind but counts my possessions too. That doesn't happen to be among them.

Mr. Gordon: Your Honor, I object to further—

The Court: It is the most extraordinary thing. He is perfectly incorrigible.

Mr. Gordon: I suggest that he continue with the cross-examination.

The Court: Well, I know. Now, let me look to see where the others went. We found some in Putnam. And you say there are also some in Orange County.

Mr. Gordon: There seem to be five from Orange and five from Rockland.

The Court: All right.

(3867) *By Mr. Sacher:*

Q. Where did you get—

Mr. Sacher: I am sorry.

The Court: You may proceed.

Q. Where did you get the names of the 20 residents of Putnam County who are referred to on—

Mr. Sacher: Page 4, is it, your Honor?

The Court: I think it is page 4.

Q. —of Exhibit 179? A. From the Telephone Directory.

Q. From the Mahantan Telephone Directory? A. Another Telephone Directory of the upstate counties.

Q. You mean you just took 20 names at random from Putnam County Telephone Directory, is that it? A. We

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took names to try out the Telephone Directory of that particular book, whatever it may have been.

Q. Well, are you sure? Is there anything which indicates that it was from a telephone directory? A. I know I had the telephone directories there and when I turned it over to a man to write them out—

Q. Is there anything on page—

Mr. Gordon: Wait a minute. Let him finish the answer.

A. (Continuing) When I turned the Telephone Directory book over to the man to write out some notices he wrote out some to those particular counties, and when they were (3868) mailed we received a letter from the clerk of the Northern District informing us that we had sent several notices to prospective jurors that resided in the Northern District and wanted to know if their district had been changed. We then checked up and found out in Putnam County, or whatever county book it was, the particular name and address that was in that book lived in the Northern District. It was very tricky, and we stopped using it.

Q. Did you have any indication from the Telephone book whether these people to whom you were sending notices were between the ages of 21 and 70? A. No, we did not.

Q. That is a requirement, isn't it, for eligibility for jury service? A. We looked at names—

Mr. Gordon: That is objected to.

The Court: Sustained. Let us not have that.

Q. When you sent notices to Putnam County was it because you were in need of additional jurors, Mr. McKenzie? A. Our hope is always to get a cross-section of all districts.

Mr. Sacher: I move to strike that out as not responsive to my question.

The Court: I will let it stand.

Mr. Sacher: I still have to get an answer to my question, so may I put it again?

The Court: Let us have it.

1937

Joseph F. McKenzie—for Government on Challenge—Cross

(3869) Q. Did you send out notices to Putnam County because you needed additional jurors? A. We are always sending out notices—

Q. Did you, yes or no, for that reason?

Mr. Gordon: Let him answer that.

Mr. Sacher: It is the second try at it. I think I am entitled to an answer.

The Court: Do you think it is important, Mr. Sacher?

Mr. Sacher: Yes. I have another question to follow up with.

Mr. Gordon: The witness started to say, "We are always sending out notices," when Mr. Sacher interrupted him.

The Court: I know.

Mr. Sacher: What is your Honor's ruling on it?

The Court: Isn't it clear that they always desired to get additional jurors? What else could be the point of sending the notices out?

Mr. Sacher: Why can't he answer it then, like an honest man would?

The Witness: We started to send—

The Court: He is wondering that there might be something about it that does not meet the naked eye.

Mr. Sacher: There probably is, but that is (3870) no business of his.

The Court: Well, maybe so, but you ask why he is hesitating. I have a little experience. I am watching and listening here, and I do not think it impairs a person's credibility when he begins to think a little bit before answering the question, particularly one that seems so obvious as that one; he wonders whether or not there isn't something the matter with it.

Mr. McGahey: Official, perhaps.

The Court: So let us take it that he said that he was trying to get more jurors. Now, go on with that next question that is going to be so good.

Mr. Sacher: Your Honor's sarcasm apparently reached the reporter of the World-Telegram. I

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recognize his raspy gurgle there.

Mr. Gordon: May that be stricken out, your Honor? I object to further examination of this kind by counsel, and if that is as much as the cross-examination is going to consist of, I would like to go back to redirect.

Mr. Sacher: No, that isn't all.

The Court: I sustain the objection.

By Mr. Sacher:

Q. Had you sent any notices to Putnam County prior to the month of May 1947, as appears from page 4 of Exhibit 179? A. Had we sent any notices?

(3871) Q. Yes. Did you before May 1947 ever send any notices whatever to Putnam County? A. Back in 1940 the Directory of Directors had names from all those outlying counties.

Q. I didn't ask you that. I asked—

Mr. Gordon: I submit that he has answered that.

The Court: Yes, I think he has answered it. Ask another question. I am getting the impression now that just because this reference to Putnam County is here that you decided to play around with it for an hour or so—

Mr. Sacher: No.

The Court: —and use up the time. I am not going to have it.

Mr. Sacher: Let me put the question.

I want to except, by the way, to being ordered to move from question to question. I want to explore this briefly, not for a length of time.

The Court: If you think these cracks about the voice of a reporter that you seem to recognize are helping you here, you are making a big mistake. I consider that sort of thing frivolous and diverting and entirely inconsistent with the dignity of the court, and I am having a great difficulty in putting a stop to it. And I don't know how it is, but you are perfectly incorrigible. You have (3872) such

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a sense of your own importance and your own conceit that nothing will put you down.

Mr. Sacher: I think that is absolutely unwarranted.

The Court: Well, it may seem so to you, but I am going to put a stop to that sort of thing—wise-cracks, flippant remarks, that sort of business all day long, I won't have it. It may seem funny to you, but I do not consider this a place for that sort of thing.

By Mr. Sacher:

Q. Now, Mr. McKenzie, if you needed additional jurors in the month of May 1947 why didn't you select names of residents of Westchester County who lived closer to the Southern District of New York than those in Putnam County?

Mr. Gordon: Objection. Immaterial.

The Court: Overruled.

A. Why did I not select—will you repeat that again?

The Court: He says you took some from Putnam County. Why didn't you take them from Westchester County?

A. We were trying out these new Telephone Directories there and that is what accounts for sending them to Putnam.

Q. Where did you get the names of potential jurors from Westchester County which are mentioned on page 19 of Exhibit 179? A. Pardon me?

(3873) Q. From what source did you obtain the names? A. From the Telephone Directory of that outlying county there.

Q. Is the same true of the five which appear at page 19 of Exhibit 179 for Rockland County? A. That is true.

Q. Now you made no mention, did you, in your affidavit of October 6th, Exhibit 227, of your selection of names of the residents of Putnam County in May 1947 from the Telephone book, did you? A. No, I did not.

1940

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Now at page 3458 of the transcript his Honor said the following to you:

"Let me ask you a question: You seem to have said that in this period between some time in 1945 to 1947 you used one book of registered voters for one single Assembly District in Manhattan and another one book for one single Assembly District in the Bronx. Did you mean to say that?"

Do you recall that? A. Yes.

Q. And did you make the following reply:

"The Witness: Yes, your Honor, I did."

A. Yes.

Q. Do you recall that? A. I do.

Q. Now do you also recall that you testified in substance that you had no present recollection of where (3874) that Manhattan Assembly District lay except, my recollection is, that you said it was on the west side of Manhattan; is that right? A. That is true.

Q. Now did you draw the names of potential jurors for the Borough of Manhattan in this two-year period, 1945 to '47, from any source other than the voters registry list of that one assembly district? A. That is all, to my knowledge.

Q. The registry list for that district was the only source for Manhattan jurors during that two-year period? A. To my knowledge, that is correct.

Q. Do you have that registry list? A. No, I have not.

Q. Do you still have the qualifying questionnaires of the persons in that Assembly District who responded to notices which you sent to them during that period 1945 to 1947? A. Yes, we have the questionnaires.

Q. And is it correct to say—

The Court: You mean, in with all the other questionnaires?

The Witness: With all the others, they are all together as of that particular time.

Q. You have these questionnaires segregated by periods of time, do you not? A. As to the day and month and year, that is right.

1941

Joseph F. McKenzie—for Government on Challenge—Cross

Q. So those for 1947 would be in one group, 1946 in (3875) another group, 1945 in another group; is that right? A. That is true.

Q. And so if you desired to ascertain the Assembly District in question you could ascertain that by examining these questionnaires for their addresses which would indicate the Assembly District within which they fall, is that right?

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

Mr. Sacher: I think it is a truism.

Mr. Gordon: The address doesn't tell the Assembly District.

Mr. Sacher: No, but you could then take a map.

The Court: There might be a number of other factors, I don't know. But the question is—I will allow the question as to whether he could tell. Maybe he would say yes and maybe he would say no, I don't know.

Could you tell by looking at those questionnaires what was the district referred to in that book that is no longer in existence, that registry—

The Witness: I don't know just what the picture might be in there, your Honor; there could be volunteers of a certain day, along with notices sent out; it would be a combination of anything.

The Court: So you say you couldn't tell?

The Witness: That is true enough, I wouldn't (3876) definitely know just what certain day.

Q. Tell me, what happened to that registry list? A. The registry voting list, when the new list came in that was disposed of, thrown out.

Q. Thrown out? A. That is true.

Mr. Sacher: Would your Honor indulge me for just a moment, please?

The Court: Certainly.

Q. Now you testified at page 3453 of the transcript as follows:

1942

Joseph F. McKenzie—for Government on Challenge—Cross

"Q. From what other sources in addition to the registered voters list and this telephone book did you receive names? A. We received names from the Federal Grand Jury Association of the Southern District of New York."

Do you recall that testimony?

A. As to what date did we receive those names?

Q. I think that refers to 1940 to 1942, I believe. Yes, at page 3450, at the bottom of the page, it is indicated that the period referred to is 1940. A. That is correct.

Q. Then you were asked the question:

"Q. From whom else?" Do you recall that?

A. Yes, I do.

Q. And do you recall making the following answer:

(3877) "A. We also secured names from the Engineers Directory; from Poor's Directory of Directors; and from the various alumni, college graduation classes."

Do you recall making that answer?

A. Yes, I do.

Q. Then two questions below that you were asked:

"Now, did you receive any names from the jury commissioner?"

And do you recall making the answer, "We did"?

A. Yes.

Q. And then you testified—

The Court: Now, before you pass on there—

Mr. Sacher: What is that your, Honor?

The Court: I say, before you pass on there:

Now, you said in that answer that was read a moment ago, from Poor's Directory of Directors.

The Witness: That was back in 1940.

The Court: Well, then, your testimony about not knowing what Directory of Directors, you are referring to the later period when you sent these people out?

The Witness: 1947, that is true.

The Court: So back in 1940 you did see this Poor's—

The Witness: I didn't see it; I sent the man from the office, a Mr. Tanner, and he went up and compiled the names the same as these two girls,

1943

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and this man has ((3878) had occasion to compile from the 1947.

The Court: Did you know it was Poor's Directory and not some other book or Directory?

The Witness: At that time the name came in it, yes, your Honor.

The Court: All right, Mr. Sacher.

I might inquire, is there something special about this Poor's Directory? There has been so much talk about it I wonder if there is some point that you might advise me of because I am a little puzzled about it. Is there something about it that is different from the others?

(3879) Mr. Sacher: Well, it is a registry of corporation directors.

The Court: And the other directories of directors are the same thing, aren't they?

Mr. Sacher: I don't know. I have not consulted them.

The Court: It seems to me it is just throwing dust in the air. I follow these things so intently, and I think there is going to be some point, and then it winds up in nothing. I have been trying to ascertain and wondering what you have been getting at about this Poor's Directory of Directors. There has been so much talk about it, and now you say you don't know yourself.

Mr. Sacher: I didn't say that.

The Court: Oh well. Then I suppose it is the old story. When I seek enlightenment counsel refuse to answer.

Mr. Sacher: No. I said I don't know the other directories. I am familiar with this one.

The Court: Well, when you keep asking witnesses questions, naturally the Court supposes you are getting at something. Now, if there is some point about this Poor's Directory—

Mr. Sacher: Yes.

The Court: —what is the point then?

(3880) Mr. Sacher: The point is that it includes the names of the rich, the propertied and the well-to-do. That is the point.

1944

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: Then it would not make any difference whether it was Poor's Directory or some other directory of directors.

Mr. Sacher: I think your Honor is quite right about that. I haven't made any fuss about that.

The Court: Well, there was no need to just spread confusion by spending such time as has been spent here on that particular thing. The minute I heard you ask that question I said to myself, "Ah, there is that Poor's Directory; there must be something in there; maybe the witness has been saying something about it that is not so," and you just led me astray that way.

Mr. Sacher: May I continue, if your Honor please?

Mr. Gordon: May I hand your Honor this Exhibit 182 that was supplied defense counsel yesterday which shows that there was 1699 names from that source, the Directory of Directors, as compared with the grand total of 25,319. So I think that repetitious questioning—

Mr. Sacher: But I am not on that. I wanted to pass on. I am not dwelling at this time on that.

The Court: That was my fault. I had my mind on this Poor's Directory. I thought there was some (3881) point about that.

Mr. Sacher: No, I was going into something else.

The Court: Now I see there is not.

Mr. Sacher: I just read it so the witness would have the benefit of the context.

By Mr. Sacher:

Q. Now, at page 3453 do you remember being asked the question:

"Q. Now, did you receive any names from the jury commissioner?" and did you make the answer "We did"?

Do you recall that? A. Yes.

1945

Joseph F. McKenzie—for Government on Challenge—Cross

Q. And then do you recall being asked:

“Q. Who was that?” and did you make the answer
“At that time it was Judge Smythe, Neil Smythe”?

A. Cornelius J. Smythe.

Q. No, but look at the record. You notice it says
“Neil.” You said Neil. A. Neil Smythe.

The Court: It was Neil Smythe.

Q. Now I show you Exhibit 180 and ask you what the notation “NS List” means on page 5 of Exhibit 180.

Mr. Gordon: Now, your Honor, I think—

Mr. Sacher: Can’t we have an answer?

Mr. Gordon: May I make an objection without constantly having you interrupt me?

Mr. Sacher: I did not stop you from making an (3882) objection.

The Court: Now, Mr. Gordon—

Mr. Gordon: Your Honor, I apologize, your Honor—it seemed the only way to make myself heard.

The Court: That is all right.

Mr. Gordon: I think that we are back again on a book which the witness said was kept by somebody else while he was out of the office, and I think I objected to it five or six times yesterday on that ground, and I make the same objection. It seems that counsel is forgetting your Honor’s ruling.

The Court: Perhaps Mr. Sacher did not notice those dates.

Is that the fact, Mr. McKenzie?

The Witness: That is correct, your Honor.

The Court: So you don’t know about that?

The Witness: That is true.

The Court: Objection sustained.

Q. Did you ever see a list marked “NS List” in your files? A. No, I did not.

Mr. Gordon: I think the record will show, your Honor, that Judge Smythe was not the jury commis-

1946

Joseph F. McKenzie—for Government on Challenge—Cross

sioner at the time that that record was made in that book.

Mr. Sacher: Are you sure of that?

Mr. Gordon: Yes.

(3883) Mr. Sacher: When did he stop being jury commissioner? I mean, I am asking for light; I don't know.

Mr. Gordon: You just want some facts?

Mr. Sacher: Yes, tell us the facts.

Mr. Gordon: My recollection, your Honor, is that on February 11, 1941, Mr. J. Donald Duncan was appointed commissioner of jurors.

Mr. Sacher: Well, that would not negate the fact that there was a Neil Smythe list.

Mr. Gordon: No. I am just—

Mr. Sacher: OK.

Q. Now, Mr. McKenzie, when a potential grand juror is interviewed by you do you make any inquiry in regard to property qualification? A. It is all on the application.

Q. And do you determine on the basis of what is contained in the questionnaire—that is what you mean by application, is that right? A. That is correct.

Q. —do you determine on the basis of the contents of the questionnaire as to whether the given juror is qualified or not within the meaning of the law? Do you make that determination, in other words? A. I would say it is a combination of the questionnaire and the conversation or the talk with the juror at the time.

Q. But you are the one who makes the determination on the basis of those two factors, is that right? (3884) A. If I am the one who interviews the juror when he presents the qualification notice, yes.

Q. I mean, you are the one who decides whether he is eligible or not, is that right? A. Eligible for jury duty, whether it be petit or grand.

The Court: If he examines him.

The Witness: If I examine him.

Mr. Sacher: Precisely.

1947

Joseph F. McKenzie—for Government on Challenge—Cross

Q. And if you examine him you mark "Eligible," is that right? A. I mark "Eligible" and then petit or grand jury.

Q. Now will you tell the Court what property qualifications are required by you of grand jurors—that is, those who are to be designated for the grand jury—of residents of Westchester County? Can you tell the Court? A. Well, some years ago I recall back in—I don't know just the exact date—a resident of Westchester County in order to serve on the grand jury had to own real property—either the juror or his wife had to be the owner of real property in Westchester County in order to serve on the grand jury. But that only applied to grand jurors of Westchester County.

The Court: Did you—

The Witness: That was the statute of Westchester County that we were governed by.

(3885) Q. Were you familiar with any requirement that a grand juror had to be on the assessment rolls of the town or ward in which he resided in counties outside of New York? A. Well, that was covered in the answer I just made. Either the juror or his wife. Either one.

Mr. Gordon: I don't find such a section in the law, your Honor—perhaps Mr. Sacher can help me—which would be different than the requirement that the juror own real property. I assume if he owned real property he would be on the assessment roll.

* * *

(Recess to 2.30 p. m.)

AFTERNOON SESSION

JOSEPH F. MCKENZIE, resumed the stand.

The Court: * * *.

Did somebody locate that Westchester statute?

Mr. Sacher: Yes, your Honor.

Would you be good enough to look at Sections 229(a) and (b) of the Code of Criminal Procedure of the (3886) State of New York?

1948

Colloquy of Court and Counsel

The Court: Is the compliance or non-compliance with this provision applicable to Westchester, charged in the challenge here?

Mr. Gladstein: The challenge charges broadly, your Honor, a violation of the statutes pertaining to the selection of jurors, including grand and petit jurors, and specifically including the grand jury that returned the indictment, sir.

The Court: You interpret it as affecting this particular matter too?

Mr. Gladstein: It covers it, yes.

The Court: Will you show me the specific reference to this? I do not think the general clauses would suffice.

Mr. Gladstein: If an amendment to the general charge is required we will ask leave to file such in accordance with the proof and for the purpose of conforming to the proof.

The Court: No, I do not think I am disposed to expand these charges any.

Mr. Gladstein: Your Honor wishes that portion of the challenge that refers to this subject?

The Court: Yes. If there is any reference to this I will allow it. If there is none I will not.

(3887) Mr. Gordon: What were those sections, your Honor?

The Court: 229(a) and 229(b) of the Code of Criminal Procedure of the State of New York. It evidently has something to do with special considerations applicable to Westchester County, as I am told. I have not had any opportunity to study the sections. I had not understood that that was involved in the case at all.

Mr. Sacher: May it in the meantime be noted for the record that the defendants Thompson and Winston are absent this afternoon?

The Court: Yes.

Mr. Sacher: And the usual stipulation.

The Court: Yes, if that is agreeable to everybody, yes.

Mr. Sacher: The two defendants I have just mentioned are absent in addition to the two who were mentioned this morning, your Honor.

1949

Colloquy of Court and Counsel

The Court: Very well.

Mr. Sacher: May it please the Court, there is no specific reference to the sections of the Code of Criminal Procedure that have just been handed up to your Honor in the challenge as filed. We would therefore like an opportunity, in view of the serious questions which are raised by these sections, to apply to your Honor, either (3888) now or at some time agreeable to—

The Court: What are the serious questions? It seems to me they have to do, as I listened this morning, to property qualifications and whether persons in Westchester or their wives were on the assessment rolls or owned real property, and things of that kind, and I notice in your challenge references to numerous specific statutory provisions that are alleged to have been infringed, and if there is nothing about this in there I do not see why I should allow it.

Mr. Sacher: Except that we want to move to amend the challenge to include among the grounds urged in support of the challenge the failure of compliance on the part of grand jurors who were members of the grand jury which indicted these defendants to comply with the requirements of Sections 229(a) and (b).

The Court: Taking everything into consideration, I deny the motion.

Mr. Sacher: May I then at this time, your Honor, make an offer of proof in regard to the matters which would come under those sections?

The Court: Yes, you may.

Mr. Sacher: The offer is that if this witness were permitted to be questioned and to answer it would be (3889) proved that a number of the grand jurors who sat on the grand jury which indicted these defendants did not possess the qualifications to act as grand jurors as specified in Sections 229(a) and (b) of the New York State Code of Criminal Procedure.

It would also be proved that if those jurors who sat on the grand jury which indicted these defend-

1950

Joseph F. McKenzie—for Government on Challenge—Cross

ants and who would be disqualified from acting if our interpretation of the two sections referred to is correct, that there would not then be a sufficient number of grand jurors to vote an indictment in accordance with the provisions of the Judiciary Code.

The Court: Let me just glance over my notes here for a minute.

(3890) Very well. You may proceed.

Mr. Gordon: Your Honor, do I understand the state of the record to be that if the witness were allowed to so testify that that is what he would testify to?

The Court: Well, Mr. Sacher's offer went beyond that, but I felt it unnecessary, in view of the fact that 17 or more of the grand jurors have testified and nobody asked them questions under these sections, and I had better let the matter rest. His offer of proof went beyond what this witness might testify to, but I am not going to allow any amendment.

Cross examination continued by Mr. Sacher:

Q. Now at page 3454 of the record, Mr. McKenzie, you were asked this question, were you not:

"Q. And did you receive any names from any other sources that you can think of at this time?"

Do you recall being asked that question? A. As to what date? Is that back in the 1940 period or does that take in 19—

Q. Yes, in the 1940 period. And did you make the following answer:

"A. We received names from judges of the courts and individual recommendations."

Did you make that answer? (3891) A. Yes, that is correct.

Q. Do you remember what judges made recommendations? A. Judge Knox sent me down a list of colored persons at one time, and other judges that had occasion

1951

Joseph F. McKenzie—for Government on Challenge—Cross

to have names sent to them; an individual wrote a letter to a judge and it would state that he would like to serve on the jury and what would be the procedure, or he heard something about jury service. And the judge would take the letter and send an additional letter—attach a letter to it and send it down to the office and ask if this person could be sent for to come in and qualify.

Mr. Sacher: May I have Exhibits 159, 160, 162, 163 and 226, please?

Q. I show you, Mr. McKenzie, Exhibits 159, 160, 162, 163 and 226, each of which have the word "Colored" on them and ask you whether you recognize any of these lists as a list which Judge Knox handed in?

Mr. Gordon: Your Honor, this is perhaps not repetitious on its face, but since these lists have been testified about and some of them have the Federal Grand Jury stamp on them, I object to going back and going over and over.

The Court: Well, they seem to have made a special charge of corruption against Judge Knox here, and I think I will receive whatever they may offer on the (3892) point.

The Witness: What is the question? Now, will you repeat the question? What is the question?

The Court: Whether you recognize any of those as being the list that you got from Judge Knox that you testified about a moment ago.

The Witness: No, they are not, your Honor.

By Mr. Sacher:

Q. You mean then, that there was a list marked "Colored List" which is not among the exhibits just now handed to you, which Judge Knox handed in; is that it? A. I know Judge Knox handed me a piece of paper with several names on and, I don't know how many names on, and at the time he told me that a colored person who had worked for him gave him these names as prospective jurors and would like to serve on the jury, and he asked me would I send for them.

1952

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: Did the paper have on it the word "Colored"?

The Witness: Not on the paper he gave me.

The Court: That was included in Mr. Sacher's question.

The Witness: Not on the paper that Judge Knox gave me, it didn't.

Q. I think your testimony yesterday in response to some (3893) questions which Mr. Crockett asked you was that the second page of Exhibit 159 had been handed to you or to your office, rather, and that the first page of that exhibit had been typed up in your office; is that correct? A. That is correct.

Q. Now will you look at the second page of Exhibit 159 and tell me whether that looks like the list which Judge Knox gave you? A. No, it does not.

Q. It does not. How many names were there on the list that Judge Knox gave you? A. About eight or ten.

Q. And how many years ago was that? A. I believe it was back around 1941 or some time in that period.

Q. Did you send qualifying notices, too, or questionnaires, too? A. They were given to my assistant, Mr. Tanner, who proceeded, who sent out for them, I should say, or handled it.

Q. Was that list that you received from Judge Knox given some kind of a designation or name or symbol of any kind to indicate that it came from Judge Knox? A. I don't know if Mr. Tanner wrote on the card there with the recommendation from Judge Knox or what he may have done. At the time I made no notation on it.

Mr. Sacher: May I have Exhibits 179 and 180, please?

Q. Were there any other judges who made recommendations (3894) of names for potential jurors in this court? A. On individual letters, which I have already stated. The letter was—

Q. What judge made such recommendations? A. I believe there is a letter in the correspondence from Judge Frank.

1953

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Did you receive any recommendations in regard to jurors from any other official connected with this court?
A. If a letter was sent to any official pertaining to jury service, it would have been the policy to attach a letter and send it to the jury office and state that the enclosed letter was received by them and it was self-explanatory.

Q. Did you ever receive such a letter from the United States Attorney of this district? A. I believe I did, or the clerk of the court did and turned it over to me.

Mr. McGohey: If the Court please, if the question is directed to ascertain whether or not the present United States Attorney did, the United States Attorney will represent to the Court on the record that in four years, probably three, certainly not more than four times members of the bar of this district and of this court whom I know have written in letters giving the names of persons whom they knew and whom they said would like to be considered for jury service, sometimes on the grand (3895) jury and sometimes just generally for jury service.

Whenever that occurred I took the letter and forwarded it to the clerk with a note stating, as was the fact in each case, that I was not at all acquainted with the person who was seeking to become a juror but that I was acquainted with the member of the bar who sent the name to me, and stating that I believed the member of the bar to be such a person that I would take his recommendations.

What was done with those thereafter, whether those persons ever got on the jury list, whether if they got on the jury list they were ever called for jury service, I have no knowledge and I have never made inquiry.

Q. Now Mr. McKenzie, I show you Exhibit 179 and invite your attention to page 6 of that exhibit. Does that exhibit indicate the selection of names of potential jurors from the Directory of Directors? A. It does.

Q. And what month and what year is that page that I have opened to referable to? A. October 1947.

1954

Joseph F. McKenzie—for Government on Challenge—Cross

Q. And can you tell the Court how many qualifying notices or jury notices were sent to directors, according to the page which I have showed you? A. There was a hundred—

Q. You don't have to detail them. Just give us the (3896) totals. A. 800 in ten days.

Q. Eight hundred and ten? A. Ten days. 800 was mailed out over a period of ten days.

Q. Isn't your addition wrong, Mr. McKenzie? A. Well, there is 219 down there. I am sorry. 800 and 219.

The Court: What?

The Witness: 219 additional on the bottom, your Honor.

Q. That is 1,019? A. That is 1,019.

Q. Sent out in October 1947, is that right? A. That is correct.

Q. How many were sent to other persons that month? A. In that same month 200 were sent to the 13th Bronx, 13th Assembly District in the Bronx.

Q. Will you be good enough to tell the Court what percentage of the 1219 jurors on that page qualified as jurors?

The Court: Doesn't that all appear in the exhibit?

Mr. Sacher: I think it does. I just thought it would help the record along.

A. 16 per cent.

Q. Will you look on page 7 of the same exhibit and tell me whether that shows any mailings to any persons (3896-A) in the Directory of Directors?

The Court: I am not going to permit any more cross-examination along this line, Mr. Sacher. Every word of that is right in the book for me to see, and you can refer to it in any memorandum you desire to submit.

(3897) Q. Now, Mr. McKenzie, you testified, did you not, that registry lists from the County of Westchester would cost you something like 25 cents or 45 cents each, is

1955

Joseph F. McKenzie—for Government on Challenge—Cross

that right? A. I believe that is the figure. I am not certain as to the figure.

Q. And I think your testimony was, was it not, that in all the years that you have been in the jury clerk's office, which covers the period from 1937 to the present time, save for the nine-month period when you were in the armed forces, there never was an adequate appropriation to permit the purchase of a single registry list from a single Assembly District in Westchester County, is that right? A. It is not only that. There was the difficulty also in securing them from the Board of Elections. We have letters on file which show that we asked them to sell us—

Q. And they said they would not sell them to you? A. They never even answered the letter.

Q. When was the last letter you sent there, Mr. McKenzie? A. I believe in 1942, there is a letter in the file.

Q. Have you written at any time in the last seven years to the Board of Elections in Westchester? A. No, I have not.

Mr. Sacher: That is all; that is, for me.

(3898) The Court: Well, you and Mr. Crockett have examined now. Do you mean to say that all the lawyers are going to cross examine this witness?

Mr. Sacher: On things that have not been covered by those who preceded.

The Court: Well, I will permit it within reasonable grounds. That is all right.

Mr. McCabe: If your Honor please, I have scratched off a good bit of the notations that I have made—

The Court: If you don't repeat it is all right.

By Mr. McCabe:

Q. Mr. McKenzie, in your testimony yesterday you mentioned about page 3598 that the expression "deferred" on a qualification sheet was a mild way of saying "rejected." Do you recall that? A. I do.

Q. What did you mean by that?

Mr. Gordon: This is objected to, your Honor, as cross examination on cross examination. Therefore it is repetitious. This was gone into.

1956

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: It does seem so. I will sustain the objection.

Q. Mr. McKenzie, what was your procedure if a prospective juror appeared at your office in response to a notice sent to him, and having filled his questionnaire and having shown on that that he had the qualifications (3899) for a juror, as set forth in the questionnaire—that is, as to citizenship, age, property qualification, and the other formal qualifications, and yet you decided from your observation of the man that he would not make an acceptable juror? What was your procedure? A. In other words, if I accepted the man or I rejected the man?

Q. If you rejected the man, if you decided that although he had the qualifications required for a juror, yet for some other reason he was not, let us say, the type that you believed acceptable for a juror?

Mr. Gordon: That is objected to.

The Court: Sustained.

Q. Was there ever an occasion, Mr. McKenzie, when a person appeared—

The Court: I think what you mean to say, Mr. McCabe, is that if there were some things relative to his qualifications that did not appear on the written questionnaire, did he do thus and so?

Mr. McCabe: Yes.

The Court: Well, you see, the way you put it it looked as though you said after he found him fully qualified and he rejected him, why did he reject him? And he never said he did that.

Mr. McCabe: No.

(3900) The Court: So what you mean is that if he observed something that was not apparent on the face of the written questionnaire, how did he proceed to exercise his discretion as to whether he would take the man or not take him; isn't that it?

Mr. McCabe: The question was directed to what did he do. I was not inquiring into his mental processes as to why he rejected the man, but what reply he gave to the man, what he did with the qualification or with the questionnaire.

1957

Joseph F. McKenzie—for Government on Challenge—Cross

The Witness: Well, prior to a certain date I would write "Rejected" on the application.

Q. And would you tell the man that he was rejected?
A. No, not necessarily—no, I didn't say to him that "You are rejected." No.

Q. Was that what you had in mind when you said sometimes "deferred" was a mild way of saying "rejected"?

The Court: I sustain an objection to that, Mr. McCabe.

Mr. McCabe: I thought perhaps the other question had requalified.

The Court: I think not.

Q. Now you say on some occasions you wrote "Rejected." What would you do on other occasions when you did not write "Rejected"? A. Well, after that question came up about (3901) putting "Rejected" on there, Mr. Follmer also mentioned that "Deferred" would be a better term to use; so after a certain date you will find "Deferred" on any number of the applications.

Q. You said after that came up about writing "Rejected." When did it come up? A. I believe some time in 1940.

Q. And what was the occasion for its coming up? Was there any incident?

Mr. Gordon: Your Honor, I object to any further questions along this line. I do not see the relevancy of it.

The Court: Sustained.

Mr. Isserman: May I say a word on that, your Honor?

The Court: Yes.

Mr. Isserman: This is cross examination on a matter which deals with the witness's use of the word "deferred" in a method quite contrary to the ordinary meaning of that word and quite contrary to the way the use of that word is described in the Tolman memorandum, which is before the Court; and cross examination here is designed to elicit precisely how and why this word was used and to indicate that

1958

Joseph F. McKenzie—for Government on Challenge—Cross

its use was not as now stated by the witness, but as stated in that report, and that (3902) it was used when persons were fully qualified, but nevertheless not put on the active list because of the type of employment that person was engaged in or because for some reason not connected with the qualifications which led the clerk to put on the designation "Deferred" and to put that card in the inactive file.

The Court: It is a singularly circuitous way of getting that fact—

Mr. Isserman: Well, it is a question of probing the credibility of the witness on the subject; it is a question of probing his understanding of the strange use of a word which, in its ordinary sense, suggests qualification and postponement of use.

The Court: I sustain the objection.

Mr. Gordon: Your Honor has the Tolman Report before you, I take it?

The Court: Yes, I have. I have it right here.

Mr. Gordon: I do not think it supports some of the extravagant claims.

The Court: Well, it probably does not, but I am not going—

Mr. Isserman: I suggest Mr. Gordon read the paragraph which he says does not support the statement I have made.

The Court: I am not interested in that at the (3903) moment. I find this cross examination now is getting very prolonged. I will try to give every conceivable and reasonable opportunity to bring out anything that may bear on the selection of jurors, but you know, you can take any kind of an inquiry and get into such minutiae that you never finish; and I am beginning to see a certain resemblance to what I have seen before here. But go ahead.

Mr. McCabe: That is not directed at me, your Honor? I have been on my feet about a minute and a half I think.

The Court: Oh yes, I am not saying that you have done anything about this cross examination, nor do I think that you asked that question for purposes of delay, but I must necessarily be cognizant of the

1959

Joseph F. McKenzie—for Government on Challenge—Cross

passage of time here; so just drop the "deferred" and get on to something more important.

By Mr. McCabe:

Q. Mr. McKenzie, you testified yesterday—and I believe it was about page 3476—that there was a drawer containing cards listed "Ready for the wheel"; is that correct? A. That is correct.

Q. Now I would like to bring out just the process by which cards traversed the—I believe it was three types of drawers that you had to get into the wheel.

(3904) Mr. Gordon: Objected to as repetitious. I remember Mr. Gladstein asking something—Mr. Sacher I guess it was—Mr. Sacher took a piece of paper out of his pocket and read something, and Mr. Gladstein said, "Isn't there a drawer with so and so on it?"

Mr. McCabe: Yes, but that was not pursued. I think you will see that in some way we got off the track, and in order to avoid going through the whole transit, if your Honor thinks that that is not necessary, I would like to get down to the very point—

The Court: Now you have got the right idea.

Mr. McCabe: —the very point where you have to have more cards for the wheel.

Q. Now, you received an order for four or five hundred jurors and you needed more cards for the wheel. Now, to which drawer do you go for the cards? A. In other words, there is a drawer marked "Ready for the wheel"—there is a couple of drawers there marked "Ready for the wheel"—

Mr. Gordon: Just a moment. The question assumes a state of facts not in evidence. The testimony is that the jury commissioner and the clerk go to the drawers for the cards, and they are the ones who do the drawing.

The Court: That is the testimony.

Mr. Gordon: Now, it has been asked of this (3905) witness as though he were the one who picked out the cards for the drawing. I object to it.

1960

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: I think that is a fair observation.
Have you seen this thing done—

The Witness: Yes—

The Court: —and it is right that it is these other people who do that, actually?

The Witness: The jury commissioner and the clerk, yes, they do that.

The Court: And you are right there watching them a quantity of the time?

The Witness: Yes, I am in that room.

The Court: Now you go on and tell us, now that we understand that you are not doing this yourself but that the others do—tell us what you observed.

The Witness: In other words, this drawer marked "Ready for the wheel"—the cards that go into that drawer are the cards that had been taken out of the wheel at the last drawing, the jurors that had served, the cards from the jurors that had served two years ago, and the new jurors who had qualified for jury service from the last drawing to the present one, and from the jurors marked down "Future date" which had been put over by the Court—

Q. And that date having arrived— A. Yes, they (3906) were put into the "Ready for the wheel" drawer.

Q. Now, would the jury commissioner and the clerk select the cards from any particular portion of that "Ready for the wheel" box, or did they take the first handful, did they take them one by one, or how would they do it? A. When they go to that drawer I start in my business in the office.

Q. The number of cards in that drawer varies, I suppose? A. It does.

Q. Any range that you could give us? Would it be from a thousand to three thousand cards? A. I am afraid I couldn't give a figure.

Q. By the way, in Manhattan and the Bronx is there any distinction between the requirements for grand jurors or petit jurors?

1961

Colloquy of Court and Counsel

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

The Court: That is a matter of law. Is there a difference? I do not know myself. I have been proceeding on the assumption that basically the qualifications were by statute the same. I don't know.

Mr. Gordon: This section that was quoted to your Honor—

Mr. McCabe: That refers to Westchester County—

Mr. Gordon: —has very little application, if any, to jurors in this court, as far as I can see, (3907) except by reference to the Judiciary Law which prescribes the qualifications for various jurors.

The Court: Well, what does the law say which prescribes the qualifications for petit jurors?

Mr. Gordon: The grand jurors have the same qualifications as the petit jurors, as I understand the law, except that in Section 598, under "Disqualifications"—this is found on page 532 of the Judiciary Law—public officers and employees of the United States Government and of State and other governments are prohibited from serving on a grand jury. Perhaps I could pass that section to you.

The Court: That is all right. I have that.

Well, I had supposed, although it may have been sheer inference without justification, that you had to be a little more careful about picking grand jurors than petit jurors because of the large responsibilities of that office.

Is it contended by the defense here that you must just pick by chance from the residual batch of qualified jurors those to go into the grand jury?

Mr. McCabe: Where the law makes no provision for a distinction, your Honor, I think it is a matter of inquiry as to where the distinction arises.

The Court: Well, I say, is it the position (3908) of the defense here that it is absolutely unlawful for those selecting grand jurors to make any inquiry whatever to separate into petit jurors and grand jurors? Is that your contention?

Mr. McCabe: I don't think we have to take a position on the law on that, your Honor.

1962

Colloquy of Court and Counsel

The Court: No, but do you take it? You know, every time I want enlightenment as to counsel's position I get this evasion. I don't see why you do it. I really don't, Mr. McCabe. Now, if you take that legal position, say you do; if you don't take it, say you don't take it.

Mr. McCabe: I certainly do take the legal position, your Honor.

The Court: Now I understand then. Now I understand what you are getting at, that you claim that it is absolutely illegal for anybody selecting jurors to make some differentiation between those who are to be in the pool of jurors for petit jury service generally and those who are to serve as grand jurors.

Now, that is what you say, and now I am going to try to find out more about it.

Mr. McGohey, can you give me your views on that as to what the law provides, or custom, and we are now just talking law; we are not talking factual matters.

And if you think the discussion would prevent (3909) your proper cross-examination of the witness, I will postpone it.

Mr. McCabe: If any harm would be done, it has been done, your Honor, so I would be glad to hear the discussion.

The Court: Surely the witness can't be so naive that he does not know there is a difference between a grand juror and a petit juror. We have been hearing about it here for several days. But if you think that some suggestion might reach him, or some harm come, why, I will drop the subject and let you pursue your examination.

Mr. McCabe: Far from it, your Honor. I would be very glad to have the enlightenment of Mr. McGohey's comments because it might save time and further cross-examination, and might just point up to me that the line I was pursuing was not worth pursuing.

1963

Colloquy of Court and Counsel

The Court: Do you care to say anything on it, Mr. McGohey? If you don't it is perfectly agreeable with me.

Mr. McGohey: I frankly don't know what the point is, your Honor. As far as the statute is concerned there seems to be no distinction in the statutory qualifications between what the qualifications must be for a grand juror (3910) and a petit juror, except what Mr. Gordon has just stated.

The Court: Yes, I understand that about certain public officers.

Mr. McGohey: Your Honor mentioned the word "custom." Now, I know that it has been the custom in New York over a long period of years for courts and jury commissioners to exercise some discretion as to the persons whom they select for grand jury service, and the reason, it seems to me, is perfectly obvious: when a petit jury is serving as a jury it is serving in a courtroom where it is hearing testimony in an adversary proceeding, where each side is protected, first of all, by its counsel, and both sides are protected by the rulings of the Court as to what is going to be submitted and what is not going to be submitted. It is a matter of fact that everybody knows that when a grand jury is convened it gets a charge by the court, and thereafter it retires to its proceedings and it gets such evidence as is presented to it by the District Attorney or by such witnesses as it desires itself to call and hear. And there are times, to be sure, when grand juries have sought to come down to the courtroom and get instruction, and they do get instruction. But generally speaking grand juries do not come down each time some question arises and get a ruling, as (3911) happens where you have a trial. So that my experience in 25 years at the bar right in New York County is that in this district and in this county there has been some care exercised in the selection of grand jurors so that they would recognize that what they are doing is not finding persons guilty of anything; that they are inquiring into finding out whether there are facts sufficient to charge somebody with crime.

1964

Colloquy of Court and Counsel

The Court: I had supposed that was so, and I noticed here in these various inquiries and other records from the clerk's office that occasionally there is a reference to "Eligible for grand jury" or something of that kind, or some notation of similar import; and I have gone up to this point on the assumption that of course there was some process of exercise of discretion in the selection of who were to be eligible for grand jury service and who were to be eligible for petit jury service.

So I think we had better proceed—

Mr. Isserman: If the Court please, I would like to be heard on this.

Mr. McGohey: May I make one more statement, please?

The Court: Yes.

Mr. McGohey: If your Honor pleases, there is another obvious factor, which is a fact, that grand (3912) juries sit every day, and they sit every day for the term for which they are called; and sometimes a grand jury—indeed, as the grand jury that returned the indictment in this case—now just let us take that for a minute—

The Court: Yes.

Mr. McGohey: —that grand jury was impaneled some time in June 1947, and it sat many days during every month or nearly every month from then until last December.

Now, there are people who can afford to give that much time to grand jury service and there are many others who can't.

The Court: And it was discharged then only because it lapsed by operation of law?

Mr. McGohey: Yes.

The Court: Because the rule of the Supreme Court was that a grand jury became defunct after 18 months of service.

Mr. McGohey: That is right, and that, of course, as your Honor recalls was incorporated from the statutory provision which obtained prior to that time, and probably still does. A grand jury may not remain in existence beyond 18 months.

1965

Colloquy of Court and Counsel

The Court: All right.

Mr. McGohey: But those are all factors that (3912-A) are taken into consideration.

The Court: Mr. Isserman, did you wish to say something?

Mr. Isserman: I think Mr. Gladstein—

Mr. Gladstein: I will defer to you.

(3913) Mr. Isserman: The Court raised the question whether there was anything absolutely illegal about the exercise of some discretion, if I can properly paraphrase what the Court said, in connection with the selection of grand jurors.

The statute is silent on separate treatment of grand jurors. There is no provision in the statute for the maintenance of a grand jury list which in the Southern District approximated between 800 and 2,000 names out of a population of millions. The question of how grand jurors were selected, absent any provisions in the statute and absent any provision for a separate grand jury list, is one which is properly before this Court and properly the subject of inquiry in the examination of the present witness.

We say that in that selection of grand jurors there has been exercised a systematic and deliberate exclusion of manual workers and Negroes, as set forth in our challenge, and of other groups, and an overloading, deliberate and persistent—

The Court: You don't have to repeat that part.

Mr. Isserman: Yes; I am referring now to the allegations of our challenge.

The Court: I know.

Mr. Isserman: And we say there is a large area (3914) between the exercise of some discretion which may or may not be vested in the jury commissioner and clerk, and the exercise of a power which leads to the result to which we object.

Now, the area is not charted by the statute, and we have a right to show by this witness and by other witnesses what the method actually was, how the segregation of 1800 names was persisted in.

1966

Colloquy of Court and Counsel

The Court: You don't need to go on, Mr. Isberman, because in the light of this discussion I am very clear as to what I shall rule, and I do it now to put an end to the matter.

I rule that there is a discretion in the selection of grand jurors as distinct from petit jurors. I rule also that it is not legal to deliberately and wilfully discriminate by the exclusion from grand jurors of particular groups and persons. So that if whatever may be brought out here tends to establish such alleged wilful and deliberate discrimination I will take it; if it is designed to prove to me that there ought to be no discretion in the selection I will not take it because it seems to me perfectly obvious as an historical fact, developed by the statutory pattern, that there must be some discretion in the selection of grand jurors as distinct from the petit jurors, and I don't think that matter is open (3915) to argument. If I am wrong, why, then that can easily be corrected, but that is what it is going to be as to my ruling.

Now you may proceed, Mr. McCabe.

Mr. McCabe: My point was, since the Congress has not made the distinction, I just wondered where Mr. McKenzie acquired the criterion which would guide him in making the selection.

The Court: Yes, you may ask him how he went about the exercise of the discretion, and frankly I was a little surprised that you didn't pursue the question that I thought you had asked earlier as to how, when he decided to accept or reject someone for grounds that did not appear in the written questionnaire, how he proceeded about that, but the minute I formulated it in that way you dropped it. I would be interested to know about that, and also how he went about the selection of a grand juror as distinct from another person. But you do just what you choose; you are cross-examining.

Mr. McCabe: It is so rare that one is criticized for not pursuing a line, it is appreciated.

1967

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: Well, you know, this is a peculiar case; you go round and round and round Robin Hood's barn, and now is the chance to look in and see what is in there. And I do hope that you get right after it, and if there (3916) is something about the way he exercises this discretion let us see what it is, and if it is wrong, it is wrong, and if it is right, it is right, but get down to it instead of going round and round.

Mr. McCabe: You mean which side of the barn the sheep are in and which side the lambs.

Maybe we can get at it in another way, your Honor, and I will be very brief about this because I know that as soon as your Honor hears Poor's Directory of Directors mentioned your Honor will perhaps naturally feel that that subject has been exhausted. But there are a couple of things that I would like to know about that, and that goes to a matter of procedure.

By Mr. McCabe:

Q. Mr. McKenzie, I presume there came a time in your administration of your office when you found yourself at a point where you desired to send out some more qualification notices, and I would like to direct your attention to, say, the time when you sent Miss Fitton—was it—and her companion up to the repository or the library where this Directory of Directors was resting?

Mr. Gordon: Mr. McCabe's prognostication is correct—that is objected to as repetitious.

The Court: When he gets to the question he may digress and ask him whether he has got a list of colored (3917) jurors in his pocket. So let him finish the question.

Mr. Gordon: Excuse me.

Q. Are you able to direct your mind to such a time, Mr. McKenzie? A. Will you repeat the question.

(Record read.)

A. Yes.

1968

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Did you have any particular directors that you wanted when you sent them up to the library? A. No, I did not.

Q. What instructions did you give them? A. I told them I was anxious to get jurors from Westchester County and the above counties and if they would go up to the Directory of Directors and secure names, get names and bring them back to the office.

Q. Get names from the Directory of Directors who lived in Westchester County? A. Or the outlying counties, I believe the way I explained it to them, counties above the Bronx, Westchester County and above.

Q. At that particular period, though, weren't you interested in any directors from Manhattan and the Bronx? A. If they were there and they took them, if they brought back names of directors from Manhattan, it didn't make any difference.

Q. Now is it a requirement in New York State that the director of a corporation be a citizen?

(3918) Mr. McCabe: I don't know, your Honor.

Q. Do you know whether it is or not? A. I do not.

Mr. McGohey: I object to this, your Honor. Its relevance completely escapes me.

The Court: Minima, minima. But go ahead, Mr. McCabe, you may be working up to something. That is what I keep thinking all the time.

Mr. McCabe: I was just wondering, if a man is going out to get grand jurors, I am wondering what leads him to go to the source which may—

The Court: But he didn't say he was going out for grand jurors. The questions that were put to him have had to do with his getting people to come in answer to the qualification notices, and whether they later became grand jurors or petit jurors was something else again that happened later.

Mr. McCabe: Now, let us ask him about that.

Q. When you wanted to get these names from Westchester County, these directors, Mr. McKenzie, did you

1969

Colloquy of Court and Counsel

have any particular category in mind as between grand jurors and petit jurors? A. No, I did not.

Q. The answer is No.

Mr. McGohey: If the Court please, I base my objection on something, that is, that it is irrelevant and (3919) immaterial because the testimony in the case is that no matter what the source of the information was that person was going to have to come in and fill out a questionnaire and it was going to be ascertained whether he was a citizen, whether he was over 21, whether he was over 70. So this line of questioning is both immaterial, incompetent and irrelevant.

The Court: Well, the one question got in there that I thought might have some importance and that was whether when he sent this woman up he told her to find a particular man that he was looking for, to get a particular individual, but he said no as to that.

Now if that is what you are after, Mr. McCabe, I am going to let you pursue this question further.

Mr. McCabe: I am just trying to develop the point that in Mr. McKenzie's mind anyone on that list would be all right, any director would be all right, he wasn't interested in any particular director but he wanted to get himself some directors.

Mr. McGohey: I move to strike that. Now, your Honor, the witness has testified as to the purpose for which he sent the clerks up there.

The Court: Mr. McCabe's statement is not quite accurate; but let us get along with the cross-examination now. I dropped the directors. Let us let (3920) the directors go.

Mr. McCabe: That is apparently more than Mr. McKenzie has been willing to do.

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

The Court: Strike it out.

Mr. McCabe: Well, now, your Honor, as long as Mr. McGohey wants to cut me off from pursuing the line of inquiry that I thought your Honor would be interested in—

1970

Colloquy of Court and Counsel

The Court: If you have something good there, why don't you get after it, Mr. McCabe? What is the use in making out that I am precluding you from going ahead with a very important crucial cross-examination? If you have got anything there, go after it.

Mr. McCabe: I think I have had enough, your Honor.

The Court: All right. Well, now, let us see; maybe somebody else wants to do some cross-examining before we have the redirect.

Mr. Gladstein: Your Honor, you will recall that I was questioning Mr. McKenzie concerning the registered lists of voters that were used in 1947 and 1948 and then asked leave to have my examination interrupted and said I would come back and conclude it, and your Honor gave me (3921) leave. And I would like to take up the subject.

The Court: You may do that.

Mr. Gladstein: Would you be good enough to let me have the registered list of voters that you see there? They are right in front of you.

The Court: Those are the ones you had checked up this morning.

Mr. Gladstein: I looked at them this morning and made a few notes on them. That is, not on the lists; made notes of my own from them.

The Court: Yes, that is all right.

Well, I guess we had better take our recess now. I have instructed Mr. McKenzie to go and look in that drawer and bring that voucher out.

(Short recess.)

Mr. Crockett: If the Court please, I believe the record already shows that all of the history cards in the active file are present here in court. I would like to request, with the Court's permission, that the history cards for each person who is named on Exhibits 159, 160, 162, 163 and 226 be

1971

Colloquy of Court and Counsel

deemed marked in evidence. Those numbers that I refer to are the so-called "Colored" list.

Mr. Gordon: That is objected to, your Honor, unless there is some point to it. It is just time-consuming.

(3922) The Court: You see, those are the five lists of colored names, that is, names of colored persons, and my disposition is to allow complete evidence as to all of those on those lists to find out whatever may be found. Now, I do not want to just deem them in evidence without my looking at them, because I have been looking at everything here as it goes along.

Mr. Crockett: May I suggest that Mr. McKenzie's assistant can be picking them out while we go on with this cross-examination.

The Court: Yes, but when do you think I am going to be looking at them?

Mr. Crockett: No; I mean as soon as he gets them together then we can pass them up to your Honor or we can take it up in the morning.

The Court: Well, I think we will start with two of them and see what we find, and then if there is some reason to go beyond that I will permit it to be done.

Now, let me see. As to 159, that was the list with the 13 names on it.

Mr. Crockett: That is right.

The Court: And I have some recollection that we looked at four of those already. Let me see. Is Flood on there? Yes; Flood, Coleman, White—White apparently is from another list; Mrs. Sadie Noisette is from (3923) another list.

Mr. Sacher: She isn't on any list, your Honor.
The Court: What is that?

Mr. Sacher: She isn't on any list, your Honor.
Mr. Crockett: She isn't on any list.

The Court: I just had those names down here.

Mr. Crockett: She was on the list for which I requested questionnaires and history cards.

The Court: I have a notation here. Let me see. Registered voters or volunteer. That must

1972

Colloquy of Court and Counsel

mean that Mr. McKenzie testified to that effect. But however that may be, let us get them all out for those first two, 159 and 160, and we will take a look at them and see what we find, and then I will decide about the others.

Mr. Crockett: I can explain to the Court that what I am trying to find out is how many of those on that list became jurors, actually qualified for jury service; secondly, which ones qualified as grand jurors and which ones qualified as petit jurors. I think that information is obtained from the history card.

The Court: Suppose, while we are discussing it, suppose we found that it was in any proportion you choose to assume, what inferences might one derive from that?

Mr. Crockett: I am not concerned about the (3924) proportions, your Honor. I want to find out whether or not any of them qualified for the grand jury from that list.

Mr. Gordon: Your Honor, I object to that as completely irrelevant to anything that could possibly be raised.

The Court: Well, it is beginning to give me the impression that I had last week of an endless chain; whatever you find then that is always the springboard for something else that may be found, and you go on and on and there is never any end, and I very much dislike curtailing proof when you get into the actual workings here. I want to give every reasonable opportunity to show anything that is wrong there. But it looks to me as though it was just a fishing around in the hopes that something or other might be found that would lead to something else.

But, anyway, I am going to let the cards on those two lists be got out, and then I will take a look at them and we will see.

The witness, Mr. Sacher, has now got that memorandum here, and I take it you would prefer to wait until Mr.—

1973

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Sacher: May I see the memo, however, in the meantime?

(3925) The Court: Yes, you may.

Mr. Gordon: May I call something to your Honor's attention?

The Court: Yes.

Mr. Gordon: Right at the beginning of the cross-examination of the witness by Mr. Crockett he called for the qualification sheet and the card of Richard—

The Court: S. Bair.

Mr. Gordon: —Bair, which was marked Exhibit 184-A and B.

The Court: That is right.

Mr. Gordon: And that is one of these sheets that has a C on it, and the history card shows that the man is a grand juror and that he served in 1944 and 1947 on the grand jury.

The Court: Oh. Well, then I will take back that other direction.

You knew all the time there was one that was a grand juror.

Mr. Crockett: No, I did not. And I would like to see that questionnaire.

The Court: Well, take a look at it.

Mr. Crockett: But my point is to find out how many of the people on these other exhibits qualified as grand jurors.

(3926) The Court: I am afraid it is some more of this trifling.

Now, you need not take any of those cards out, you just leave them alone for the time being.

Let Mr. Sacher see that memorandum.

Mr. Gladstein: May I proceed, your Honor? Shall I proceed?

The Court: Yes.

By Mr. Gladstein:

Q. Mr. McKenzie, as I understand your testimony, from time to time you removed the names of jurors from files by reason of your obtaining information that they moved

1974

Joseph F. McKenzie—for Government on Challenge—Cross

from the jurisdiction or they are dead, or they passed the age of 70, or reasons of that sort; is that right? A. That is correct.

Q. That is the normal process that goes on every month, is that correct? A. At all times that is going on.

Q. And every month you keep a tabulation of the fact that a certain number of such jurors have had their names removed from the active files; correct? A. That is correct.

Q. Now, for example, I ask you to look at Exhibit 179 in evidence, page 31. Does it purport to set forth a month by month recapitulation of the removal of cards from the (3927) active jury lists? Does it? A. Yes, I would say it does.

Q. All right. Now, what is the lowest number of cards removed during that year, for what month is it? A. The year of 1948 on the trial jury?

Q. Yes. What is the lowest number of cards of male jurors removed during any part of that year?

The Court: This is indicating by months.

The Witness: That is correct.

Q. Just the lowest. A. In July.

Q. How many did you remove during the month of July?

The Court: Of '48.

A. July, 12 men and seven women.

Q. All right. Now, what was the highest number of names during any month removed during the year 1948? A. There is a combination of two months here which is the highest number.

Q. Which are they? A. January and February, 132 men removed from the list.

Q. And how many women? A. 25 women.

Q. And January and February were not separately tabulated, but combined together represent the largest number for any two months of names removed from the active file during the year 1948; correct? A. That is correct.

1975

Joseph F. McKenzie—for Government on Challenge—Cross

Q. And all of the other months show figures like 58 (3928) or 44 or 60 or 24, or figures in between those two extremes; correct?

The Court: But those figures are not in between those two extremes.

Mr. Gladstein: In between 12 and 132?

The Court: Oh, 132. I thought you said 32.

Mr. Gladstein: No, the witness said 132.

The Court: 32 men?

The Witness: 132 for January and February.

The Court: Oh, I beg your pardon. That is right.

Mr. Gladstein: Is that clear now, your Honor?

The Court: Yes.

Q. Now I want you to turn to that portion of your record, page 17.

The Court: Which book is this? 179 or 180?

Mr. Gladstein: Yes, 179.

The Witness: 179.

Q. Now, from February through December of 1947, what was the largest number of names removed from the active lists at any time in any month, from February through December? A. July of 1947 there were 126 men removed from the rolls.

Q. How many women? A. 22 women.

Q. And what was the month in which the lowest number of names was removed from the active jury file? (3929) A. May of 1947, there were 36 men removed and seven women.

Q. And in April of that year there were 34 men, or the names of men removed, and 15 names of women; is that correct? A. That is correct.

Q. Now in one month alone, January 1947, how many cards were removed from the active files of jurors? A. That is not removed, Mr. Gladstein.

Q. How many does your record show of cards removed from the files? A. I have already accounted for them. 2,353. When you gave the figure—

1976

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: Just let me get the figure. Two thousand and what?

The Witness: 2,353.

Q. That figure appears just below the following expression, does it not, "Names removed"—

Mr. Gordon: Your Honor,—

Mr. Gladstein: May I finish the question?

Mr. Gordon: —this line of examination is objected to as repetitious and obviously time-consuming. This was gone over; we had a discussion about it the other day, and I think the witness agreed that it was when they took a stock inventory instead of a running inventory.

Mr. Gladstein: The witness agreed to no such (3930) thing.

The Court: I am getting so bewildered here by the constant change of subject that I can hardly follow this matter any more. It is just a strain on me mentally; I no sooner get my mind on one thing, with every endeavor to get it straight, when we are off on something else, and it makes a perfect mass of confusion.

Let me check back here and see what this is.

Do you remember, Mr. Gordon, about when that subject was gone into? I have my notes here according to days, and this has gone on severals days; I have tried to arrange it by subject matter but, of course, the change of subject matter was so rapid that I had to give that up.

Mr. Gordon: I am trying to find it, your Honor.

The Court: All right, take your time now because I want to understand this. But I am getting absolutely bewildered.

Mr. Gordon: It was right about the time that Exhibit 179 was first introduced.

The Court: All right, just a second now. 179. Now, let me see that book for a second.

(Book handed to the Court.)

1977

Joseph F. McKenzie—for Government on Challenge—Cross

(3931) The Court: Now, what did you say the explanation for that large figure was? The column, or, rather, the tabulation reads: "Brought forward December 1946, 9162 men; 1658 women."

The Witness: That was what was on the old sheet.

The Court: That is right. Then according to months here for 1947 there is an indication of those who were taken off and the balance remaining?

The Witness: Yes.

The Court: Now, what is the explanation for that 2353?

The Witness: In other words, Mr. Doyle, in starting this book, he asked as to that figure—

The Court: Oh, I remember now. It was a discrepancy?

The Witness: And they counted the cards, and when they counted them they found the correct amount—

The Court: I remember. I sustain the objection.

Mr. Gladstein: If your Honor please, I offer to prove by this witness if he were permitted to answer the question—

The Court: You don't need any offer of proof. Ask your question.

Mr. Gladstein: All right.

(3932) *By Mr. Gladstein:*

Q. Isn't it a fact that according to your records the cards of 2354 jurors were removed in the month of January, 1947?

Mr. Gordon: Objected to.

The Court: Sustained.

Q. Isn't it a fact that according to the official records of your office 9162 jurors, male, and 1658 jurors, female, had cards in your active files as of December, 1946? A. That is not so.

1978

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Will you look at your records and see what they say? A. When they were counted they were not there.

Q. I asked you if according to your records those were the figures. Is that true, according to your record, that those are?

Mr. Gordon: This is objected to as repetitious; and, secondly, your Honor, counsel has said "According to the official records of your office."

Now, I think there should be a distinction made between the official records of the clerk's office and records which the jury clerk might keep for his own convenience.

The Court: I am going to sustain the objection anyway.

Mr. Gladstein: Am I to understand that the (3933) document is not to be regarded as an official record?

The Court: You don't understand that I have ruled on it at all.

Q. Now, Mr. McKenzie, did you keep a tabulation of the month by month count of jurors in your active files for the period prior to December 1946?

Mr. Gordon: Same objection. Repetitious.

The Court: Sustained.

Q. Does your record show what the count of the active jury file cards was at any time between 1940 and 1947?

Mr. Gordon: I press the objection.

The Court: Sustained.

Mr. Gladstein: Your Honor, I submit this is not a subject that has been inquired into, and we have a right to ask if there was such a record.

The Court: I have sustained the objection.

Mr. Gladstein: Of course, I cannot argue with the Court about the matter, but I do submit that it ought to be permitted that we inquire into why 2,353 cards were missing from the files, either because they were removed in the month of January

1979

Joseph F. McKenzie—for Government on Challenge—Cross

1947 or because they were removed from time to time prior thereto, so that upon a count of all the cards as of January 1947 there was found that 2,353, or, in other words, approximately (3934) 25 per cent of all the active cards of the jurors were no longer there; and I submit, your Honor, that that subject has not been examined into.

The Court: Mr. Gladstein, to some people it seems that if you ask a person and he answers, and then you ask him again and he says the same thing, and you ask him again and he says the same thing, that until you get the kind of answer you want, that, of course, you have not asked the question. Now, I ruled that question out. I have heard what he said about it. It is for me to consider what weight I will give to it and how I will consider it, and I do not think repeating it over and over is going to do any good.

Mr. Gladstein: Very well.

Q. Now I show you Challenge Exhibit 183-A for identification. This is a list of registered voters for the year 1946 that you obtained, as I understand it, in connection with your getting a number of Assembly District lists from which to get names for potential jurors; correct? A. That is correct.

Q. Will you look through that one and see whether you obtained any name whatsoever from any part of that entire Assembly District?

The Court: What is the exhibit number?

Mr. Gladstein: 183-A for identification.

(3935) The Court: 183-A? And what district is it?

Mr. Gladstein: The 1st Assembly District of the Bronx.

The Court: Now may I have that map or those maps back?

Mr. Gladstein: Yes.

The Witness: In the absence of numbers being on this I would say this book had not been used.

1980

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Now, I will show you the list of registered voters for the year 1946, Second Assembly District, Borough of the Bronx, which is here marked Challenge Exhibit 183-B for identification. I will ask you to look through it and state whether it shows any evidence of your having obtained names from it of people to whom you sent notices to come in and qualify for jury service? A. I see on page 7 nine numbers which would indicate that nine qualification notices were written up in this book.

Q. And do those nine names which you have just mentioned, and as to which some marks have been made to indicate that their names were taken from that document for use as potential jurors—do they occur within a single Election District? A. I would say yes, they do.

Q. Which one? Doesn't it show? A. It shows the 11th Election District, and there are nine names here (3936) with numbers alongside them.

Q. And that appears on page what? A. That appears on page 7.

Q. Then is it your testimony that not a single name was marked from page 1 to page 7, nor a single name marked from page 8 through page 37; is that right? A. That is correct.

The Court: Let me see that just a second, Mr. Gladstein.

(Exhibit handed to the Court.)

By the Court:

Q. What are all these marks I see on page 7? A. Those are names and check marks of the people who used the books in the office. When they write out a book they will put a number alongside of a name. In other words, the clerk will be assigned to send out notices, or come into the jury office to assist you to send out notices. They would be given a registered voter book along with a batch of notices; they go off into a courtroom or wherever his desk may be and write notices.

Q. That is what he did with those? A. That is what the occasion would appear on this here.

1981

Joseph F. McKenzie—for Government on Challenge—Cross

Q. But, you see, these are some more you did not notice (indicating). You were telling me about page 9.

Mr. Gladstein: No, your Honor has that mistaken.

A. There are none on page 9.

Q. Those are the same ones you are talking about? A. Yes, nine notices or nine checks on page 7.

By Mr. Gladstein:

Q. You decided, of course, Mr. McKenzie, which of these registered lists to give your clerks, is that right? A. I go to a drawer and pick out a book from the file drawer and hand it to them.

By the Court:

Q. How is he to know how many he would get out of this book? Who fixed that number 9? A. In other words, you can't account as to how many he will get out of a book. It would be how much time he is on the book. He can sit down and write up five or write up 500.

Q. It is just a question of chance? A. Yes, that is true, the time he will devote to it writing the notices.

By Mr. Gladstein:

Q. You mean it is just a question of chance that out of that whole book 9 names appearing on page 7, and no names appearing on any of the other 30-odd pages will be checked? Is that what you mean, sir? A. I don't get that.

Q. No, I don't wonder. Do you want to hear it again?

Mr. McGohey: I move to strike that out, your (3938) Honor. That is certainly what the man testified to. Another handful of fish hooks.

Mr. Isserman: If your Honor would like to hear me—

The Court: You will not do it now.

Mr. Isserman: Your Honor asked a question.

1982

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: I happen to be talking now, and you will kindly be silent a moment and wait.

It seems to me if somebody was to pick names out of a book it would be pure chance unless he was looking for some particular individuals whether he picked one name from one page, a couple of names from some other page, and so on. I do not see anything so significant that there would be 9 of them in the same Election District.

Now, what do you want to say, Mr. Isserman?

Mr. Isserman: I was going to show that the Assembly District in question may have as many as 60 or more Election Districts—I don't know the exact number; I haven't got the book in front of me; it probably ranges between 50 and 70 Election Districts—may I have the book, please?

The Court: I don't see how else they are going to pick them except the way the witness has stated, unless, as you perhaps think, they had some particular individuals (3939) up there who were picked out for some special reason.

Were there particular individuals there that you ever heard of?

The Witness: No, your Honor, I never did.

By Mr. Gladstein:

Q. Mr. McKenzie, how do you account for the fact that—

Mr. Isserman: Let me finish.

Mr. Gladstein: Oh, I am sorry.

The Court: You take all the time you want, Mr. Isserman, and give me a good argument to show what is wrong about this.

Mr. Isserman: I will show you. This exhibit, 183 for identification, Challenge Exhibit 183 for identification, represents the list of registered voters for the Second Assembly District of the Borough of the Bronx. It contains some 60 Election Districts, some 500—averaging roughly five to seven hundred names in each district. I have counted them, and that is what the average runs.

1983

Colloquy of Court and Counsel

The Court: That accounts for how many thousands?

Mr. Isserman: So let us say even 500 to a district, it amounts to 30,000 names in the Bronx.

The clerk has testified that in the year 1947 by a change in the system he commenced using the list of registered voters in Manhattan and the Bronx to select (3940) names. We have here one district with over 30,000 names. We find no selection in any Election District whatsoever until we get to page 7, where in the 11th Election District some 9 names are chosen. It would take any person about three minutes or less to make that selection of 9 names. The clerk says that the reason why 30,000 less 9 names were not used in 1947 and 1948 in this area of the Bronx is because some clerk did not have time to copy names. Now, that, your Honor, does not appeal to common sense. And I say this—

The Court: I don't so understand it.

Mr. Isserman: —and I say this, that an investigation will show that these 9 names picked on this particular page were not picked at random out of this book, and that this book was not used to select jurors in the Bronx, but was used to check off these particular 9 names.

The Court: Suppose you were the jury clerk and you had I don't know how many hundreds of Election Districts covering millions of people in the City of New York, and you had that list before you, in the exercise of your discretion how many names would you have picked?

Mr. Isserman: Your Honor said the other day looking at one of the exhibits in evidence that it seems—

(3941) The Court: No, I just want you to concentrate on this.

Mr. Isserman: I am concentrating, your Honor. Your Honor said—

The Court: No, keep the general picture in mind. And here this man picked 9. Now how many would you have picked out of that particular one?

1984

Colloquy of Court and Counsel

Mr. Isserman: I will tell you. Your Honor said the other day looking at one list that it seems that every tenth name is picked. Now I have had some experience or knowledge of how Election Districts are used for jury purposes, and sometimes they will pick every tenth name; sometimes—

The Court: Do you remember my question?

Mr. Isserman: —sometimes they will pick the first five names and skip the next five, and pick the next five, and skip one, or pick one name in 20 or five every so often; but I say the selection of 9 names out of 30,000 in one district on one page is not a type of selection—

The Court: How many would you have selected?

Mr. Isserman: How many would I have selected?

The Court: That is the question.

Mr. Isserman: I am not the jury commissioner, (3942) your Honor, or the jury clerk, but I know this—

The Court: If you can, with all your talk about this, get yourself into the frame of mind of imagining that you were the jury commissioner, functioning under the system that you say should have been used, how many names would you have picked from that book?

Mr. Isserman: It would depend on a number of things, your Honor. If at this point I was looking for 500 names and I had my districts in rotation, and I was trying not to exclude a district like the 1st—and we will bring evidence to show what that district is and why these names were not selected—

The Court: You might pick out 9?

Mr. Isserman: No. I would find some method which would be truly representative of the 30,000 people living in the 1st Assembly District.

The Court: How would you know which of those people were colored or Jews or other things? How would you tell?

Mr. Isserman: That is not the practice, your Honor. I would take a representative grouping, and 9 is not a representation out of 30,000 or more.

1985

Colloquy of Court and Counsel

The Court: Then you say maybe you would have taken 50?

Mr. Isserman: No. I might have taken 500, (3943) your Honor.

The Court: You might have taken 500? If you took 500 from that district and you took 500 more from every other district, you would have such a huge number of names as to be utterly unwieldy, wouldn't you?

Mr. Isserman: That doesn't follow.

The Court: It seems to me to follow.

Mr. Isserman: No. There are 16 districts in Manhattan. There are, I believe, 13 in the Bronx—I may be one out—that is 28 districts. The 500 would come to about 28,000, which is just about the amount that the clerk said he sent out that year. But he did not do that. He took whole districts and excluded them. He took the first and picked 9 names out of 30,000, and the reason was the composition of the 1st Assembly District, which we will put on this record.

The Court: You probably would have picked them differently, and I suppose no two human beings—

Mr. Isserman: Without discrimination, your Honor.

The Court: Well, I am getting tired of this kind of proof of alleged discrimination. If this selection of these 9 names out of this book is something wrong, it is very difficult for me to perceive it.

(3944) Mr. Isserman: Does your Honor know the composition of the 1st Assembly District in the Bronx?

The Court: I haven't the slightest idea.

Mr. Isserman: We will offer evidence on it and we will show why only 9 names were picked.

The Court: We will see what evidence you will offer. We will come to that a little later on.

Mr. Gordon: Your Honor, it would be enlightening, I think, if it would not offend you, for you to read the 9 names. May I?

The Court: Yes.

1986

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Gordon: The first name is Edward Conlon; the next name is Henry F. Peters; the next one is Rose Katz; the next one is Evelyn Markowitz; the next one is Morris Levine; the next one is Russell Lakestream; Philip Lewerth; Nicholas Werkler and Harry Beck. Those are the nine names, your Honor.

Mr. Gladstein: That were picked. What about the 30,000 that were not?

The Court: Well, it does not look like they discriminated against people with Jewish names.

Mr. Gladstein: I can show from that—

The Court: I suppose your position is that you can't tell about these names. If you get men with names like Katz and Levine and that sort of thing that ordinarily (3945) one might consider that perhaps they were Jewish; but you say you could not tell whether he was a Jew or not without some special investigation?

Mr. Gladstein: Could I answer this question? You know, you asked Mr. Isserman if he could answer a question, your Honor, and I would like very much to say something on that, if I may.

The Court: I think perhaps we had better let it pass.

Mr. Gladstein: All right.

By Mr. Gladstein:

Q. Now, I ask you, Mr. McKenzie, when you go to your files and select a list of registered voters for one of your clerks to begin to make marks on that list for the purpose of picking the names of potential jurors, people to whom you are going to send notices to come in and qualify, do you tell him how many names you want him to pick? Do you say 500, a thousand, or what? A. No, I do not.

Q. You do not give them any idea as to how many names you want? A. I give them the notices and to get as many as the time will allow them working there. I never say get any amount.

1987

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Who are the people during 1947 and 1948 who have been making the markings on these lists of registered (3946) voters? A. Mr. Ward, deputy court clerk.

Q. First name, please? A. Thomas Ward; a deputy court clerk.

Q. Who else? A. A Mr. Rexrode.

Q. Full name, please? A. Charles Rexrode.

Q. Yes? A. Mrs. Florence Fitton.

Q. Is she a relative of yours by the way? A. Of mine?

Q. Yes. A. No, sir.

Q. Is she related to the clerk?

The Court: Suppose she were, what of it?

Q. Is she related to the clerk? A. She is not related to me.

The Court: I am not going to permit that. I don't understand that kind of thing. Suppose she were his sister, what of it?

Q. Who else, please, Mr. McKenzie? A. Mrs. Stevenson.

Q. Who else?

Mr. Crockett: First name?

Mr. Gladstein: Do you want to give the first name of Mrs. Stevenson?

The Witness: That I don't know, the first name of Mrs. Stevenson.

Q. You don't know? A. No. I believe there was Mr. Leary.

Q. First name.

(3947) Mr. McGohey: Your Honor, what is the materiality of this?

The Court: Well, I am going to find out. Maybe they want to subpoena all these people.

Mr. Gladstein: I might. It is possible that the recollection of one of them might be better on the subject than Mr. McKenzie.

1988

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Gordon: Your Honor, unless there is some further cross-examination which is proper or relevant, I am going to object to this and ask that we go on with the proof. That remark certainly was uncalled for.

The Court: Yes, it does seem to me of getting back to that old routine of just dragging, dragging, dragging; and if you are just going to ask the witness about all the different people around the court house—

Mr. McGohey: And his relatives.

The Court: —and then plan to serve subpoenas on everybody to keep the thing going indefinitely, I will find some way to stop it.

Mr. Isserman: Now, if the Court please, I am going to object to your Honor's characterization of the cross-examination—

The Court: Yes, you are always helpful, Mr. Isserman. Go ahead.

Mr. Isserman: I would like to object to your (3948) Honor's remarks on the ground that the inquiry from a witness on the persons under him who did things in connection with jury service is completely relevant and proper. There is no indication or suggestion that every one of those persons is or will be subpoenaed, but on cross-examination we are entitled to know the persons who worked on the selection which is on review before the Court. We are entitled to pursue this cross-examination, and on behalf of the clients I represent, while we have made every effort here not to duplicate, and it is not our intention to duplicate, I say that I desire and expect to have the right to cross-examine this witness to the point where the essential matters which I believe—

The Court: You are going to cross-examine him too?

Mr. Isserman: I certainly am, your Honor, on behalf of my clients.

The Court: Well, we will see.

1989

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Isserman: We will see about that. I have matters which have not been touched on by the others.

The Court: Better let Mr. Gladstein take care of it at the moment, and then when you start cross-examining you will have enough to do then.

Now, go ahead, Mr. Gladstein, with the rest (3949) of those books and get the business here.

By Mr. Gladstein:

Q. I show you Challenge Exhibit 183-K for identification which has to do with the 13th Assembly District of the Bronx. Look through the first 8 pages and state, if you will, whether or not marks appear for a rather substantial number of persons.

The Court: What is the number of this district?
Mr. Gladstein: The 13th.

The Court: Is that where Parkchester is?

Mr. Gladstein: No, your Honor, Parkchester is the 10th and the 9th.

Mr. Gordon: Instead of having the witness characterize the marks, why not hand the exhibit to the Court? The Judge has to pass on it.

The Court: Yes, let me look at it. Just a couple?

Mr. Gladstein: No, your Honor.

You just watch me, Mr. McKenzie—perhaps we can shorten this—

The Court: No, I want to see the book.

Mr. Gladstein: Oh yes, sure.

The Court: Now, is there something special the matter with this district? All rich people up there?

Mr. Gladstein: I simply want to call attention—

(3950) The Court: Well, I asked a question. Do you consider that this is an especially rich district, the 13th Assembly District?

Mr. Gladstein: That district—that is, the Election Districts in that Assembly District which appear on the first eight pages are—yes, are in the wealthiest section of the Bronx, and your Honor

1990

Joseph F. McKenzie—for Government on Challenge—Cross

will see that 1300-and-some-odd names come from those first eight pages and not a single name came from any of the remaining 52 pages of that book.

(3951) The Court: So you say that is a very wealthy district up there, so they picked all these people on purpose for that reason? Or if you don't desire—

Mr. Gladstein: I did not pick them.

The Court: I did not say you picked them, Mr. Gladstein. But there is such a way of getting along with it so we don't chew over everything so much.

Mr. Gladstein: I just want to get the figures into the record.

The Court: Now, I would like to see all these books together for the moment here. Let me have them all.

Mr. Gladstein: Do you want them in order?

The Court: I don't care particularly about the order. I just want to see them. Let me look at them.

(Books handed to court.)

By the Court:

Q. Now, I see here, Mr. McKenzie, that in some of these they seem to be picked about every ten names; sometimes they are all higgledy-piggledy; there is a list, there would be two or three near together, and then they would skip 15 or 20, and there seems to be no particular system. In some of them the first few pages will be marked with numbers and the later pages not marked at all. Was there any system followed as to this? (3952) A. There was none whatsoever, your Honor. It was up to the individual—

Mr. Sacher: I object to that question as irrelevant, incompetent and immaterial and calling for a conclusion of the witness.

The Court: Overruled.

Mr. Sacher: Exception.

Mr. Gordon: I did not hear all of the witness's answer, your Honor.

The Witness: It was up to the individual, your Honor, as to how they selected the names.

Mr. Sacher: I can't hear.

1991

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Did you when you gave out these books to these various assistants, did you tell them to look at the rich places and pick the rich people? A. Definitely not, your Honor.

Q. Do you know what these different districts are, as to whether they are inhabited by one class of people or another class of people? A. I do not, your Honor.

Mr. Gladstein: Judge, your questions and the answers to them put me in mind of the very wonderful sentence you wrote to the Supreme Court about what jury clerks do.

The Court: Yes, I know. I suppose I will hear that to the end of time.

Mr. Gladstein: I suppose it is a matter of (3953) pure chance that all those pages—you will find whole pages crossed out. You look through some of those, Judge, and you will find the word "Out" on them. You will find things crossed.

Mr. Gordon: Ask the witness his—what year is this, Your Honor?

The Court: Let me see one of those.

Mr. Gordon: The Tenth Assembly District, the witness said.

The Court: The Tenth Assembly District of the Bronx?

Mr. Gordon: Yes.

By the Court:

Q. Now, there is a place where there is a blue pencil mark with the word "Out." Do you know anything about that? A. I do, your Honor.

Q. Well, tell me about it. A. In other words, the book that was used for 1945 down to this time embodied this Parkchester area, and in writing out the notices the girl had written out these here in the previous election book. So in order that they would not be duplicated and sent out all over again, this was marked out of the new book so the party in using this book would not duplicate the names that had been sent out in the previous books.

The Court: I thought it was suggested here that (3954) they only took them from Parkchester. What

1992

Joseph F. McKenzie—for Government on Challenge—Cross

are all these here in the later pages? Aren't those Parkchester?

Mr. Sacher: They had already been taken, your Honor.

The Court: No.

Mr. Sacher: He said they had previously been taken.

The Court: Taken from the place where it was marked "Out," Mr. Sacher.

Mr. Sacher: Yes. They had them already.

The Court: Now, how about these ones that are not marked "Out" that come on the later pages?

Mr. Gladstein: Which one are you looking at?

The Court: The one we have been looking at all along, 183-H, which is the list of registered voters for the year 1946 in the Tenth Assembly District of the Bronx.

Mr. Gladstein: I just want to correct your Honor. It just so happens that nobody this afternoon has mentioned 183-H.

The Court: You mentioned the place where some parts had been marked "Out."

Mr. Gladstein: That is not the only one.

The Court: That is not the one you were talking about?

(3955) Mr. Gladstein: I say that is not the only one, and I have no objection to your Honor asking the witness the question, but I think the record should show the exhibit you are talking about.

The Court: I don't think your objection would have much weight.

Mr. Gordon: Maybe there are some marked "Out" in the Ninth as well, your Honor.

By the Court:

Q. You look here where I tell you to, Mr. McKenzie, and see the number of names in this exhibit that I have just identified after the part marked "Out" with the blue pencil, and do you see all these numbers along here (indicating); they indicate selections of persons to whom notices were to be sent, don't they? A. Were sent or to be sent.

1993

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Yes. Now how were they picked out? You see, the other one has "Out," a big cross in blue pencil, and then the pages that follow it are these pages I am directing your attention to. Now, how is it that some are marked "out" and these others have numbers alongside? A. In the old book they had only sent notices to these particular pages.

Mr. Sacher: "These particular" meaning those in Parkchester, is that right?

(3956) The Witness: The ones in Parkchester.

By the Court:

Q. Where the word "Out" appears? A. Yes, sir.

Q. So these later ones are not in Parkchester? A. Well, that I will have to look. I don't know, your Honor.

Mr. Isserman: We will have evidence on that, your Honor, as to where they are.

The Court: Well, don't be too sure.

The Witness: I would have to know just where this is as to whether or not it is.

Q. It might be Parkchester and maybe not? A. That is true, your Honor.

The Court: Now, what is the next thing, Mr. Gladstein?

Mr. Gladstein: Oh, there are a number of them with lines scratched through them. Let us first ask the witness—

The Court: No, we will just pursue what I have in mind here for a second.

Mr. Gladstein: Well, I want to object to your Honor taking the cross examination out of my hands without permitting me to complete this portion of my cross examination. For example, I desire to know whether it was Mr. McKenzie or someone else who made those marks on that exhibit, and (3957) if I am not permitted to do that now, if I come back to it there will be an objection that it has been touched on, and your Honor will say yes, that is repetitious. So I desire the opportunity to complete

1994

Colloquy of Court and Counsel

on this subject at this time, and I object to your Honor preventing it.

The Court: The application is denied.

Mr. Gladstein: And your ruling is excepted to.

The Court: You accept it?

Mr. Gladstein: Excepted to.

The Court: Oh, excepted to. I thought it was queer.

Now, where is another one with this "Out" business?

Here is one, Challenge Exhibit 183-O. That on the first page has something like 15 or 20 names, and then two or three pages go by, and then you have a page with maybe 40 or 50 names, and a couple of pages are skipped, and you get 10 or 15 names, and so on.

Mr. Sacher: Will your Honor state how many hundreds or thousands you passed since the last one—

The Court: I am not going to permit—I will state now I am not going to permit witnesses to be called to show where everyone of these persons lived and what kind of a place it is and all that sort of business. It seems to me that the person who goes through lists of (3958) registered voters and selects which ones are to receive notices for qualification is something that must be exercised in a more or less haphazard manner. I do not see how else it can be. You can't start in with one list and go through that whole list, because if you do that that will be criticized, and, as a matter of fact, whatever anybody does would probably be criticized too. So I am just going to put a stop to this, and we won't have any more examination about these lists that you have got here. I think what you desire to prove as to that, Mr. Gladstein, is sufficiently plain already.

Mr. Isserman: If the Court please, it is not plain. What the Court has done in the last few minutes, which I object to, is to take the cross examination out of the hands of counsel; to draw assumptions as to what proof will be offered without it being offered; to state that the proof that would

1995

Colloquy of Court and Counsel

be offered on the Court's assumption would not be allowed, and the Court has found at this stage—I object to the finding of the Court that the selection as made was necessarily and as a matter of law a haphazard selection, and that no other method could have been used, when in truth and in fact—

The Court: I did not intend to make any finding, Mr. Isserman, but you except to it just the same. That is all right.

(3959) Mr. Isserman: Well, may I complete?

The Court: Yes, you go ahead.

Mr. Isserman: I was going to say, when in truth and in fact, if the examination along this line were allowed to be continued by the Court we will demonstrate that there is nothing haphazard about leaving out from the persons chosen from the list of registered voters in the Bronx those areas in the Bronx which contain—

The Court: Now you raise your voice.

Mr. Isserman: Well, I can do it very quietly, your Honor.

The Court: Well, I will tell you what I am going to suggest: Let me think this over overnight. Perhaps on reflection I may feel tomorrow that it is better to let Mr. Gladstein go ahead and see if he is going to prove all those things that you say he is. Maybe it is better for you to do that. So I will consider the matter overnight and allow Mr. Gladstein to reopen the question as to these lists of registered voters in the morning.

Mr. Gladstein: Very well.

The Court: Mr. Sacher, you better give that paper back to the witness.

(Adjourned to February 18, 1949, at 10.30 a. m.)

1996

Colloquy of Court and Counsel

(3960)

New York, February 18, 1949;
10.30 a. m.

The Court: Now, I have given consideration to that application made by the defense yesterday for certain 1947 and 1948 records, or a sampling thereof, and I deny the application.

And I also rule that the cross-examination of Mr. McKenzie must finish by three o'clock this afternoon.

Mr. Isserman: If the Court please, on the question of your Honor's first ruling I believe that at one point—well, let me put it this way—that I had not fully stated the reasons why that ruling should not be made—

The Court: Now Mr. Isserman, let me make a suggestion: You and your colleagues have from now until three o'clock to conclude the cross-examination of Mr. McKenzie. I think you had better reserve matters of argument and exceptions and things of that kind until after that is concluded. Otherwise you may take up time that you would more profitably have used pursuing the questions on his cross-examination. Now you may do as you choose.

(3961) Mr. Isserman: Then, I will reserve my right to state for the record my objection to the ruling your Honor made in respect to the examination of qualification notices.

I would also like to state my objection to your Honor's ruling that the cross-examination of Mr. McKenzie must finish at three o'clock as a denial of due process.

The Court: Very well.

Mr. Crockett: I assume, your Honor, that the reservation of the right to interpose an objection applies to each of the defense counsel?

The Court: That is right, it applies to you all, and you may use the time between now and three o'clock as you choose, but I think it is wiser to pursue such questions as you desire to put to him and go to the more important matters first. But you may suit yourselves as to that.

1997

Colloquy of Court and Counsel

Mr. Gladstein: Now, your Honor, there have been marked for identification certain registered lists, and according to my notes these are marked 183-A to 183-Y for identification, inclusive.

Am I correct about that, Mr. Clerk?

The Court: That is right. And I remember at the close of the session yesterday I stated that we would take a fresh start as to those today. I felt that (3962) I was so physically and mentally fatigued toward the end of the session yesterday that perhaps it would be better, as I then indicated, to take a fresh start as to those registered voting lists.

Mr. Gladstein: Very well.

The Court: And you may disregard any rulings I made as to them in the latter part of the afternoon and proceed just taking a fresh start.

Mr. Gladstein: Very well.

I offer those in evidence.

Mr. Gordon: No objection.

The Court: They may be marked. And I would suggest that the clerk mark those at the recess. They all have marks for identification now, and he can mark them in evidence then, so as not to take the time to do it now; but you may use them just as though they were in evidence, as they now are.

(Defendants' Challenge Exhibits 183-A to 183-Y for identification, inclusive, received in evidence.)

Mr. Isserman: If the Court please, before we proceed, we have had several witnesses subject to call. May they be excused for the balance of the day?

The Court: Yes. You mean defense witnesses?

Mr. Isserman: Yes, because we don't know if the Government has more witnesses or not, and—
(3963) The Court: That is right, they may be excused.

Mr. Isserman: Thank you.

1998

Joseph F. McKenzie—for Government on Challenge—Cross

JOSEPH F. MCKENZIE, resumed the stand.

Cross examination continued by Mr. Gladstein:

Q. Now yesterday, Mr. McKenzie, I showed you an exhibit which was the registered list of voters for the year 1946 for the Second Assembly District of the Bronx. Do you recall that? A. I do.

Q. And it showed that nine names were marked on page 7 of that exhibit; do you recall that? A. I do.

Q. Now am I correct that the mere fact that a mark has been placed upon the name of a person or alongside the name of a person appearing on one of those registered lists, 183-A to 183-Y, inclusive, does not necessarily mean that a notice to qualify as a juror has ever been sent to such a person? A. It would indicate that a notice was compiled and put in the drawer up in my office, and as we would take the notices to mail them out, we would take them from the drawer and mail them out.

Q. Now am I correct that the mere presence of such a mark on a registered list does not mean that you have already sent a notice; am I correct about that? A. No, I have a couple of thousand up in the drawer up there at the present time that is to be mailed out, and (3964) may have been compiled months ago.

Q. Mr. McKenzie, is it not true then that there are names marked on these registered lists of persons to whom you have never yet sent such notices; is that right? A. That is correct.

Q. All right. So that the registered lists themselves and the markings upon them do not indicate one way or another a record of persons to whom you sent notices; correct? A. It would indicate that there are marks in the book and notices have not yet been sent out.

Q. Now, do you have any other record in your office to indicate who the people are whose names have been marked on these registered lists and to whom you actually did send notices to come in and qualify? A. We have no other means of knowing the name on that registered voting book.

Q. Isn't it a fact that you do have questionnaires that are filled out by people who come in to your office in response to notices to qualify? A. That is true.

1999

Joseph F. McKenzie—for Government on Challenge—Cross

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

The Court: Sustained.

Q. By looking at the—by the way, you keep all questionnaires that are filled out? A. The original questionnaire that is filled out is on file.

(3965) Q. Is on file? A. That is right.

Q. And that is true, regardless of whether the person who fills out the questionnaire is thereafter accepted as eligible or found to be ineligible? A. Any application that is filled out and sworn to by the juror is deferred or rejected or marked "eligible," and it is kept in the office of the jury clerk.

Q. Therefore, am I correct that you could tell which of the persons whose names have been marked on the registered lists of voters have been sent notices by checking against your questionnaire?

Mr. Gordon: That is objected to; among other things, several days ago we went over this.

The Court: Yes. Sustained.

Q. Do you have the registered voting lists for the year 1948 in your possession? A. No, I haven't, sir.

Q. When a person volunteers for jury service do you have that person fill out some uniform type of form? A. The same application that all jurors fill out.

Q. You do? A. Yes, sir.

Q. And is that in evidence? One of these regular questionnaires, you mean? A. A regular questionnaire.

Q. Was there ever a time when you used a different form for volunteers?

The Court: I think we had better stop to identify (3966) what the paper is.

Mr. Gladstein: Very well, your Honor.

The Court: My recollection is that it is one of those ones that was annexed to the Tolman report.

Mr. Gordon: A current one, your Honor, is marked BB.

The Court: BB. Very well. Show it to the witness and have him identify it.

2000

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Is this the form you have in mind, Mr. McKenzie (handing)? A. That is correct.

Q. How long has this been in use? This was substantially— A. 1936, about the middle of—sometime in 1936.

Q. Now is it your testimony that this form is the one that is used both for persons who come in to volunteer and for persons for whom you send? A. All jurors who fill out an application, it is the same form whether or not they be volunteers or taken from the registered voting book or any book or list or anything at all; they all fill out the same questionnaire.

Q. Have you ever used a different and further form for volunteers?

Mr. Gordon: His question just now was, was this substantially the form, and that I think was what the witness says it was, substantially the form since 1936.

(3967) The Court: Is that right, Mr. McKenzie?

The Witness: Your Honor, there was a time when the office was piled up with all that work and they had a small notice that when a volunteer came in they would ask him to fill this out, and when they got up—they didn't stay on those; when they were caught up with the work of the office they would send for them; in other words, to come in to fill out an application; they had filled out some application. But there was a time back in 1940 or so that the office had given a short form to anyone who walked in. In other words, they weren't accepting any volunteers at the time, any jurors; they were getting the clerical work caught up on and they gave them a short form, and when the court is in need of jurors—

Q. Just a moment. There is a form, perhaps I can show it to you. I show you Challenge Exhibit 103 in evidence, and I turn to a document—

Mr. Gordon: I don't like to interrupt, but it is 102.

2001

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. McGohey: 103 is the letter that accompanied it.

Mr. Gladstein: I beg your pardon.

Mr. Sacher: 103 is the Chandler letter.

The Court: Wait until I get that.

(3968) Q. And in the upper righthand corner—

The Court: Just a second until I get my list of exhibits. Go ahead.

Mr. Gordon: 102 is the report, your Honor, and 103 is the letter of Mr. Chandler which accompanied the report.

The Court: That is all right.

Q. Now I show you on the page which follows page 9 a page in the upper righthand corner of which appears the following: Exhibit 1, actual size 8½ by 7 inches. I will ask you if that is a true copy of the type of form that was used for volunteers in the year 1940? A. Yes, that is correct, in 1940; I am not certain as to the date; it might have been '39. I am not positive as to the year that that was used.

Q. Over how long a period of time was it used? A. Only a short time. I don't know as just the exact form,—

(3969) Q. Roughly. Several years? A. Oh no.

Q. When did it cease? When did you stop using it? A. Before I went in the Army; it had ceased possibly right at the start of the war, sometime in the latter part of 1941.

Q. What did you do with the forms such as the one I have shown you used in connection with volunteers for jury service? Did you keep them on file? A. I believe they were kept in the drawer there for some time.

Q. In what drawer? A. One of the drawers up in the office, file drawer.

Q. In one of the files? A. That is correct.

Q. Do you still have them on file? A. I don't believe so.

Q. In what manner if any were these ever used? A. That I could not state.

Q. Now the qualification notice that you use is a true and correct copy of that shown as Exhibit 2 attached to

2002

Joseph F. McKenzie—for Government on Challenge—Cross

the Tolman memorandum? A. No, it is different, a little different today.

Q. When did it change? A. Well, the last batch of it shows when the last ones were made up, I believe.

The Court: Mr. Gladstein, I don't like to bother you, but when you two get together I just can't hear you.

(3970) Q. When did you stop using the form marked Exhibit 2 attached to the Tolman Report? A. It is the same form but just an added—the qualification notice is the same; it has just a few lines of additional information on the new qualification—the new notice to qualify.

Q. Do you have a copy of the form that is now in use?

Mr. Gordon: I object to this as completely irrelevant. A notice for a man to come in—here is one if they want to mark it.

Mr. Gladstein: I would like to, yes.

Mr. Gordon: And it is just exactly what the witness says. It is practically the same.

The Court: They have from now until three o'clock and how they use their time is up to them.

Q. Is that a copy, sir? A. That is one that is used in the office today.

Mr. Gladstein: I ask that it be marked and introduced in evidence.

Mr. Gordon: No objection.

(Marked Defendants' Challenge Exhibit 228.)

Q. Look at the next page of the Tolman memorandum. Do you see there a document marked Exhibit 3? Do you still use that form, or substantially that form? A. Substantially that form is still in use.

Q. For the purpose indicated there, namely, for persons (3971) who have not appeared in response to the first notice; correct? A. It is also used for summonses, where a juror fails to appear on the summons, when he is summoned in for jury service.

2003

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Very well. Now look at Exhibit 5 attached to the memorandum, the Tolman memorandum. That is a re-qualification notice, is it not? A. That is correct.

Q. You still use that? A. Yes, we still have these in the office.

Q. Look at the next one, Exhibit 6. That is a requalification notice for women, is it not? A. That is correct.

Q. You still use that? A. Yes; I don't know if these "women" are still there or we use the same one; I am not certain as to whether or not we still have some of these printed up and use them and whether or not we use the men qualification—in other words, one was for men and one was for women. I don't know as there is any still in the office with "women" on. But when a juror comes in and asks any information we ask them to fill out one of these to give us the information so we can check the files. Many jurors come in and inquire or write us they hadn't been called, when is there time up after serving, how long do they have to wait. So we give them these forms to fill out, and (3972) we check the name there given with whatever information is on the history card.

Q. Look at Exhibit 7, the next page, attached to the Tolman memorandum. Do you still use this form in response to inquiries as to when the person is going to be notified to come in and serve for jury duty? A. Yes, this is still on file at the office.

Q. All right. Look at the next page. The next page is the history card for men, is that not right, the history and wheel card? A. That is correct.

Q. Do you still use those? A. We use white for trial jurors and blue for grand.

Q. And the contents of those cards is the same as shown on Exhibit 8 attached to the Tolman memorandum? A. Yes, that is so.

Q. Look at the next page, Exhibit 10. That is the form used for the wheel card of women, is it not? A. Yes, that is so.

Q. Still used? A. Yes, still in use.

Q. Look at Exhibit 11. That is just the form that is used when a court orders a jury; correct? A. That is so.

Q. That is still in use? A. That is still in use.

2004

Joseph F. McKenzie—for Government on Challenge—Cross

Q. The next page, Exhibit 12, is the type of panel or jury list that is made up in your office regularly; (3973) correct? A. That is correct.

Q. And you still use the same form, right? A. Yes.

Q. What is Exhibit 13? Do you still use that? A. That is the precept which is attached to the panel.

Mr. McGohey: Would you keep your voice up, please, Mr. McKenzie.

Q. Will you look at Exhibit 21. Is that the wheel card for grand jurors? That is Exhibit 21 attached to the Tolman memorandum? A. Yes, that is so.

Q. Still use those? A. Yes, we do.

Q. Look at Exhibit 22. Is that the history card for grand jurors? A. Yes, but in a blue color. The color is blue.

Q. And you still use it? A. Yes, we do.

Q. Did you bring with you in response to the subpoena the address telephone book that you have used as a source from which the names of jurors have been taken? A. Yes, I have.

Q. Would you hand it to me? A. (Witness hands book to Mr. Gladstein.)

Mr. Gladstein: I have been handed a 1946 address telephone book. I will ask that it be marked for identification.

Mr. Gordon: Let us find out where it came from:

(3974) *By Mr. Gordon:*

Q. Does this belong to you? A. No, it does not.

Q. When did you get it? A. Sometime in the early part of 1947. It was borrowed from the Division of Jurors of the County Clerk of New York.

Q. Have you had it since then? A. Pardon me?

Q. Have you had it since then? A. It has been in our possession since that time.

Q. It belongs to them? A. Yes, it is their property.

Q. Have you told them you would give it back? A. I did, when I get another one.

2005

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Gordon: I object to its being marked for identification unless there is some relevance to the inquiry.

Mr. Gladstein: Perhaps we can avoid that. We have another copy that is very much the same.

The Court: I think it would do no harm to mark it. I was a little sorry yesterday that I did not have that affidavit of Mr. McKenzie actually marked instead of being merely deemed in evidence. I think it will do no harm to mark it, and for my own convenience it will be helpful to have the marks on as many of these exhibits as possible.

(Marked Defendants' Challenge Exhibit 229 for identification.)

(3975) *By Mr. Gladstein:*

Q. Mr. McKenzie, as I understand you you will return this book, Challenge Exhibit 229 for identification, back to the source from which you got it in exchange for a later one, is that it? A. That is so.

Q. And this is the book that you have used to obtain names of people to whom you sent notices to come in and qualify as jurors, is that right? A. That has been used.

Q. And jurors have been obtained by that method, right? A. Yes, I would say so.

Q. Is there anything in this book to indicate from what sections of Manhattan or Bronx or any portion of the Southern District of New York you obtained the names? A. Is there any information as to—

Q. Any indication by mark or notation of any kind within Challenge Exhibit 229 for identification to show who the people are or in what sections of the Southern District of New York they lived to whom you sent notices to come in and qualify for jury service? A. Well, they could make up cards from here and not mark it—

By the Court:

Q. I know, but, Mr. McKenzie, you remember those registered voters lists, they had numbers and marks on them? (3976) A. Yes.

2006

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Are there numbers and marks on that? A. No, your Honor, we didn't want to deface this book.

Q. That is right. That is what he is asking you in substance. A. Pardon me, there are some little marks where they did put on some a little line alongside the name in light pencil, and then it was called to their attention to put the names in cards and take the cards and send them out from there, and then as the juror came in we would take them off from the card rather than from the book.

Q. So that generally speaking there were no marks put on there similar to the marks put on the voting lists? A. No, no marks, that is right.

By Mr. Gladstein:

Q. What type of cards were used on which to put the names and addresses of people whose names and addresses you got from this Challenge Exhibit 229? A. A small 2 x 4 card that I explained before on some of those lists that were used.

Q. Is there anything to distinguish those cards from cards that contained names obtained from different sources? A. No, there is not.

Q. Where did you keep those cards? A. Those cards, if the juror came in and qualified, (3977) the card is marked whatever the disposition is and put in a file.

Q. Which file? A. In the off file; the card that the notice was sent from, the card was made up. The card of the juror from the application goes into the active file of the juror, if he qualified, and if he didn't qualify it goes into the Off file.

Q. So the Off file will contain all of these little cards of the size of 2 x 4 on which are the names and addresses of people to whom you sent notices to come in regardless of whether those people qualified or did not qualify, is that right?

The Court: Let me ask a question:

By the Court:

Q. You said a moment ago what you did with the card when the juror came back, or the prospective juror came back and qualified. A. That is right.

2007

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Now, where the prospective juror came back and he was not qualified, what did you do with the card? A. That card was disposed of. It was treated like a qualification notice.

Q. Thrown away? A. That is right, your Honor.

Mr. Gladstein: Now I desire to put in evidence the telephone book, but I don't want to deprive the Federal court of this copy. We do have another copy that has (3978) been marked in evidence, a 1948 one, but it is the same type, and I suggest that—

The Court: I see no reason why this book may not be marked in evidence. If the County Clerk or whoever it was over in the Division of Jurors in the Supreme Court, New York County, complains, why, I will take up the complaint and we will straighten it out together.

Mr. Gladstein: Very well. I offer it.

(Defendants' Challenge Exhibit 229 for identification received in evidence.)

Mr. Gordon: Has your Honor ever looked at one of those books?

The Court: I do not think that I have, except that I glanced at that other one when it was produced earlier, and I remember distinctly the testimony of the witness about it. I do not want to take the time now. I want to let Mr. Gladstein go ahead with whatever questions he may have.

By Mr. Gladstein:

Q. Now, in what part of your files in the Off list or Off files do you keep those 2 x 4 cards on which you put the names of persons, whether obtained from the telephone directory or other sources to whom you are going to send notices? A. Well, that is not used at all times, the 2 x 4 cards.

(3979) Q. What else do you use? A. In other words, if you would use the registered voting book you do not make up a card; and possibly in instances of the tele-

2008

Joseph F. McKenzie—for Government on Challenge—Cross

phone book they did not make up cards if they got a check alongside of it. In other words, when you notice the check—

Q. But in such instances where you do make up these 2 x 4 cards, where in your files do you keep them? A. In the Off file.

Q. What part? A. In the alphabetical arrangements along with all of the cards there.

Q. Now, did those cards also contain the names that were taken from Poor's Directory? A. Well now, when you say Poor's Directory—on this Directory of Directors that I had occasion to use—

Q. Yes, the Directory of Directors. A. —there is cards in there for that, yes.

Q. And how about the Engineer's Directory; cards also contained the names of— A. If they were in that 1947 which show directory, so many mailed, there is a card in the Off file for such a man.

Q. The same thing for college alumni? A. If it was used at this particular time—

The Court: May I have those two books? I think it is 179 and 180. I would just like to have them before me. (3980) You may go right ahead.

Mr. Gladstein: Thank you, your Honor.

Q. Do these cards indicate on them the source from which they were taken? A. No, they do not.

Q. So, in other words, in looking at these little cards you would find a group of names some of which came from the Directory of Directors, some from the Engineers Directory, some from the telephone book, and so on, is that right? A. Now, if you are talking about 1947—back in 1944, or back in 1940, I should say, the cards possibly were different marks than they are now from 1947 on.

Q. I don't understand that, Mr. McKenzie. A. In other words, on these cards that went in there in 1947 we have the name and address of the juror.

Q. Yes. A. And the business address.

Q. Yes. A. Now, possibly back in 1940 all they had on there was a number and the name and address of the juror. So on 1947—

2009

Joseph F. McKenzie—for Government on Challenge—Cross

Q. You mean your information is more complete on the card you had since 1947? A. That is correct.

Q. Now, you have not understood my question. I want to know if the cards used either in 1940—or since the beginning of 1947 show on their face the source from which the name was obtained? A. No, they do not.

Mr. Gladstein: All right.

(3981) Now, would your Honor be good enough to let the witness have those two exhibits?

The Court: Which two exhibits?

Mr. Gladstein: Well, one he may have, the one that has the record of qualification notices sent in July 1942 and thereafter.

The Court: You mean the book? I think it is Exhibit 180.

Mr. Gladstein: 180, yes, your Honor.

(Exhibit handed to witness.)

Q. Now, Mr. McKenzie, look at the first page on which there is writing—that is page 1, is it not, of this Exhibit 180? It is a page marked 1 in the upper righthand corner, is it not? A. Page 1, that is correct.

Q. Now, did you see whether according to that page you had occasion to send notices to people to come in and qualify for jury service who were taken from a list designated 13-E?

Mr. Gordon: Your Honor, for the umpteenth time, July of 1942 the witness was not in the office; he did not make the record. I object to asking the witness whether the record shows that he did something.

Mr. Gladstein: This is a record of the office. I am not going to argue it. If it means that we can't ask Mr. McKenzie whether according to the office records (3982) this particular list was used, then we will call Mr. Borman, who apparently was in charge.

The Court: You see, it has already been made clear that he was not here at the time when he was off in the service, and I would think it a waste of

2010

Joseph F. McKenzic—for Government on Challenge—Cross

time to keep asking him what is substantially the same type of question about that.

Mr. Gordon: There are some records in the book that he made but this is not one of them. And that is the basis of my objection.

The Court: Yes.

Mr. Gladstein: I may say, your Honor, that all I have in mind here is to have the witness testify according to the records that certain lists which are given specific designations were used as sources, and I understand they are contained in the envelope—is that here, Mr. Clerk?

The Court: You see, he was away then in the armed services and he does not know.

Mr. Gladstein: Well then, we can get Mr. Borman to identify them perhaps since he was here at the time. But I would think that Mr. McKenzie, who is in charge of the office, would know from the official records whether it appears that a certain list was used.

The Court: Well, that question has come up again (3983) and again, and I make the same ruling that I made previously about it.

Mr. Gladstein: May I have the envelope that contains these lists?

(Clerk hands envelope to Mr. Gladstein.)

Mr. Gladstein: Mark this, please, for identification.

Mr. Gordon: Aren't they all marked?

Mr. Gladstein: They are all a part of—

Mr. Gordon: Oh, I am sorry.

Mr. Gladstein: These are not marked. Do you apologize, Mr. Gordon?

Mr. Gordon: Yes.

Mr. Gladstein: The apology is accepted.

The Court: These are the lists that were in that envelope.

Mr. Gladstein: Yes, your Honor, and the envelope is marked Challenge Exhibit 165 for identification.

The Court: All right.

2011

Joseph F. McKenzie—for Government on Challenge—Cross

(Marked Defendants' Challenge Exhibit 230 for identification.)

Q. Now, Mr. McKenzie—

The Court: What is the number of that first one?
Mr. Gladstein: 230.

Q. Mr. McKenzie, I ask you to look at Challenge Exhibit 230 for identification and state whether based on what you (3984) observe on it that document was used as a source from which names and addresses were taken of people to whom notices to qualify for jury service were sent? A. It would indicate it was used during my time.

Mr. Gladstein: All right, I offer it in evidence.
Mr. Gordon: No objection.

(Defendants' Challenge Exhibit 230 for identification received in evidence.)

Q. Now I show you a list of names and addresses of people with the stamp on the upper righthand corner indicating it was supplied by the Federal Grand Jury Association under date of May 27, 1940. I ask you to state from your observation of that document whether it appears that that document was used as a source of names of persons to whom qualifying notices for jury service were sent? A. It would indicate it was used during my time.

Mr. Gladstein: I ask that this be marked and received in evidence.

Mr. Gordon: No objection.

(Marked Defendants' Challenge Exhibit 231.)

Q. I show you another document taken from the same envelope, 165 for identification, and ask you to state upon your examination of this document whether it appears that it also was used as a source from which you took the names and addresses of people to whom you sent notices (3985) to come in and qualify as jurors? A. I don't recognize the writing on this one at all.

Q. What is the date? A. This one is in 1940.

2012

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Does it show on its face that persons, the names of persons were used from that source for jury service?

The Court: I think the formula you used before was: Was that a source of names of persons to whom notices were sent to come in and qualify for jury service?

Mr. Gladstein: Yes.

Q. Doesn't it appear on its face, Mr. McKenzie, that it was such a source? A. Yes, it would indicate that.

Mr. Gladstein: All right, I offer it and ask that it be marked and received in evidence.

I have in mind your three o'clock deadline, your Honor, so I would like to go through these quickly. You don't mind, Mr. Gordon, do you, if I go ahead?

(3986) Mr. Gordon: Do I have to answer that question?

The Court: Go ahead and indicate if you have any objection to it.

Mr. Gordon: I want to look at the exhibit for a moment, your Honor.

The Court: You have a right to do that.

Mr. Gordon: Among other things, I note that some of these papers that are stapled together are just stapled together without there being any continuity between the top and the bottom sheets, and that is what I am trying to find out.

The Court: Yes.

Mr. Gordon: No objection to this one.

(Marked Defendants' Challenge Exhibit 232 in evidence.)

Q. I show you another document taken from the same envelope and ask you to state whether from observation of it and particularly at the date at the bottom, May 5, 1941, it appears that it was used as a source from which you obtained the names and addresses of persons to whom you sent qualifying notices to come in and become jurors. A. There is not anything to indicate, Mr. Gladstein, whose writing or anything that I could tie it up with.

2013

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Regardless of whose writing is on there, can (3987) you not tell from your practice in the office and your knowledge of the workings of your office that from the face of the document I have just handed you, it appears that this list was used as a source from which you took names and addresses of people to whom you sent qualifying notices?

A. It would indicate that that was so.

By the Court:

Q. Did you mean to say that only a few were picked out and notices sent? A. Oh, no. I don't—

Q. Well, you see, you have got to listen to the question. The question as put would indicate to me that you only used part of the names. I thought possibly you did not notice that in there.

Do you mean to indicate that as far as you can tell all of those names were used for the sending out of notices?

A. I have no idea, your Honor.

Q. One way or the other? A. One way or the other. That is just the list I am trying to identify from some writing, something on there as to whose writing I might recall back in 1941—

By Mr. Gladstein:

Q. As I understand it, your testimony is that as to this last exhibit you are now testifying to, it was used (3988) as a source of potential jurors but you cannot now say how many of the persons on that list were sent notices?

A. And the other lists, as a matter of fact.

Q. Is that correct? A. That applies to the others too.

Mr. Gladstein: All right, I offer this and ask that it be marked and received in evidence.

Mr. Gordon: With the understanding that his testimony is that he does not know whether the people were sent for or not—

Mr. Gladstein: No, he does know—

The Court: He says that as far as he can tell from looking at it it was used as a source of names of persons to whom notices were sent to come in and qualify for jury service; is that right, Mr. McKenzie?

2014

Joseph F. McKenzie—for Government on Challenge—Cross

The Witness: That is correct, your Honor.

Mr. Gordon: But as to all of the lists he said, your Honor, "I don't know how many of the notices were sent for."

The Court: Or whether they were all sent for.

Mr. Gordon: That is right.

The Court: He has no personal knowledge of that. I understand.

The Witness: That is right.

(3989) (Marked Defendants' Challenge Exhibit 233 in evidence.)

By Mr. Gladstein:

Q. Now I show you another document dated April 22, 1941; the Federal Grand Jury Association stamp appears on it; and the designation "6-List," to which are attached pages which refer to May 1, 1941, and also June 2, 1941, and I will ask you to state upon your examination of this document whether it appears that it was used as a source from which you took the names and addresses of persons to whom you sent qualifying notices, or your office sent? A. I can't tell much about this one.

Q. Look at the last three pages. Do they bear check marks? A. There are check marks in front of the name.

Mr. McGohey: Will you keep your voice up, please, Mr. McKenzie.

The Witness: There are check marks in front of the name.

Q. Now, in view of your testimony the other day, upon using names on these lists, using them in the sense of sending notices to the persons whose names were on the list, you either drew a line through the name or used a check mark placed against the name, or perhaps the letter E, or some other letter, was placed alongside the name— (3990) are you able now to say whether the document in your hand was used as a source from which you obtained—

The Court: That preliminary point you have on there is a little confusing.

2015

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Gladstein: I think not. It has been so testified, your Honor.

The Court: If it be deemed a summary of all his testimony about it, I think it hardly fair to have him stop and think about all that he testified on the subject. Why don't you ask him to look at the paper and see if he can tell from the marks that are on there whether it was used as one of the sources?

Mr. Gladstein: Yes.

Well, that is my question.

Q. Now, as the Court has changed my question, will you please answer? A. No, I cannot.

Mr. Gladstein: Then we had better have that marked for identification, since you testified about it.

Mr. Gordon: May I point out, your Honor, that this is one of those papers I was talking about. There are 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 pages, but they are not all pages from one list. The first—as Mr. Gladstein pointed out earlier, the first four pages are dated April 22, 1941, and there is a notation "6-List" in the corner.

The Court: Yes.

(3991) Mr. Gordon: Then you start with a list of May 1, 1941—

Mr. Gladstein: With the designation—

Mr. Gordon: —and it has "6-List" written all over again. So apparently somebody took—

Mr. Gladstein: And—

Mr. Gordon: Wait a minute. Let me finish the sentence.

Mr. Gladstein: Please, finish the paper.

Mr. Gordon: So apparently somebody took several lists and put them together.

Now, Mr. Gladstein asks that I finish the description, and I will do that. The second list of May 1st has 1, 2, 3,—that has four pages.

Mr. Gladstein: Now—

Mr. Gordon: Now, you just asked me to do this.

Mr. Gladstein: I object to this, because it is consuming unnecessarily—

2016

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: Don't you see, Mr. Gordon, that with these passages it will only lay a foundation for counsel perhaps later to claim that the time today that might have been used for cross-examination was consumed in colloquy. So make your description just as brief as you can.

Mr. Gordon: And the last list is dated June 2, (3992) 1941, and also has "6-List" and it has three pages, and that is the one which has some check marks in front of the names, and the names are checked off, but there is no other indication on it.

The Court: Very well.

Mr. Gladstein: All I have asked is that this be marked for identification.

(Marked Defendants' Challenge Exhibit 234 for identification.)

By Mr. Gladstein:

Q. Now I show you another document bearing a date August 20, 1940, again the Federal Grand Jury Association stamp on it; please look at that and state whether from your examination you can state whether this list was used as a source of potential jurors. A. This would indicate that it was used—

Q. That it was so used? A. That it was so used.

Mr. Gladstein: I ask that it be marked and received in evidence.

Mr. Gordon: May I see it?

(Paper handed to Mr. Gordon.)

Mr. Gordon: I will simply state that this one again, your Honor, appears to be more than one list put together, but I will take no further time than that.

The Court: Very well. You have no objection (3993) to it?

Mr. Gordon: No.

(Marked Defendants' Challenge Exhibit 235 in evidence.)

2017

Joseph F. McKenzie—for Government on Challenge—Cross

Q. I show you another document dated March 21, 1941, and I will ask you to state whether upon your examination of it you are able to state that it was used as a source of potential jurors? A. Yes, that is true.

Mr. Gladstein: I ask that it be marked and received in evidence.

Mr. Gordon: No objection.

(Marked Defendants' Challenge Exhibit 236 in evidence.)

Q. I hand you a document containing names and addresses; the date of the document is February 5, 1941; the Federal Grand Jury Association stamp appears on the document. Examine that and state in answer to the same question whether it appears it was used as a source of jurors? A. Yes, that is so.

Mr. Gladstein: I ask that it be marked and received in evidence.

Mr. Gordon: I am going to object to this unless we get some idea of what the marks mean or who put them on there.

Mr. Gladstein: The witness has already—
(3994) The Court: Just a second, I am making a note here.

Very well, you may question the witness as to that, Mr. Gordon.

Mr. Gladstein: This is over my objection, your Honor. The witness has already said this source was used—

The Court: The objection is sustained. The paper may be marked for identification.

Mr. Gladstein: I have asked that it be received in evidence, your Honor.

The Court: Let me see it.

(Paper handed to Court.)

The Court: What is the question you had about it, Mr. Gordon?

Mr. Gordon: There is writing on there after the names indicating—

2018

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: You wanted to know whose handwriting it was?

Mr. Gordon: I want to know who put the notes on and when, your Honor.

Mr. Gladstein: I would think that is a proper subject for redirect examination, your Honor.

The Court: Probably that is so.

Mr. Gordon: I object to the exhibit on the ground that it is not competent, because there has been no foundation (3995) laid for its reception in evidence.

By the Court:

Q. Did you say, Mr. McKenzie, that this paper, this list of February 5, 1941, in your judgment had been used as a source of names for prospective jurors? A. All I am saying is that I was in the office at that time, but as to anyone, myself or my assistants, I cannot tell by the checks on them.

Q. You have said as to a variety of these lists that while you did not do it personally it was your judgment from your knowledge of the practice in the office that the particular list had been used as a source of names of persons to whom notices were sent to come in and qualify for jury service.

Now I am asking you whether, looking at this paper, you can make a similar answer, or is this different from the others? A. This is different; but, your Honor, all I am testifying to on this list here, they were in my office at the time, and I assume that notices and everything were sent to these people. But as to this writing on here, I can't identify the writing.

The Court: I will receive it.

(Marked Defendants' Challenge Exhibit 237 in evidence.)

(3996) *By Mr. Gladstein:*

Q. I show you a document dated February 15, 1941, Federal Grand Jury Association stamp. Please examine

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it and state whether you can give to the same question the answer as to whether that document bears evidence that you have used it in your office as a source of potential jurors.

The Court: Did you say that he used it, Mr. Gladstein?

Mr. Gladstein: I beg your pardon, your Honor?

The Court: Did you say that he used it or—

Mr. Gladstein: The office.

The Court: The office?

Mr. Gladstein: His office, yes.

The Court: Very well.

A. It would indicate that this was in the office at the time.

Q. It would indicate more than that, wouldn't it, Mr. McKenzie? Doesn't it indicate that you used the names there as people to whom you sent notices to come in and become jurors? A. I would say yes.

Mr. Gladstein: Yes.

Mr. Gordon: Now I object to that, your Honor. That is the sort of thing where the counsel is browbeating the witness.

(3997) The Court: Well, I don't really think there is any browbeating going on. It is just an inflection of the voice that Mr. Gladstein and his colleagues have a way of doing when they want to indicate to me that they have got something good. Then they give that little inflection. I do not think it bothers the witness any, and if it is something good, why, maybe I will hear about it now. I would like to.

Q. Isn't it a fact as to this list—

Mr. Gladstein: First of all, let us have this marked for identification in view of the witness's answer.

(Marked Defendants' Challenge Exhibit 238 for identification.)

Mr. Gladstein: I think it should be received in evidence in view of his testimony. May I ask that that be done?

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The Court: Yes. That is going to be 238, isn't it?

The Clerk: 238 in evidence.

(Defendants' Challenge Exhibit 238 for identification received in evidence.)

By Mr. Gladstein:

Q. Mr. McKenzie, isn't it a fact that examination of Challenge Exhibit 238 shows that choices were made as between whether you put certain people on the grand (3998) jury or petit jury; correct? A. No choices was made to—

Q. Do you see the letters "GJ"—

The Court: Wait a minute. Let him say.

A. (Continued) There was no choices made, your Honor. Possibly the marking on here would indicate as to whether or not the man went in a trial jury or the grand jury.

Q. All right. What markings? What markings, please? A. Well, on this particular list it has got "PJ."

Q. What does that mean? A. I don't know what it meant.

Q. What is that?

Mr. Gordon: He said he didn't know what was meant by it.

A. "PJ"—I am just trying—

The Court: It might be petit jury.

The Witness: Petit jury back in 1941. Petit jury.

The Court: And "GJ"?

The Witness: There is "GJ," which might be grand jury.

Q. You think that that is probably true, do you?

By the Court:

Q. And it was one of your duties, as you described it here, yesterday, to help to select and determine which

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ones you thought were eligible for the grand jury? A. That is correct.

(3999) Q. Now, you can't remember, however, as to this paper whether that was done or not because you personally did not do it? A. That is true.

Q. That is not your own handwriting on that paper? A. That is correct, your Honor.

By Mr. Gladstein:

Q. But it is your best judgment that where the name is marked "PJ," that means the man became a petit juror; where it is marked "GJ," it means he became a grand juror, is that right? A. That would be the term that would be used.

Q. And where you find on checking and you see a name was on a former list, your office put the words "old list"; is that right? Do you see the words "old list" after any name there? A. I see "old list" but I don't know what that means.

Q. Now, do you see "XY list" in this document? A. After this name is marked "XY list."

Q. Would that indicate that this document was used in part for the purpose of having the name as to which you have the expression "XY list" attached, put on a list called the "XY list"; correct? A. I don't know.

Q. Did you have an "XY list" in the office?

Mr. Gordon: I think you have already offered in evidence—

(4000) Mr. Gladstein: This is in evidence.

Mr. Gordon: I say I think you have already offered in evidence a list that had XY on it. I think that was one that was marked.

Mr. Gladstein: All right.

Q. Did you have such a list, an XY list? A. If it is there. I certainly couldn't tell now.

The Court: The ones I have here this morning, one bears "F list," "XA list," "T list." I don't remember one of that particular designation that you have just mentioned, but according to the testi-

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mony of the witness as to how these symbols were selected, the purpose of them would be to put them on the cards so they might serve as identification marks; and I don't see that there is much point to it.

Is there some mystery about that?

Mr. Gladstein: No mystery. I just wanted to know if he had such a list, your Honor.

By Mr. Gladstein:

Q. I show you a document which comes out of the same envelope—

The Court: What happened to 238? Did that go in evidence?

Mr. Gladstein: That was received. I thought it was.

(4001) The Court: Let me just glance at that.

Mr. Gordon: Your Honor, briefly, the point I was trying to make in the objection before, without suggesting anything to the witness, was that there should be an inquiry as to whether the "PJ" and the "GJ" was put on there before the man came in or after he came in.

Mr. Gladstein: This is all redirect examination.

The Court: Well, I think it is pretty clear, Mr. Gordon, from Mr. McKenzie's testimony, that there was no selection of people before these notices went out; that he did not know anything about the people before the notices went out, and the inference I would naturally draw is that whatever marks about petit jury and grand jury which were put on, were put on after the person came in and had been interviewed and filled out his questionnaire, and so on.

Mr. Gordon: Then I withdraw any objection.

The Court: But let me ask you something about this, Mr. McKenzie.

By the Court:

Q. This is one of those lists submitted by the Federal Grand Jury Association dated February 15, 1941, Chal-

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lenge Exhibit 238. Now, was it not the case that when a list like that was brought in, somebody checked to see whether (4002) the persons whose names were on there were already on the jury list? A. That is correct, your Honor.

Q. Well, if they found that they were, would it be a proper notation to say "old list"? A. They might do that or they might strike a line through the name—

Q. But you don't know about that? A. That is true.

Q. That is because this paper 238 does not bear your handwriting? A. That is correct.

Q. And you haven't any recollection of doing anything about it yourself? A. That is true, your Honor.

By Mr. Gladstein:

Q. Now did you yourself put any marks on any of these exhibits? A. I would have to look through them. I could tell—

Q. Don't you remember? A. No—

The Court: Well, I have heard him identify his handwriting on some of them, so if there is any point about it get out the one you want to question him about.

Q. Now, what were the instructions you gave to your assistants as to what they ought to do with the particular list when they have made use of it? A. Instructions as to what, Mr. Gladstein?

Q. Well, suppose you were given a list by the Federal (4003) Grand Jury Association, as you were given many, and you took that list and gave it to an assistant and you said, "Now, I want you to check first of all to see whether any of these people are in our active files"—is that right? A. Or in our off files.

Q. "Or in our off files." All right. And once a check was made, if the name was found in one or the other file, I suppose you gave instructions to scratch out or dispose of that name; is that right?

The Court: Did you give separate instructions as to every list that came in?

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The Witness: No, your Honor. The man who was doing it was carrying it on as long as he was there.

The Court: You see, the way you are testifying, it might look as though with each list you gave separate instructions.

The Witness: No, by no means.

By Mr. Gladstein:

Q. So it was your general instructions and general practice under those instructions that this procedure would take place as you have described it, is that right? A. That is so.

* * *

(Short recess.)

(4004) The Witness: This list has no date on, the year at least. I don't see any year on that one.

By Mr. Gladstein:

Q. Well, can you not by examining it and the marks on it, the writing on it, the lines drawn through names, your knowledge of the practice in your office, the fact that this was taken from your files, tell us, Mr. McKenzie, whether this list was used as a source of names of people to whom you sent qualifying notices for jury service? A. I don't know on this. There is no year or anything to indicate.

The Court: The answer is no?

The Witness: No. That is right, your Honor.

Mr. Gladstein: May it be marked for identification?

(Marked Defendants' Challenge Exhibit 239 for identification.)

Q. From what file in your office did this last numbered exhibit come, Mr. McKenzie? A. I would say it came in that envelope there with all the other—

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Q. All the other what? A. Lists that you have on the table there.

Q. Lists that were used as sources of jurors; right?

Mr. Gordon: Objected to.

The Court: Sustained.

Mr. Gordon: If Mr. Gladstein wants to offer all (4005) the lists and argue from them that it appears that some of them were used for that purpose and some were not, we have no objection. He can go through them one by one.

The Court: It sounds like a good proposition.

Mr. Gladstein: Very good. I will accept it.

The Court: That means the ones just marked for identification go in evidence with the rest?

Mr. Gordon: Yes, your Honor.

The Court: That is a fine proposition.

(Defendants' Challenge Exhibits 234 and 239 for identification received in evidence.)

The Court: You will mark those, Mr. Borman; just count them and reserve numbers for those, so that while the rest of us are eating lunch you can enjoy yourself putting those numbers on.

Mr. Gordon: Your Honor, perhaps Mr. Gladstein and I could agree on the question to the witness, or I will ask it and you may object to it.

Mr. Gladstein: You ask it, and I will tell you.

Mr. Gordon: This envelope with these lists, Mr. McKenzie, these are lists which are kept in your office which include lists from which names were obtained?

The Witness: That is correct.

Mr. Gordon: Does the envelope purport to contain all the lists from which names were contained?

(4006) The Witness: All that is in my office.

Mr. Gordon: All that is in your office.

The Witness: That is right.

Mr. Gordon: And all that were ever used?

The Witness: That I do not know. That I could not state.

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Mr. Gordon: Well, that is the point, your Honor. I do not want it to appear that these are all the lists if they are not; if there were some others that are not there or they do not have any more. I would like that brought out, and then I would have no objection.

The Witness: That is possible.

The Court: All that you have of that character—

The Witness: They are all there.

The Court: There might have been some others?

The Witness: Yes, your Honor.

The Court: But there might—

The Witness: That is true, your Honor.

Mr. Gordon: Included in the list, in these papers are some final notices and things of that kind?

The Witness: Yes.

The Court: Whatever the marks on there may be, why, Mr. Gladstein and his colleagues may argue from that later.

Mr. Gladstein: Let the record be clear, because (4007) we have been saying such things as "these papers" and so on, that we are now discussing the remaining lists contained within the envelope which has been marked 165 for identification, and that these are the lists which came from the jury clerk's office, and these lists are the ones which contain the names and addresses of people to whom notices as shown on the lists—

Mr. Gordon: No.

The Court: You see, Mr. Gladstein, the testimony seems perfectly clear to me. He has said that he got or that the clerk in his office got names from various sources to make up these thousands upon thousands of persons to whom notices were mailed to come in and qualify as jurors. Now, I do not think anybody is going to claim that lists that were got from the—lists of registered voters are among those names—

Mr. Gladstein: Oh, we are not talking about that.