

*Colloquy of Court and Counsel*

ment of further proof relevant and material to the establishment of the challenge filed by these defendants; and in that connection I might say that we are prepared to defer to whatever ruling the Court may make in directing the order in which our proof should be adduced.

Now, it seems to me that in the light of the expression of such a willingness there should be no hesitancy, as I see it, on the part of the Court in permitting the further introduction of evidence. For, as I see it, it seems to me that certainly from here on out it cannot be said by anybody that the defense has not only been willing but eager to present its proof as speedily, as quickly as it can, and with due regard to whatever orders the Court may make as to the order of proof.

And in these circumstances I respectfully request of the Court that it reconsider its earlier direction and permit us to proceed with the adduction of our proof in support of the challenge.

The Court: After what has been going on here (3424) for the last four weeks I think it would be a serious dereliction of duty on my part had I ruled otherwise.

Mr. Gladstein: Your Honor, I wish to object and to speak very briefly on behalf of my objection to the ruling which the Court has made terminating for the moment all right and opportunity of the defense to continue and complete the presentation of evidence in support of the challenge.

The charge that we make, as I need not remind the Court, is a very grave one, and would not and should not ever be made lightly. We did not make that charge lightly. We gave earnest thought to that charge, and gave vigorous effort to ascertain the evidence that exists that supports that charge. And when that charge was finally made and embodied in the papers that were sworn to and are on file here, that happened only a result of and after we had become convinced that given a fair opportunity to prove our contention, we would do so up to the hilt.

*Colloquy of Court and Counsel*

Now, we realize that the law places upon us the burden of proving those charges by a preponderance of the evidence. We gladly assume that burden. We willingly assume that burden; indeed, we demand the right to discharge to completion the burden we have undertaken (3425) to discharge in the presentation of this case.

If the United States Attorney were concerned, as he might well have been, with the most serious implications of our charge; if, indeed, he had manifested any desire to be partners with us and with the Court in a true, impartial investigation of the facts rather than to proceed as though we were adversaries, as though we were trying a damage suit—if it had been different then there might be wisdom or justification for the suggestion on the part of the Court that Mr. McGohey proceed now—

The Court: It is no suggestion. It is no suggestion. I directed that that be done, and it will be done.

Mr. Gladstein: Yes. But I wish to say that everything that has happened in this case so far demonstrates that although this is the kind of charge which should inspire the Court to become an alert and eager participant in the search for the truth, so that the confidence of the people in their courts and in the administration of justice that occurs in their courts will not be shaken—although that should be the fact, it has turned out rather plainly, if the Court please, that we are engaged in a typical type of legal contest in which you have one side pitted against the other with the (3426) Court acting as a sort of referee. And if that be the case, as it is, we ask no favors, but we don't like the rules of the game changed in the middle.

In all such contests, he who starts out to prove, as he has a right to prove, a contention, is given the opportunity, because he has the right, to pursue his proof up to the point where the Court says—as your Honor did not say; I did not hear your Honor say: “Gentlemen, there is adequate proof in

*Colloquy of Court and Counsel*

the record on the part of the defense. That will establish the validity of the challenge unless the Government comes in with proof that rebuts it." And if your Honor had said, "Mr. McGohey, at this point I have received enough evidence to warrant a finding that a prima facie case has been made out by the defense unless the United States Attorney rebuts that case, and hence I am calling on you, Mr. McGohey, to rebut that case, in view of my statement, in view of the finding I make that a prima facie case has been established"—if your Honor had said that then there might be some warrant for your Honor's ruling.

But since not only has your Honor failed to make a finding that way, that the defense have established a prima facie case in support of our challenge, but, to the (3427) contrary, every statement, every implication, and even those things that emanate from the Court that do not appear reflected in the record—all combined to give the clear impression that your Honor is not of a mind to make such a finding at this time—then I submit it is not a matter of discretion of the Court. The Court has no discretion at this point under the statement that it is simply ordering how the proof shall be brought in. The Court has no slightest discretion whatsoever to say at this point to us, absent such a finding that I have referred to, that we shall be cut off from introducing the balance of our proof and that Mr. McGohey shall go ahead.

(3428) The Court: That you shall what? And that Mr. McGohey shall go ahead? Let me hear that part.

(Record read.)

The Court: You are not cut off from introducing the balance of your proof at all.

Mr. Gladstein: At this point—

The Court: I am merely regulating the order of proof here. You are cut off from doing it now.

Mr. Gladstein: That is my point.

*Colloquy of Court and Counsel*

The Court: Continuing what you have been doing for the last four weeks, that you are cut off from.

Mr. Gladstein: That is exactly my point, that what your Honor has done is to prevent the proponent of this challenge from completing in the orderly manner in which due process of law contemplates that it shall be done the proof of our case.

And I desire to point out further for the record as grounds for my objection that we apprehend that Mr. McGohey will call to the witness stand as his witness one or more of the people whom we have subpoenaed as witnesses to appear and testify for the defense. And I know from my experience as a lawyer, and I am sure Mr. McGohey does, and I am certain the Court is not unaware of this as a fact, that given a witness who is carefully led and directed in certain areas by Mr. McGohey the testimony (3429) may be developed quite differently and with perhaps even different content than if that witness were put on the stand by us, though he be an adverse and hostile witness to us.

We are not satisfied that the law places upon us the burden of refraining from cross-examining a hostile witness but we take the law as it is, and if the law requires that we pursue in a certain manner our examination of an adversary witness we are content to accept the law and abide by it, but we insist upon our right to develop our case and present the evidence in support of our case as the law contemplates that it shall be done.

I therefore submit that when your Honor says that he is taking this step and ordering Mr. McGohey to proceed and by the same ruling ordering us to desist from putting in any further proof at this point, your Honor is not exercising any discretion as to the order of proof but is committing plain, clear reversible error.

Now I want to say that if your Honor does not reverse this ruling, as each witness is called by

*Colloquy of Court and Counsel*

Mr. McGohey who—I do not know his witnesses—who, as it turns out may be one or more of those whom we had planned to call, I shall object to Mr. McGohey proceeding with (3430) those or any of those witnesses as his. I state that now so that the Court shall be apprised of one of the reasons for my earnest submission of this argument.

Mr. Crockett: If the Court please, I should like to state on behalf of my clients our objections to the order entered by the Court immediately at the conclusion of the morning session. In my opinion the order amounts to an abuse of discretion on the part of your Honor, and I should like to point out in one particular respect in which I think there is an abuse of discretion.

We have made it plain from the outset that the whole theory of presentation of our proof had to do with showing the product of the illegal discrimination that we had alleged in our challenge. We proposed to show and we did show evidence indicating that there had been geographical, occupational and racial discrimination in the selection of jurors here in the Southern District of New York. It was further within our contemplation, once that pattern had been established, to call the clerk to the stand for the purpose of ascertaining from him how he could in compliance with the requirements of the law come up with an end product which indicated so much disparity between what the law required and what his methods had produced.

The Court is aware, I am sure, that the other (3431) day at the suggestion of your Honor we obtained photostatic copies of certain records in the clerk's office. Those records indicated that the clerk was keeping separate lists of colored jurors. The memorandum which we filed with the Court this morning indicated very clearly the method by which we expected to prove the existence of discrimination because of race and color in the selection of jurors.

*Colloquy of Court and Counsel*

I cannot help but wonder, your Honor, whether or not it is an abuse of discretion on the part of the Court at this time that just as we are on the threshold of proceeding to present evidence of this illegal racial discrimination the Court enters an order to the effect that we shall cease right now and permit the Government to go on with its proof, which obviously will be an attempt to explain away the indices which we have already pointed out that indicate racial discrimination.

Mr. Gladstein: On this last, if I may just add a supplement to what Mr. Crockett has said: your Honor will recall that on the day when the clerk and some other representatives from the court attaches's office came down here with certain lists of names of people who went into the jury system, that I identified for the record just one or two and then your Honor made an order that we could have some of those photostated—

(3432) The Court: Yes. You had huge stacks of documents there.

Mr. Gladstein: Yes, because huge stacks of documents were provided to the clerk by private, unauthorized organization such as the Federal Grand Jury Association, as we will show. Now, I did not create the huge stacks. That is the way it was. And, of course, when we ask for the records, if huge stacks come out it is because that is the way it was created in the office.

But your Honor will recall that when the recess occurred and I was in your Honor's chambers with Mr. Shapiro making notations as to some of those records, there was one particular one that we were making notes of and it had the legend at the top "Colored List," and your Honor asked me what that meant, and I recall looking up to your Honor and saying, "That is the way in which the Negro people were segregated in the clerk's office by being put on a separate list."

Now, this I state merely in support—

The Court: That is what you said.

*Colloquy of Court and Counsel*

Mr. Gladstein: Well, we will see if the clerk denies that. But my point is that we have the right to examine him, his deputies, the jury commissioner, and as we said at the outset, one or more or perhaps all of the (3433) judges of this court. This is not unusual. In matters of this kind, a challenge of this kind, it has been known that hundreds of witnesses have been produced.

The Court: The way this thing has been conducted, Mr. Gladstein, is something that I never thought I would see in a court of justice, never.

Mr. McCabe: I will agree, your Honor, on that last point; the way this case has been conducted is one which I certainly hoped that I would never see in a court of justice.

The Court: You mean the way it has been conducted by me, I take it.

Mr. McCabe: I mean that exactly.

The Court: I have in mind the way you lawyers for the defendants have acted and what you have done and what is already on the record, and with respect to which I made a finding, which I only made with the utmost reluctance and regret, as I stated at the time. But that is all in the past, and what you did will remain and cannot be eradicated.

Mr. McCabe: I will say that so far as I am concerned and so far as I recall anything on the part of the attorneys for the defendants being concerned, there is nothing which we wish to have eradicated, but we will leave it to a higher court perhaps to eradicate some of the errors to (3434) which I refer.

The Court: Well, that sort of threat does not have any effect upon me.

Mr. McCabe: It is not a threat at all.

The Court: I have been subjected to every kind of vituperation here and you might just as well tell me how I am going to be reversed and all that. It remains to be seen what will be done by higher courts, and your telling me about that isn't going to affect my judgment. I am trying my best here

*Colloquy of Court and Counsel*

to rule justly, to rule impartially, to protect the rights of these defendants despite the conduct of their counsel, and I shall continue to do that.

Mr. McCabe: I rise simply to say—to except to your Honor's characterization that anything the defendants' attorneys have done is sabotage. Sabotage there has been, but as I say I think it has been a sabotage of the entire system of justice in this court, and I say that we are the only ones who seem to be interested in that.

Mr. Crockett: I should like to enter my objection to the Court's remark to the effect that your Honor had been engaged in protecting the rights of the defendants despite the conduct of their counsel.

The Court: And I shall continue to do that.

Mr. Gladstein: Well, now, may I ask your Honor this: does your Honor really mean that the record shall (3435) indicate that it is a protection of the rights of these defendants for your Honor to say when I offer a piece of evidence, "Mr. Gladstein, that would be material, that would be relevant, that would help to prove your case, but I am not going to let you put it in evidence because I don't like the way you and your colleague lawyers have been behaving"?

The Court: Did I say that?

Mr. Gladstein: In effect, yes, because you have absolutely rejected and you have prevented me from introducing evidence—

The Court: You approach the Court in this threatening way; I don't quite understand what you mean by it. But I do not desire any more repetition of your objections, and we will now go ahead.

Mr. Gladstein: When you say, approach the Court, your Honor, did you mean because I walked—

The Court: I mean, you walked right up near the bench pointing at me as though it was something horrible that I had done. I am not going to stand for that sort of thing, Mr. Gladstein.

Mr. Gladstein: I want the record to show that in the presence of several hundred people it was per-



*Colloquy of Court and Counsel*

fectly obvious that I was making no threatening or menacing gesture at your Honor. I was speaking to the Court.

(3436) The Court: You read what you said in the record and put it together with my comment and see whether my remark was justified or not.

Mr. Isserman: I would like to have the record note that at the point when Mr. Gladstein was talking to your Honor, which your Honor described as being near the bench, that he was alongside of the jury box.

The Court: Well—

Mr. Sacher: I would like to add that he was at a spot where he has been frequently in the last few days in the examination of the witness.

The Court: Very well, Mr. McGohey, you may proceed.

Mr. Gordon: May we have removed this group of charts containing many exhibits which are not in evidence.

The Court: Yes.

Mr. Gladstein: And one or two that are in evidence.

Mr. Gordon: May we have them removed?

The Court: Yes, those charts may be removed, both those on top which are not in evidence and those underneath which I think probably are.

(3437) JOSEPH F. McKENZIE, called as a witness by the Government on the Challenge, being duly sworn, testified as follows:

Mr. Gladstein: I desire to object to the United States Attorney examining Mr. Joseph F. McKenzie as a witness for the United States Attorney upon grounds, among others, as follows:

First, that Mr. McKenzie has been under subpoena to appear as a witness for the defense since the first week of these proceedings, that is to say,

*Colloquy of Court and Counsel*

shortly after January 17, 1949. The exact date I do not have at the moment but will supply for the record in due course.

Secondly, that thereafter Mr. McKenzie was re-subpoenaed, and this happened just a few days ago. That on both occasions the subpoenas served upon him were subpoenas duces tecum calling for the production of certain records, books, documents and other materials dealing with the manner in which jurors are selected for both grand and petit jury service in this court since about January 1, 1940, and up to date.

I desire further that the record show that I made verbal arrangements with Mr. McKenzie whereby he was to be in readiness to appear upon short notice, because he is here in this building, at my request just as soon as we were in a position to place him on the stand.

(3438) I also want the record to show that this verbal arrangement with Mr. McKenzie was actually also contained in a written notice to him in which I said in part:

“Dear Mr. McKenzie:

“In accordance with the oral understanding we have previously reached”—

Mr. Gordon: May I object, your Honor, to the interruption of the examination of the witness?

Mr. Gladstein: I am making an objection to his proceeding.

The Court: Well, Mr. Gordon, I will listen a little bit.

Have you many pages of it there?

Mr. Gladstein: No, your Honor; I just want the record to show the basis for my objection. You mean the notice to Mr. McKenzie? It is two paragraphs, and it reads as follows, under date of February 10th:

*Colloquy of Court and Counsel*

“In accordance with the oral understanding we have previously reached, you will not need to actually appear at the exact time called for in attached subpoena inasmuch as I do not desire to inconvenience you and there is no way of knowing exactly when you will be placed upon the witness stand.

“As per agreement, I will expect you to respond (3439) to the subpoena within a few minutes after word is communicated to you from the courtroom.”

And I signed my name.

I object for the reason I have just stated and for all the reasons which were stated by me earlier in connection with your Honor's ruling directing the United States Attorney to proceed, and for all the reasons expressed by the other defense attorneys, the reasons which I adopt; upon all those grounds I object to Mr. Gordon proceeding with any direct examination whatsoever of Mr. McKenzie.

The Court: Objection overruled.

Mr. Isserman: If the Court please, I wish to add my objection very briefly, not repeating what I have urged before, but stating at this time that the questioning of Mr. McKenzie and the calling by the Government—and the calling of Mr. McKenzie as a Government witness at this time is a denial of effective compulsory process for obtaining witnesses in favor of the defendants as guaranteed to them under the Sixth Amendment to the Constitution. And that that, coupled with the Court's prior refusal under the subpoena duces tecum with which Mr. McKenzie was served to examine the documents in his possession prior to his appearance here, constitutes such denial of compulsory process on behalf of and in favor of the defendants.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

(3440) *Direct examination by Mr. Gordon:*

Q. Mr. McKenzie, what is your occupation? A. Jury clerk and deputy court clerk.

Mr. Gladstein: May I hear the answer?

The Witness: Deputy clerk and jury clerk.

Q. In the United States District Court for the Southern District of New York? A. That is correct.

Q. How long have you been employed in the clerk's office of this court? A. Since the summer of 1935.

Q. What was the nature of your first employment or the title of the position? A. I was a clerical assistant.

Q. How long did you remain a clerical assistant in the clerk's office? A. Until the latter part of 1936.

Q. And at that time did you receive another appointment? A. At that time I was made deputy clerk.

Q. Now, when was it that you first assumed the duties or any duties in connection with the office of the jury clerk? A. I was assigned to the jury clerk's office as assistant to the jury clerk in the summer of 1937. Not necessarily assistant. I was still a deputy clerk assigned there to help the jury clerk.

Q. Who was it that appointed you as clerical assistant in 1935? A. Captain Charles Weiser.

Q. He was the clerk? A. He was the clerk of the court at that time.

(3441) Q. Who was it that appointed you as a deputy clerk? A. Captain Charles Weiser.

Q. And who was it that assigned you to work in the office of the jury clerk? A. George J. H. Follmer. He was the chief deputy clerk.

Q. Under Captain Weiser? A. Under Captain Weiser, that is right.

Q. And I believe there has been testimony that Mr. Follmer subsequently became the clerk. A. That is correct.

Q. Who was the jury clerk whom you worked under? A. Benjamin Kellogg.

Q. Do you know where he is? A. He is deceased.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Q. Now during the time that you first worked for Mr. Kellogg as his assistant, in general what were your duties?

A. Well, when I was first made assistant to Mr. Kellogg my duties were to bring the records up to date, all of the jury material in the jury office. I was assigned to take care of the clerical end of bringing the records and getting them in order.

Q. Did you interview any prospective jurors at that time? A. I did not.

Q. When was that you first began to interview prospective jurors, approximately? (3442) A. About 1940.

Q. Do you know how it came about that those prospective jurors came in to the office to be interviewed?

A. Prospective jurors at the time Mr. Kellogg or the time I was there as the jury clerk?

Q. Yes. A. Notices were sent out, qualification notices were sent out requesting them to come in and have their qualification notices checked, or their qualifications, I should say.

Q. And that was in about 1940? A. That is correct.

Q. And when those people came in what took place? Let me ask you, when did you become jury clerk? A. In 1940, about the early part of 1940.

Q. Who appointed you to that position? A. The clerk of the court, George J. H. Follmer.

(3443) Q. Now, as jury clerk—

The Court: Just a second. Who did he say appointed him?

Mr. Gordon: Mr. Follmer, your Honor.

Q. Now, as jury clerk did you interview any prospective jurors? A. I did.

Q. And will you tell the Judge in general the procedure that was followed? A. Well, the prospective juror would bring in the qualification notice that had been mailed to him, and when he would come into the office and he had never served on the jury and had no knowledge of jury service, he would ask me what this notice meant, what was required of him. So I told him that it was for jury service in the Southern District Court of New York. He would

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

ask for how long; and I would tell him that the minimum service would be a minimum of five days and a maximum of two weeks. He might state, well, to serve at the present time would work a hardship or that there were some reasons why—

Mr. Isserman: If the Court please, I want to object to this answer and have it stricken on the ground that it is not responsive. The answer deals with specific statements by some imaginary individual. It is not a general procedure, which was the question (3444) as put by Mr. Gordon.

The Court: Well, the witness is explaining what the general procedure was.

Mr. Isserman: Well, without identifying jurors he is giving us the conversation with jurors, and I am certain that not every juror answered in the way that he is suggesting.

The Court: Overruled.

Mr. Gladstein: May I add this objection: I understand the question to be that Mr. McKenzie is being asked to give a general idea of what he did to interview a juror, a prospective juror, and I have heard so far a good deal in which it appears that the prospective juror was interviewing Mr. McKenzie. It seems to me that what the question calls for is not any possible things stated by the juror, but the subjects of inquiry into which Mr. McKenzie pursuant to instruction or otherwise went when he was interviewing prospective jurors.

I object therefore to the answer thus far given and move to strike that portion which is inconsistent with the basis of my objection.

The Court: The motion is denied. The objection is overruled.

Mr. Crockett: I wish to object, your Honor, to that portion of the witness's answer in which he (3445) purported to relate what someone else had told him. I submit that it is hearsay, and I there-

1677

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

fore move that that portion of the answer be stricken.

The Court: Overruled.

*By Mr. Gordon:*

Q. Mr. McKenzie, in response to my question you were telling his Honor the general procedure followed in interviewing these prospective jurors. Would you continue? A. So I would explain to the juror or the prospective juror—

Mr. Sacher: Excuse me, may I ask that Mr. McKenzie speak a bit more loudly.

The Court: Try and keep your voice up, if you will, Mr. McKenzie.

A. (Continuing) I would explain to the prospective juror what the length of service was. If he asked no other, further questions, or did not state that it would be a hardship for him to serve on the jury, I would give him a questionnaire and ask him to sit over at the table and fill out the questionnaire.

Mr. Isserman: If the Court please, I am sorry but I did not hear what preceded the word “hardship.”

The Court: He said he would give him a questionnaire and ask him to sit over at the table there.

Mr. Isserman: Yes, but there was some reference (3446) to the word “hardship” and I could not get the preceding words to that.

A. (Continuing) If a man had not stated before he was given the questionnaire that it worked a hardship on him to serve on the jury, or there was no physical illnesses or severe illnesses that would affect him, he was then given a questionnaire, and if he also did not claim some exemption, as a doctor or a lawyer, or any number of the exemptions there might be, he was then given a questionnaire and he sat over at the table and filled it out.

He then brought the questionnaire back to my desk; I looked it over; if he had failed to answer any question I

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

would call it to his attention; he would then fill it in; I would then take his oath as to the statement on the application, and if there was no further question from the juror, that completed the interview.

Mr. Gordon: Now, will you mark this for identification, please.

(Marked Government's Challenge Exhibit BB for identification.)

Q. Now, it would appear from your answer that when these prospective jurors came in, some might claim an exemption or would claim an exemption before filling out (3447) the questionnaire?

Mr. Sacher: I object to the question on the ground that there is no such suggestion in anything the witness has said.

Mr. Gladstein: And I add that any suggestion that has been announced was in the question put by Mr. Gordon, and I therefore object to the question as leading and suggestive. And I suggest the Court admonish Mr. Gordon to follow the rule of not leading his own witness.

The Court: The question may be reframed.

Q. I show you Challenge Exhibit BB for identification. Do you recognize that document? A. I do.

Q. And what is it? A. This is a questionnaire as to the qualifications for jury service.

Q. Is that currently in use? A. It is.

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

Mr. Isserman: We have no objection. I would like to know if copies are available. If not I would like—

(Paper handed to Mr. Isserman.)

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



*Joseph F. McKenzie—for Government on Challenge—  
Direct*

The Court: What has just been handed to you apparently is a copy, only it is one of the other exhibits (3448) that has been filled in.

Mr. Crockett: Your Honor, I think what we wanted was a copy we could use ourselves and take away from the court with us. This presumably is one of the exhibits introduced in evidence.

Mr. McGohey: It is a printed form, your Honor, and I shall get one identical with that and give it to defense counsel, and I will have it **this afternoon**, at least at the recess.

Q. Now, referring to Government's Challenge Exhibit BB in evidence, is that the questionnaire which you referred to in your testimony? A. Yes, it is.

Q. Did all people who came in as prospective jurors fill out such a form as Exhibit BB? A. No, they did not.

Q. What would the occasion be for a prospective juror who came to your office and not filling out such a form? A. If a juror came in with a qualification notice and he had a legal exemption, such as a doctor, a lawyer, if he was a policeman or a fireman, or he had explained that it would work an undue hardship on him, for financial reasons, or even for physical reasons, or for reasons of someone sick at his home which would work a hardship on him to be here on the jury, he would not be given one of these questionnaires but (3449) would be told that we were sorry to trouble him and—

Q. He would leave? A. That is correct.

Q. Now, as to those people who filled out that form, Government's Challenge Exhibit BB, did all of them qualify as jurors? A. No, they did not.

Q. Did you make any examination of their qualification sheets to determine whether there appeared to be anything on there which would disqualify them? A. At the time of the interview?

Q. Yes. A. Yes, I did.

Q. And some were qualified and some were not? A. That is right.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Q. Now, this procedure which you have described in general for his Honor—did that take place during the entire period that you have been jury clerk? A. Yes, it has.

Q. Was there ever a period of time since 1940 when you were not acting as jury clerk? A. There was.

Q. When was that? A. That was during the summer from July of 1942, say the middle of July, 1942, until the middle of April of 1943.

Q. And where were you at that time? A. I was in the armed forces.

Q. Now to go back to 1940 up to the present time, leaving out the time when you say you were in the armed (3450) forces, what has been the source, the main source from which names were taken of people to whom qualification notices have been sent?

Mr. Sacher: I object to the question as calling for the witness's conclusion as to what the main source was.

Mr. Gladstein: I also object on the ground that it assumes something not yet testified to, namely, that there was a source or particular sources, or what they may have been.

The Court: Overruled.

A. The list of registered voters from Manhattan and Bronx.

Q. The list of registered voters from Manhattan and Bronx? A. That is correct.

Q. For any particular Assembly District? A. For all Assembly Districts.

Q. Now let us go back to 1940 when you became jury clerk. In general give us your best recollection of where the names were taken from time to time. A. In 1940 in addition to use of the list of registered voters for Manhattan and Bronx we used the address telephone director—that is, the telephone directory by streets and not by names—

Q. Do you have one of those? A. No, I borrowed it (3451) from the Division of Jurors of the County Clerk of New York.

Q. Is that the office in the County Clerk's office where they get jurors' names? A. That is correct, sir.

Q. And what else—

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Mr. Gladstein: May I hear that question? Is that what?

Mr. Gordon: Is that the office in the County Clerk's office where they get names of the jurors.

Mr. Sacher: For which jurors? The blue ribbon or general?

Mr. Gordon: No, your Honor, I suppose the orderly procedure would be to go ahead and then let them examine afterwards.

The Court: It is just Mr. Sacher's way of doing. I don't think he meant anything by it.

Mr. Gordon: I will ask the question for him, your Honor:

Q. This office in the County Clerk's office that you borrowed this address phone book from—that the office where they select all the jurors for the Supreme Court of New York County, or just the blue ribbon panels?

Mr. Gladstein: I object to this witness answering that question. He has not been qualified to say all the jurors—

(3452) The Court: You see—

Mr. Gladstein: Let me finish my objection.

The Court: I know. One of you asks the question, and then when it is asked the other one jumps up and objects to it. It is the most extraordinary thing.

Mr. Gladstein: No, I don't think so. I have a legal objection to make and I desire to make it, your Honor.

The Court: I see Mr. Isserman is now on his feet. So we may as well start the old thing over again.

Mr. Isserman: I don't want to start any old thing over, but when I hear a characterization of the conduct of counsel by the Court, and in a tone which is slighting, I must rise to object—

The Court: Well—

Mr. Isserman: —and I am merely objecting.

Mr. Gladstein: Now, may I finish the ground of my objection?

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

The Court: Let me ask Mr. Sacher a question: Mr. Sacher, what on earth prompted you to make that statement without rising from your seat? Did you think it was important to find out whether it was the blue ribbon jury that the alphabetical or residence list had been used for? What prompted you to do that anyway?

Mr. Sacher: It was such an association—an (3453) irresistible association of ideas.

The Court: That is what I thought. So let us just drop it, and Mr. Gordon, you may drop the question now too, and doubtless if it is considered important, Mr. Sacher or one of the defense counsel will go into it on cross-examination.

Mr. Gordon: The question is withdrawn.

*By Mr. Gordon:*

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.

Q. From whom else? A. We also secured names from the Engineers Directory; from Poor's Directory of Directors; and from the various alumni, college graduation classes.

Q. Did you have any alumni directories in your office? A. No, we did not, sir.

Q. Now, did you receive any names from the jury commissioner? A. We did.

Q. Who was that? A. At that time it was Judge Smythe, Neil Smythe.

Q. Was that Cornelius Smythe? A. Cornelius J. Smythe.

Q. He was the commissioner of jurors for the Southern District? A. That is true. At that time he was the commissioner of jurors.

(3454) Q. Did any volunteers ever come into your office? A. Yes, we had volunteers.

Q. And did you receive any names from any other sources that you can think of at this time? A. We re-

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

ceived names from judges of the courts and individual recommendations.

Q. Now, with respect to all these sources, the voting lists, the lists from the Grand Jury Association, from the telephone book, and so forth, and the letters from the judges of the court, what was the practice which was followed with respect to those names, as to all of them?

The Court: This is 1940?

The Witness: That is true.

Mr. Gordon: That is right, your Honor.

A. The names were taken and they were checked with the active file to see if the juror was on the list, and they were checked with the old file to see if the juror had not been on and taken off at some time; and then a qualification notice was mailed out to each juror telling them to come in on or before a certain date to have his qualifications checked into.

Q. Now, was anybody ever put on the list in your office during your period of service as jury clerk without an interview and a qualification notice? (3455) A. No, they were not.

Q. A qualification form? A. Without filling out a questionnaire?

Q. Such as BB? A. That is true.

Q. Now, in 1942 you went into the Army? A. That is right.

Q. And did this procedure which you have described continue from 1940 until you went into the Army? A. That is correct.

Q. And when you came out of the Army what was the procedure which was followed? A. When I came out of the Army in 1943 there were some notices which had been accumulated by my predecessor, a small number, and I continued to mail them out, sent them out until the balance of April of 1943. Thereafter no notices were sent out of any kind or from any list until the early part of 1945. From 1945 to the early part of 1947 we used exclusively one book—one registered voting book from one Assembly District of the list of registered voters from Manhattan,

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

and one Assembly District from the list of registered voters books in the Bronx.

Q. Was the Manhattan Assembly District within the 17th Congressional District?

Mr. Sacher: I am sorry, may I have that last answer?

(3456) Mr. Gordon: Mr. Sacher would like the answer just before that question.

The Court: The reporter will read it.

(Answer read.)

Mr. Gordon: I will withdraw the last question I asked.

Q. During that period of time where were the jurors coming from? A. During what period of time, Mr. Gordon?

Q. You came out of the Army, and you were not sending out any names for new people to qualify? A. From the latter part of April of 1943 until the early part of 1945?

Q. Yes. A. They were all volunteers and individual recommendations where someone might recommend a name or an individual name sent by the Federal Grand Jury Association.

Q. But the individuals came in and were interviewed? A. Absolutely.

Q. Now, in addition to those new jurors, those volunteers, such as there were, you also had the names of jurors who were already on the list? A. That is correct.

Q. Now, this registered voting book from Manhattan—do you happen to recall what section of Manhattan it was from? A. It was—

(3457) Q. The portion of the city? A. It was from the West Side, I don't know just what particular section, but I know it was the West Side.

Mr. Isserman: Could we get the number of the Assembly District?

Mr. Gordon: Perhaps on cross-examination you might ask him.

1685

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Mr. Isserman: I thought it might be well to get it now. The witness talks about an Assembly District in Manhattan.

The Court: I think it will come out in a minute.

Mr. Isserman: There are only about 16. He should know the number.

Mr. Gladstein: I think it will come out.

Mr. Gordon: Now, your Honor—

The Court: What is that, Mr. Gladstein?

Mr. Gladstein: I think it will come out.

Mr. Gordon: May I ask—

The Court: You know, these suggestions are just made at the moment in the spirit of fun—

Mr. Gordon: Yes, I appreciate that, your Honor—

The Court: Sometimes they are in fun, most times not.

Mr. Isserman: If the Court please, I would like to state this, that my suggestion was not made in fun—

(3458) The Court: Mr. Gladstein's was, I think. Even he will admit that.

Mr. Isserman: What I was trying to do is follow the same procedure that Mr. McGohey did when Mr. Wilkerson was on the stand to bring out some fact closely related to the question for better identification. And I am sure that is a practice that your Honor must have indulged in on a great many occasions when he was on this side of the counsel table.

The Court: Let me see what Mr. Gladstein says. Was that a rather humorous remark of yours?

Mr. Gladstein: When I said it will come out you could say I was kidding on the square.

The Court: That is what I thought you were doing. So that is all right.

Let us get back and have as little confusion as we can here.

Let me ask 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

1686

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Assembly District in Manhattan and another one book for one single Assembly District in the Bronx. Did you mean to say that?

The Witness: Yes, your Honor, I did.

The Court: So for all those two years you (3459) just used these two books that had to do with a single Assembly District each?

The Witness: That is correct, your Honor.

*By Mr. Gordon:*

Q. Now, do you know the boundaries of the Assembly Districts in Manhattan yourself? A. No, I do not.

Q. Do you know where the various numbers fit on a map of Manhattan? A. No, I do not.

Q. Are you in a position to tell us which Assembly District that one book came from? A. No, I am not.

Q. Just that it came from the West Side? A. That is correct.

Q. And with respect to the Bronx, do you know the Assembly District of the Bronx? A. No, I do not know that.

Q. Do you know the general portion of the Bronx, north, east, south or west? A. I know it took in the Parkchester area, whatever district that is.

Q. There has been testimony here and I think that there is in evidence—

Mr. Gordon: There are two maps in evidence which show Parkchester, your Honor, and one shows Parkchester half in one Assembly District and half in another one.

Q. Now, do you know which one of the two it was? A. No, I do not.

(3460) Q. Now, after a period of time when you were using a single registered voting book from Manhattan, and a single one from the Bronx, did there come a time when you changed that procedure? A. Yes, we did.

Q. Tell us when that was? A. That was in the latter part of January of 1947 or the early part of February 1947.



1687

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Mr. Gladstein: Does your Honor want to take a recess at this time?

The Court: Yes, I will.

(Short recess.)

Mr. Gladstein: Your Honor, before Mr. Gordon resumes his questioning I desire to say that I am informed that there is present in the courtroom a Mr. Arthur Borden seated in the third row. My information is that he is employed in some capacity by Judge John C. Knox, and Mr. Borden has been observed taking notes of the testimony of Mr. McKenzie. I desire to ask, therefore, whether or not it is planned by the Government to produce Judge Knox as a witness, and therefore suggest that if that be true, that anyone associated with Judge Knox not be permitted to take notes of this testimony in accordance with the usual rule that a witness to be called should not be present in the courtroom while testimony is being given before he takes the stand. Because (3461) I assume that the only purpose of Mr. Borden making such notes would be for the purpose of transmitting them to Judge Knox. That is my information. I do not make it as a statement of fact but rather as an inquiry.

Mr. Gordon: I do not see any purpose that would be gained by answering counsel's inquiry, your Honor. It is obvious that the statement was made with some other purpose in mind, because it is plain that the minutes of the case are taken down by the stenographer and are available to both sides, so that any proceedings here in court cannot be a secret from any potential witness.

The Court: Yes.

Did you make it in the form of a motion, Mr. Gladstein, or suggestion?

Mr. Gladstein: I asked the United States Attorney to state whether or not he planned to call Judge Knox, because if he did then I think a proper application of the rule of exclusion of witnesses would require that Mr. Borden not take notes, or

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

perhaps be excluded from the courtroom if the purpose of his taking notes is to transmit them to Judge Knox prior to the Judge taking the stand.

The Court: Well, I shall not make any direction as to any of the persons who are in the courtroom. I (3462) do not think the circumstances require it.

*By Mr. Gordon:*

Q. Mr. McKenzie, in 1940 when you became jury clerk were there any names of people in the office who had already qualified as jurors? A. Yes, there were.

Q. Can you tell me approximately how many? A. I would say about eight thousand.

Q. About eight thousand? A. That is correct.

Q. So that the procedure which you have been describing was for the purpose of adding to the list—

Mr. Gladstein: I object to the form of the question. Let us ask the witness what the purpose was rather than having Mr. Gordon state the purpose in his question.

The Court: Well, if they had 8000 of them already isn't it perfectly obvious that what they did as to getting new ones was to add to the list?

Mr. Gladstein: I think the witness ought to be asked what the purpose was, your Honor, rather than be told. I object to the question because of its form; it is leading and suggestive.

The Court: All right, I will sustain the objection. Please reframe the question.

Mr. Gordon: Yes, your Honor.

Q. What was the effect on the number on the list of (3463) the people that you qualified during the period that you have testified to?

Mr. Isserman: May that be limited as to time in this period? It may be any one of a number of years.

Mr. Gordon: I said during the period he testified to, your Honor.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Mr. Isserman: He testified from 1940 to 1947.

The Court: That is just the period that I think is inquired about.

Mr. Isserman: Can we get the list at the beginning of the period or the middle of the period or the end of the period? It could not be the same list in seven years.

The Court: I think when you come to cross-examine if there are any details you want to bring out I think you can do it.

Do you understand the question, Mr. McKenzie?

The Witness: No, I do not, your Honor. I have lost it.

Mr. Gordon: I will reframe it:

Q. As I understand your testimony you sent notices out, and then there were volunteers and the people were interviewed and some filled out notification sheets and some were qualified, is that right? A. That is correct.

(3464) Q. Now, at the time that they were qualified there were already some 8000 names on the list when you started? A. Yes, that is so.

Q. Did the effect of qualification of these people that you have described add to the list, make the list smaller, or change it in no way? Have you any idea? A. It added to the list.

Q. And did the list itself remain constant? A. I don't understand that.

Q. Did all the people who were on at the beginning of the time stay on? A. Oh, yes, unless they died or was taken off as a non-resident. In other words, when you say "stay constant," the present number at that time, although we were adding to them, many of them had moved out of the district, many of them had died or they were taken off.

Q. Now, the list which you got from the Federal Grand Jury Association, did you understand that to be a list or any of the lists you got from them, lists of members of the Association? A. No—

Mr. McCabe: I object, your Honor, as leading.

Mr. Isserman: If your Honor please, we are getting one leading question after another.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

The Court: I think not, Mr. Isserman. This question can be put in the form “were they?”

(3465) Mr. Gladstein: I want to add another objection: I suppose it is obvious that when the witness says he received a list, that that must be in some written or typewritten form. I therefore suggest that the question calls for secondary evidence, and there has not been established a basis for offer of that, offering the conclusions of the witness. And until the witness says that the lists are not available so that they can be introduced, I object to his being asked about what the list purported to be, members of the Association or otherwise.

The Court: Overruled.

Mr. Gladstein: I desire to add to my objection and ask the Court to require the production of the lists about which the witness is presently being questioned.

Mr. Gordon: I am not asking him about the lists; I am asking him about their sending the names.

The Court: I know. I deny the application.

Mr. Crockett: If the Court please, I want to object to the form of the question. The witness has not identified what lists he is speaking of. I recall his earlier testimony that he did receive lists—in the plural—from the Grand Jury Association. Now, I think the question, if the stenographer will read Mr. Gordon’s last question, I think it will indicate (3466) he was particularizing lists.

The Court: Well, by the time you all get through objecting I suppose we will all forget what the question was. We will have it read now.

Mr. Gladstein: It was about the lists, and I simply suggested we could save time by having the list rather than have the witness describe it.

The Court: I know. That is just what I will not require at this time.

(Question referred to read.)

A. No, I did not.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Q. They were lists of names that the Association supplied? A. That is correct.

Q. But not people who were necessarily members? A. That is so—

Mr. Isserman: If the Court please, Mr. Gordon is testifying. I object to the form of the questions, which are repeatedly given in an incorrect form. I believe your Honor should not allow him to continue to put the words into the witness's mouth.

The Court: Well, ask him, were they names of members of the Association?

Mr. Sacher: I object to that question, if your Honor please, because no foundation has been laid. The witness has not yet been shown to know who were members (3467) and who were not, so how can he testify as to whether they were or not?

Mr. Gordon: Your Honor, I will withdraw any further questions on the subject and try to go to something else, to save time.

The Court: Now Mr. Gladstein is going to object.

Mr. Gladstein: I still want the lists.

The Court: Well, that is what you are not going to get yet.

Q. Now, Mr. McKenzie, come back to the first part of 1947 and tell us from what source or sources you obtained names at that time. A. In the early part of 1947 we secured the list of registered voters for all of the Assembly Districts in Manhattan and all of the Assembly Districts in the Bronx. We also secured the address telephone directory from the Division of Jurors of the County of New York.

Q. Did you use any other source? A. Not until later.

Q. Well, continue on and tell us the sources you used. A. Then possibly three or four months later we also secured names from the Directory of Directors at the New York Public Library where that book was being kept. We also received volunteers—

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

(3468) Mr. Isserman: I am sorry, I didn't get that last answer.

The Court: He said he got some names from the Directory of Directors at the New York Public Library. That was three or four months later than the first period he testified to.

Mr. Isserman: He said something about a book being kept or checked.

The Court: He said the book was up in the New York Public Library. At least, I understood him to say that.

Mr. Gladstein: Where the book was being kept, I think is what he said.

The Witness: That is right.

The Court: You mean by that it was in the Library?

The Witness: That is true. It was in the Library.

The Court: You didn't have a man up there keeping it?

The Witness: No, that is right.

Q. Did you have a copy of the book in your office? A. No, we did not.

Q. Now, how long did you continue using these registered voting books? A. We continued using them, and (3469) we still are using them.

Q. How about the address telephone book? A. The address telephone book was only used for a short period, I would say possibly a month or two, when we discontinued it. We secured a thousand names from that source.

Q. And the use of the Poor's Directory which was kept at the Library? A. Why, we completed using that in May or June of 1948.

Q. Now, I think you have testified that after the qualification notice was sent out, the prospective juror would come to your office for an interview, and you have described the interview, is that right? A. That is correct.

Q. Did all of the people to whom notices were sent come in? A. No, they did not.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Q. And did all of the people who filled out qualification notices or who came in, qualify? A. No, they did not.

Q. Now, in connection with qualifying jurors for service in this court, have you ever discriminated against—

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

The Court: On what ground?

Mr. McCabe: I think it is obviously leading, suggesting the answer. The very manner of putting the (3470) question—

Mr. Sacher: It calls for a legal conclusion.

The Court: When a person is charged with something I suppose in every system of jurisprudence he is permitted to say he did not do it.

Mr. Isserman: This is not the accused in this proceeding, your Honor. He is called here as a Government witness. I think it would be perfectly proper, as we were required to do, to ask him what he did.

The Court: Do I understand that the defense claims that it is to be permitted to prove that there was discrimination but that the Government is not to be permitted to prove that there was no discrimination?

Mr. Isserman: There is a perfectly proper way to prove it, your Honor.

The Court: Well, I think this is a proper way.

Mr. Isserman: I object to the question because it calls for a legal conclusion on the part of the witness.

The Court: Overruled.

Mr. Gordon: I suppose I better finish the question, your Honor.

The Court: Yes.

Q. In your duties in qualifying prospective jurors for service in this court, have you ever discriminated (3470-A) against anyone or failed to qualify anyone because of race— A. No, never.

Q. Color? A. No, definitely not.

Q. Creed? A. No.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Q. Sex? A. No.

Q. Political belief? A. No.

Q. Or economic or social position? A. No, never.

(3471) Q. Now, of this period in 1947 through 1948—I withdraw it.

Q. Did you ever qualify anybody because of those grounds which I have mentioned? A. I have, yes. I have qualified all jurors who had met with all the qualifications, but I never had any question as to an individual's race, his creed or his color, had any question at any time.

Q. Did you ever qualify anybody solely because of his color or his creed, or his political belief or economic station? A. No, definitely not.

Q. How many jurors were added in this 1947-1948 period? A. How many jurors were added?

Q. How many were qualified? A. I would say about 4,000.

Q. How many were called?

The Court: What period is that?

Mr. Gordon: This 1947-1948 period, your Honor.

The Court: 1947-1948, about 4,000.

Q. Can you tell us what percentage of qualification notices ended up in qualification? A. How many notices of the total amount sent out?

Q. Yes. A. How many qualified? In the percentage basis?

Q. Rough percentage? A. About 15 to 20 per cent.

(3472) Q. 15 to 20 per cent qualified? A. Qualified out of the number that was sent out 1947 and—

Q. And 1948? A. That is right.

Q. Can you tell us of those that qualified what the source of information was for the bulk or preponderant number of them? A. The preponderance, the most names came from the list of registered voters.

Q. Can you give us an approximate percentage? A. I would say from 80 to 90 per cent.

Q. From 80 to 90 per cent came from the list of registered voters? A. That is correct.

Q. Did you have a list of registered voters for Westchester County? A. No, we did not.



*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Q. Did you try to get one? A. Yes; I called the Board of Elections in Westchester County.

Q. And what was the information that you received?  
A. They told me there would be a fee attached to securing the books, we would have to pay for them.

Q. Did you have any funds available for that purpose?  
A. No, we did not.

Mr. Sacher: Would you ask him how much it was, that fee?

The Witness: I don't recall; it was so much a book—twenty-five or forty-five.

Mr. Sacher: 45 cents?

(3473) The Witness: Cents a book, that is right.

Q. The books for Manhattan and Bronx, did you pay for those? A. No, we did not.

Q. Now after a juror fills out the qualification sheet and appears to you to be qualified, what is done with his name?

A. After the juror qualifies a history card is made up and a wheel card is typed up from the application. The history card is placed in files alphabetically and the wheel card is placed in a drawer of new jurors.

Mr. Gordon: I think that we have already seen the history card, your Honor.

The Court: Yes. Several of them are already in evidence.

Mr. Gordon: We are getting those now. And I think I have here a sample of a wheel card.

Would you mark that, please.

(Government's Challenge Exhibit CC marked for identification.)

Q. I show you Government's Challenge Exhibit CC for identification and ask you if you recognize that? A. I do. This is a wheel card used in the jury office.

Mr. Gordon: I offer it in evidence.

Mr. Gladstein: May I see it?

(Mr. Gordon hands to Mr. Gladstein.)

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Mr. Gordon: There appears to be no objection.

(3474) (Government's Challenge Exhibit CC for identification received in evidence.)

Mr. Sacher: Can we have a photostat of that, Mr. Gordon?

Mr. Gordon: I think you can have a sample.

Mr. McGohey: Yes, we will give you a card just like that.

Q. Now if you look at Exhibit X which has already been marked in evidence and tell me what that is a photostat of? A. It is a photostat of one of the history cards in the jury office.

Q. This happens to be the history card of Harvey Avedon, and there are a series of dates, there are eight dates, and in front of each date the letter E. Can you tell me what that E means? A. That means that the juror was excused on that particular day for that summons of that month.

Q. How do you indicate that a juror served? A. By an S. S would be where the E is on this particular card.

Q. On that particular card there are no S's? A. That is correct.

Q. Now here is Exhibit W, for Louis Alpren. There appears to be one S on there. A. This man served once and was excused the balance (3475) of the notations there.

Q. Now as I understand it the qualified juror has his name, address and occupation typed on the history card and the wheel card, is that correct? A. That is correct.

Q. Where do you keep those records? A. They are all kept in a safe in the jury office.

Q. Are they kept in any sort of order? A. In alphabetical arrangement.

Q. Is there any arrangement with respect to date? A. On these history cards?

Q. Yes. A. No, there isn't.

Q. How about the wheel cards? A. The wheel cards are kept in several different orders. There is one order of the cards of new jurors who qualified, there is another

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

drawer with jurors that had served, there is another drawer of jurors who had been excused and put down for a previous date.

Mr. McGohey: Or a subsequent date.

The Witness: Subsequent date, I should say. I am sorry.

Q. Now here on Louis Alpren's history card, Challenge Exhibit W, I see after the entry 10-2-45 which has an E in front of it, Feb. What does that mean? A. That means on that date the Judge marked on this summons excused to February.

(3476) Q. What did you do with the wheel card for Mr. Alpren? A. Mr. Alpren's card was put in the "Future dates" under February.

Q. Now, then, are you ever present in the office when a jury is drawn? A. I am.

Q. Will you tell the Judge what the procedure is that takes place? A. The clerk—

The Court: Let me see that card. You go right on with your testimony. I just want to take a look at this.

Q. I am now referring not to a jury in a box but one of these panels such as we have had identified in court, the jury list. A. The clerk in the court and the commissioner come into the jury office. The commissioner will ask to see the order directing us to draw so many jurors. He will then go to the safe where the wheel cards are kept and he and the commissioner, and the clerk of the court, will take the drawer marked "Ready for the wheel" petit jury, and grand jury also marked "Ready for the wheel." They will take the drawer over to the jury wheels and proceed then to put the cards into the wheel.

Q. Now the drawer that is marked "Ready for the wheel," what cards are in there? A. That drawer is compiled of all the jurors that had served two years previously, new jurors that had qualified from the last drawing, and (3477) the jurors marked down for future date, like the one in February that I had referred to.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Q. Is there a separate wheel for the petit jury and for the grand jury? A. There is.

Q. Now the jury commissioner and the clerk do what with these cards? A. I see them at the wheel putting the cards in the wheel one by one, and I continue to qualify people in the office, carry on the duties of the office while they are carrying on placing the cards in the wheel, and drawing the cards from the wheel.

Q. What do they do after the cards are put in the wheel? A. After the cards are in the wheel they announce how many they put in or how many they had put in, I should say; they then draw the jury from the wheel after having first spun the wheel, and they then continue to draw the jury.

Q. And they take out how many cards? A. Whatever the order calls for.

Q. What is done with the cards that they take out that comprise the order called for? A. Those cards then are turned over to me, I take them to a typist or clerical assistant to have them assorted or arranged alphabetically and typed on these panel sheets. Both are taken to the clerk of the court for his signature, and one is taken to the cashier and (3478) the file stamp is put on showing it has been filed in this office; and the one for the marshal is taken down to the marshal's office along with the summonses, for the summonses to be mailed out. A third copy is taken to the calendar commissioner's office along with the wheel cards, of the cards that had been drawn in that particular drawing.

The Court: You say they put the cards in the wheel, then they spin the wheel and they draw out the number of cards that are called for by the order?

The Witness: By the order, that is right.

The Court: How many cards do they put in?

The Witness: Well, it will all depend, Judge, as to how many—

The Court: I take it is a larger number than they—

The Witness: They have always put in, and when the last drawing was completed there was always a minimum of 300 left in the wheel.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

The Court: A minimum of 300 left in. All right.

Mr. Gladstein: Is this as to the grand or both?

The Witness: Both.

Q. The number of petit jury cards is related in what way to the number that is to be drawn? A. The number of (3479) petit jury cards might run into 375 or 400, and the grand jury would only be 75.

Q. That is, the number to be drawn? A. The number to be drawn, that is right.

Q. How many cards would be put in the wheel? A. It depends on how many was compiled throughout that month. 2,000, 1500, 1200. And with the grand jury we always have a certain amount in the wheel. In other words, a grand jury wheel is never cleaned out, only by order of the court. So that—

Q. After these lists go down here to the calendar commissioner's office have you ever been down there on the return day? A. I have.

Q. And have you seen any of the jurors come in in response to the summons? A. I have.

Q. And what happens down there? A. The jurors that are ready to serve, the deputy clerk in that particular room, puts the card attached to the summons after that had been filled out by the juror and sends it back to the calendar commissioner. The jurors that are excused, their card is attached to the summons and is presented to the Judge in 109 to be excused.

Q. And the Judge in 109 excuses some of the jurors and then the rest of them serve, is that right? A. That is correct.

(3480) Q. I show you Exhibit C-2 which apparently is a letter addressed by Mr. Anable, one of the witnesses here called by the defendants, addressed to Mr. Connell requesting that he be taken off the—

Mr. Sacher: Just a moment. I object to the question. He is stating the contents of a written paper not in evidence.

The Court: He has not said anything about the contents yet.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Mr. Sacher: He is just stating what is in it.

Mr. Gordon: Your Honor, this is a Government's Challenge Exhibit C-2 marked in evidence on January 21, 1949.

Mr. Sacher: Oh, I am sorry. I thought it was not in evidence. I did not know that it was in evidence.

Q. That is a letter addressed by Mr. Anable, one of the defendants' witnesses, to the clerk of the court asking to be excused from jury service. Do you find any notation in the upper lefthand corner that you are familiar with? A. Yes, I do.

Q. What are the notations? A. It is Judge Knox's signature under "Off."

Q. His signature or his initial? A. His initials, I should say.

Q. That means what? A. It means "Take this juror (3481) off the list".

Q. Now, do notations of that kind appear after the Judge has heard excuses in Room 109? A. They do, yes.

Q. From those notations do you get any information for your records? A. Yes, we do.

Q. What sort of information do you get? A. Whatever the judge has occasion to mark on that summons is transferred to the history card and the wheel card in the jury office.

Q. Now how do you find out—you have now told us what the judge has marked on; that would be with respect to marking them off; is that right? A. That is correct.

Q. And with respect to an excuse? A. Yes.

Q. How, how do you get your information to put on your cards with respect to those who serve? A. After the jurors have served, the calendar commissioner puts all the cards in an envelope, or he puts a little tag on saying those jurors served during the month of February, or whatever month it might be. We then transfer—we put on the back of it an S and a date that the juror served. That is also then transferred to the history card.

Q. That is, on the back of the wheel card? A. On the back of the wheel card.

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

Q. And the front of the history card? (3482) A. And the front of the history card.

Q. We have seen other notations here, I think "N.A." A. That means "No answer," where a juror failed to appear on the date that the summons was returnable.

Q. As to this 80 to 85 per cent who are called in the first place but don't qualify, do you keep some record as to them? A. I don't—80 to 85 per cent?

The Court: You said a little while ago that notices were sent out to lead to the qualification of jurors and that only 15 to 20 per cent qualified of those to whom the notices were sent. Do you remember that?

The Witness: Yes, Judge.

The Court: Now do you keep some record about the remaining 80 to 85 per cent who don't qualify?

The Witness: No, Judge; if a man comes in with a qualification notice and he explains that he is entitled to exemption as a doctor or lawyer, or he states that it would work a hardship on him and he is not given a questionnaire, there is no record kept of those qualification notices.

The Court: Do you keep some record of the list of those to whom the original notices are sent?

The Witness: We had some lists there we kept, but the list of registered voting books after new ones come in the old ones are disposed of and thrown out. (3483) And the same applies to the address Telephone Directory; we return the old one to the Division of Jurors to pick up the latest one.

Mr. Sacher: Do they do the same with the Directory of Directors?

Mr. Gordon: Perhaps Mr. Sacher would like to begin his cross-examination. I have no further questions, your Honor.

The Court: Yes, all right.

Mr. Gladstein: Your Honor, it is 4.20. Would it be appropriate to suggest that the cross-examination commence in the morning? I would like to have—

*Joseph F. McKenzie—for Government on Challenge—  
Direct*

The Court: Is that what you desire, too, Mr. Isserman?

Mr. Isserman: I was going to say, I have a portion of the record that I was going to ask your Honor to correct. I was going to do it in the morning, but if your Honor will do it now and reserve cross-examination, we can use a few minutes.

The Court: Do you see any objection?

Mr. Gordon: It appears they were not ready to question the witness, as they have stated repeatedly, that they were. But otherwise, we have no—

Mr. Isserman: We are not talking about that. (3484) We are only talking about the few minutes.

The Court: Let us see the correction that you want. What page is it?

Mr. Isserman: On page 2609, if the Court please.

The Court: 2609. Now just let me find that.

Mr. Isserman: It is part of Congressman Marcantonio's testimony.

The Court: Well, I think perhaps the best thing is, if you will discuss that with the United States Attorney or some member of his staff perhaps you can adjust that and then there will be nothing for us,—

Mr. Isserman: I think the first matter is adjustable in that way. And the second, that I could take up in the meantime, is a matter of supplying the information left open in Congressman Marcantonio's testimony as to one panel which had three extra pins in, three pins more than the Congressman had names for. We have checked that and find that we had failed to give the three names. I would like to put those three names on the record, but I could do that in the morning.

The Court: I think you can straighten that out with the other side, and if there is anything left for me to decide in the morning, why, I will (3485) take it up at the commencement of the proceedings.

Mr. Isserman: May we between us have the record corrected without approaching the bench?

The Court: Yes.



*Colloquy of Court and Counsel*

Mr. Gladstein: Mr. McKenzie, when you return in the morning, will you be good enough to bring the documents called for in the supplementary subpoena? They were enumerated for you.

Mr. Gordon: The Government will object, your Honor, to any examination of this witness which is not germane to the direct examination.

Mr. Gladstein: It will be germane to the direct. It will be concerning the very things that were mentioned.

The Court: Well, if it is the supplementary subpoena duces tecum that has been served, he will have the papers here in the morning and then we will pass on the questions as they arise.

Mr. Gladstein: Very well.

(Adjourned to February 15, 1949, at 10.30 o'clock a. m.)

(3486)

New York, February 15, 1949;  
10.30 a. m.

\* \* \*

(3495) JOSEPH F. MCKENZIE, resumed the stand.

The Court: It is a little hard for me to keep in mind; things keep moving along so fast in here that I don't have a chance to look around and get the identification of these defendants that I have been trying to accomplish, but I guess I shall before too long.

Mr. Gladstein: Did you want something, Mr. McKenzie?

The Witness: Yes, I would like to ask the Court if I may have Mr. Doyle sit here, inasmuch as these cards are the key records of the jury office, and in the event they may want something upstairs he can take it up to the jury office.

Mr. Gladstein: Yes, I have no objection to that.

The Court: Yes.

*Joseph F. McKenzie—for Government on Challenge—Cross*

*Cross examination by Mr. Gladstein:*

Q. Mr. McKenzie, you testified yesterday that during your tenure as jury clerk you have received from time to time recommendations from the Federal Grand Jury Association of the Southern District of New York of persons for potential jury service; is that right? A. Yes.

Q. Now in what form were these recommendations received by you? A. In an individual letter sent down with the (3496) juror himself, with the prospective juror, I should say.

Q. On each occasion? A. On each occasion.

Q. Did you keep such letters? A. Yes, I did.

Q. Do you have them in your files? A. Yes, they are.

Q. In what file are they contained? Is there a designation for that file? A. In the correspondence file.

Q. And you have them readily available, do you? A. Yes, we have.

Q. Now over how long a period does that correspondence refer to? A. I believe from 1940-1939, 1940.

Q. Until the present date? A. That is right.

Q. Now, passing for a moment from that file, did you receive from the Federal Grand Jury Association lists of names? A. Yes, I did.

Q. Were these delivered to you or sent to you? A. They were mailed.

Q. Were there covering letters accompanying the lists? A. I don't know.

Q. Now if there were, is it true that you kept such letters?

Mr. Gordon: Objected to. It is speculative, your Honor.

The Court: Overruled.

Q. Do you want the question read? A. Yes.

(Question read.)

(3497) A. Yes.

Q. They would be in the same correspondence file or a different one? A. They would be in the same correspondence files.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. Very well. Did you keep the lists that were sent to you from time to time by that Association? A. I don't know.

Q. Do you have in your office lists that were sent by that Association? A. I have.

Q. What did you mean when you said you don't know whether you kept such lists? A. I don't know of all the lists that they sent us.

Q. So that, in other words, some of the lists, your testimony is, some of the lists that the Association sent you know you have and there may be others that were sent to you that you don't have; is that it? A. I wouldn't say I don't have. I don't know if they are all the lists that were mailed to me from the Federal Grand Jury Association.

Q. No, you misunderstand me, Mr. McKenzie. Let us start again. I understand your testimony to be that the lists of names submitted by the Association as potential jurors from this Association were to some extent at least kept by you and are in your possession, is that right. A. That is true.

(3498) Q. Now I also understand from your testimony that it may be true that certain lists were sent to you and that you don't have them now; is that right? Isn't that so, sir? A. I couldn't answer that.

Q. You couldn't answer it. All right. Well, let us go to the lists that you do have. Would you be good enough to show me any one of the lists in your possession that came from that Association? May I see it? A. (Witness hands.)

Mr. Gladstein: The witness has handed me a three-page document. I would like to have it marked for identification.

(Defendants' Challenge Exhibit 156 marked for identification.)

Mr. Gordon: May I see it?

(Mr. Gladstein hands to Mr. Gordon.)

Q. Mr. McKenzie, I notice that you have a considerable pile of documents on the table here. Have you arranged these lists from the Grand Jury Association in any par-

*Joseph F. McKenzie—for Government on Challenge—Cross*

ticular order, say, chronologically or something of that sort ? A. No, I haven't.

Q. You haven't. All right. Now I show you 156 for identification. Is this a list which was sent to you by the Federal Grand Jury Association? A. Yes.

Q. Now, for what purpose does the document indicate (3499) that the names on that list were to be used?

Mr. Gordon: That is objected to. I don't understand the question.

The Court: I don't either.

Mr. Gladstein: I will reframe it.

The Court: Is there some heading to the list?

Mr. Gladstein: Yes.

Q. Does the document indicate any purpose for which those names were to be used? A. Yes.

Q. And what is that purpose? A. It says, nomination for panels of Federal grand jurors for the Southern District of New York.

Q. Now did these nominations then come from the Association; is that it? A. This list came from them.

Q. Yes. Now, do you know who prepared that list? A. No, I do not.

Q. Did you know at or about the time when you received the list?

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

The Court: On what ground, Mr. Gordon? I do not understand that.

Mr. Gordon: He has asked does he know who prepared the list and he says, No, and then he is asked does he know at the time he received the list who prepared it?

(3500) The Court: Oh, as repetitions.

Mr. Gladstein: It is not, your Honor. I asked him if at the time he received it he knew.

The Court: I will allow it.

A. No, I did not.

Q. Did you ever undertake to ascertain who prepared the list which you hold in your hand? A. No, I did not.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. After receiving that list it appears that certain check marks were made on it. That is correct, isn't it?

A. Yes, that is true.

Q. There are little check marks in front of some of the names, isn't that right, sir? A. That is right.

Q. By the way, each of the names is followed by an address of the person whose name appears and in some instances the name of the firm apparently with which that person is connected; that is right, isn't it? A. That is correct.

Q. Did you make these check marks on 156 for identification (handing)? A. No, I did not.

Q. Do you know who did? A. No, I do not.

Q. Now, it is true that after receiving this list, 156 for identification, notices were sent to the persons named on that list to appear for the purpose of qualifying as jurors? That is true, isn't it? A. No, I would say not.

(3501) Q. Are you stating that none of those people have become jurors?

Mr. Gordon: This is getting a little intimate, your Honor; it is hard to hear.

Mr. Gladstein: Oh, I am sorry.

Mr. Gordon: Nor did he say what Mr. Gladstein last said.

Mr. Gladstein: I will withdraw that question.

Q. Were notices sent out to any of the persons on that list to appear and qualify as either petit or grand jurors?

A. I don't know.

Q. How would you undertake to find out? By checking your records? A. I would have to check the records.

Q. In other words, if you had a history card for each of these persons you would then know from that fact that such persons had been asked to come in to be qualified and were put in the active file, is that right? A. No.

Q. How would you determine from the history card whether or not the persons set forth on that list were asked to come in? A. Will you give me that question again?

The Court: He did not say he could ascertain from the history card.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Mr. Gladstein: Well, I will withdraw the question.

The Court: You see, your question is based on the (3502) assumption that he had so stated.

Mr. Gladstein: I will withdraw that question.

Q. Mr. McKenzie, I direct your attention to the upper righthand corner of that exhibit. What do you see written on it? A. "4 list."

Q. The figure 4 and the word "list"? A. That is true.

Q. What does that designation mean? A. I did not put that on there.

Q. What does it mean, sir?

Mr. Gordon: I submit that if he didn't put it on he may not know what it means.

The Court: Well, he can say. He may know, he may not know.

A. I don't know at the time that this—

Q. Pardon me. A. I say, I don't know what means at the time here.

Q. Now Mr. McKenzie, isn't it a fact that when you received lists of this kind from the Grand Jury Association your office or you put designations of various kinds on those lists? That is true, isn't it? A. What do you mean by designations?

Q. You used a symbol such as No. 4 and No. 6, or you might use the letter S or something of that sort; isn't that a fact? A. If the list was used.

Q. Yes. A. Yes, I would say there was some.

(3503) Q. So that when a list was used the designation went on it? Is that correct? A. That is true.

Q. To what does the designation "No. 4 list" refer, if you can tell us? A. I would say that is "4 list," a symbol list when the notices were sent out.

Q. Well, now, I understand then from your answer that when notices were sent out to the persons whose names and addresses appear on that exhibit a designation was placed on it, to wit, "4 list," is that correct? A. That is true.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. Now thereafter, when the persons to whom the notices were sent out responded they were asked to qualify for jury service, isn't that so? A. They were asked if they knew any reason why they shouldn't qualify for jury service.

The Court: May I see that list for a moment, Mr. Gladstein?

Mr. Gladstein: Shall I continue or defer for a moment?

The Court: I just wanted to look at the character. All right.

Q. Now they were handed a questionnaire, were they, to fill out? A. Not in all instances.

Q. Well, all right, there may have been exceptions. But generally the practice was to hand them a questionnaire before they could qualify, isn't that right?

(3504) Mr. Gordon: That is objected to. He just said No.

Mr. Gladstein: May I have the question read to you, your Honor? I think it is not objectionable.

The Court: I thought it was all right. Let us hear it.

Mr. Gordon: I think he is arguing with the witness, that is all. But I will withdraw the objection if your Honor thinks—

The Court: It did not seem so to me.

(Question read.)

The Court: I think it is sufficiently explicit. It is a little argumentative, but I will allow it.

Q. Will you answer, please? A. I would say not generally.

Q. Well, when, as on this list, it appears from your testimony that notices were sent out, those persons who came in would before qualification be required to sign a questionnaire; isn't that right? A. Before they were put on the jury list they filled out a questionnaire.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. Yes. And then if you found that the questionnaire was adequate in the sense that the potential juror was qualified by law, then you made a card, a history card for that person, did you not? A. He was sworn in, his application was sworn to, and that was the next step in (3505) making the history card.

Q. And then the history card went into a file— A. Also—

Mr. Gladstein: Excuse me. Do you want to add something?

The Witness: No.

Q. The history card that was then made out would go into a file known as the active file of jurors, be it petit or grand, isn't that right? A. That is correct.

Q. You had a separate file of active jurors for the petit jurors, didn't you? A. A separate file—

Q. A file of cards, isn't that right? A. No, that is not correct.

Q. Did you keep both the grand and the petit jurors in the same file? A. Yes, we did.

Q. All right. Now thereafter when the history card went into the active files, in due course the person whose history card went into the file would be summoned for jury service, isn't that right? A. In due course.

Q. Yes, is that correct? A. Yes.

Q. All right. Now by checking the names on Exhibit 156 against your active files, that is, the history cards in either the active files or the "off" files, you could ascertain which ones and how many of the persons on No. 156 (3506) actually became jurors; isn't that true? A. Yes.

Mr. Gladstein: I offer this in evidence.

Mr. Gordon: I don't think this list is relevant to the challenge here, your Honor, for this reason: If we are going to start going through each of these papers and find out whether this juror got on the list or that juror got on the list, the probative force of it at the end of all that examination would be such that it will not be relevant to the challenge that there has been discrimination in disqualifying people. It



*Joseph F. McKenzie—for Government on Challenge—Cross*

merely shows that some of the people on the list of jurors or some of the names on the history cards may have come from suggestions submitted by the Federal Grand Jury Association after the people were brought in and subjected to the qualification procedure.

The Court: I think at this preliminary stage I will allow it until I understand the drift of counsel's questions. At the moment I know nothing about it at all, and it is hard for me to tell whether it may lead to something or may not; so that until I see some reason to suppose that you got off into another one of these long drawn out affairs, I am going to allow it.

(Defendants' Challenge Exhibit 156 for identification received in evidence.)

Mr. Gladstein: Would you be good enough to (3507) mark this for identification.

(Marked Defendants' Challenge Exhibit 157 for identification.)

The Court: Is that another one of these lists?

Mr. Gladstein: Yes, your Honor.

*By Mr. Gladstein:*

Q. Now Mr. McKenzie, I show you Challenge Exhibit 157 for identification. Did this come from your office files?

A. Yes, it did.

Q. It also purports, does it not, to have come from the Federal Grand Jury Association? A. Yes, that is correct.

Q. Is there anything on the document to indicate the approximate date when it was sent to you by that Association? A. No.

Q. Is there anything to indicate how many names and addresses of persons appear on that exhibit? A. Yes.

Q. What is the figure? A. 517.

Q. Is there anything to indicate on the list the utilization of it by your office or by you by means of a designation?

The Witness: Will you repeat that question?

Mr. Gladstein: Well, I will reframe it.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. Do you find on that exhibit any designation such as the one we have just finished with which was designated (3508) "No. 4 list"? Do you find a designation on this exhibit? A. Yes.

Q. What is the designation? A. "13-K."

Q. Do you have a code book, by the way, in which all of these designations are kept? A. You say a code book?

Q. Or any kind of a book in which there is any reference to what these designations mean? A. Do we have in the office?

Q. Yes. A. Yes, there is a book that shows the code number and the notices that were sent out under that—

Mr. Gordon: No, I don't think the witness understood the question.

The Court: Well, the question in substance is, when it "4 list" on Exhibit 156 and "13-K" on Exhibit 157 for identification, whether there is some book in which you kept such symbols or designations with indication of their meaning.

The Witness: No, no; definitely not.

Q. In any case, as I understand your testimony, that list of names was used in the sense that notices were sent out to the people whose names appear on it as of the time that the designation "13-K" was put on it; is that right, sir?

Mr. Gordon: I submit he has not so testified, (3509) your Honor.

Mr. Gladstein: Well, I am asking.

The Court: No, he has not so testified, but the question is whether he did that.

Read the question.

(Question read.)

The Court: You will have to reframe it because it is based on the assumption that he has testified to that, whereas he did not.

Mr. Gladstein: Very well, I will reframe it.

*Joseph F. McKenzie—for Government on Challenge—Cross*

*By Mr. Gladstein:*

Q. Is it true that the designation "13-K" was placed on the exhibit you hold in your hands—what is that number, by the way, 157? A. Yes.

Q. (Continuing) At the time that notices were sent out to the people whose names appear on them?

Mr. Gordon: That is objected to, your Honor, as assuming a state of facts not in evidence, and Mr. Gladstein knows that.

The Court: Well, was that symbol put on there at the time that notices were mailed to the persons on that list—or let me put it differently: Is there any way you can tell whether notices were mailed to the people whose names appeared on that list?

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

(3510) Q. How can you tell? A. This is not my list.

Q. It is not what? A. This is not a list that I was using when I was in the office.

Q. Whose list is it? A. I don't know.

Q. Do you mean it came in at a time when you were not in the office? A. It may have come in while I was there, but that 13-K was not on there during my time.

Q. Was it before your time or during your absence in the service?

Mr. Gordon: If he knows.

A. I don't know.

Q. Oh, I am sure that you understand that every question I ask assumes that you are to answer only as to your knowledge. If you don't know, just say so. A. I don't know on this one.

Q. Well, it would be a simple matter, would it not, sir, to simply check the names against your history cards and thereby ascertain whether or not these people were given notices, did come in and qualify, and did become jurors; isn't that right?

Mr. Gordon: That is objected to, your Honor. The history card shows whether a man is qualified. It does not show whether he was qualified because that list was used.

*Joseph F. McKenzie—for Government on Challenge—Cross*

The Court: I know. I realize that.

(3511) Mr. Gladstein: May he answer the question.

The Court: I will sustain the objection to the question.

*By Mr. Gladstein:*

Q. Did you keep a record in your office of the time when and the names of the persons to whom notices were sent to come in and qualify? A. Not at all times.

Q. Well, during what times did you do that? A. I kept it from February of 1947 to the latter part of 1948.

Q. And not at all before? A. In the keeping of these notices sent out?

Q. That is what I am talking about. A. No, I did not.

Q. In other words, you have no records in your office at any time prior to February 1947 as to the names of the people to whom you sent out notices to come in and qualify for jury service? A. I did not keep any records.

Q. You were at that time for some time before February 1947 the jury clerk; is that right? Jury clerk? A. Prior to 1937?

Q. '47. A. Prior to 1947? I was jury clerk from the early part of 1940 down to the present time.

Q. Yes, and you still are, isn't that right, sir? A. That is correct.

Q. And as jury clerk your work involves working with (3512) the selection of jurors, isn't that right? A. That is true.

Q. And you are in charge of an office in which that work is done; isn't that so? A. That is correct.

Q. And is there made available to you from time to time one or more deputies to assist you in that work? A. Yes.

Q. And these records are under your immediate custody, isn't that right, sir? A. That is correct.

Q. And these records are kept in your own office, indeed, isn't that right? A. That is true.

Q. Now, is it your testimony that at no time prior to February 1947 did you keep a record in your office or did you have anyone else keep one for you of the names of the persons to whom from time to time you sent out notices to

*Joseph F. McKenzie—for Government on Challenge—Cross*

come in and appear for the purpose of qualifying for jury service? Yes or no, please. A. I can't answer that yes or no.

Q. Well, answer it any way you can. A. Prior to February of 1947 I never kept any records of notices mailed out, to where they were mailed.

Mr. Gordon: I don't think the witness understands the question again, your Honor. The question—

Mr. Gladstein: How does Mr. Gordon know whether the witness understands the question?

(3513) Mr. Gordon: Because his answer was not responsive, that is how I know. The question included this significant fact—Did he have any record of the names of people to whom notices were sent? And the witness said that prior to a certain date he kept no record of the number of notices that were sent.

The Court: Overruled.

Q. Or of the names of the persons to whom notices were sent; isn't that right? A. You better give me that question again.

Q. Now Mr. McKenzie, did you keep in any handy place, or in any form, be it a list or in a ledger book or on cards or in any other written manner, a record from time to time of the names of the persons to whom you sent out notices to come in and qualify as jurors? Did you?

The Court: You mean all the persons?

Mr. Gladstein: Yes, all the persons.

A. Do you mean if these lists were kept or if a book was kept—

Q. You said you kept these lists. Let me put it to you this way: Did you from time to time make a record of the number of persons to whom you sent out, say, in any particular month, a notice to come in to appear? A. I did from early February 1947 down to date.

(3514) Q. But not before? A. I did not.

Q. And did you at any time prior to February 1947 keep in some particular place a record of the names of the per-

*Joseph F. McKenzie—for Government on Challenge—Cross*

sons to whom you sent out notices to come in and appear to qualify as jurors?

The Court: You mean all persons?

Mr. Gladstein: Yes, all persons.

A. No.

Q. Or any of them, for that matter? A. Well, those lists, for example.

Q. Well, what about these lists? A. Well, they are kept.

Q. They are kept? A. Yes.

Q. In other words, notations are made on these lists which will indicate who the persons were, and how many of them, to whom notices were sent out; isn't that right?

A. No.

Q. Now Mr. McKenzie, isn't it a fact that a check mark or the drawing out of a name on one or another of these lists, such as those obtained from the Federal Grand Jury Association, took place as a means of recording the fact that that person had been sent a notice and had come in and become a juror; isn't that right? A. They may not have all been sent for on that list.

Q. How am I to know—will you take a look at that (3515) record, that Exhibit 157, and tell me what it shows on its face that indicates whether a particular person was sent a notice to come in as a juror?

Mr. Gordon: This is objected to because—

The Court: Sustained. Sustained.

Does it indicate on its face that notices were sent or that notices were not sent?

Mr. Gordon: May I remind your Honor that he said that he never used this particular list.

The Court: I know he did.

The Witness: I couldn't tell from this.

Mr. Gladstein: I will pass this for a moment. Will you mark this.

Mr. Isserman: May I see the exhibit, please?

(Exhibit handed to Mr. Isserman.)

(Marked Defendants' Challenge Exhibit 158 for identification.)

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. Mr. McKenzie, did anyone else in your office keep any record of notices sent to prospective jurors prior to February 1947? A. Yes.

Q. Who? A. A Mr. Borman while I was in the armed forces.

Q. During what period? A. I would say that was from the latter part of June or early part of July until the middle of—July of 1942 until the middle of April (3516) of 1943.

Q. Was that the only period that anyone kept a record of the notices sent out to prospective jurors? A. In my time, yes.

The Court: Does that mean all prospective jurors?

Mr. Gladstein: Yes.

The Court: I don't know whether the witness understood that.

Q. By the way, what form did the notice to the prospective juror take? Was there a form of some sort? A. You mean a qualification notice?

Q. Yes. What is the first notice, a qualification notice? A. A qualification notice.

Q. All right. Now was a carbon copy kept in the office of the notice, the qualification notice that was sent out to prospective jurors? A. No.

Q. What record did you keep to enable you to know at any time who the persons were to whom you had sent these notices? A. They are either listed in the registered voting book, they were on lists, or they were on cards that were compiled from any book that they may have taken names from.

Q. On cards? There were cards made? A. Yes, there were.

(3517) Q. What kind of cards were those? A. These were small 2 by 4 cards that were used instead of lists.

Q. When you say "they" you mean you, don't you? A. Whoever in my office compiled it.

Q. And those in your possession or in the custody of the office? A. The cards themselves that these names had been sent from?

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. Yes. A. Some may be there and some not.

Q. Well, how were they designated? Where can they be found? A. In the "off" file.

Q. In the "off" file? A. Yes.

Q. What will appear in the "off" file that will indicate the people to whom qualification notices were sent? A. That is provided there on these 2 by 4 cards and not on lists or from the registered voting book.

Q. What is there that will indicate that? A. The name and address of the prospective juror, or the potential juror, and a number stating as to the number that was on the qualification notice.

Q. Was a number put on the qualification notice? A. Yes.

Q. Well, what did that number mean? A. When the party came in with the qualification notice it was checked off the list or checked—

Q. Checked off what list? A. Whatever list was (3518) being used, the registered voting book or the card.

Q. I see. In other words, if you were sending a qualification notice to a person whose name appears on that last exhibit, which is designated "13-K"—

Mr. Gordon: No, it is designated 157 for identification, and the question is objected to, your Honor.

Mr. Gladstein: I am sorry.

Q. I want you to look at 157 for identification. Is it true that on the upper lefthand corner there is a designation 13-K? A. Yes.

Q. All right. Now if a notice to qualify was sent to anybody whose name appears on that list, is it true that the designation "13-K" would be on the notice sent to the prospective juror?

Mr. Gordon: Objection.

The Court: Well, if he knows, of course.

Mr. Gladstein: Of course, if he knows.

A. I don't know.



*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. Wasn't it the practice, wasn't it your practice to put the designation of the list that contained the prospective juror's name on the qualification notice that was sent to the juror?

Mr. Gordon: What useful purpose can be served by arguing with the witness about an exhibit he never saw, (3519) your Honor, except to consume time?

Mr. Gladstein: I am now asking about practice, your Honor.

The Court: I will sustain the objection. It all comes down to that 13-K. He has already testified about that.

Q. Well, Mr. McKenzie, isn't it a fact that if a person to whom you sent a qualification notice failed to respond, you would then send a notice of the possibility of court action by way of bench warrant, isn't that true? A. No.

Q. Did you ever send such notices? A. Bench warrant? No.

Q. Did you ever send notice— A. We sent a final notice.

Q. Do you have a form of that? A. It is the same notice with "Final" stamped on the qualification notice.

Q. All right. And you therefore had a record, did you not—you must have had a record of the persons to whom you had sent the first qualifying notice in order to enable you to determine which of those had not responded and therefore should be sent the final notice; that is true, isn't it? A. That is correct.

Q. Now, where did you keep your record of those to whom you sent the first notice, the qualifying notice? (3520) A. On the list of the registered voters.

Q. Where else? A. On the lists that may have been used.

Q. And when you say the lists that may have been used, you mean such lists as the one that is in evidence, such as 156; is that right? A. Let me see if that is one we had occasion to—

*Joseph F. McKenzie—for Government on Challenge—Cross*

The Court: The blue one is 156.

Mr. Gladstein: The blue one.

Q. Is that right? A. I want to see if that is one that we had occasion to use during my time.

Q. It says April 10, 1941, on it. Is that before your time or during your time?

Mr. Gordon: Now that assumes that that is when the list was used, your Honor. There has been no testimony—

The Court: I think the witness understands. He asked for it to see if he can tell.

The Witness: The date on here of April 10, 1941, does not indicate the date that this list was actually used.

Q. What date does it indicate, the date you received it, the date it was compiled? A. I would say that was the date that whoever made it up put it on. I don't know if it is the date I received it or when.

Q. Of course, you say there may have been covering letters that would indicate just when you received it; is (3521) that right? Is that right, sir? A. Not in all instances would they be letters.

Q. In some? A. Maybe.

Q. Were there telephone calls also? A. I don't know.

Q. Don't you remember whether at any time you had telephone communication with the Federal Grand Jury Association in connection with lists they were either sending you, had sent you, or were about to send you? A. I don't know.

Q. You don't know. Now did you keep anywhere a record of the date corresponding to the time when you put the designation on a particular list?

The Court: Well, you keep calling that a designation. I don't know—

Mr. Gladstein: What do you want to call it, your Honor?

The Court: Well, it has some writing on there.

Mr. Gladstein: Yes.

*Joseph F. McKenzie—for Government on Challenge—Cross*

The Court: "13-K" is on there. That is what you are talking about?

Mr. Gladstein: This one is "4," No. 4.

The Court: This is another one.

Mr. Gladstein: This is the one that is in evidence.

The Court: That has "4 list" on?

(3522) Mr. Gladstein: That is right.

The Court: What is it you are asking him about that?

Mr. Gladstein: Will you repeat the question.

(Question read.)

A. No.

Q. Now, these lists—did you ever mark or stamp on them any date to indicate the time as of which the names on the lists were being sent notices? A. I don't know.

Mr. Gordon: May the record show that Mr. Gladstein has gone to the table containing the papers which are subpoenaed and has selected one of the papers?

The Court: Yes.

Mr. Gordon: After going through the pile.

Mr. Gladstein: I am going through them all.

Mr. Gordon: Mr. Gladstein says he is going through them all your Honor, and that was the basis of my objection earlier.

The Court: Well, whether he is going through them all or not, we won't decide now.

Mr. Gladstein: Will you mark this, please, for identification.

(Marked Defendants' Challenge Exhibit 159 for (3523) identification.)

*By Mr. Gladstein:*

Q. Mr. McKenzie, isn't it a fact that you made up a separate list on which you set forth the names and addresses of prospective jurors who were Negro?

Mr. Gordon: That is objected to. It does not appear that he made up any of these lists.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Mr. Gladstein: I am asking him.

Mr. Gordon: Oh, I am sorry.

The Court: You mean a list on which all the Negro prospective or actual jurors were enumerated?

Mr. Gladstein: I think the question is very clear, your Honor. Do you want the question?

The Court: You see, when you ask a question as to whether a list was this or that, it might mean some, it might mean all, I don't know. You might quote it back to me afterward that he said all were when he did not mean that.

Mr. Gladstein: I withdraw that.

Q. I show you Challenge Exhibit 159 for identification. Did that come from your office? A. Yes, it did.

Q. It consists of two pages, does it not? A. That is correct.

Q. Now, it is a fact, isn't it, that one of those pages was typed in your office? A. I don't know.

(3524) Q. It is a fact that one of them was typed not in your office, isn't that right, sir? A. I don't know.

Q. Did you type that? A. No, I did not.

Q. Were you present in the office as of about the date when that purports to have been made? A. I was in the office at that time.

Q. Now, what does it say at the top of the first page?

A. The first page reads "Colored List."

Q. And how many names and addresses appear on that?

A. 13.

Q. And what symbols or designations appear on that?

A. "B-1"—

Q. The designation. A. "B."

Q. The designation is the letter B, isn't it? A. That is right.

Q. And that designation appears in front of each of those names, doesn't it? A. Along with the number.

Q. Yes; and the number goes from 1 to 13, doesn't it?

A. That is correct.

Q. Now, does it say anything at the bottom of that page that would indicate some date corresponding to the time

*Joseph F. McKenzie—for Government on Challenge—Cross*

that page was made? A. It says "Returnable March 7, 1941."

The Court: We will take our recess now.

(Short recess.)

(3525) *By Mr. Gladstein:*

Q. Mr. McKenzie, I have drawn up a list of about 50 names and addresses and I will ask you at the convenience of your deputy to produce later in the day, if you will, history cards of these names.

The Court: Are you going to leave that colored list?

Mr. Gladstein: No. I just wanted to give this to the witness at the present time so that he will have ample time, say perhaps during the noon hour, or perhaps he can give it to us by having his deputy get it.

Mr. Crockett: And also the questionnaire.

Mr. Gladstein: And the questionnaires for those particular persons. Will you do that, Mr. McKenzie?

The Court: Let me understand just what it is you are asking him to do.

Mr. Gladstein: I am asking for the questionnaires and the history cards of the jurors whose names appear on that list, your Honor.

The Court: This is a list prepared by you?

Mr. Gladstein: Yes, of names taken from the jury panels. Will it be all right?

The Court: I see no objection to it.

Q. Now, Mr. McKenzie—

The Court: I would like to know about this (3526) colored list.

Mr. Gladstein: I am about to go into it.

The Court: You are keeping the thing in mystery—whether that is supposed to be all the persons of the colored race who were on or whether it is part or what it is.

Mr. Gladstein: I will be very happy to go into that.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. Mr. McKenzie—

Mr. Gordon: Well, I will answer your Honor's question.

Mr. Gladstein: No, just a second, Mr. Gordon.

The Court: I think we had better let the witness do the answering, Mr. Gordon.

Mr. Gladstein: If Mr. Gordon wants to answer he may take the stand.

The Court: No.

Mr. Gordon: Are you calling me as a witness?

The Court: No.

Mr. Gordon: I thought perhaps Mr. Gladstein did not know the answer or there was some mystery about it, but if he knows the answer and doesn't want to answer, why, I will withdraw my statement.

The Court: Well, he is leaving me temporarily with the impression that this list, which happens to be (3527) the one that was on the top of the pile the other day when I went in my chambers during a recess and saw them there, that is, saw the individuals who were in there and this is the same list, I am curious about that, but I gather that I will hear before long.

Mr. Gladstein: Yes.

Q. Now will you look at that exhibit which is 159 for identification. Do you see on it a blue pencil mark or letter after the name of each of these 13 persons? A. I do.

Q. Now in certain instances the letter E appears after the name, isn't that right? A. Yes.

Q. Now based on your experience in the office and your knowledge of the practice followed in your office, what does that letter E mean? A. On this particular list here it means eligible.

Q. Do you see in any case the letter D? A. Yes, I do.

Q. And what does that refer to? A. Deferred.

Q. What? A. Deferred or disqualified.

Q. Deferred or disqualified? A. That is true.

Q. And how would one find out which it was? By examining the questionnaire filled out by that particular person? A. That is true.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Q. And you have such a questionnaire, is that right?  
(3528) A. I have.

Q. Now in certain instances there is no letter but a little check mark placed after the name of the person, is that right, sir? A. That is correct.

Q. What does that mean? A. I don't know.

Q. You mean that based on your experience in that office and your knowledge of the practice followed, you can't tell us what that check mark means?

Mr. Gordon: Of course the record does not show the tone of voice, but it is argumentative, your Honor, and objected to.

Mr. Gladstein: I think the record should show that my tone of voice is gentle, your Honor.

The Court: It is a gentle tone but with a touch of—what shall I say?

Mr. Gordon: Incredulity.

Mr. Gladstein: Could we have the question read to the witness?

The Court: Do you know what that check mark means?

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

Q. Well now, look at the—

The Court: What was the date of that?

The Witness: March 7, 1941.

The Court: 1941.

(3529) Q. Isn't it a fact that you were in the office as a jury clerk, as the jury clerk in March 1941? A. That is right.

Q. And that the use of such lists as 157 for identification—

Mr. Gordon: 159.

Mr. Gladstein: 159. I beg your pardon.

Q. —that the use of such lists as 159 occurred under your immediate supervision and direction; that is true; isn't it? A. Yes.

Q. Yes. And yet you don't know what that check mark means, is that right?

*Joseph F. McKenzie—for Government on Challenge—Cross*

Mr. Gordon: The same objection.

A. No.

The Court: Yes, I will overrule it; but this is the third time he said he didn't know what it meant. I think you had better let it go at that.

Q. Well, at that time, in 1941, in March 1941, how many people besides yourself were working on any of these lists in connection with the selection of jurors? A. I had one assistant and whatever temporary help assigned to me by the clerk of the court.

Q. Who was that assistant? A. Mr. George Tanner.

Q. Well now, as your assistant I suppose he was—by the way, is Mr. Tanner still employed in the clerk's (3530) office? A. No, he is not.

Q. When did he leave the clerk's office? A. I believe in the early part of 1942.

Q. Now did you as Mr. Tanner's superior instruct him as to how he should utilize and what marks he should make upon such lists as No. 159? A. Mr. Tanner used his own way of checking a list.

Q. Did you make the letters E and the letter D that appears on 159? A. Yes, I did.

Q. Well then did you make the check mark too? A. No, I did not.

Q. You just put the E's and the D on and someone else put the check marks on? A. I know the E and the D is my writing, but the check marks I cannot identify them as my check.

Q. Is it possible that you did check that exhibit?

Mr. Gordon: That is highly speculative, your Honor—

A. I don't know—

Mr. Gordon: —and argumentative.

The Court: Sustained. You know, if you are going to take every paper and go through this microscopic examination we will be right back where we were last week. I really can't quite see the occasion for using such depth as to every little detail, but I am (3531) going to allow you to do it with a



*Joseph F. McKenzie—for Government on Challenge—Cross*

certain amount of latitude until I understand what you are getting at.

Q. Did you ever undertake to find out what the check mark after any of the names appearing on Exhibit 159 means? A. No, I have not.

Q. Can it be ascertained whether any of those persons on that list became jurors by reference to history cards? A. Yes, it can.

Q. And it is a fact, isn't it, that some of the persons whose names are on that list designated "Colored List" did become jurors; isn't that right? A. I would say with this E meaning eligible, yes.

Q. Attached to the first page is a second page. Will you please look at that. Do you know who typed up that list, that second page?

Mr. Gordon: That is repetitious, your Honor. He has gone through that. He asked that exact question a half hour ago.

The Court: Sustained.

Mr. Gladstein: I beg your pardon?

The Court: I sustain the objection.

Q. Now the second page contains the same names that you see on the first page but with some biographical data, that is to say, some information concerning the address of the person and where he works, isn't (3532) that right? A. Some have the place of business, others have not.

Q. Yes. For example there is one Leander A. Simms; it says about him that he holds a very responsible position in a wholesale house; that is right, isn't it? A. Yes, that is right.

Q. Did you receive the second page before the first page was made up? A. Yes.

Q. And the first page was made up in your office after you had received the second page, is that right?

Mr. Gordon: That was exactly what he testified he didn't know, your Honor, and Mr. Gladstein knows it and is assuming a state of facts not in evidence.

The Court: That is right.

*Joseph F. McKenzie—for Government on Challenge—Cross*

Mr. Sacher: Are we bound to accept the witness's answer? This is cross-examination.

The Court: No, but you are not entitled to ask him the same question over and over again.

Mr. Gladstein: I don't understand, your Honor. If when I asked him a question before he said he didn't know, now I ask him a question and he says he does know and he answers it, I don't understand that I am bound not to obtain that answer.

Mr. Gordon: Mr. Gladstein cleverly includes two questions in one; in the first part of it he (3533) assumes something which is not in evidence and in the second part he asks something which is quite obvious, "and isn't that correct, sir?" and the witness says yes. And that is what I am objecting to.

The Court: Sustained.

Q. Look at that second page again, Mr. McKenzie. Do you see some writing on it? A. Yes.

Q. Do you recognize whose handwriting that is? A. That is my handwriting.

Q. What does it say? A. It says, "George, kindly send for the above."

Q. And what is the notation or designation that appears after it? A. That is the file mark when it is completed; any paper that is completed I put that mark on to be filed.

Q. Well, what is meant by completion? A. This list here indicates that it had been completed, that all the names on it are checked off or they got some mark on them which indicates it was to be filed away as used.

Q. Checked off with what or against what? A. Against the list.

Q. Against what list? A. This that I hold in my hand.

Q. You mean the first page? A. Yes, the first page.

Q. Who is the George to whom you refer? (3534) A. George was my assistant.

Q. George— A. George Tanner.

Q. So this was a direction to him to send for the people who were on that list, is that it?

The Court: What is this list anyway?