

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: Let me have that book, Mr. McKenzie.

(Witness hands book to Court.)

By the Court:

Q. Now pursuing the subject that I touched upon before the recess, this book, Exhibit 179, and your testimony, indicate, do they not, that large numbers of notices were sent out to persons to come in for purposes of qualification? A. That is right, your Honor.

Q. And then after responses were made and put through the mill, whatever that process was, there came out a much lesser number who really qualified? A. That is true.

Q. Now, as I understood your testimony on direct examination—or perhaps it was cross, I forget which—it was to the effect that of all the thousands of notices sent out, as indicated by this book and by your testimony, only about 15 to 20 per cent qualified? A. That is correct, your Honor.

Q. Now you have also told me that there is no way of telling from your records as to any particular Assembly District how many qualified of the number to whom notices were sent? A. That is true, your Honor.

Q. You only have the aggregate number who qualified? A. That is true, your Honor.

(3696) Q. So that, for example, in the Ninth Assembly District, 900 notices were sent out. For all you know only perhaps 15 or 20 persons qualified, or perhaps a hundred persons qualified, or perhaps more? A. That is true.

Q. That is all a matter of speculation, as your records are silent on the subject? A. That is true, your Honor.

Mr. Gladstein: Now, I have asked the witness, and I think that he responded and gave the figure as to the number of notices sent out to people in the 15th Assembly District as being a figure in excess of 4,000—

The Court: 4,075.

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By Mr. Gladstein:

Q. Is that right? A. Yes.

Mr. Gladstein: Now I will ask the Court to take judicial notice of the fact that the 15th Assembly District is represented in the State Legislature of the State of New York by a Republican.

The Court: Well, if that is so I will do so.

Mr. Gladstein: Very well.

The Court: I will take your word for it.

Mr. Gladstein: Now, your Honor, as a preface to the next two or three questions I will call your Honor's attention to the fact that the First, Eighth (3697) and Ninth Assembly Districts are in substantial part contained within the 17th Congressional District.

The Court: The First, Eighth and Ninth Assembly Districts?

Mr. Gladstein: Yes; a portion of the Eighth and substantially all of the Ninth and substantially all of the First.

The Court: Generally in the—

Mr. Gladstein: Generally in the 17th Congressional District.

(3698) Q. Now, Mr. McKenzie, during the two-year period we are talking about, 1947 and 1948, how many notices did you send out to people in the First Assembly District?

The Court: He has given you that. 2850.

Q. And in the 8th? A. 650.

Q. And in the 9th? A. 900.

The Court: Yes, we have that already.

Mr. Gordon: You can't double it by repeating it, your Honor.

The Court: No. I have been taking these all down. You started with the 9th; you covered the 9th, the 15th, the 1st and the 8th.

The Witness: That figure I gave you, that is 605.

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The Court: 650?

The Witness: It should be 605.

The Court: All right.

Q. Now turning for a moment to the Bronx, to which of the Assembly Districts located therein did you send the largest number of notices during this two-year period? A. The 9th Assembly District of the Bronx.

Q. And how many notices did you send? A. 4500.

Q. And did you send any to the 10th? A. This would indicate yes.

(3699) Q. How many? A. 1970.

Mr. Gladstein: I will ask the Court to take judicial notice of the fact that Parkchester is located partly in the 9th and partly in the 10th Assembly Districts.

Mr. Gordon: Will your Honor take judicial notice that those two Assembly Districts are the largest in the Bronx?

The Court: Yes, I will take judicial notice of both facts.

Q. How many notices during that period did you send out to people whose names you obtained from the Directory of Corporation Directors? A. From February 1947 to October 1948 Directory of Directors shows 1699.

Q. How many do your records show that you obtained from the membership lists of trade unions? A. There is nothing to indicate on the list here.

Mr. Gordon: Is there anything to indicate that any trade unions ever submitted any lists, your Honor? That is completely irrelevant.

The Court: I did not know trade unions had directories that were published for distribution.

Mr. Gladstein: I said membership lists.

Mr. Gordon: Membership lists. I think that in view of the fact that there has been no testimony that any trade union ever tried to get someone on the jury, that (3700) the question should be—

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The Court: I think it sufficiently appears that the witness did not in his operation of the system here seek to get directories of trade unions or membership lists of trade unions.

Q. How many do your records show you sent to people whose names you got out of the address telephone book?

A. For the Manhattan Telephone Directory 1150.

Q. Did you get some that you called miscellaneous or miscellaneous source? A. Miscellaneous sources from the Assembly Districts of Manhattan and Bronx.

Q. How many? A. Miscellaneous 155.

Q. How can those be identified as to Assembly District? A. They were all odd lots.

Q. Odd lots from what? A. From each Assembly District there would be probably 115 or 116. I would send out the hundred and put the 16 in with a batch to add a round figure and mail them all out then under miscellaneous or mixed or odd lots, whatever they may have used.

Q. Miscellaneous, odd lots, mixed, would represent persons who came from one or another of the registered lists of Assembly Districts to which you sent notices, these little miscellaneous groups being left over from an odd lot, is that it? A. From various Assembly Districts, the odd lots on (3701) those districts, that is correct.

Q. However, those miscellaneous, mixed and odd lot groups consist of people whose names came from the very same registered lists of voters in the very same Assembly Districts to which your records show you sent notices, is that correct? A. That is true.

The Court: They would have to be.

Q. Does that last answer cover also the item of mixed? A. Mixed, that applies the same. Miscellaneous and mixed would cover those particular items.

The Court: Now you have got this whispering again. Let me just see now.

Mr. Gladstein: I think the testimony of the witness plainly clarifies the exhibit. And I will now offer in evidence that exhibit, your Honor.

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The Court: Let me see what this word mixed means. You had a little talking session there, I think you understood it but I didn't get it.

What is the "mixed"?

The Witness: Mixed is the same as miscellaneous that I explained.

The Court: So really we ought to add miscellaneous and mixed together.

The Witness: They should, but the book states them in one page as mixed and over in another page it is (3702) referred to as miscellaneous.

The Court: I see. That is very clear. All right, the exhibit may be marked in evidence.

(Defendants' Challenge Exhibit 182 for identification received in evidence.)

Q. Now on your table, Mr. McKenzie, I see a lot of lists of registered voters. Are those the ones you made use of during 1947 and 1948? A. That is correct.

Mr. Gladstein: Now one of these has been marked, your Honor, and it is in evidence at 183, and I suggest that perhaps the others be added to it as 183-A, B, C, D, if that will be satisfactory.

The Witness: Are you going to take all of them?

Mr. Gladstein: Yes.

The Court: I see no objection to that. That is 186-A, B, C, D?

Mr. Gladstein: I think that is the way to do it. They are all registered lists. If possible, I suggest they be marked to have the Manhattan group first and the Bronx group next, but I don't want to put you to any trouble about it.

The Clerk: It will be more than D when I get through.

The Court: Yes, I see what it is; but we will wait until they are marked and then I can make the notation. (3703) Perhaps it is better to have these papers marked during the recess. We will reserve the number for them. Mr. Borman tells

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me that the arrangement of them will take a little time. So, Mr. Gladstein, you may proceed.

Mr. Gladstein: Your Honor, may my examination be interrupted? Mr. Crockett has another matter connected with the case this afternoon and he has some questions he would like to put to Mr. McKenzie. It would convenience both of us greatly.

The Court: Now as I understand it, you are not going to have a lot of repetition here?

Mr. Gladstein: Oh, no.

The Court: And you gentlemen have this organized so that you can do it expeditiously. And with that understanding I will allow him to do that.

Mr. Gladstein: I will come back—

The Court: I don't want anything like what we had a little earlier. Now, just go along and organize this thing in an expeditious and reasonable way. I am going to let you conduct your cross-examination in whatever way you want to do it.

Mr. Gladstein: Very well.

Mr. McGohey: There is no objection from the Government, your Honor.

(3704) *By Mr. Crockett:*

Q. Mr. McKenzie, Challenge Exhibit No. 181 is an envelope that contains—

Mr. Sacher: Will you speak up, Mr. Crockett. I can't hear you.

Q.—Challenge Exhibit No. 181 is an envelope that contains qualification questionnaires; they are matters of record in your office, is that right? A. That is correct.

Q. And those are the questionnaires for the persons whose names appear on Challenge Exhibit No. 181-A, is that right? A. That is correct.

Mr. Crockett: If the Court please, I should like to offer in evidence individually each of these qualification questionnaires and have them marked as Defendants' Challenge Exhibits.

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The Court: Do you think it is necessary to do that?

Mr. Crockett: I think so, your Honor, because I do want to ask some questions concerning each one.

The Court: Well, let us try the first one and see how it goes. I do not want to have such a multiplicity of exhibits here that the thing gets unmanageable; but if it develops that the line of examination is within reasonable bounds I shall permit you to do it.

(3705) Mr. Crockett: This is a questionnaire filled out presumably by Richard Sypron Bair. I should like to have that marked for identification.

(Marked Defendants' Challenge Exhibit 184 for identification.)

Mr. Crockett: I offer it in evidence.

The Court: That is the questionnaire and also the card, or just the questionnaire?

Mr. Crockett: That is the questionnaire and the card. The history card. I am sorry.

The Court: You had better mark them A and B.

(Marked Defendants' Challenge Exhibits 184-A and 184-B for identification.)

The Court: 184-A and B?

The Clerk: Yes, your Honor.

The Court: You are reserving 186 for the others?

The Clerk: 183.

The Court: 183. Then I got that wrong.

Mr. Gordon: No objection.

Mr. Crockett: I offer it in evidence.

(Defendants' Challenge Exhibits 184-A and 184-B for identification received in evidence.)

Q. Now, Mr. McKenzie, I show you Defendants'—

Mr. Sacher: Louder, please. I can't hear you, Mr. Crockett.

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(3706) Q. I show you Defendants' Challenge Exhibit—

The Court: You had better do what I suggested to Mr. Gladstein, then everybody can hear.

Mr. McGohey: May I ask your Honor: these are the papers that Mr. McKenzie produced this morning, are they not, Mr. Crockett?

Mr. Crockett: That is right.

Mr. McGohey: Thank you.

Q. You have before you, Mr. McKenzie, Defendants' Challenge Exhibit No. 184-A, is that right? A. That is correct.

Q. And that is the qualification questionnaire filled out by what person? A. Richard Sypron Bair, B-a-i-r.

Q. And that questionnaire is sworn to, is it not? A. It is, as of May 26, 1942.

Q. Will you state who took the acknowledgment on that questionnaire? A. I did.

Q. Your signature appears on there? A. That is correct.

Q. Directly below your signature is there in a circle the letter C? A. That is correct.

Q. Now I show you the remaining qualification questionnaires that were included in the envelope marked Challenge Exhibit No. 181, and I should like to have you separate those questionnaires into two piles, one, those (3707) that have a C on them and those that do not have a C on them in a circle. A. (Witness complies.) All right, sir.

Q. Now you saw the prospective juror Mr. Bair at the time you took his acknowledgement, did you not? A. Yes, I did.

Q. Was he a Negro or was he white?

Mr. Gordon: Your Honor—

The Court: Well, now, they are going to be able to tell without asking him, but it is all right with me. I think I can tell generally myself. So I am going to allow the question, even though at an earlier stage of the proceedings it was insisted that the person be asked the specific question.

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Mr. Gordon: It was insisted by Mr. Crockett.
The Court: I know. But I am going to allow it, just the same.

Mr. Crockett: Perhaps I can reframe it.

The Court: You do not need to reframe it.

Mr. Crockett: Very well.

The Court: I think I can tell, generally speaking, when a person is a Negro or not, and that is all that is being asked here, and I think it is perfectly proper.

Mr. Crockett: There is a difference, your Honor; at the time I objected it was to the Court's statement because it was in the nature of testimony by the (3708) Court.

The Court: Well, it did seem to me at the time it was a little bit ridiculous, when I see a man take the stand who looks to me like a white man and then you have to ask him the question. I did think it was silly and I said so. But now you are asking him if he noticed whether the man was a Negro or not, and I am saying it is a perfectly proper question, and it is.

Q. Will you answer the question?

The Court: Now what is the answer?

The Witness: Will you give me that question again?

The Court: Whether you saw he was a Negro.

A. From the indication on this—from the mark on this application it would indicate that he was a Negro.

Q. So that C on there means that it is a Negro? A. C on here would mean that the juror is a Negro.

Q. You placed the C on there, did you not, Mr. McKenzie? A. On this particular application, the questionnaire, I did.

Mr. Crockett: Your Honor, in view of the testimony that the witness has just given I move that all of the questionnaires in the jury commissioner's office be impounded and that the Court grant to me and my colleagues, in association with the United States Attorney, (3709) a reasonable opportunity

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to go through each of these qualification questionnaires in order to pick out how many of them have that notation C on there.

The Court: I will deny that application. This witness has testified, I think it was yesterday, that there was no way of telling, that some of them had this mark on as was indicated by the few lists produced yesterday, but as I understood him that there was no general practice throughout of doing that. So that I do not suppose it would develop anything.

Mr. Crockett: I am not speaking about the lists that were introduced in evidence yesterday, your Honor, which presumably were sent by the Federal Grand Jury Association. I am talking about the official records of this court, the questionnaire that was filled out by a prospective juror and at that time the witness himself, who is the jury commissioner, took cognizance of the prospective jurors' race and made a notation on the questionnaire to that effect.

The Court: Yes; you see, Mr. Crockett, if there was proof that that was done throughout the whole period so that all you had to do was look at the questionnaires to see, I might consider that more seriously. But as the testimony is that you can't do that, I am not going to permit it.

(3710) Mr. Crockett: The proof can only be ascertained, your Honor, by going through the questionnaires and finding out.

The Court: I will not allow it.

Q. Mr. McKenzie, how many questionnaires do you have there with the letter C on them? A. (Referring to papers.) 30.

Q. Now those questionnaires are always kept on hand, regularly available, in your office, are they not? A. Yes, they are.

Q. So that if at any time it was desired to ascertain the race of a juror you could by referring to his questionnaire find out what his race was?

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Mr. Gordon: That is objected to as very speculative and in view of the proof it is contrary to the testimony.

The Court: It seems to me that is the question that I asked yesterday or the day before to which he answered that you could not, but I will permit it again. Maybe there is some misunderstanding.

Mr. Crockett: I recall that your Honor's question had to do with the history cards.

The Court: I don't think so.

Mr. Crockett: I am talking about the qualification questionnaires on which the witness has (3711) admitted that a C, indicating the race of the juror was placed.

Mr. Gordon: One juror. 30 I think. 30.

The Court: I asked him, according to my notes, in the morning session of February 15th, whether there was any way of telling how many Negroes were on the full jury lists and he said there was not. I take it that means, if it means anything, that you just can't go through all those questionnaires and ascertain it. But you may ask him again.

Mr. Crockett: Will you read the question to the witness.

Q. (Read.) A. No, you could not.

Mr. Crockett: May I see Challenge Exhibits 159, 163 and 162? Do you have them, Mr. Borman?

The Clerk: What were the numbers?

Mr. Crockett: Challenge Exhibits 159, 163 and 162.

The Court: Let's see. 163 and 162. Let me see if I can identify them here.

Yes. Those are, respectively, 159 is that list of 13 names returnable March 7, 1941, that was called "Colored List" on which the names were respectively marked B-1 to B-13 inclusive.

162 is the list of 31 names submitted by the (3712) Federal Grand Jurors Association and marked "6 List." And 163 is the list of four names dated June 17, 1941, marked "Colored Men" or

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"Males," I forget which, also submitted by the Federal Grand Jurors Association.

Am I right, Mr. Crockett?

Mr. Crockett: That is right, your Honor.

If your Honor please, I should like at this time to offer in evidence each of these qualification lists that were included in the envelope marked Challenge Exhibit 181.

The Court: Only the ones with the C on?

Mr. Crockett: No. All of them.

The Court: All of them.

Mr. Crockett: There are some that do not have the C on.

Mr. McGohey: The Government has no objection.

The Court: All right, you may do that. I am a little puzzled as to the purpose, but you may mark them.

Mr. Gordon: I understand Mr. Crockett made the representation this morning that the names of all those people were colored people, taken from "Colored Lists."

Mr. Crockett: No, I did not.

The Court: No.

Mr. Gordon: Was it Mr. Gladstein?

Mr. Crockett: I don't think Mr. Gladstein did.

(3713) The Court: I don't think so, Mr. Gordon. I did not so understand it. I was wondering what this was supposed to be, but I do not think Mr. Crockett or Mr. Gladstein stated that.

Mr. Gordon: My recollection is that Mr. Gladstein said that all the people on that list which they had given to Mr. McKenzie were colored people.

Mr. Crockett: Well, if Mr. Gladstein made such a statement he was mistaken. As a matter of fact I prepared this list and gave it to Mr. Gladstein to request that the witness bring in those qualification questionnaires.

The Court: Yes and you did not understand that they were all colored persons?

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Mr. Crockett: I did not. I am prepared to state for the record, your Honor, that the list represents the names of jurors on the 30 panels that were testified to here in our direct examination who resided in the 22nd Congressional District.

Mr. Gordon: Mr. Crockett is prepared to testify as to that, your Honor?

Mr. Crockett: No. I said I am prepared to state it for the record. If you object, then I will not press it.

Mr. Gordon: Then I object to it.

The Court: Let me just get myself straightened out. How many names are on that list, Mr. Crockett, (3714) approximately?

Mr. Crockett: I would say approximately 45.

The Court: All right.

Mr. Crockett: Your Honor will recall that there were four names with which no questionnaire or history card was found by Mr. McKenzie.

The Court: Yes, I do. The 22nd Congressional District, you said.

Mr. Crockett: That is right.

The Court: We will just take that as an indication. That is not testimony, that is just your representation, which is all right. Now, go on from there. You have got these three exhibits now that you asked for and the clerk is going to mark in evidence all of the—

Mr. Crockett: Can't we do it all at one time, your Honor, to save time?

The Court: Yes, he may do it now.

Mr. Gordon: Why not mark the envelope with its contents, your Honor?

The Court: But he is only offering part of them now.

Mr. Crockett: I am offering all of them, but I would like to have them marked individually because I desire to ask a question about each one.

The Court: Well, you may do that. We will (3715) mark them consecutively.

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Mr. McGohey: I think that is better, your Honor, and we will know what we are talking about.

The Court: Yes.

The Clerk: The questionnaire will be A and the history card will be B.

The Court: That is right. As you mark a few of them hand them up to me so that I can be looking at them.

The Clerk: These will be A and B, 185 to and including 226-A and B.

The Court: I suggest, Mr. Crockett, that while Mr. Borman is marking those you may pursue your inquiries as to those three exhibits, 159, 163 and 162 which have been handed to you.

Q. I show you, Mr. McKenzie, Challenge Exhibit No. 159. I believe you testified yesterday that the second page of that exhibit was received in your office and then the first page was prepared, is that right? A. That is correct.

Q. You also testified that you did not know what the check marks on the first page indicated, is that right? A. Yes, that is so.

Q. Could it be possible that those check marks indicate that notice to come in and qualify was sent to each person whose name is checked there?

(3716) Mr. Gordon: That is objected to, your Honor.

The Court: Sustained.

Q. Are you prepared to say that notice to come in and "testify" was not sent to each person whose name is checked there? A. No, I am not.

Mr. Gordon: To testify?

Mr. Crockett: To come in and qualify I said.

Mr. Gordon: He said, to come in and testify.

The Court: Well, he meant "to qualify."

Q. If such a notice were sent and the person came in and qualified there would be a history card for the person, would there not? A. Yes, there would.

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Mr. Crockett: May I see the questionnaire for Roger W. Flood?

The Court: That is 187-A and B?

The Clerk: It is not numbered yet, your Honor.

The Court: All right. You may use it and we will give it a number in due course. It is sufficiently identified by the name.

Q. Now, at the time the first page of Challenge Exhibit No. 159 was prepared in your office—it was prepared in your office, is that right? A. The first page?

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

Q. And it was in your office that the designation (3717) "Colored List" was placed at the top, is that right? A. That is correct.

Q. Was there any previous check made to ascertain whether or not each of the 13 names on the first page of Challenge Exhibit 159 were Negroes? A. We did not check the Negroes; we checked the files to see if the man was ever on the jury or had ever been taken off at any time.

Q. You interview the man when he comes in, do you not? A. Yes.

Q. And you can tell from the interview whether or not he is a Negro or a white person, can you not? A. That is correct.

Q. Now I ask you again, at the time the name "Colored List" was placed up at the top of the first page of Challenge Exhibit 159 had there been a previous determination that each of the 13 persons whose names appear on that list were Negroes? A. They had been checked in the Off file and the active file, but not checked to determine if they were Negroes.

Q. You see the name of Roger W. Flood on that first list, do you not? A. I do.

Q. I show you the questionnaire for a Roger W. Flood. I ask you if that is the same Roger W. Flood whose name appears on the first page of Challenge Exhibit 159? (3718) A. That is correct.

Q. And the C on the questionnaire for Roger W. Flood indicates that he is a Negro, is that right? A. That is correct.

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Mr. Crockett: Do you have the questionnaire for Wilbur Coleman?

The Court: Wilbur Coleman?

Mr. Crockett: Coleman.

The Court: May I have that exhibit which is the list, 159? Is that around here somewhere?

Mr. Crockett: I think the witness has it.

The Court: That is the two pages.

The Witness: No. 159, your Honor.

The Court: 159, here it is.

Q. I show you Defendants' Challenge Exhibit No. 190-A which purports to be the qualification questionnaire of Wilbur Coleman. I ask you if there is not the designation C, meaning Negro, on that questionnaire? A. Yes, that is correct.

Q. And that Wilbur F. Coleman is the same Wilbur F. Coleman whose name appears on page 1 of Challenge Exhibit No. 159, is that right? A. Yes, that is so.

Q. And there is a check mark after his name, is that right? A. That is so.

Q. So that check mark might indicate that a notice (3719) to come in and qualify was sent to him?

Mr. Gordon: Objected to.

The Court: That was the objection made before and sustained. The witness has testified that he did not know anything about that. What it might be or what it might not be is a matter of inference which I may draw or you may draw, but don't ask him the same question because I have ruled on it.

What is the date of the Coleman questionnaire?

The Witness: March 7, 1941.

The Court: Thank you.

Q. Mr. McKenzie, what does the check mark beside the name of Wilbur F. Coleman on Challenge Exhibit No. 159 mean?

Mr. Gordon: That is objected to as repetitious.

The Court: Sustained.

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Q. Now I believe you testified with reference to Challenge Exhibit 159 that the E which appears besides the names of some of the persons on there was placed there by you, is that right? A. The assistant might—

Q. I believe you said it was in your handwriting. A. On this particular exhibit? Pardon me. I am referring to the history card. This particular one is my E, yes.

The Court: Meaning what exhibit?

The Witness: Exhibit 159.

(3720) The Court: 159.

Q. You also testified that that E indicated that the person was eligible for jury duty? A. That is correct.

Q. Can you explain why there was no E opposite the name of Wilbur F. Coleman? A. No, I cannot.

Q. But he was eligible for jury duty? A. He qualified—

Mr. Gordon: He became a juror and served, your Honor.

A. (Continuing) He qualified on March 7, 1941 and served in April 1941.

Mr. Gladstein: I move that Mr. Gordon's remarks be stricken. I think that comes under a category of testimony, your Honor.

The Court: Well—

Mr. Gordon: The exhibit is in evidence.

The Court: The card is right before the witness, and the card shows those very things. I see no impropriety in them, Mr. Gladstein. The fact remains, as Mr. Crockett has brought out, there isn't any E on there and the witness does not know why there isn't any E there and I don't either.

Q. Am I correct in my understanding, Mr. McKenzie, that for each person whose name is followed by an E on Challenge Exhibit No. 159 a qualification questionnaire was made out and history card prepared? A. That is (3721) correct.

Q. But you are unable to state whether or not the person whose name is followed by a check made out a qualification

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questionnaire? A. That I don't know. I know the E is my writing, and I know the D is my writing. As to the checks, I cannot account for that check on there.

Mr. Crockett: I should like to request at this time, your Honor, that you direct the witness to bring in for this afternoon's session the qualification questionnaire and the history card of each person who is listed on Challenge Exhibit No. 159.

The Court: I am not going to direct that until you are through with this mass of things that you have directed him to bring in. It seems to me it is too much of a good thing.

Mr. Crockett: There are only 13 names on here, and two of them we already have.

The Court: I know; but you see, you keep thinking of new things and the papers keep pouring in and then you drop them and your mind goes off to something else, and you tell him to bring in a lot of new ones. Now I said you are not going to have any more until you are through with what you have got.

Mr. Crockett: May I make one observation, your Honor?

(3722) The Court: Yes.

Mr. Crockett: It was not until I examined the questionnaires this morning that I ascertained the use of this symbol C to mean Negro. I did not include all of the names on this Challenge Exhibit No. 159 in requesting questionnaires. Now what I want to find out is, whether or not the questionnaires prepared of all the names that appear on Challenge Exhibit 159 contain the designation C, meaning Negro.

The Court: Well, I do not quite see what it would prove if it did. It is to be assumed, as that list is marked; the title of it is "Colored List," and you have already found that several of them were. Isn't it fair to assume that all of them were? And, if it is so, what of it?

Mr. Crockett: It becomes important to know—

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The Court: You see, you try to assume or to at least assume that if there is this particular list and some others that had "Colored" on that therefore there must have been a designation throughout all these years of every questionnaire of every colored person as colored. Now that is what the witness says did not happen.

Mr. Crockett: I am not assuming that. I merely want to check it and find out. That is why I asked (3723) permission to examine these lists, to see if it is on there.

The Court: I see no reason to allow that. And it seems to me that you may go upon the assumption that all the names on that list 159 are Negroes and it will not be necessary to get the questionnaires out to show that.

Q. Does that same assumption, Mr. McKenzie, stated by the Court apply to Challenge Exhibit 162 which has the heading "Colored"?

The Court: Well, that was an assumption that I made. I thought it was reasonable. And I shall be willing to make it, if there are lists there that are headed "Colored List", I am perfectly willing to infer from that that the persons on there are colored persons.

Q. Is that correct, Mr. McKenzie?

Mr. Gordon: I don't think Mr. McKenzie knows.

A. I don't know. I am not in a position to answer it. I don't know.

Mr. Crockett: That is precisely why I wanted to examine the qualification questionnaires.

The Court: You see, when a lawyer wants to examine or to put in evidence to prove something and the Judge says, "Well, I think that has been established," and the lawyer still wants to prove and the proof involves getting a lot of documents and asking a lot of questions, (3724) naturally the Judge wonders why.

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Mr. Isserman: If the Court please—I am sorry.

The Court: I am satisfied that from the present state of proof that these lists that are called lists of colored persons are lists of colored persons. I do not see why I should not—

Mr. Isserman: If the Court please, there is another reason for the production of the remaining applications or questionnaires for which Mr. Crockett has asked. It is true that the Court now assumes that the persons in question are Negroes, but we are concerned with the question of whether or not they were marked so on their questionnaire, and whether or not it is a general practice to so mark them, and we can't accept it from this witness, who has changed his testimony a number of times—

Mr. Gordon: That is objected to.

Mr. Isserman: —and qualified; I am prepared to show that, your Honor, in detail.

Mr. Gordon: This is not proper argument.

Mr. Isserman: That this witness has qualified his general statements since he got on the stand. And I say that under cross-examination, we are not bound by his answer, we are not obliged to accept it; we can probe further, and if we cannot prove that that is the (3725) system of marking every application we have every right to show to the extent to which applications in the office of the clerk are marked with a C, which can have no purpose but to indicate discrimination.

Mr. Gordon: Your Honor, the record shows that these people served.

The Court: I am going to rule on it now, and I don't think I need extended argument. It seems to me that a single question will clear this whole business up, at least for the moment.

Mr. McKenzie, was there a time when a C was put on to indicate the jurors who were colored and other times when there was not?

Mr. Isserman: I object to that question, if the Court please, even on the Court's question.

Mr. Gladstein: I don't object to it.

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The Court: All right, I will withdraw the question and sustain the objection.

Q. Now, do you have Challenge Exhibit No. 163 before you, Mr. McKenzie?

Mr. Isserman: Will your Honor rule on the application?

The Court: I did rule on it. I denied it. I sustained the objection that was made by the Government. It is just another of these things of trifling with the Court.

(3726) Mr. Isserman: I object to the Court's remark.

The Court: You can object all you want. If you want to find out the fact I was prepared to find it out. It developed that you didn't want that.

Mr. Crockett: I believe your Honor has Challenge Exhibit No. 163.

The Court: 163? Let me get this straightened out. I have a note about it here. I haven't actually got it before me.

Mr. Gordon: Here is a copy. Will that help you?

The Court: But you proceed. I know what it is.

Mr. Gordon: I have given Mr. Crockett a photostatic copy. I think he can examine from that.

The Court: Yes, 163 is the list of the four names of colored persons that were submitted by the Federal Grand Jurors Association on June 17, 1941. I am going to assume that those four names are names of colored persons.

Q. Do you have Challenge Exhibit 162? A. No.

Mr. Crockett: I do not seem to be able to locate Challenge Exhibit 162, your Honor.

(3727) The Court: Well, 162 is the one with the list of 31 colored persons. It is marked at the top "6 List."

Mr. Crockett: I know what it is, but I think it has certain markings on it that I wanted to inquire about. This is my copy of 162.

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The Court: You probably just left it up there on the desk.

Mr. Crockett: No, I am looking for the original that was introduced in evidence that had the markings on it.

The Court: A little patience, and we will find it.

Mr. Gordon: He produced them a few minutes ago.

Mr. McGohey: If your Honor please, I understood that the original of what went into evidence as Exhibit 162 was among the papers which Mr. Gladstein asked to have photostated and were photostated by the clerk. So perhaps there is a photostatic copy in the possession of the defendants, as I have.

The Court: He has got the photostat in his hand but he wants the original for some reason.

Mr. Gordon: He just called for it. I thought it was produced.

Mr. Crockett: I will use my own photostatic copy, it is just the same as the original, but I wanted (3728) the witness to have one before him while I was using this.

The Court: Well, maybe there is some way of digging up another photostat around here.

Mr. McGohey, will you be self-sacrificing enough to let him use yours?

Mr. Gordon: We should like to use ours ourselves.

Mr. McGohey: And I have notations of my own on it, and I don't want to get into a discussion of whether Mr. McKenzie knows my writing, which I often don't recognize myself.

The Court: I think we will have to get into a huddle. You put it in a place where we three can see it, and we will keep our voices up, and we will soon surmount this crisis.

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By Mr. Crockett:

Q. Now Mr. McKenzie, I show you Challenge Exhibit 162 and call your attention to certain check marks that appear after the names of persons on that list. Can you tell us what those check marks are intended to indicate?

Mr. Gordon: May the record show that the check marks appear after the occupations, not after the names.

The Court: Yes, they do, and they only appear after some of them.

Do you know what they indicate?

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

(3729) Q. Do you know if any check was made by you or by anyone in your office as to the race of the persons whose names appear on there? A. There never was.

Q. There never was? A. No.

Q. Do you know what persons whose names appear on there filled out the qualification questionnaires? A. From this here (indicating)?

Q. Yes. A. No, I do not.

Q. If such questionnaires were filled out they would be in your official files? A. That is correct.

Q. And there would also, in the event that you decided they were eligible, be history cards? A. That would be so. That is correct.

Q. I believe you also indicated yesterday that "6 List" was just the identification you gave to that particular list of names represented by Challenge Exhibit 162? A. To that group of names that were sent out in that batch.

Q. To that extent it constitutes an original list in your office, is that right? A. No, it does not.

Q. Was there a 1, 2, 3, 4 and 5 list? A. That I could not say.

Q. Can you explain why that particular list is called "6 List"? A. Yes. When the clerk was preparing the (3730) applications or the cards for this particular "6 List" he made them up in cards and prepared no list. On each card was put the name and the address of the prospec-

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tive juror. A qualification notice was mailed out from that card. When the juror responded the card was taken out of that file and put into the Off file, and if he qualified the history card went into the active file.

Q. Were all of the lists of prospective jurors or nominations for jurors which you received from the Federal Grand Jury Association given a number? A. Not in all cases.

Q. They were not listed numerically? A. No, I will say they were not.

Q. I notice there is the imprint of a stamp on Challenge Exhibit 162 which reads "Federal Grand Jury Association, 101 Park Avenue." Was that stamp on there when that list was received by your office? A. I would say yes.

Q. Does the Federal Grand Jury—

The Court: It is on each one of the sheets, is it not?

The Witness: No, just the first sheet.

The Court: Well, just look and see.

The Witness: Oh, and on the second sheet also.

Q. Does the Federal Grand Jury Association usually (3731) stamp in that manner each list which they submit to your office?

Mr. Gordon: This is objected to on two grounds, your Honor: One, the witness can't know; and, two, because it is repetitious of the ground covered by Mr. Gladstein yesterday afternoon.

Mr. Crockett: Your Honor, Mr. Gladstein did not inquire about this stamp.

The Court: As I remember it some of those other papers did not have any such stamp on.

Mr. Crockett: But Mr. Gladstein did not inquire about the stamp.

The Court: No, but what is the use in asking him when we have the papers right there and they show that they did not.

Mr. Crockett: I have not seen the papers, so I don't know it.

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The Court: Well, they are in evidence. Let us see those three.

Mr. McGohey: 159 is one.

The Court: 159, 162 and 163. Now let us take a look at them right now and we will see. Let us see that list with the four names.

Mr. Crockett, you had those exhibits yourself at the beginning of this line of cross-examination. There (3732) were three. 159, 162 and 163. Now, one of them is a list of four names submitted by the Grand Jury Association. Haven't you got it right in your hand?

Mr. Crockett: I have my photostatic copy—

The Court: The photostatic copy will show whether that stamp is on there.

Mr. McGohey: That is Exhibit 163.

The Court: The one with the four names is the one I am looking for.

Mr. McGohey: That is Exhibit 163, your Honor.

The Court: Isn't it right in your left hand there?

Mr. Crockett: This is the first list.

The Court: Yes.

Mr. Crockett: That does not have it on there.

The Court: No, because there is no evidence that that was the grand Jury Association.

Mr. Crockett: That is right, and this is the other list. It is not on there (indicating). I mean, the four names are not.

The Court: Well, it may not be of any importance, anyway, but my recollection was that one of those lists did not have that little stamp on, but some of the others had, and the witness's testimony is that that stamp was on there when they arrived at his office.

(3733) Mr. McGohey: According to my copy of Exhibit 159 there is no such stamp on the paper.

The Court: That is my recollection.

Mr. McGohey: But it does appear on the photostatic copy which I have of Exhibit 162 and of Exhibit 163.

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The Court: Yes. My recollection was that it was one of those lists that the stamp was not on. You say that is confirmed by your examination of the exhibits?

Mr. McGohey: It is, your Honor.

By Mr. Crockett:

Q. I show you, Mr. McKenzie, what purports to be a list of nominations received from the Federal Grand Jury Association, and dated June 17, 1941. This is a photostatic copy, as I understand it, of the original.

Will you tell me if you have seen that before? Have you seen the original before?

Mr. McGohey: May I look at that, Mr. Crockett?
Mr. Crockett: Yes (handing).

A. Yes, I have.

Q. And that is identical with the original in your files, is that right? A. It is in the court now.

Q. That has been offered in evidence? A. Well, it is right here in the courtroom.

(3734) The Court: If it is a photostat, it must be the same.

Mr. Crockett: This is my copy of the photostat but I find that the United States Attorney does not have this.

Mr. Gordon: Here is the original brought in by Mr. McKenzie according to the subpoena, and they have not offered it yet or marked it. There it is. I just took it from that envelope.

The Court: Why, this seems to be a new list of colored persons.

Mr. Crockett: That is right. That is why I want to get it marked for identification and put it in evidence.

The Court: I guess the reason we could not find it was because it had not yet been marked for identification. So that may be done.

Mr. Gordon: No objection, your Honor, to its being received in evidence.

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(3735) AFTERNOON SESSION

JOSEPH F. MCKENZIE, resumed the stand.

The Clerk: 183-A for identification through 183-Y for identification. They are the registered voters' lists for Manhattan and Bronx.

(Defendants' Challenge Exhibits 183-A through 183-Y marked for identification.)

The Clerk: 185-A and B through 222-A and B are history cards and questionnaires of jurors. 223-A and 224-A are the history cards of two jurors. 225-A and B and 226 for identification is a list of colored persons.

The Court: What was that?

The Clerk: That is a list of colored persons, dated 6/17/41.

(Defendants' Challenge Exhibits 185-A and B through 222-A and B, 223-A, 224-A, 225-A, 225-B and 226 marked for identification.)

* * *

By Mr. Sacher:

(3736) Q. Now, Mr. McKenzie, I have a Challenge Exhibit 188 and ask you whether the Walter White mentioned on this exhibit as the juror is the Secretary of the National Association for the Advancement of Colored People? A. I would say yes. I am sorry, I failed to bring my glasses down; Mr. Doyle will bring them right down.

Q. Try mine if you wish. I am a much older man than you. A. Let me take a look and see if they are any good.

The Court: This is almost too much!

A. (Continuing) I am afraid that these (referring to glasses) won't do.

Mr. Gordon: If it is on the card—

(3737) The Witness: It will only be a second.

Mr. Gordon: Does it show on the card? Yes. We agree to that, your Honor. That is what the exhibit shows.

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The Court: Well, I am a little bit stunned here. But I guess everything is all right. No objection. So you can go right ahead now.

I gather that that Walter White is one of the names that was in the batch that were put in the envelope.

Mr. Sacher: Of the 30.

The Court: Is he one of the ones with the C?

Mr. Sacher: He is, your Honor.

The Court: Yes. Now would you mind giving me the date of his questionnaire, Mr. Sacher?

Mr. Sacher: That is September 19, 1940.

The Court: Yes.

Q. You took Mr. White's affidavit on that date, did you not, Mr. McKenzie (handing)? A. Yes, I did.

Q. Was Mr. White's name on one of the colored lists which you received in your office? A. I couldn't tell, sir, from that application.

Q. Well, would you be good enough to look at these papers, which are Exhibits 159, 160, 162 and 226 in evidence and tell me whether you find Mr. White's name (3738) on any of those lists?

The Court: Now just a second. Those don't coincide with my numbers here. As I list them there are five lists, five separate lists that have reference to colored persons—159, 163, 162, 225-A or B and 226.

The Clerk: No. 225-A and B are questionnaire and history card of the juror.

The Court: Oh yes. 226 is the only one.

The Clerk: That is right.

The Court: So that makes four now.

Mr. Sacher: 160 is also—

The Court: 160?

Mr. Sacher: It is "Colored Women," your Honor.

The Court: Just let me check that. Yes, those are "Colored Women." And that is a list that is submitted by the Grand Jurors Association and has marked on the top "6 List," am I right about that?

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Mr. Sacher: That is right, your Honor.

The Court: So that now we have six of them.
No. Five.

Mr. Gordon: Five of them, that is right.

The Court: 226.

Mr. Sacher: That is right.

The Court: So that there is 159, 160, 162, 163,
226, and he has them all before him.

(3739) The Witness: I have 226 before me
here. That was the one you had shown me, Mr.
Sacher.

Mr. Gordon: I object to the use of the photo-
stats if the originals are available, and the reason
is that 226 for example—would you hand that orig-
inal to the Judge, Mr. Borman.

The Clerk: Surely.

Mr. Gordon: —is not in evidence.

Mr. Sacher: What isn't in evidence?

Mr. Gordon: 226.

Mr. Sacher: Well, if it is not, I offer it in evi-
dence.

The Court: Yes, it may be marked.

Mr. Gordon: So I think if we could stick to the
originals we will do better.

The Court: I think the originals are better be-
cause there are marks of one kind or another on
them, and it may be a question of whether he identi-
fies his handwriting on them or not, and I think it
is better to use the originals. So that now you are
going to hand him the five that I enumerated a
moment ago.

(Defendants' Challenge Exhibit 226 for identifi-
cation received in evidence.)

(3740) The Court: Now what is the question,
Mr. Sacher?

By Mr. Sacher:

Q. I show you Exhibits 159, 160, 162, 163, and 226, and
ask you whether the name of Walter White appears on
any of those exhibits? A. Yes, he does on Exhibit 226.

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Q. Thank you. Now I show you the questionnaire of Mr. Wilbur F. Coleman, which is in evidence as Exhibit 190-A and B, and ask you whether on March 7, 1941, he swore to his questionnaire before you personally, Mr. McKenzie?

Mr. Gordon: That is objected to as repetitious. We went through that just before lunch.

The Court: I think it was Flood.

Mr. Sacher: Flood is the one.

The Court: Flood is the one they referred to before the recess.

The Witness: Yes, he did.

Q. Do you find Mr. Coleman's name on any of the five exhibits now before you? A. Wilbur F. Coleman is on Exhibit 159.

Q. That is one of the "colored" exhibits, is that right? A. That is correct.

Q. And there is this C for "colored" on Mr. Coleman's questionnaire, Exhibit 190-A; is that right? A. Yes, that is so.

Q. Now I show you the questionnaire of Mrs. Sadie (3741) Noisette, which appears to be sworn to before Mr. George Tanner on April 11, 1941, which is in evidence as Exhibit 198-A and B, and ask you whether Mrs. Noisette's name appears on any of these "colored" exhibits? A. I do not see it on these exhibits, Mr. Sacher.

Q. You don't see it on any of these exhibits? A. I don't see it, going down.

Q. You better look again. I don't know whether it is, myself, but—

Mr. Gordon: Your Honor, I object to that. If he knows it is, cannot he direct his attention to it?

Mr. Sacher: I say I don't know. I really don't know. I just took this over from Mr. Crockett at one o'clock.

Mr. Gordon: I just don't see the purpose of it.

Mr. Sacher: Well,—

Mr. Gordon: Part of these objections, your Honor—

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The Court: It is very mild and I think we better just leave things alone.

That questionnaire has a C on it, has it not?

Mr. Sacher: It has, your Honor.

Mr. Gordon: May I look at it?

Mr. Sacher: Please do, Mr. Gordon.

A. No, I do not see the name listed on any of these (3742) particular lists.

Q. Now, Mr. McKenzie—

Mr. Sacher: Will you move away, Mr. Gordon, so I may see the whites of his eyes?

Q. Now, Mr. McKenzie, do you have any other "colored" lists in your files that are not among Exhibits 159, 160, 162, 163 and 226? A. No, I would say that this has either come from the registered voting book or it is a volunteer.

Q. Why did you mark that with the letter C? A. Because when the party had qualified, swore to the application, I put a C on as colored.

Q. Why did you do it? Why did you mark it colored? Was that of importance to you? A. No. The former clerk of the court, Mr. George J. H. Follmer, had directed me to do it.

Q. Mr. Follmer directed you to do it? A. Mr. George J. H. Follmer, the former clerk of the court.

Q. Follmer? A. Yes.

Q. He is dead now, isn't he? A. No.

Q. He is not dead? A. No, sir.

Q. And is he still working for the Government here? A. No. He is retired.

Q. He is retired? A. Yes.

(3743) Q. Now did he tell you why he wanted you to mark questionnaires sworn to by Negro citizens with the letter C? A. He asked me at the time if I knew—

Q. No, no. Did he tell you—

Mr. Gordon: Now,—

Mr. Sacher: Just a moment, Mr. Gordon.

If your Honor please—

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The Court: Address yourself to me. I am right on the job here.

Mr. Sacher: I will. I ask that Mr. Gordon please subdue his ebullience and allow us to proceed—

The Court: Better not fool with that word again.

Mr. Sacher: All right. And may I proceed with this witness? Please.

Mr. Gordon: May the witness answer the question?

The Court: I know he is going to answer the question you asked him.

Mr. Sacher: That is right.

By Mr. Sacher:

Q. Now, I am asking you, did Mr. Follmer tell you why he wanted you to mark questionnaires signed by Negro citizens with the letter C? Now, if he told you, all right. If he did not, you are at liberty to tell me.

The Court: Give him a chance to answer.

(3744) A. He wanted to know how many colored jurors were on the rolls at the time. I told him that I had no knowledge of how many were on. He said, "Could you give me a figure?" I said, "No."

He said, "Well, I have been asked a question and in all probability I will be asked it again." So he said, "Put C on there, on the questionnaire or the application of a colored juror"—

Q. "Every time you get him"? Is that right?

Mr. Gordon: Just a moment, your Honor. May he finish?

The Court: Yes.

A. (Continued) He said he would take it up with Commissioner Smythe, and that was the jury commissioner, and that is where the conversation stopped.

Q. Did Mr. Follmer tell you to put the letter C on the questionnaire of every Negro man or woman who filed a questionnaire with you? A. He told me to put a C—

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Q. Did he? Yes or no. A. Well, yes, he said to put a C on it.

Q. All right. Will you swear that the only questionnaires in the files of your office which are marked with the letter C are the 30 questionnaires which were introduced in evidence today?

Mr. Gordon: That is objected to as to form.

(3745) The Court: Sustained.

Q. Do you say, Mr. McKenzie, that the 30 questionnaires which were introduced into evidence today are the only questionnaires bearing the letter C which are on file in your office? A. No, I will not say that.

Q. Do you know how many more questionnaires there are than these 30 which are marked with the letter C? A. I have no idea.

Q. Have you ever made a search to find out?

Mr. Gordon: Now, this is objected to, your Honor, as irrelevant.

The Court: Sustained.

Mr. Sacher: On credibility, your Honor. Credibility.

The Court: Well, I do not think to keep repeating that in different form is going to have much bearing on that.

Q. When did Mr. Follmer retire as clerk of this court? A. I believe it was in the latter part of 1945.

Q. For how long a period of time did you continue to mark questionnaires sworn to by Negro citizens with the letter C, do you know? A. The period that I first started—

Q. From the time you first started until the time that you stopped, if you ever stopped? A. I have not stopped.

(3746) Q. Did you ever stop? A. No, I did not.

Q. You carry it on to this very day? A. On the questionnaire, yes. In other words,—

Mr. Sacher: No, no, that is answer. There is no question before him now, your Honor.

The Court: Go ahead and make your explanation.

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The Witness: In other words, it was before I went into the armed forces, and I believe it was some time in 1941 that Mr. Follmer directed me to put a C on all of the questionnaires of colored jurors.

By the Court:

Q. How long did you continue to do that? A. I continued right down, your Honor. In other words, if a colored juror came in today I would put the C on the questionnaire.

Q. I thought you told me the other day that there was no way that anybody could tell by going over the files how many colored jurors there were? A. There is no way, your Honor.

Q. But if each one of them is marked with a C, then there is a way? A. That is not so, your Honor, because up until 1941 when Mr. Follmer directed that the C be put on there were eight or possibly nine thousand jurors on the rolls that there were no marks on, no marks on applications or anywhere to indicate what they were.

(3747) *By Mr. Sacher:*

Q. But isn't it true, Mr. McKenzie, that during 1940 and since 1940 you have been sending out requalification notices to the people who were on the jury lists; haven't you? A. Through the mail, Mr. Crockett—

Q. No, my name is Sacher. You pay me a compliment, but my name is Sacher. A. I am sorry, Mr. Sacher. Through the mail requalifications are sent out to all jurors that had served. Before they go into the wheel, their two years is up, and in order to ascertain as to whether or not the information on the card is correct, if they reside at the same address as they did when they served two years ago, a requalification is mailed out to the jury with a self-addressed envelope returning it to the office. So we do not see those jurors. It is just a questionnaire that is mailed to them, a requalification form it is called.

Q. Will you tell the Court whether you have made any computation as to what percentage of the jurors who were on the active jury list in 1940 are still on the active jury

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list in 1949? A. I never made such a computation and I have no means of making such a computation.

Q. Well, your records which are found in Exhibits 179 and 180 show, do they not, the number of people who are removed each year from the active jury list and the number (3748) who are added to it, isn't that so? A. Yes, that is correct.

Q. And do you not think that on the basis of those figures you could perhaps with a little time and effort provide the Court with—

Mr. Sacher: Just a minute, Mr. Gordon—

Mr. Gordon: I have not opened my mouth.

Mr. Sacher: But your back looks so menacing to me—

The Court: Oh, Mr. Sacher, why—

Mr. Sacher: It is annoying, your Honor, to have a big man—

The Court: It is just confusing. I was listening here, and you get half way through a question and you see somebody get up and you are off on a digression.

Mr. Sacher: Well, if it makes him happy, let him be happy.

The Court: But it is not a question of happiness. It is diverting, it is confusing. I wish you would not do that.

Mr. Sacher: All right, I will rephrase the question, your Honor.

Q. Will it be possible for you on the basis of the figures contained in your records to provide the Court (3749) with some figures which will indicate what percentage of the jurors who were on the active list immediately prior to your commencement of this practice of marking jurors' questionnaires with the letter C when they were colored—as to what percentage of the total number in 1940 still remains in 1949 on the active jury list? A. That was such a long question I lost half of it.

Q. Well, to make it simple and short: Can you compute from your books, 179 and 180, what percentage of 1940 jurors are still on the active list in 1949? A. I believe that could be computed from the books as to the

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total number of jurors on at one time and the total number of jurors on at the present time. As to the percentage I don't know.

Mr. Gordon: That does not—what Mr. Sacher has asked, your Honor, I think the books in evidence show cannot be done because you can't tell which of the people came off.

The Court: That is just what I was thinking.

Mr. Sacher: I will let it lay, your Honor. I will let it lay.

The Court: He might make a computation, but how accurate it would be is a question that is doubtful.

Q. How many jurors' history cards on the active list do you have in your files at the present time? I am (3750) speaking of the petit jury list. A. Well, the book will show that. I believe it is close to between 12 and 13 thousand male and females.

Mr. Gordon: Petit jurors?

Q. Petit jurors. A. Petit jurors.

Q. Are you sure of that? A. No.

Q. Well, you better look.

The Witness: It is a combination of all jurors.

A. I cannot tell at the present time. I can only tell as of the close of business at December 1948.

Q. That is good enough. Will you tell us what it was?

A. There were 8,868 men and 1,874 women on the trial jury or petit jury. There was 1,852 men and 273 women on the grand jury.

Q. Did I understand your testimony the other day—

The Court: That makes the total about what he said.

Mr. Sacher: That is for petit and grand, your Honor.

The Court: Yes. It is 12,867.

Mr. Sacher: And it is ten thousand something—

The Court: 10,742 for the petit jurors.

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Q. Now, if you went through the history cards of the 10,000 or more in the petit jury, you would be able to come up, would you not, Mr. McKenzie, with the cards, (3751) of all those who were placed on the active jury list prior to the time you began this practice of marking these questionnaires with the letter C, is that right? A. If we went through the active files it would show the date as to which each juror had been qualified.

Q. Now, do you have your active file organized or arranged according to date; that is, chronologically, or do you have it according to alphabet? A. It is arranged alphabetically.

Q. Now, you do have certain drawers in your safe upstairs which are marked "New jurors, active file," is that right? A. "New jurors, active file"?

Q. Well, do you have anything with "New Jurors" on it up in that safe? A. There might be "New jurors ready for the wheel."

Q. "New jurors ready for the wheel"? A. That is right.

Q. Now, how many are there in that file "New Jurors ready for the wheel"? A. At the present time?

Q. Yes. A. I only had occasion to look at it here a day or so ago and there were no cards in there.

Q. No cards under the "New jurors ready for the wheel"? A. No, there are not.

Q. You mean you are not getting up "New jurors ready for the wheel"? A. We have not had occasion to prepare any new jurors, put new jurors on or get the preparation (3752) complete.

Q. For how long? A. A couple of months.

Q. How many? A. A couple of months.

Q. What does that mean, a couple of months? How long?

Mr. Gordon: Since you started going into his office.

Mr. Sacher: If the Court please,—

Mr. Gordon: Well, that is the testimony, and it is in the record, your Honor, and in the last five minutes it has been repetitious, and I object to it.

The Court: I don't really see why you interrupted this. He can say well enough if that was the

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time. It just gets things confused. I do not think that contributed anything much.

Mr. Gordon: Well, the objection, your Honor—I apologize—in strictly legal form is that in the questions as to the number of jurors, the work as to whether they have been doing any qualifying lately, and so forth, were all gone over by Mr. Gladstein, and the objection is that it is repetitious of something another counsel has asked.

Mr. Sacher: This business of "New Jurors ready for the wheel" is a new term in the record.

The Court: I am very much puzzled as to (3753) what this part about the "New jurors ready for the wheel" could conceivably contribute here, and—

Mr. Sacher: I will be glad to tell your Honor. What I am interested in seeing is how many Negroes are being accepted for jury service currently. That is what I am interested in. And since this witness says that every Negro—

The Court: I do not think that has much to do with it, Mr. Sacher.

Mr. Sacher: You mean if we show that currently Negroes are being discriminated against, it has nothing to do with it? Well, you want me to show it for 1947? I will do it for 1947.

(3754) The Court: You know you started back in 1940 and then you go back to the time the trial started and then after the trial started you bring up the point about that isn't enough, you want it right up to today which we are doing, and then as we go on each day there are some more days and you get lists each day and you go into it; I can't see why, if you have all the time from 1940 down here to the time the panels were drawn for the commencement of this trial, I don't see why that isn't enough. And furthermore, all this fuss about putting those C's on there as though there was something criminal about it—

Mr. Sacher: Not criminal but sinister.

The Court: As though you were trying to carry water on both shoulders.

Mr. Sacher: Now, your Honor—

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The Court: If a man does something to show how many colored jurors there are that is wrong, and if he doesn't do it that is wrong. And I am frankly puzzled. But however that may be, if you desire to inquire down into today you may do so.

Mr. Sacher: Your Honor, I feel obliged to say just a few words in response to what your Honor has said.

The Court: You see, you have gained your point. (3755) But that isn't necessary.

Mr. Sacher: I am not interested in coming down to today. I am not that literal.

The Court: I will permit the question in the form in which you put it. Perhaps that will terminate the discussion. If the reporter can get back to the question—

The Reporter: The reporter who took that question is not now here.

Mr. Sacher: I can reframe it.

The Court: You put a question to him about these new jurors ready for the wheel and he said there weren't any and then you proceeded to find out why there weren't any and when he told you there was something else you wanted to know. Now, what is that something else?

Mr. Sacher: I remember the record, your Honor.

By Mr. Sacher:

Q. Mr. McKenzie, are you the man in your office who interviews jurors who come in to file questionnaires for jury service? A. I am one of the men.

Q. And can you tell the Court whether or not any Negro men or women appeared at your office during the entire year 1948 with qualifying questionnaires for jury service? A. Yes, they have.

Q. How many appeared during 1948? A. That I couldn't (3756) say.

Q. Well, was it five?

Mr. Gordon: Objected to.

Mr. Sacher: All right, your Honor.

The Court: Was it a substantial number?

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Mr. Isserman: I object.

The Witness: That came in the office in the course of the year? I would say yes, a substantial number of colored people.

Mr. Isserman: I would like the record to note my objection as it calls for a conclusion and it is—

Mr. Sacher: We will clarify it.

Q. What number do you mean by the word—

The Court: I was trying to find out whether I would let Mr. Sacher pursue this inquiry. If you got the answer that I did—I am going to overrule the objection and let you go ahead; and then one of the rest of you jumps up and objects on the ground that I am doing it. Frankly, I sometimes wonder what you are objecting to.

Mr. Isserman: It is very simple. In all my experience, and I am sure in all your Honor's experience, where a general answer is given on cross-examination to the effect of an uncertain number, the witness doesn't know the precise number, the procedure is to start—

The Court: I am doing it so as to lay the (3757) foundation and allow Mr. Sacher to pursue it.

Mr. Isserman: Then I certainly withdraw my objection, your Honor.

The Court: I overrule the objection.

Q. What do you mean by a substantial number, Mr. McKenzie? A. I would say there was a constant flow of colored people coming into the office there at all times. As to a figure, I certainly couldn't place the figure.

Q. What do you mean by the term "substantial"? A. I will say a large number.

Q. What do you regard as a large number? A. Pretty close to a thousand or in a thousand figure.

Q. A thousand came into your office to qualify for jury service during 1948? A. People came in—

Q. No, no. I am asking you, did a thousand colored people come into your office in 1948 to qualify for jury service?

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The Court: When you say "to qualify" you must mean in response to a notice.

Mr. Sacher: Precisely, your Honor.

The Witness: Your Honor, that is what I meant. I meant that colored people are constantly coming into the office to volunteer, to get certificates of service to show that they served, to ask a question as to when (3758) will they be called again if they served at such and such a time. So when I say constantly, it is a constant flow of colored people coming in and out, but not as I say a questionnaire or qualification notice was sent to them.

Q. Now, Mr. McKenzie, I am dealing here with colored persons who were sent a notice by you such as you send to white persons requesting their appearance at your office for the purpose of qualifying as jurors.

Mr. Gordon: That is objected to, your Honor. The testimony is he doesn't know whether they are white or colored when he sends a notice.

Mr. Sacher: But he knows when they come in, he testified.

The Court: Well, as to the people who came in and you noticed were colored, you testify there was a large number that you name and that they came in and out, many of them, asking various questions and so on.

The Witness: That is true.

The Court: What Mr. Sacher wants to ask you is, have you any way of telling, of that large number that came in, how many of them came in in response to notices for qualification?

The Witness: I couldn't state that, your Honor.

Q. You don't know? A. I do not.

Q. However it is true, is it not, that whatever (3759) colored people came in with a questionnaire to qualify for jury service and who submitted their questionnaire to you after they had sworn to it before you or one of your assistants, would have his questionnaire marked with the letter C, is that right? A. If I failed not to forget about it

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or didn't put it down, it happened where I failed to put it down.

Q. How did you learn that you had failed to put it down, Mr. McKenzie? When did you discover that you had failed to put it down? A. At the end of the night I would count up the qualification, the questionnaires to discover how many, so that I had a count of how many came in that day, and I would know that I had colored people that filled out questionnaires and had qualified. But yet I wouldn't say—

Q. Did you kick yourself for it or did you hate yourself in the morning for it.

The Court: Well, I think we can eliminate that.

Q. Would it be possible to ascertain how many colored people you qualified during the year 1948 by looking through your active jury file? A. No.

Q. Do you have on file the questionnaires made out and filed by prospective jurors during the year 1948? A. Yes, I believe we have.

(3760) Q. And if those questionnaires were examined they would reveal, would they not, how many have been marked with the letter C during the year 1948, would they not? A. Yes, that—

Q. Yes. A. That would show, yes.

Q. Now, do you have your 1948 questionnaires in any place where they can be gotten to? A. Yes, these questionnaires are there.

The Court: Let me ask you, Mr. McKenzie—

Q. Can we see them today?

The Court: Just a second.

Let me ask you something. Suppose in the course of the day, just hypothetically, that a hundred persons came in in response to notices and that 15 of them qualified, and let us suppose that of the other 85 that did not qualify there were 20 Negroes. Did you make any notation as to them?

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

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The Court: You only made these notations of a C where they did qualify?

The Witness: That is correct, your Honor. Or if the juror—on the application I just put C.

The Court: So that no matter how many there were or weren't who didn't qualify, you have no record of them at all?

(3761) The Witness: No, I have not, your Honor.

Q. But do you have your 1948 questionnaires in any specific place where we can look at them? A. Yes, those questionnaires are here.

Q. They are up in your office? A. Yes, they are.

Q. May we see them this afternoon, after the court recesses? A. I believe that they can be looked at.

Q. All right. Now, Mr. McKenzie, as I recall your testimony of the day before yesterday you testified, did you not, that you entered the service of the clerk of this court some time in the year 1935, is that right? A. Yes, that is correct.

Q. And I believe your testimony was you entered in the capacity of clerical assistant, is that right? A. That is correct.

Q. How long did you serve in the capacity of clerical assistant? A. About a year.

Q. On what date did you enter the service here in the clerk's office? A. In August of 1935.

Q. And until what date did you remain clerical assistant in that office in 1936? A. Until the latter part of 1946; I was made a deputy court clerk.

Q. You mean 1936, don't you? A. 1936 I should say.

Q. You were made what the latter part of 1936? A. Deputy court clerk.

(3762) Q. And what duties did you perform as a deputy court clerk? A. I was in court, acting as a court clerk, deputy court clerk.

Q. Like Mr. Borman is here (indicating), is that right? A. That is correct.

Q. And for how long did you serve in that capacity as deputy court clerk? A. For about eight or ten months.

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Q. Until some time in 1937? A. That is correct.

Q. And what happened to you in 1937, from the point of view of the position which you occupied? A. I was made—I was sent into the jury office to assist the jury clerk, Mr. Kellogg.

Q. Who sent you in to assist Mr. Kellogg? A. Mr. Follmer, George J. H. Follmer.

Q. Mr. Follmer was the clerk of the entire court, is that right? A. That is correct.

Q. And is he the man who originally appointed you as clerical assistant in his office in 1935? A. No. It was Mr. George J. H. Follmer.

Q. Mr. Follmer was the clerk then, is that right? A. That is correct.

Mr. Gordon: Wait a minute.

A. (Continuing) Mr. George—Charles Weiser.

Q. You mean Weiser, sir, don't you? A. Captain Charles Weiser.

(3763) Q. Captain Weiser.

The Court: Let me get myself straightened out on this.

Who was it appointed you in 1935?

The Witness: Captain Charles Weiser.

The Court: And I failed to get down what happened in 1937 there. I referred back to the beginning of your direct examination and I see nothing there about some change in 1937. What was that change in 1937?

The Witness: In 1937 I believe I was made assistant jury clerk, assistant to the jury clerk.

Q. Mr. Kellogg was the jury clerk at that time?

The Court: Just a second.

Mr. Sacher: Oh, I am sorry, your Honor.

The Court: Now I have a notation here that you testified on your direct examination that in 1940 you began interviewing prospective jurors and that

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in early 1940, upon designation of Mr. Follmer, you became jury clerk; is that right?

The Witness: That is correct.

The Court: Now in 1937 you were made assistant jury clerk, is that right?

The Witness: That is true.

The Court: And who appointed you then?

(3764) The Witness: Captain Charles Weiser.

The Court: And who was he?

The Witness: He was the clerk of the court.

The Court: Oh yes. All right. Very well.

Q. So that you served from about the middle of 1937, did you, until about the middle of 1940 in the capacity of assistant to the jury clerk, is that it? A. That is correct.

The Court: Well, you said early 1940.

The Witness: That is right, the early part of 1940.

The Court: Well, that is not the middle of 1940. So just pay attention here.

The Witness: The early part of 1940.

Q. And by the early part do you mean the winter of 1940 or the spring of 1940? A. I would say in March of 1940.

Q. That was a big day in your life, wasn't it, becoming a jury clerk of this court? A. Not with the salary it paid.

Q. Oh, the salary wasn't good enough. You need a trade union for the jury clerks I think.

The Court: It was a big day when I became judge, too.

Q. So that for approximately three years you served as assistant to the jury clerk before you became jury (3765) clerk, is that right? A. That is correct.

Q. Now during that three-year period did you come to know a man by the name of Cornelius Smythe? A. He was the commissioner of jurors at that time.

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Q. When did he become the commissioner of jurors, if you know? A. That was before my time.

Q. Before 1937, is that right? A. Yes.

Q. Are you sure of this now, Mr. McKenzie? A. I am certain of that, yes.

Q. You are certain of that, all right. Did you have occasion too—

The Court: What makes you so certain about that?

The Witness: Well, he was the commissioner at the time that I was appointed as assistant to Mr. Kellogg, and he was the only commissioner that I knew at that time.

The Court: Oh yes, that is 1937.

The Witness: That is 1937. That is right, your Honor.

Q. Now, Mr. McKenzie, did you know who Mr. Smythe was when you were appointed assistant to the jury clerk, what his social position, what his professional position was? A. I didn't know the man at all.

Q. Well, did you ever learn anything about him in the three years that you were assistant to the jury clerk? (3766) A. I had very little connection with Commissioner Smythe at that time, only in seeing him.

Q. Did you ever hear anything about him at all, as to whether he was a lawyer or bricklayer or something like that? Did you hear anything about Mr. Smythe? A. I had heard that he was a lawyer.

Q. And did you hear anything about how he came to become the commissioner of jurors at \$5 a day? That was his salary.

The Court: Is that what he got?

Mr. Sacher: That is what he got.

Mr. Gordon: \$5 a day, your Honor, when he came in, but—

Mr. Sacher: He had to work for it in other words.

Mr. Gordon: Well, your Honor, may I hand you the statute which contains the provisions?

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The Court: Yes, or just tell me about it.

Mr. Gordon: Well, it is \$5 a day when he comes in to draw a jury, and I think that is limited to two or three days a month, something like that.

The Court: Oh. So he is not here all the time?

Mr. Sacher: Oh no. Of course not.

The Court: Well, I really am learning about these things for the first time.

(3767) Is that right, Mr. McKenzie, that the commissioner of jurors is just in here occasionally?

The Witness: That is right.

The Court: He didn't have an office here where he was all the time, the way you are?

The Witness: That is correct, your Honor.

Q. Did you ever hear at any time while you were in that jury clerk's office or during the period that you were assistant to the jury clerk or after you became jury clerk yourself, as to the reasons why Mr. Smythe became the commissioner of jurors in this court? A. No, I did not, sir.

Q. You never learned it at all, is that right? A. That is right, sir.

Q. Mr. McKenzie, do you know a man by the name of Tolman? A. I met Mr. Tolman.

Q. When did you meet Mr. Tolman? A. When did I last meet him?

Q. No. When did you meet him for the first time? A. Oh. I met Mr. Tolman for the first time I believe it was back in the latter part of 1940. Mr. Follmer brought him into my office and introduced me to him and told me he would like to look over how the jury—how we carry on the jury here.

Q. The jury system you mean. A. The jury system, I (3768) should say.

Q. That is right. A. And if he wanted any of the forms, papers that were used, why, to let him have it. And I complied with Mr. Follmer's request.

Q. Did you have any conversation with Mr. Tolman? A. I did.

Q. How long did your conversation last?

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The Court: Is that to indicate maybe there were more than one with Mr. Follmer on the same subject?

Mr. Sacher: With Tolman, your Honor.

The Court: With Tolman.

Mr. Sacher: Yes.

The Court: Well, you see I think it is a little unfair.

Mr. Sacher: I will withdraw it.

The Court: In my experience at the bar I have felt that the most unfair question that could possibly be asked is one that assumes something to be so so that the witness proceeds from the assumption. The way you put it—

Mr. Sacher: I don't wish to do that.

The Court: —it seems there were several conversations and the first thing the witness says he is enmeshed in saying it, whereas he never meant to say that there were several conversations.

Mr. Sacher: I don't want to do that with Mr. (3769) McKenzie, certainly not.

Q. Did you have more than one conversation with Mr. Tolman? A. Just that one conversation on the first day.

Q. And how long did that conversation last? A. Why, I would say he was in my office and in my company from about 11 in the morning, and then we went to lunch.

Q. Together? A. No, we did not.

Q. You separated? A. That is right, sir. Until three in the afternoon.

Q. And did you give him any papers from your files? A. I gave him a copy of all the forms that we used.

Mr. Sacher: May I trouble you for Exhibit 102 in evidence?

Mr. Gordon: You have it.

Mr. McGohey: You mean the Tolman Report?

Mr. Sacher: Yes.

Mr. Gordon: It is your exhibit.

The Court: I think I had better hand these maps back and get them out of my way here.

Mr. Gordon: Your Honor, that provision which provided for paying the jury commissioner only

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twice a month has been repealed and so the people have taken it out of the appendix. It is just marked "Repealed." But I think my recollection is that was what it was.

(3770) The Court: That evidently is not in any dispute, so that is all right.

Mr. Sacher: Certainly no claim that the compensation was excessive.

The Court: Well, you are on 102 now, are you?

Mr. Sacher: That is right, your Honor.

Q. Now I show you Challenge Exhibit 102, Mr. McKenzie, and ask you to look at the forms which are marked Exhibits 1 to 22, which are annexed to Mr. Tolman's report, and tell me whether each of those exhibits is a true and correct copy of a form which you gave Mr. Tolman on the occasion of this conversation you have testified to?

Mr. Gordon: Would it be of any assistance to your Honor to hand you a photostat?

The Court: Yes. The copy I have hasn't got the forms in. Thank you very much. Can I keep this?

Mr. Gordon: Yes, sir.

A. Yes, that is so.

Q. And did you discuss each of these 22 exhibits with Mr. Tolman in the course of this conversation? A. No, I did not.

Q. Many of them required no discussion, is that correct? They indicate on their face what they are, very clearly? A. Many of them are for other departments, like the calendar commissioner's office.

(3771) Q. Will you indicate which of those exhibits came from the jury clerk's office? A. Exhibit No. 1, Exhibit No. 2, Exhibit No. 3, Exhibit No. 4, Exhibit No. 5, Exhibit No. 6, Exhibit No. 7, Exhibit No. 8, Exhibit No. 9, Exhibit No. 10, Exhibit No. 11, Exhibit No. 12—

Mr. Sacher: May I interrupt to suggest that Mr. McKenzie look those over during the recess, so

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we need not consume the time of the Court on these additional exhibits?

Q. I would like to ask you this question—

The Court: Is there some point in whether they came from the jury room or some other room? That is what you asked him.

Mr. Sacher: Yes, I asked him—he mentioned that some of them came from other places, so I am simply asking him to designate—

The Court: Now, one of the things that has bothered me a good deal with the cross-examination is that just when I get my mind right on something and I am wondering what is coming, then you are off on something else, and some of them are never finished off.

Mr. Sacher: We will finish them off.

The Court: And it just disturbs me.

Mr. Sacher: I am making notes right here so that I will tie these ends up for your Honor.

(3772) The Court: I know, but it will be better if you keep them right there until you finish it.

Mr. Sacher: I will try to do it, consistent with what has to be done.

The Court: You see, for instance, the other day there was a great to do about getting three cards or four cards, and he came back with the cards, and one of them he couldn't find, and I am all intent on what all this is going to be, when—whoop! —you are off on something else and that is the last I hear about that; and then we get around to something else, then we get somewhere and that is stopped and you go off on something else.

Now you started asking about these exhibits, and it seems to make a lot of difference whether they came from the jury room or from some other room and I get it all down in my notes here and then you drop it and you are off on something else.

Mr. Sacher: I did not want to take your time. I want to expedite this, your Honor.

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The Court: Maybe I am crazy, I don't know, but it does seem as though it would be a little easier for me if you kept right on with a given subject.

Mr. Sacher: I am sorry, your Honor; as an old cross-examiner you know you don't do that.

(3773) The Court: Well, I used to do it.

Mr. Sacher: All right.

Q. Now, Mr. McKenzie, will you tell me whether you used Poor's Directory of Directors as a source of names of potential jurors at any time prior to your appointment as jury clerk?

Mr. Gordon: Objected to as repetitious.

Mr. Sacher: It is not.

The Court: Sustained.

Mr. Sacher: Your Honor, that specific question does not appear in the record. A year is mentioned, but not in relation to the date of his appointment as jury clerk.

The Court: I don't care, I am going to rule it out.

Mr. Sacher: All right.

Q. Mr. McKenzie, will you tell us when you first made use of the Engineers Directory as a source of names of potential jurors?

Mr. Gordon: The same objection, your Honor.

The Court: Sustained.

Q. You testified the other day that there was a conversation between Mr. Smythe, Mr. Follmer, and yourself concerning the use of Poor's Directory, the Engineers Directory, the alphabetical telephone book and college (3774) alumni directories some time around 1939; is that correct?

Mr. Sacher: I want to use it as a starting point.

The Court: I know. Let me give it to you exactly. It was, first, 1939 or thereabouts, and when he was questioned later it was 1939 or 1940. So that that is the time of the conversation.

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Mr. Sacher: All right.

The Court: With Mr. Follmer and Mr. Smythe.

Mr. Sacher: All right.

Mr. Gordon: And do your Honor's notes show that this was on cross-examination that this was brought out?

The Court: Yes, this was on cross-examination.

Mr. Sacher: Yes.

Q. Now, whether it was 1939 or 1940 in which this conversation took place, will you tell us whether it took place before or after you became jury clerk?

Mr. Gordon: Your Honor, that is the basis of my objection.

The Court: Sustained.

Mr. Sacher: What is wrong with finding out whether it took place before or after?

The Court: Just listen and I will tell you what is wrong. When the cross-examiner covers a subject by repeated questions it is in the discretion of the Court whether or not to permit him to do it all over again.

(3775) Mr. Sacher: But I haven't—

The Court: And this time in the exercise of my discretion I am saying "No."

Mr. Sacher: May I just point out—

The Court: Yes, you may.

Mr. Sacher: —that that question was not asked by Mr. Gladstein, who went into this. He asked for the year, and I am now simply pressing—it is of some importance as to whether it was before he was appointed or after. Now, why can't we have that disposed of in a moment?

The Court: It is disposed of.

Mr. Sacher: Well, all right. Not satisfactorily, though.

Q. How long were you jury commissioner—jury clerk, rather, before you began to use the alphabetical telephone directory as a source for the selection of potential jurors' names?

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Mr. Gordon: The same objection.
The Court: Sustained.

Q. Address phone book.

Mr. Gordon: The same objection.
Mr. Sacher: I beg your pardon.
The Court: Sustained.

Mr. Sacher: I take it the objection holds for both the address phone book as well as the alphabetical one, (3776) is that right?

The Court: Yes, because my notes indicate that that also was covered on the cross-examination. I will tell you what it covered. It covered the Poor's Directory of Directors, the Engineers Directory; he was asked about Who's Who in New York, the college alumni list, the address telephone book and so on.

Mr. Sacher: Your Honor, I am not making a point of the items.

The Court: I know you are not.

Mr. Sacher: The point I am making here is one which relates to whether he was already jury clerk or before he was jury clerk. That is what I want to find out.

The Court: You know, that seems so important to you.

Mr. Sacher: It does. If you would be good enough to permit that I would appreciate it.

The Court: That is not what I am going to do.

Mr. Sacher: Then I can't appreciate it.

The Court: It doesn't seem to me that it can be vital to have that question over again.

Mr. Sacher: All right.

The Court: It is a good thing I have got my notes here.

Mr. Sacher: I don't—all right.

(3777) Q. Did Mr. Smythe tell you why he wanted you to use the address telephone book, the college alumni directories, Poor's Directory of Directors, and the Engi-

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neers Directory for the selection of names of potential jurors? A. No, he did not.

Q. Did he just say to you, "Joe, I would like you to use those four sources as sources for the names of potential jurors"?

Mr. Gordon: This line of examination is objected to, your Honor.

The Court: Do you object?

Mr. Gordon: Yes.

The Court: Sustained.

Mr. Sacher: Do you want to take the recess now?

The Court: Yes, that is right.

(Short recess.)

(3778) Mr. Gordon: Your Honor, in view of your Honor's remarks about taking up a subject and leaving it, may I suggest that perhaps you should have handed to you these exhibits which Mr. Crockett and then Mr. Sacher started taking up, the jurors Flood, White, Cole, Noisette, people who apparently were colored, because they had a C mark on their forms—I think your Honor might be interested in looking at the history cards of those jurors which indicate that they were called for jury service quite regularly.

Mr. Sacher: This only proves what we charge, that these are token jurors of the Negro race, that is all.

Mr. Gordon: It hardly proves exclusion.

The Court: So far the proof I have heard does not bear out the notion of token jurors at all.

Mr. Sacher: You certainly have not heard of mass representation by the Negro people, your Honor.

The Court: No, I do not think mass representation has significance in connection with juries that I have heard of in the cases. But, however, Mr. Gordon, I have a note here that in the batch that were put in that envelope there were 30 with a C.

Mr. Gordon: Yes, sir.

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The Court: Now, there were four inquired into, (3779) Flood, Coleman, White and Noisette. These that you hand me—

Mr. Gordon: Are those four.

The Court: —are those four, oh, yes. Let me glance at them.

Mr. Gladstein: May I interrupt for just a second? That envelope that you properly observed would not survive, an effort has been made to bolster up the jury lists by getting a new envelope, and perhaps we ought to transfer the challenge exhibit number to it.

The Court: I think that is a good idea, and then we can dispose of the envelope.

Mr. McGohey: And perhaps the challenge?

Mr. Gladstein: At this time.

Mr. Gordon: Mr. McGohey suggests that the challenge be added to the disposition.

The Court: Well, I am not prepared to dispose of the challenge now.

By Mr. Sacher:

Q. Mr. McKenzie, am I correct that you testified earlier this afternoon that Mr. Follmer asked you to place this letter C on the questionnaires of Negro jurors because of the inquiries that you had been receiving concerning Negro jurors? A. Mr. Follmer asked me how many jurors I had on the rolls at the time—

(3780) Q. Yes? A. —of colored jurors, or did I know, and I says, “No, I didn’t.”

He said, “Is there any means of telling?”

I said, “No.”

So he said, “Put a C on the questionnaire and I will take it up with Commissioner Smythe.”

Q. And did he ask you to maintain any tabulation of the number of Negro jurors that would thereafter come in and qualify? A. No, he did not.

Q. He just asked you to mark them C and not do anything further beyond that, is that right? A. That is true.

Q. Now, is it correct to say that you consulted the Directory of Directors for the purpose of obtaining di-

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rectors of corporations as potential jurors? A. No, that is not so.

Q. Did you go to the Directory of Directors for the purpose of getting Negroes as jurors? Yes or no.

Mr. Gordon: That is objected to, your Honor. I do not see the purpose of the question here in relation—

Mr. Sacher: We are on the question of intent now. What did he go there for?

The Court: He told you what he went there for, because he was told by Mr. Follmer to do it.

Mr. Sacher: I am trying to spell some rationale out of it.

(3781) Mr. Gordon: He went there for names. Is there any proof that there are no Negroes in the book?

The Court: I am sure I don't know whether there were or not, but I will allow the question.

Did you go to that book to get Negroes for jurors?

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

Q. Did you go to the Directory of Directors to get manual workers as jurors? A. No, I did not.

Q. Isn't it a fact that you went to the Directory of Directors to get corporation directors as jurors? A. That is not so.

Q. That is not so? A. No.

Q. Well, let me ask you then: Did you go to college alumni directories to get college graduates as jurors? Yes or no. A. No.

Q. Did you go to the college alumni directories to get manual workers as jurors? A. No.

Q. Now, how about the Engineers Directory? Did you go to that directory for the purpose of getting the names of engineers as potential jurors? A. No.

Q. No? A. No.

Q. Did you go there for the purpose of getting professors of astrology in the Engineers Directory as jurors?

Mr. Gordon: This line of examination—

(3782) The Court: I will sustain the objection.

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Mr. Gordon: It is very entertaining, however.

Mr. Sacher: Hardly illuminating, however, the answers.

Q. Did you ever take a look at Poor's Directory of Directors yourself? A. No, I have not.

Q. You have never seen it? A. No, sir.

Q. Not even one copy, is that right? A. That is correct.

Q. Now, I think you testified the other day that you sent Mrs. Fitton at one time to get names for you from the Directory of Directors, is that right? A. Yes.

Q. Now, did you tell her what names to get out of Poor's Directory of Directors? A. I told her—

Q. No, did you? Yes or no.

Mr. Gordon: What names?

The Court: You mean to get particular persons' names?

Mr. Sacher: To get names out of Poor's Directory of Directors, a generic term; just names.

Mr. Gordon: Excuse me, your Honor, could the question be reframed?

The Court: Yes, I think that can be reframed.

Mr. Sacher: Is it objectionable? Is there objection to it?

The Court: Yes. I will tell you why it is. (3783) If he says Yes, or if he says No, the answer is open to misconstruction.

Mr. Sacher: I see.

The Court: When you say, did you go to get or did you tell somebody to get names, that might mean to get particular names, to get the names of particular persons, or to look and see if so-and-so and so-and-so and so-and-so were in there. I don't think you mean that, and that is why I suggest that you reframe the question.

Mr. Sacher: I will accept your Honor's suggestion.

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By Mr. Sacher:

Q. On the occasion that you mentioned the other day when you asked Mrs. Fitton to go up to the library and examine Poor's Directory of Directors, was that the first occasion on which she had been directed to do that? A. I did not state Poor's Directory of Directors. I sent her to the library to get the Directory of Directors.

Q. Well, did you tell her what Directory of Directors to get? A. I told her to inquire from the Information desk and they would direct her to the Directory of Directors.

Q. Now, when you first started, that is, when your office first started to use a Directory of Directors, it was Poor's Directory that they used, wasn't it? A. Mr. Tanner had occasion to use Poor's Directory (3784) of Directors, that is right.

Q. Now, you were the one who had told Tanner to use it, weren't you? A. No, it was Commissioner Smythe and Mr. Follmer who had made that decision.

Q. I know, but didn't they tell it to you and didn't you then tell it to Mr. Tanner? A. I told Mr. Tanner—yes, I did.

Q. Yes. So you were the one who told Tanner to use Poor's Directory of Directors, is that right? A. That is correct.

Q. All right. Now how many years later did you tell Mrs. Fitton to go to the Library and look up a Directory of Directors? A. Seven years later, say.

Q. In 1948? A. In 1948, and 1947, also, there was a period there when we used it.

Q. Now, did you use the Directory of Directors during 1946? A. No, we did not.

Q. You did not use it at all? A. No, sir.

Q. Did you use it in 1945? A. No, we did not.

Q. Did you use it in 1944? A. No, we did not.

Q. Did you use it in 1943? A. No.

Q. Did you use it in 1942, before you went into the Army? A. There might have been some names that Mr. Tanner had compiled that were still left there and had been used, so that would be getting a little bit close.

(3785) Q. A little bit close to what? A. To 1940, to the time he compiled them. The notices were not sent out im-

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mediately. He compiled the names and they were put in the drawer there and they were sent out at intervals.

Q. Now, did you have any familiarity with any Directory of Directors other than Poor's Directory of Directors? A. My personal—

Q. Yes, you personally. A. No, I did not.

Q. Did you ever know that there was more than one Directory of Directors? A. I had heard there was, yes.

Q. From whom had you heard that, Mr. McKenzie? A. In the conversation. I don't know.

Q. With whom?

Mr. Gordon: Well, I object to that.

Mr. Sacher: Oh, wait a minute.

Now, your Honor, every time you get on something Mr. Gordon is there with an objection.

The Court: Now, don't you think it is right that I should hear his objection and rule?

Mr. Sacher: I think it is, your Honor. But I do not think it is right that he should make it.

The Court: It might be better than you suspect. What is it, Mr. Gordon?

Mr. Gordon: I am tempted, your Honor, under the circumstances, to withdraw the objection.

(3786) The Court: I think that is a good idea.

Mr. Sacher: All right.

By Mr. Sacher:

Q. Who told you about these other Directory of Directors? A. I don't recall.

Q. When was it told to you? A. That I don't recall.

Q. What other Directory of Directors was mentioned to you besides Poor's Directory of Directors?

Mr. Sacher: I am waiting for your answer, Mr. McKenzie.

The Witness: I am trying to help you, Mr. Sacher, and give you an answer.

A. I can't say, Mr. Sacher.

Mr. Gordon: I suppose the record should show that when Mr. Sacher said that he was waiting, there

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was no interval between the question and the answer.

The Court: And, of course, he did not say in answer to your prior question that anybody had named any directories. It was just one of those questions that he might well hesitate about because it contained one of those submerged assumptions of fact.

Q. What is Mrs. Fitton's position in your office? A. She is a deputy clerk at the present time.

Q. And what was she in 1947 when you first sent her to the Library to look at a Directory of Directors? (3787)

A. Clerical assistant.

Q. And what was her Civil Service classification at the time?

Mr. Gordon: Objected to as irrelevant.

The Court: Sustained.

Mr. Sacher: Bearing on the witness's credibility. He sends up a clerical assistant to deal with Directory of Directors?

The Court: Yes, and I hold that her Civil Service status has no bearing upon the witness's credibility.

Q. Did Mrs. Fitton tell you at the time you asked her to go to the Library to examine this Directory of Directors that she had any familiarity with these books which contained the names of corporate directors? A. No, she did not.

Q. How long prior to the time you sent her to the Library to look at a Directory of Directors in 1947 had she come to work in your office? A. I haven't got the exact date.

Q. Give me the best, within a year or two is good enough.

A. Within a year, and possibly before that.

Q. Within a year, possibly before that? A. Yes.

Q. And had she indicated any familiarity with Directories of Directors prior to the time you sent her up to the Library for the first time to look at a Directory of Directors? A. Not to my knowledge.

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(3788) Q. And you did not indicate to her what directory she should look for, is that right?

Mr. Gordon: That is objected to as repetitious.
The Court: Sustained.

Q. Was the Address Telephone book used in 1948?

Mr. Gordon: Same objection, your Honor. Mr. Gladstein inquired about that, I believe. If I am wrong I withdraw the objection.

Mr. Sacher: Well, unless Mr. Gordon knows, I don't think he ought to take the time of the Court to interpose the objection.

Mr. Gordon: Well, maybe Mr. Sacher knows. Did Mr. Gladstein ask the witness anything about the Address Telephone book?

Mr. Sacher: Look, the burden is on you to know what you are talking about, Mr. Gordon.

The Court: He asked about the Address Telephone book, but I do not see in my notes whether there was any such question with reference to 1948. But I believe I have a recollection that there was testimony by this witness to that effect.

Mr. Gordon: I have just found in my notes where Mr. Gladstein inquired about the use of the Address Phone book, and the witness testified that he borrowed it from the County Clerk, something about no written instructions, (3789) George Tanner used it; and then he said, "Who else used it?" And he said, "1947 or thereabouts Mrs. Fitton."

"What was her first name?" The witness said, "I don't remember." And then he said, "Yes, it was Florence, Mrs. Florence Fitton."

Mr. Sacher: Anything about 1948?
The Court: Yes, I have all that.

Mr. Sacher: Anything about 1948?

The Court: Yes, 1947 to date, but no record was kept of those.

Mr. Gordon: That is right.

Mr. Sacher: All right.

Mr. Gordon: I object to it.

The Court: Sustained.

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By Mr. Sacher:

Q. Now, did I understand you correctly that you were born in New York City, Mr. McKenzie? A. That is correct, sir.

Q. And you have lived in the City of New York for how many years? A. All my life, sir.

Q. And how many years is that, if you don't mind? A. 47.

Q. You are sure that is right now? A. 47, that is correct. You would think I was a woman trying to conceal it.

Q. And I take it you have been about the town a little (3790) bit in 47 years, is that right?

Mr. Gordon: That is objected to.

The Court: Sustained. Very ambiguous phrase.

Q. Have you ever been on Fifth Avenue in New York City? A. I have, sir.

Q. Have you ever been on Park Avenue? A. Yes.

Q. Have you ever been north of 110th Street in New York City? A. I have.

Q. Have you ever been north of 110th Street on Lenox Avenue in New York City? A. Yes.

Q. And have you walked through that area at all at any time? A. I have.

Q. Did you see any Negro people around Lenox Avenue and 116th and 117th Street and north? A. I did.

Q. I think you testified the other day, Mr. McKenzie, that you have no familiarity with the Assembly District boundaries of various parts of the city, is that correct? A. That is true.

Q. By the way, is that area on Lenox Avenue north of 110th Street familiar to you under the name of Harlem? A. I would say yes.

Q. And since you don't know where Harlem lies according to Assembly district lines, what procedure would you follow to find out where Lenox Avenue and 116th Street lies if you wanted to know whether it is or is not in Harlem?

(3791) Mr. Gordon: Objection.

The Court: Sustained.

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Q. Would you use the Address telephone book to find out whether a given juror's address or a potential juror's address was in or outside of Harlem?

Mr. Gordon: Objection.

The Court: Sustained.

Q. Do you have any notion as to the area which you call Harlem? Can you tell us the boundaries of Harlem as you understand it to be? A. No, I couldn't, sir.

Q. You couldn't? A. No, sir.

Q. Can you tell us the names of some streets in New York north of 110th that you would regard as being part of Harlem, Mr. McKenzie? A. Yes.

Mr. Gordon: Objection.

The Court: I will sustain the objection.

Mr. Sacher: He said yes.

The Court: I can't see—

Mr. Sacher: You won't allow this clerk to say what he understands to be Harlem when the charge here is that he has systematically excluded Negro men and women who live in Harlem? How are you going to prove intent if you don't prove at least that? And your Honor said, "Call the clerk," and we were ready to call him, and they (3792) have called him. Now that they have called him we can't ask him what he regards as Harlem?

The Court: Well, you see, you have already asked him and you have already got answers that I deem sufficient to indicate that he does know about the district in question and he does know that Negroes are there, and I can scarcely imagine anybody here in New York that does not know something about that.

Mr. Sacher: Very good.

The Court: So when I sustain the objection—

Mr. Sacher: That is implicit in your Honor's ruling, I see.

The Court: I thought it was pretty clear. I have no objection to your asking him about these 11th, 12th, 13th and 14th Assembly Districts, if there was

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any reason why notices were not sent there. I think that is a perfectly proper question.

Mr. Sacher: I respectfully decline to ask that.

By Mr. Sacher:

Q. Now Mr. McKenzie, was there any period of time when you used a registered voters list to obtain the names of potential jurors from Westchester County? A. Not in my time, sir.

Q. In other words, when you say not in your time, (3793) does that mean from 1937 to date, or does it mean from 1940 to date? What period of time do you mean? A. Well, there is a lapse of nine months when I was in the armed forces.

Q. Well, we are all aware of that. You were there from July 1942 to April 1943; is that right? A. Yes.

Q. All right, excepting that period—

The Court: Just a second.

Now, I don't suppose you are in much doubt about the time you were in the Army?

The Witness: That is correct, your Honor.

The Court: Well, what you just said was the direct opposite to what you said before, because you probably didn't pay much attention. Now what you told me before was that it was from July 1942 to the middle of April 1943; is that correct?

The Witness: That is correct, your Honor.

Q. Now, you never used a voters registry list then in the years 1937 to the present date, is that right, in regard to Westchester? A. That is true.

Q. Now I show you Exhibit 158 and ask you whether there is a substantial number of names of residents of Westchester County on that exhibit which bears the date on the first page thereof at the bottom, October 8, 1940?

The Court: What is the number of that exhibit? (3794) Mr. Sacher: 158, your Honor.

A. Yes, that is so.

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Q. Now I show you Challenge Exhibit 164 for identification and ask you whether that is your handwriting on the upper lefthand corner of the first page?

Mr. McGohey: What is the number, please, Mr. Sacher?

Mr. Sacher: 164 for identification.

Mr. McGohey: Thank you.

A. No, it is not.

Q. Do you know whose handwriting it is? A. No, I do not.

Q. Was this paper produced from your files, 164 for identification?

Mr. Gordon: Your Honor, I am going to object to further questions to the witness on this paper on the ground that it bears a date February 17, 1943, which is when the witness said he was in the Army.

Mr. Sacher: The world and the jury clerk's office didn't come to an end because he was in the Army.

Mr. Gordon: I stated an objection. I wasn't intending to argue with Mr. Sacher.

The Court: February 7, 1943, you say?

Mr. Sacher: 1943, your Honor.

The Court: Let me look at the paper.

Mr. Gordon: And the witness has now said he does (3795) not recognize the handwriting, and so forth.

Mr. Sacher: But he has also said it comes right from his files.

The Court: Read the question.

(Question read.)

The Court: It has already appeared it was produced from the files. So I will sustain the objection.

Mr. Sacher: I want to offer it in evidence.

Mr. Gordon: Your Honor, the exhibit was offered by Mr. Gladstein, and the grounds of the objection were stated, and the objection was sustained. The fact that it comes from his files does not tell us what it is.

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The Court: Yes. I had a recollection when I looked at it a moment ago that that was the very paper I excluded yesterday.

Mr. Gordon: Same objection as yesterday.

The Court: I will sustain the objection.

By Mr. Sacher:

Q. Who was the jury clerk during the time that you were in the Armed Forces? A. Mr. William Borman.

Mr. Sacher: Would your Honor allow me to ask Mr. Borman—

The Court: Oh, no. I will have no more of this shifting people around.

Mr. Sacher: No, I just wanted to ask him from (3796) here whether it is his signature, and then we can put it in.

The Court: No, we are going to take one witness at a time and we are going to conclude with that witness.

Mr. Sacher: All right.

Q. Now I show you Challenge Exhibit 166 for identification bearing date April 18, 1941, and ask you whether that came from your office? A. Yes, it did.

Q. I call your attention to the words "5 List" on the left side thereof, and ask you what that indicates? A. That indicates that when these qualification notices were made out a card was made bearing "5" on it.

The Court: "5 L"?

The Witness: "5 L", I should say.

Q. Does that notation "5 List" indicate that names were taken from this Exhibit 166 for identification and qualifying notices sent out to prospective jurors selected from that exhibit? A. That is what it would indicate.

Mr. Sacher: I offer it in evidence.

The Court: Selected from that exhibit, or were all the names used?

The Witness: I don't know, your Honor, whether they were all used or not.

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Q. But some were? A. I don't know.

(3797) Mr. Sacher: Now, I am just trying to lay a basis for its admission.

The Witness: All I can account for is that this is "5-L" and the manner in which it was used. It was not made up on lists but cards, "5-L" or "6-L" and as the juror came in a card was made up and it was marked on the card "Eligible" or "Disqualified" or whatever it might have been—

The Court: And whether they did that with all the names on that or some of those names or none of those names you can't be sure because there is nothing on there to refresh your recollection?

The Witness: That is correct, your Honor.

Q. Doesn't the word "5 List" indicate that the names of some people on this one, 166 for identification, were added to an active jurors list known as "5 List"; isn't that so? A. That I couldn't state.

Q. Do you deny that when "5 List" appears on a list that it means that that was the list from which qualified jurors were taken? A. You could have made up "5 List" then when the cards were made up and qualification notices made up and sent out for them.

The Court: That is what he has been saying all the time.

Mr. Sacher: Do you deny that the foundation (3798) has been laid for the admission of this exhibit now?

The Court: Well, offer it.

Mr. Sacher: I offer it in evidence.

Mr. Gordon: I object to the exhibit, your Honor, on the ground that there is no proof that it was ever used for any purpose in connection with securing persons as potential jurors; there is no proof, if it were used; it is speculative as to how it was used; it does not appear to be germane to the direct examination. On those three grounds.

Mr. Gladstein: May I speak on that objection, your Honor, before your Honor rules?

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The Court: No. I will tell you so that you may not unnecessarily burden yourself, I am very likely to let this exhibit in.

Mr. Gladstein: Very well.

The Court: Very well.

Mr. Gladstein: I will say nothing to dissuade your Honor from that intention.

Mr. Gordon: Perhaps I can be equally gracious, your Honor. Under the special circumstances I will withdraw the objection.

The Court: The exhibit may be marked.

(Defendants' Challenge Exhibit 166 for identification received in evidence.)

The Court: So there may be no fog around (3799) the ruling, I feel that the evidence that has been given by Mr. McKenzie would warrant the argument that such a list as this was probably used in the office of the jury commissioner or jury clerk for the purpose of making out cards to be sent to persons who might or might not thereafter qualify as jurors, and that those cards had on them the identifying symbol—is it "5" or "6" on there?

Mr. Sacher: "5," your Honor.

The Court: "5-L" and that the list may well have been kept, or in connection with other papers kept for the purpose of seeing whether the persons to whom those cards were sent responded.

By Mr. Sacher:

Q. It is true, is it not, Mr. McKenzie, that Challenge Exhibit 166 consists of names which are nominations for the panel of federal grand jurors for the Southern District of New York bearing date April 8, 1941, and contains the names of people whose residences are stated to be within the County of Westchester?

Mr. Gordon: Oh—

Mr. Sacher: Some of them. Not all.

Mr. Gordon: Well, look at them again, Mr. Sacher. I think perhaps the exhibit should be passed—

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Mr. Sacher: Do you say there are none?
(3800) The Court: Let him look.

Mr. Sacher: Yonkers and Mount Vernon are in Westchester, even though you don't know it.

The Court: Let him look. If some of them are in there he can see it.

Mr. Gordon: I didn't say that, your Honor.

The Court: I know. You have been very wise in remaining perfectly silent on this occasion, and I think it fine. Now let us just look and see what he finds.

Are there some from Westchester?

The Witness: Yes, there are some, your Honor.

The Court: A few?

The Witness: A few, yes, your Honor.

Mr. Sacher: Will you indulge me just a moment, your Honor?

The Court: Is that another one of those grand jurors—let me look at it.

Mr. Sacher: It does not bear the legend from the federal grand jury.

The Court: Oh, it does not?

Mr. Sacher: Oh, yes, I think it does. It does. I am sorry.

The Court: Then I think I had better add that to my list over here.

(3801) *By Mr. Sacher:*

Q. Now Mr. McKenzie, I show you Challenge Exhibit 167 for identification, which is marked 13-P, and I ask you whether that list was used by your office for the purpose of sending out notices for qualification to persons named on that list? A. It would indicate that it was used by the office. As to whom, I have no means of knowing who used it.

Q. I show you page 13 of Challenge Exhibit 180, and ask you to tell us whether entries on that page indicate that list marked 13-P was used by your office in the sending of notices to jurors for qualification? A. Well, this was not during my time as jury clerk.

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Q. Well, look, the world didn't come to an end, Mr. McKenzie, while you were out. A. Is it permissible to testify—

Q. I am asking you—

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

Mr. Sacher: Well, wait.

Mr. Gordon: I would say the world came pretty close to coming to an end during that period.

The Court: Well, the witness if he does not know anything about whether this was used or not should say so.

Mr. Sacher: I am asking him whether the record, (3802) the exhibit in evidence, indicates that 13-P was used.

The Court: You see, what he is trying to say is that he really does not know whether it was or not; that probably it was. That is about the size of it.

Isn't that right, Mr. McKenzie?

The Witness: That is correct, your Honor.

Mr. Sacher: I am not interested in "probably was." I want him to tell us whether this exhibit 180 indicates that it was. That is what I am asking him.

The Court: Well, if there is an objection, I am going to sustain it.

Mr. Gordon: Objection.

The Court: I will sustain the objection. That calls for a mental operation that you and I can draw just as well as the witness.

Mr. Sacher: Then may I, for the purpose of exercising both of us in the operation, state to your Honor that page 13 of Exhibit 180 bears the following notation: Under the column headed "District" there appear the figures and letter P, "13-P" five times on pages 13 and 14; and under the column "Quantity mailed" indicates 61 mailings of qualifying notices on March 4, 1943; ten on March 12, 1943; 15 on March 16, 1943; 10 on March 18, 1943.

(3803) The Court: Well, you see that is just what I said, that it can be drawn as an inference from what appears right on the face of the book.

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Mr. Sacher: All right. I now offer Challenge Exhibit 167 for identification in evidence.

Mr. Gordon: The same objection as the objection to 164, on the ground that the exhibit contains a lot of marks, lines and check marks, and if the witness isn't familiar with it then we won't know what it means.

Mr. Sacher: Does your Honor wish to see it?

The Court: Yes. What is the date of it?

Mr. Sacher: It bears no date, your Honor.

Mr. Gordon: Well, the page that Mr. Sacher was reading from Exhibit 180 bears a date of March. Wasn't that where you were reading from?

Mr. Sacher: Yes. Pages 13 and 14. The dates indicate—

Mr. Gordon: It says "March 1943" at the top.

Mr. Sacher: That is right.

The Court: March 1943?

Mr. Sacher: That is right, your Honor.

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

Mr. Sacher: The exhibit does not go in?

The Court: No, that is right. As I understand (3804) it, the witness has said he does not know anything about that paper. Am I right, Mr. McKenzie?

The Witness: That is correct, your Honor.

Mr. Sacher: But, your Honor, you invoked the mental operations of both of us, and I showed that in this record 180 this list, 13-P, shows the mailings of notices; the witness has testified that as a general matter these letters and numbers, et cetera, are reflected in the records to show the mailings, and this is—

The Court: Yes. The book on which your question was based justifies the inference or argument that you make. The paper that I have excluded however does not bear that inference because if you look at it you will find it bears a whole lot of lines through various names and marks of one kind or another, and I would not feel justified in drawing any inference at all.

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Mr. Isserman: If the Court please,—

Mr. Sacher: But it bears the name—just a moment—it bears the figure 13-P. That is the link between that and the book.

The Court: I understand it. But I am ruling on it.

Mr. Sacher: All right. Exception.

The Court: And I probably will make a mistake (3805) in trying to explain my rulings for your guidance, but I shall continue to do it where I think it may be helpful. But the ruling is clear to me. I may be wrong about it, but I feel absolutely clear on it.

Mr. Isserman: If the Court please, I would like to call one fact to your Honor's attention from which the inference I feel could be drawn, and that is this witness has testified that lines through a name indicate that qualification notice had been sent, and that is in the record.

The Court: That is not my recollection.

Mr. Gordon: That is exactly not so, your Honor.

Mr. Isserman: I will call it to your Honor's attention.

The Court: All right.

By Mr. Sacher:

Q. Now you came back from the armed services in April, 1943, is that right? A. That is so.

Q. Now did you make any entries whatever after you came back from the armed services in this Exhibit 180? A. Yes, I did.

Q. Will you show us on what pages your entries appear, Mr. McKenzie? A. On page 15, April 1943.

Q. Page 15? A. And the heading is April 1943.

Q. Are there any other entries in Exhibit 180 in (3806) the year 1943 made by you or anybody else? Will you look—

Mr. Sacher: No, please, Mr. Gordon, will you let—

Joseph F. McKenzie—for Government on Challenge—Cross

Your Honor I can't stand this. Now I am in the process—look, he has got me crowded out of the corner practically.

The Court: Mr. Sacher—

Mr. Sacher: I am a little fellow and he is big man.

The Court: You get so excited.

Mr. Sacher: No. He is always pushing.

The Court: I can never tell when you are really excited or when you are putting on an act.

Mr. Gordon: This is an act.

Mr. Sacher: Now look where I stand, your Honor, just look.

The Court: Now, what is worrying you? Because Mr. Gordon is standing there isn't really harming you.

Mr. Sacher: I am cornered. I want a little bit of room.

The Court: What is the question that you have asked the witness?

Mr. Sacher: And he is hiding me from public view, too.

Mr. McGohey: Not your voice.

(3807) The Court: Well, confession is good for the soul.

Mr. Gordon: Your Honor, may I look at the entry which he directed the witness's attention to? And then I will get away from here. I think that is something—

The Court: Let him ask the question.

Mr. Gordon: Oh, he already asked a question.

The Court: But I take it you are approaching the witness stand so that you might or might not formulate an objection.

Mr. Gordon: It was to see what the examination was about. In the case of Mr. Sacher we don't have the whispering problem, but there is a little conference up there.

The Court: Yes. I think it is not always proper for an adversary counsel to see exactly what it is, but here I see no harm in it. And I have forgotten

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Joseph F. McKenzie—for Government on Challenge—Cross

the question in the excitement. Now, let us see what the question was. As I recall it, you were asking did anybody else, in the whole book—

Mr. Sacher: No, I want to show the rest of the year 1943—

The Witness: After—

Q. After page 15, which you have mentioned, is there any entry in that book for any part of the year 1943 after (3808) page 15 which contains entries in regard to April, I think you said, 1943? A. There is no entry as to notices sent out after April 30, 1943.

Q. As a matter of fact aren't there seven pages missing from this book Exhibit 180, pages 17 to 24 inclusive? Where are those pages 17 to 24?

Mr. Gordon: Well, is there one question or two?

Mr. Sacher: Wait a minute. Your Honor, I would like to have the witness's answer.

The Court: Sustained. You have been going on asking any number of questions and I don't know which one he is supposed to answer.

Mr. Sacher: All right.

Q. Are pages numbered 17 to 24 missing from that book? A. It would indicate that they are.

Q. They are. Where are they? A. When Mr. Borman started this book back in 1942 it was an old book and he started in trying to keep a record which we had never kept before and had never any indication that the book was of importance to count the pages and see that every page was there. It was taken out of a file, and I don't know if Mr. Borman discovered it at that time, but I do know that in all the time that I have been in the working on this book that the pages certainly were not—not in there from the time I made the last entry until (3809) the time the figures were kept on this particular—

Q. I don't know what the latter part of your answer means.

1901

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: Do you know what happened to those pages?

The Witness: They were not in the book when the book was started, from what I understand.

Q. On what do you base that statement?

The Court: Just a second.

Mr. Sacher: I beg your pardon.

The Court: Do you know where those pages are or what became of them?

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

Q. It is the fact, though, is it not—

The Court: Just a second. I want to take a look at the book.

The book bears absolutely no evidence, under my scrutiny, that the pages were taken out at all. As far as I can tell from the appearance of the book, when it was first bound and put together the pages were then missing and had been so missing from the beginning.

Mr. Sacher: I move to strike that statement from the record on the ground that your Honor is not under oath and hasn't been shown to be qualified to give expert testimony as to what the book indicates, (3810) as to whether pages have been torn out or not.

The Court: It indicates that to me and I put it on the record.

Mr. Sacher: For what it is worth, shall we say.

The Court: Don't you think it looks the same way?

Mr. Sacher: I have no opinion to offer on it. I think we ought to send for Mr. Osborn before any of us can form an opinion on it.

The Court: I got the impression from the way you spoke that the back showed evidence of pages being torn out. As I look at it I find no evidence of anything whatever being taken out. This isn't the first book that had pages missing.

1902

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Sacher: Let me say to your Honor that this is the kind of book—you will notice where that cord is run right through the page; you could pull pieces of paper out from both sides of the page there and there would be no evidence that the paper had been torn. That is the way that is constructed there. And to say that there is no evidence is simply to say that the structure of the book at that point is such that you can remove pages without leaving a trace of the removal.

The Court: It so appears to me. If I am wrong, why, I will take evidence that you may submit. But that is (3811) the way it looks to me. Let me look at it again and see if there is a continuity of subject matter.

Mr. Sacher: Continuity of subject matter?

The Court: Yes.

Mr. Sacher: No, sir, there is not.

Mr. Gordon: I move to strike that out.

Mr. Sacher: That is what aroused my curiosity about it this morning.

Mr. Gordon: I move to strike that.

The Court: Well, I do not have any objection to counsel making some comment like that. I think it is reasonable enough when there is an obvious hiatus in page numbers for counsel to express a suspicion. The nature of the matter on the various pages as far as I can tell at the moment indicates little one way or another.

Mr. Gladstein: May I see it, your Honor?

The Court: Yes. Well, here is where we are going to adjourn for the day.

The Witness: Your Honor, may I ask—

Mr. Isserman: If the Court please—

The Witness: —is Mr. Gladstein going to come up in our office to look at some applications? There is some question about it.

The Court: Do you want to go up there and look (3811-A) at some applications, Mr. Gladstein? You straighten it out between you and Mr. Gladstein.

(Adjourned to February 17, 1949, at 10.30 a.m.)

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Joseph F. McKenzie—for Government on Challenge—Cross

(3812)

New York, February 17, 1949;
10.30 a. m.

* * *

(3817) Mr. Sacher: Shall I proceed, your Honor?

The Court: Yes.

Cross examination continued by Mr. Sacher:

Q. Now, Mr. McKenzie, yesterday afternoon you testified as follows, at page 3783 of the transcript:

"Q. On the occasion that you mentioned the other day when you asked Mrs. Fitton to go up to the library and examine Poor's Directory of Directors, was that the first occasion on which she had been directed to do that?"

And you answered: "I did not state Poor's Directory of Directors. I sent her to the library to get the Directory of Directors."

Do you recall that? A. I do, sir.

Q. Did you ever learn what Directory of Directors she actually did use?

Mr. Gordon: Objected to as repetitious, your Honor. This is either the third or fourth time around on this subject.

The Court: I think it is.

Mr. Sacher: Did he testify that it was Poor's?

The Court: No, I think he testified that he didn't know which one.

Mr. Sacher: Well, I have here some testimony to call to his attention which shows that he did know. That is the purpose of this.

((3818)) The Court: Then without all the preliminaries get right to it.

Mr. Sacher: All right.

Q. Do you recall testifying in response to Mr. Gordon's questions as follows at pages 3468 and 3469 of the transcript:

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

1904

Joseph F. McKenzie—for Government on Challenge—Cross

Do you remember that? A. Mr. Gordon was talking about back in 1940—

Q. No, do you remember that? Do you remember that? A. I do.

Q. Did you make that answer? A. I did.

Q. Were you asked the following question:

“Q. How about the address telephone book?” And did you make the following answer at page 3469: “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.”

Did you make that answer? A. Yes, I did.

Q. Were you asked the following question by Mr. Gordon at page 3469:

“Q. And the use of the Poor’s Directory which was kept at the Library?”

(3819) Were you asked that question? Do you remember that?

Mr. Gordon: It looks as though I made a mistake.

A. And that was referring to 1940—

Mr. Sacher: Now wait a minute. Is that an objection or a confession? Which is it?

The Court: Well, I don’t think we will go into that. Go ahead and ask him the question.

Mr. Sacher: All right.

Q. Were you asked the following question:

“Q. And the use of the Poor’s Directory which was kept at the Library?”

Were you asked that question? Yes or no? A. I was.

Q. And did you make the following answer:

“Why we completed using that in May or June of 1948.”

Did you make that answer? Yes or no? A. Yes, I did.

1905

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Sacher: May I trouble you for Exhibits 178 and 179, please?

(Exhibits handed to Mr. Sacher.)

Mr. Sacher: I wanted 179 and 180.

Mr. Gordon: That is not what you asked for.

Mr. Sacher: I don't think your hearing is very (3820) good today, Mr. Gordon.

Mr. Gordon: I will stand on the record that you asked for 178 and 179. Now you made a little mistake just the way I did when I thought that Poor's was the only directory.

The Court: Now, Mr. Gordon—

Mr. Sacher: He didn't have breakfast this morning—

The Court: —you ought not to seize that bait so readily.

Mr. Gordon: I apologize, your Honor.

The Court: They spread this bait around here. Now you snap it up so fast.

Mr. Gordon: I apologize, your Honor. Unfortunately the record does not show all the remarks which are made to me *sotto voce*.

The Court: I know, but those little remarks, they have no place in the record, and it is undoubtedly just the way you say, but don't get bothered by these things.

Mr. Gladstein: Your Honor means that Mr. Gordon ought not to respond to the fish hooks?

By Mr. Sacher:

Q. I show you Exhibit 179, page 24, and ask you to state whether there are any entries on that page which (3821) indicate the mailing of jury notices to directors of corporations? A. Yes, there are.

Q. What month of the year and what year does page 24 of Exhibit 179 refer to? A. May of 1948.

Q. And how many notices does page 24 indicate were sent to corporation directors in May 1948?

Mr. Gordon: If it indicates that at all, your Honor. I don't understand—

1906

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Sacher: He just testified it did, Mr. Gordon.

Mr. Gordon: Did he?

Mr. Sacher: You are not listening.

Mr. Gordon: You see, your Honor, I say nothing in reply.

The Court: I know. That is good work.

A. It shows three dates of 25 apiece sent out and one day of 125. A total of 200.

Q. 200 jury notices sent to corporation directors in May, 1948, is that right? A. That is correct.

Mr. McGohey: You mean qualification notices?

The Witness: Qualification notices.

Q. Qualification notices? A. Yes.

Q. When was the next month after May 1948 that you sent out qualification notices to prospective or potential jurors? Does that appear in Exhibit 179? A. It does.

(3822) Q. On what page does that appear? A. On the following page.

Q. And what is the month on that following page? A. Qualification notices—

Q. No. What is the month? The month? A. October 1948.

Q. Does that indicate then that there was a hiatus of four months, that is, between May 1948 and October 1948 when no jury qualification notices were sent out? A. That is correct.

Q. Now, does page 25 of Exhibit 179 indicate that qualification notices were sent out to directors of corporations during the month of October, 1948? A. Yes, it does.

Q. How many notices were sent to corporation directors in October, 1948? A. There are five days at 50 apiece. 250.

Q. 250? A. Yes.

Q. What was the total number of notices sent out; that is, jury qualification notices, sent out during the month of October 1948? A. 750.

Q. So that the number of qualification notices sent to corporation directors constitute 33-1/3 per cent of the total number of qualification notices which you sent out in October, 1948, is that right? A. I haven't computed it.

(3823) Q. Well, don't you know that—

1907

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: It is about—

Mr. Sacher: It is not about. It is exactly a third.

The Court: If it is, it is, so let us not get into argument with the witness about it.

Mr. Sacher: After all, Mr. McKenzie can add and subtract and divide, I assume.

The Court: Yes, so can I, but I make mistakes very often.

Mr. Sacher: All right.

Now I would like to have Mr. McKenzie's affidavit of October 6, 1948, please. That is among the filed papers in the case.

The Court: In what connection was that served, Mr. Sacher?

Mr. Sacher: That was served in opposition to the motion to dismiss the indictment on the ground that the grand jury was illegally composed, your Honor.

The Court: I am not sure whether I have here all the papers that were put in last fall.

Mr. McGahey: That motion did not come on before your Honor. That is the one that came on before Judge Hulbert.

The Court: Well then, I think I can find it. (3824) I think I probably have the papers here that were before Judge Hulbert. I may not have them all.

October 6, 1948?

Mr. Sacher: That is right, your Honor.

The Court: I have it here (handing).

Q. Mr. McKenzie, will you be kind enough to look at this paper and tell me whether that is your signature? A. Yes, that is correct.

Q. And does this paper which I show you purport to be an affidavit which you swore to on October 6, 1948, before John T. O'Lear, Jr., notary public? A. That is correct.

Q. And you did swear to the truth of the contents of that affidavit that I have just shown you? A. I did.

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Sacher: I offer the affidavit of Joseph F. McKenzie, sworn to October 6, 1948, in evidence, and ask since it is a court record that it be deemed marked.

The Court: Yes. Let me have a look at it. Has Mr. McGohey seen it?

Mr. McGohey: Yes, I am familiar with the affidavit, your Honor. I have no objection.

The Court: It may be deemed marked in evidence.

(Deemed marked Defendants' Challenge Exhibit 227 in evidence.)

(3825) Q. Did you have any conversation with anyone in the office of the United States Attorney prior to your signing Exhibit 227 in respect to the matters which are contained in that exhibit? A. I did.

Q. And whom did you speak to, Mr. McKenzie? A. I believe it was a Mr. Wallace.

Q. Mr. Wallace? A. Yes.

Q. Is he in the courtroom now? A. No, I don't see him.

Q. Has he been in the courtroom since the trial of this challenge began, do you know?

Mr. Gordon: That is objected to. The witness does not know.

Mr. Sacher: Will you concede that, Mr. Gordon?

The Court: If there is some inconsistency proceed without all these preliminaries.

Mr. Sacher: I will, your Honor.

Q. Did Mr. Wallace ask you to tell him how the names of prospective or potential jurors were selected by you or your associates or assistants in the jury clerk's office? A. Mr. Wallace asked me—

Q. Did he? Yes or no? A. No, he did not.

Q. He did not? A. No.

Q. Did he tell you that the defendants in this case had made a motion to dismiss the indictment on the ground (3826) that the jury, the grand jury, which indicted them, was illegally constituted?

1909

Joseph F. McKenzie—for Government on Challenge—Cross

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

Q. Did you tell Mr. Wallace anything concerning the selection of names of corporation directors— A. Mr. Wallace—

Q. —as potential names of jurors? A. Mr. Wallace asked, "Where are you getting your jurors?"

Q. Is that what he asked you? A. Yes.

Q. Did you tell him? A. I said, "From the lists of registered voters."

Q. Is that all you told him? A. That is all I told him. He asked for the list of registered voters and I went and got them for him, and he asked, "How do you arrive at the names here?" And I explained to him they are given to a deputy court clerk who—

Q. I know. You got on, Mr. McKenzie. I realize you have spoken to somebody, but just answer my question, will you?

Mr. Gordon: May that remark be stricken?
The Court: Yes.

I think, Mr. Sacher, you are trying to insinuate that somebody told him to answer in a particular way. (3827) I do not think you ought to do that.

Mr. Sacher: I will desist, your Honor.

The Court: If you desire to bring out some alleged inconsistency, go ahead and bring it out.

Mr. Sacher: I will, your Honor. It won't be too long. I will.

Q. Now, the fact of the matter is, is it not, that the last mailing of jury qualification notices which had taken place prior to your conversation with Mr. Wallace took place in May 1948, as appears from page 24 of Exhibit 179 in evidence; isn't that the fact? A. The affidavit shows that I talked to him on October 6—is that correct?

Q. I didn't— A. I just want to check these figures to be sure.

Q. Look, I am asking the questions. You don't ask them; you answer them. A. I am sorry.

Q. Now, is the fact that the last time you sent out notices, these jury qualification notices prior to your con-

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Joseph F. McKenzie—for Government on Challenge—Cross

versation with Mr. Wallace, was in May 1948? Is that right? A. Well, I will have to know the date of the conversation with Mr. Wallace.

Q. Well, don't you know the date of your conversation with Mr. Wallace? A. Unless you refresh me with something there to refer to.

(3828) Q. I see. You need to refresh your recollection, is that what you say? A. I would like to know the date on which I spoke to him.

Q. Well, let me ask you this: It is a fact, isn't it that the last mailing immediately preceding your affidavit in this case was the mailing in May 1948; isn't that so? A. What is the date of the affidavit?

The Court: October 6, 1948.

A. Yes, the last time of the mailing of applications, or qualification notices, I should say, was on May 28, 1948.

Q. Now when you mail jury qualification notices out do you make any preparations the day before in the way of preparing notices and the envelopes and the names, et cetera, of the persons to whom you are going to mail them out? A. It may be done in the morning of that day—

Q. The preceding day? A. It may be done in the morning of that day that they are mailed out or in the middle of the day; I wouldn't certainly say as to what time of the day as to the operation actually takes place.

Q. Might it also be done in the afternoon immediately preceding the day on which you mailed those notices out? A. I don't know in every instance.

Q. You wouldn't deny that it has happened in the past, that notices sent out to jurors on one day were actually prepared for mailing on the day immediately preceding the (3829) mailing; isn't that so?

Mr. Gordon: Objected to.

The Court: Sustained.

Mr. Sacher: Now, I have asked him as to whether it happened.

Mr. Gordon: I object.

The Court: You asked whether he would not deny, and I sustained the objection because I think

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that just adds an element of confusion. His recollection of it is relevant.

Mr. Sacher: All right.

Q. Do you recall then, Mr. McKenzie, whether there have been instances in the past when you have prepared jury qualification notices for mailing, or your office has, on the afternoon or morning of one day, and actually mailed them out on the following day? A. I don't know.

Q. You don't know? A. No, sir.

Q. Now will you be good enough to tell the Court on what day in October 1948 was the first day on which you mailed out jury qualification notices to directors of corporations? A. There was 50 mailed October 7th—

Q. On what date was that? A. There was 50 mailed October 7, 1948.

Q. October 7th, that was the first day after the filing (3830) of this affidavit, which is Exhibit 227, is that right? A. That's correct.

Q. Now I ask you to look at Exhibit 227, read it carefully, and tell the Court whether there is any mention in Exhibit 227 of the fact that you ever mailed jury qualification notices to persons whose names had been selected from a directory of corporation directors.

Mr. Gordon: Your Honor, that question is objected to as unfair, for this reason: that the affidavit does not purport to concern itself with the people to whom notices were being mailed. It has appeared from the testimony of the witness that he was asked and he told Mr. Wallace about the place where he was getting the names from.

Mr. Sacher: I object to this because this is clearly an effort to tell the witness how to answer the question. I implore the Court to give us the same consideration that was extended to the prosecution when similar efforts—objections were made by us.

Mr. Gordon: Mr. Sacher is trying to mislead the Court, and I deem it my duty to see that your Honor gets the facts.

The Court: Well, I am not easily misled, I think. Of course, no one ever knows about such

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Colloquy of Court and Counsel

matters. But I really think that this persistent idea that I am (3831) always favoring the prosecution and that I am ruling one way for the prosecution and one way for the defense, it is just that sort of innuendo that is wrong, it ought not to be done. I am trying to do my best here to rule properly on every one of the things that come before me. But I suppose I must hear more of that. But I say it isn't so.

My rulings have, as far as I could humanly do so, been as fair as I could make them, as impartial as between the prosecution and the defense, and this continual talk about how I always rule for the prosecution and that I always say yes to them is so completely belied by the record that I don't see how counsel can keep saying it.

Now let me read the affidavit here and get it more closely in mind. May I have before me the paper to which this affidavit was responsive? Let me see what it was that was said on the other side. You know, it is easy to get these things all tangled up.

Mr. McGohey, I wonder, or Mr. Gordon, if I have the papers here, the motion papers to which the Government made response by filing opposing affidavits. I would like to find the part of the motion papers of the defendants that this affidavit of Mr. McKenzie was responsive to.

Mr. McGohey: Yes, your Honor.

Mr. Gordon: Mr. Sacher and I are not in agreement.

(3832) Mr. Sacher: As to what he wants you to see; he wants you to see one little thing, I would like you to see everything.

The Court: You know, if I took the time to read everything in those papers—

Mr. Sacher: No, not everything.

The Court: —it would probably take me from now until about an hour and a half. I remember studying them over very carefully when you made that so-called hysteria motion last fall, and then you asked me to look over these affidavits that have

1913

Colloquy of Court and Counsel

been submitted to Judge Hulbert and I did so, but it was a lengthy matter. Now I will look at what each of you want me to see.

Mr. Gordon: I understood that your Honor wished to know what the motion was to which the affidavit was addressed.

The Court: Yes.

Mr. Sacher: He thinks "motion" means notice of motion, and I think "motion" means the things that move, that were submitted to move the Court. Now, what is it you want, your Honor?

The Court: Well, you see, if that is so, the responsive affidavit in opposition usually starts out, according to the common practice of lawyers, by saying, "I have read the affidavit of so-and-so dated such-and-such (3833) a date," and then go on to deny or not deny whatever is in that affidavit.

Mr. Sacher: That is what I wanted to show to you.

The Court: But this affidavit of Mr. McKenzie does not do any such thing as that, and so I think you had better get straightened out what the man is supposed to be doing by this affidavit before we get it all confused. You know, the moment—

Mr. Sacher: Right at the bottom of the page.

The Court: This is the notice of motion.

Mr. Sacher: No, your Honor. That is the affidavit in response to which his affidavit was made.

The Court: All right. Now Mr. Gordon wanted me to look at the notice of motion.

Mr. Gordon: On the bottom of the first page of the papers, your Honor; the notice of motion says that the argument will concern itself with the unlawful composition of the grand jury.

Mr. Sacher: But the affidavit tells your Honor what we regard as unlawful.

The Court: I know, but I am going to look at them both, Mr. Sacher.

Mr. McGahey: If the Court please, may I know what page it is that Mr. Sacher referred to your Honor there?

(3834) The Court: It is page 28.

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Colloquy of Court and Counsel

Mr. McGohey: Thank you.

The Court: I have my thumb on it here while I am reading the first part in the notice of motion.

Mr. Gordon: The notice of motion, I think it is the third line from the bottom; that was as far as I had got in looking through the papers when Mr. Sacher took them from my hand, your Honor. Then I believe he refers to page 28 of somebody's affidavit—Mr. William Z. Foster, which apparently was sworn to on the 28th of September.

The Court: Yes.

Mr. Gordon: May I have that book?

The Court: Very well, I have the matters in mind.

Mr. Gordon: Does your Honor also have in mind that the grand jury, whose composition was being attacked, was impaneled on June 16th or 17, 1947?

The Court: Yes, I do. I do. So that the charge in here that the grand jury was composed almost in its entirety of executives, manufacturers, brokers, and so on is a distinct charge from the one that has to do with this systematic exclusion of all working people and all members of the colored race, and so on.

Mr. Gordon: And if your Honor will look at (3835) Exhibit 179 in evidence you will find that the qualification notices in this book for the period prior to the selection of that grand jury seem to come predominantly from the registered voters lists. I find no reference to any directory of directors. There are notices, your Honor, which were also mailed out—

Mr. Sacher: How about the Address Telephone book there?

Mr. Gordon: There are—may I complete my sentence?

The Court: Yes.

Mr. Gordon: There are notices which were apparently sent out from the Manhattan Telephone Directory.

May I hand the exhibit to your Honor?

1915

Colloquy of Court and Counsel

The Court: Yes. What was the date—

Mr. Gladstein: Is it necessary, your Honor—

The Court: What was the date when that grand jury was impaneled?

Mr. McGahey: June 1947.

Mr. Sacher: June 16, 1947, it was drawn on June 4, 1947, just about seven days after the last mailings in May to corporation directors.

Mr. Gordon: Oh, no, you are talking about 1948 in there.

Mr. Sacher: Oh, I am talking about 1948?

(3836) Mr. Gordon: Yes.

Mr. Sacher: Then let me help you out a little with 1947, then.

The Court: Wait a moment. Let me get this straight. The charge was made as to the grand jury that indicted the defendants.

Mr. Sacher: That is correct, your Honor.

The Court: And that charge had to do with the grand jury that convened on June 16, 1947.

Mr. Sacher: Yes, your Honor.

The Court: So that any affidavit he put in could scarcely be deemed to describe what was done in 1948, a year or so, a year or more after that grand jury was impaneled.

Mr. Sacher: Has your Honor—

The Court: I think that is important.

Mr. Sacher: All right.

The Court: That is why I wanted to find out what we were talking about before you begin getting the thing all mixed up.

Mr. Sacher: No. I won't—

The Court: Go ahead with the cross-examination. You know, you get an affidavit, and unless you know what the man is talking about, why, you simply produce confusion.

Mr. Sacher: May I have 179?

(3837) The Court: Yes. Maybe this is the book you are looking for.

Mr. Sacher: Yes, I think so, your Honor.

Mr. McGahey: I suggest to your Honor that the character or the occupations of the grand jury which

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Joseph F. McKenzie—for Government on Challenge—Cross

returned this indictment are all pretty much a matter of this record, since nearly all of them appeared as witnesses called by the defendants.

The Court: Yes, they did.

By Mr. Sacher:

Q. Now let me ask you this, Mr. McKenzie: It is true, is it not, that the names of people which are selected for the mailing of jury qualification notices are usually selected some time in advance of the mailing of the notices to them; isn't that so? A. I did not get that question, Mr. Sacher. Will you repeat that?

Q. Well, if you are going to send notices to somebody, let us say, in October, you prepare, some months in advance, the names of people to whom you are going to send out notices in October; isn't that so? A. Not necessarily October. They might—

Q. Suppose, for example, you were going to send notices out in October, would you be collecting those names—
A. They are prepared in advance.

(3838) Q. Would you be collecting them in January and February and March of that year, and April and May?
A. It could be of any time.

Q. Now, do you recall whether you collected any names or selected any names of corporation directors at any time in the year 1947? A. Yes, I did.

Q. When did you select such names—tell his Honor; in what months of that year?

Mr. Gordon: This is repetitious, your Honor.

Mr. Sacher: What?

Mr. Gordon: This is the fourth time.

The Court: Well, I think what Mr. Sacher is trying to do is to show that there is something about this affidavit of October 6th that impairs the credibility of the witness.

Mr. Sacher: Precisely.

The Court: And I shall permit him to do so.

Mr. Sacher: Will you be good enough to read the question to the witness, Mr. Reporter?

(Question read.)

1917

Joseph F. McKenzie—for Government on Challenge—Cross

A. The last date that I can recall is August and possibly the early part of September; the latter part of August, the early part of September 1947.

Q. Will you tell his Honor how you happen to remember it was in the latter part of August and the early part of (3839) September? A. I still have a slip up in my desk of—

Q. Will you produce that slip?

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

A. (Continuing) Of a carfare slip of the man who went there, your Honor, to the Library, and the ten-cent trips amounted to possibly a dollar or so, and I gave him the money and he signed the receipt for it; and I had failed to collect it from the cashier's office, I didn't have the vouchers made up. So it is still in my desk.

Mr. Sacher: I ask that those slips—I withdraw that.

Q. You say it is on your desk? A. It is in my desk.

Q. Where in your desk is it, do you know? A. It is there some place.

Q. When did you last see it, Mr. McKenzie? A. Oh, possibly—

Q. Yesterday? A. No, I wouldn't say it was yesterday.

Q. The day before?

The Court: Well, let him think and answer.

Mr. Sacher: I am trying to help him, your Honor. In any event, I ask that the witness be—

The Court: Listen, let him think. You know, there is nothing worse than pushing a man when he is trying to think. Let him think and give us the answer.

A. I don't know just when it is, how recent, if it is (3840) a couple of weeks or what it may be, but I know it is there.

Q. You know it is there? A. Yes.

Mr. Sacher: Suppose we take our recess now, if it is agreeable to your Honor, and have the witness bring it down.

1918

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: No, we are going to have the recess at half past eleven.

Mr. Sacher: Well, I ask—I want that.

The Court: You will have plenty of time; you can go on to something else. I am not going to forget about this at all.

Mr. Sacher: No. I would like to have it now because my mind is on it. I may forget about it. As a matter of courtesy, your Honor—

The Court: When I say to you, Mr. Sacher, "I have my mind on this," you go off.

Mr. Sacher: I am trying to help your Honor.

The Court: Now this time you are going to go off. You see, you had my mind off so many times yesterday and now this is one time when—tit for tat.

Mr. Sacher: Well, the consequences I think will be a little bit different. You see, if your Honor—

The Court: Well, I know.

Mr. Sacher: All right.

(3841) The Court: But I am going to have this thing go along steadily now and it is not going to hurt anybody if we have to take our minds from something once in a while. Yesterday it was very disturbing to me; yesterday during that whole long cross-examination, just as you would get into some particular subject and I was all intent on it, you drop it like a hot potato and go off to something else. Now this is the time you will drop it because I tell you to drop it.

Mr. Sacher: May I ask this courtesy of the Court: Will the Court be kind enough to suggest to the witness that he dispatch one of his assistants to get it?

The Court: No, I won't do anything of the kind. You go on to something else, and at half past eleven, unless you can keep this argument going until that time, why, we will use up the time on something else.

Mr. Sacher: I will keep it going on only one condition—if your Honor likes it I will keep it going, if not I will desist.

1919

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: I am not having a bad time with it, I will say. It is not the best kind of amusement, but it will suffice for the moment.

By Mr. Sacher:

Q. Now, did you say that you took this money, this (3842) dollar in carfares to send this man to the Public Library out of your own pocket? A. The man laid it out himself.

Q. Did you reimburse him out of your own pocket? A. I don't know what date he called my attention to it, but he still had his carfare—

Q. Coming to him? A. —coming to him, and—

Q. What was the name of that man? A. Mr. Rexrode.

Q. Who? A. Mr. Rexrode.

Q. How do you spell that, please? A. R-e-x-r-o-d-e.

Q. Is he an employee of your office? A. He is a deputy court clerk.

Q. Now I have a recollection that you testified yesterday that Mrs. Fitton was sent to the Library to look at a Directory of Directors; do you recall that? A. A Miss Stevenson I mentioned also.

Q. When did Mrs. Fitton go to the Library?

The Court: You know, you are not going to keep this ball rolling until half past eleven.

Mr. Sacher: No, I don't want to keep the ball rolling. I want to get this now. This is no ball.

The Court: I suggested that you pass to something else until half past eleven—

Mr. Sacher: No, I am going ahead to something else now. I am going into the matter—

(3843) The Court: Well, I can tell you right now, in view of what you are doing, that I am not going to tell him to look for that memorandum until this afternoon some time.

Mr. Sacher: Well, your Honor, if your Honor wishes to be arbitrary about it.

The Court: So, if you think you are going to have your way—

Mr. Sacher: I am not.

1920

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: —and I am not going to have mine, this is one good place for me to show you that I am the boy that is ruling the show here.

Mr. Sacher: I don't dispute that.

The Court: So, if you will go on with something else—

Mr. Sacher: What do you mean? Do you want me to take the question of inquiring when they collected directors' names?

The Court: No—

Mr. Sacher: Well, that is what I am after.

The Court: You go on talking—

Mr. Sacher: That is all I want, the directors' names.

The Court: —about this little memorandum.

Mr. Sacher: No, I am not asking about the (3844) memorandum.

The Court: But it sounded as though it was the same thing.

Mr. Sacher: I have passed on to Mrs. Fitton. In regard to her there is no memorandum so far as I know.

The Court: Well, just about carfare and vouchers—

Mr. Sacher: I will forget carfare for the time being too, and vouchers.

The Court: Well, you know, Mr. Sacher—

Mr. Sacher: I want to put a question, your Honor.

The Court: —a great deal of trouble here is that when I indicate what I think ought to be done—

Mr. Sacher: I want to do it.

The Court: —I have been faced with the situation that others have different views, and they pit their wills against mine, and because I am mild and quiet about it they get the impression that in the end they will prevail. Now you ought to know by this time that, while I am keeping quiet and calm—

Mr. Sacher: Will your Honor let me ask a question in respect to this?

The Court: —I still have a will of my own,—

1921

Joseph F. McKenzie—for Government on Challenge—Cross

Mr. Sacher: I know that.
The Court: —and you are going to learn more
of it.

(3845) *By Mr. Sacher:*

Q. Did Mrs. Fitton go to the Public Library in the
year 1947 for directors' names? A. No.

Q. She did not? A. I believe she went in the early
part of May of 1948, I don't know.

Q. When did Mrs. Stevenson—is it Mrs. Stevenson?
A. Mrs. Stevenson.

Q. When did she go to the Public Library for the names
of corporation directors? A. About the same time Mrs.
Fitton went.

Q. Now do you recall in what part of August 1947 the
names of these directors were selected? A. As to the
exact dates, I don't know.

Q. When was the last time prior to August 1947 that
your office resorted to the Directory of Directors for the
names of corporation directors as potential jurors? A. I
believe it was May or June.

Q. May or June of what year? A. 1948.

Q. No. Now look, I asked you when the last time prior
to August 1947 when you last used the Directory of
Directors as a source? A. It was used in August and not
prior to that.

Q. Never prior to that? A. Back in 1940? Yes, but
now you are talking about this 1947 period.

Q. Now, I call your attention to the following testimony
(3846) which you gave at page 3550, and ask you whether
this refreshes your recollection as to when you sent Mrs.
Fitton and Mrs. Stevenson to the Public Library for the
names of corporation directors?

The Court: What page?
Mr. Sacher: 3550, your Honor.
The Court: Just a second.
Mr. Gordon: May I object, your Honor?
The Court: Yes. What is the objection.
Mr. Gordon: The objection is that the witness
was asked "When did you use the names?" and he

1922

Joseph F. McKenzie—for Government on Challenge—Cross

gave a date; and then Mr. Sacher said, "Now, may I refresh your recollection as to when you last sent somebody."

Mr. Sacher: Oh no. I asked him when they last selected names prior to—

The Court: Let me look at it. (Examining.)
I will sustain the objection.

Q. Mr. McKenzie, did you select any names from the Directory of Directors prior to August, 1947? A. Not—no.

Q. Did you send anyone to the—

Mr. Gordon: Just a minute—

A. Back in 1940 we got—

Mr. Sacher: Now you see what happens, your Honor. The witness said no; Mr. Gordon popped up, whereupon the witness said "Oh yes, this was in 1940." He is a (3847) mnemonic.

The Court: Did you think this was telepathy?

Mr. Sacher: No, it is not mental telepathy. This is a big boy that gets up and indicates.

The Court: Mr. Sacher, this witness has said particularly what was done in 1940, around there, and then there was this long interval.

Mr. Sacher: Right.

The Court: Now, we are going to take our recess now, but I am going to tell this witness, I don't want you looking for that voucher until I tell you that. Just remember that.

Mr. Sacher: May I appeal to your Honor—

The Court: You can appeal all you want—

Mr. Sacher: No, you—

The Court: —but you are not going to see that voucher for some little time.

Mr. Sacher: I want to appeal to you—

The Court: I know. It is a question of which one of us is going to run the show. You are going to find out that I am the one.

Mr. Sacher: May I acknowledge here that you have been, you are and you will continue to run the

1923

Joseph F. McKenzie—for Government on Challenge—Cross

show without regard as to whether I see the slip of paper or not.

The Court: You can argue your head off—

(3848) Mr. Sacher: I mean—

The Court: —but you are not going to have the witness look for that paper until I tell him to.

Mr. Sacher: I have no doubt of that.

The Court: And there is going to be some cross-examination before that, because you are going to learn your place here, and this is going to be a very good time and occasion to do it. So that paper will rest where it is.

We will take our recess and we will have our little debate in chambers.

(Short recess.)

The Court: Now, we have been discussing the question of whether I will direct that certain records be placed at the disposal of counsel or their assistants, and I am reluctant to do it, but I am going to think the matter over until tomorrow and we will decide the matter then.

Mr. Sacher: Shall I proceed, your Honor.

The Court: Yes. You may.

By Mr. Sacher:

Q. Mr. McKenzie, do you recall the following language in your affidavit, Exhibit 227:

“I have acted as jury clerk continuously for the past ten years except for a period of nine months (3849) while I was in military service”?

Do you remember that? A. I do.

Q. And do you remember your affidavit, Exhibit 227, containing the following language:

“In carrying out my duties I together with my assistants select at random from the lists of registered voters.”

Do you remember that language? A. I do.

1924

Joseph F. McKenzie—for Government on Challenge—Cross

Q. Will you be good enough to tell the Court whether you ever selected the name of a potential juror from Westchescter County from a list of registered voters? A. Not during my time.

Q. What is that? A. Not during my time.

Q. Then this affidavit is false, is it not, in respect to jurors selected from Westchester County? Is that right? Is this affidavit false in so far as it applies to Westchester County? A. That is correct.

Q. What is that? A. That is correct.

Q. What is correct?

The Court: It is not false at all. What is the use in saying that?

Mr. Sacher: What is that?

The Court: Show me that affidavit. Did he say those were the only lists?

Mr. Sacher: Your Honor—

(3850) The Court: You get him to say it is false.

Mr. Sacher: He just said it is false.

The Court: But it is not false to me—

Mr. Sacher: Your Honor, may I respectfully suggest that this affidavit, Exhibit 227, was submitted to this great Court for the purpose of apprising the Court as to the manner in which jurors or the names of jurors were selected; and, as a matter of fact, Mr. McGohey filed a brief in this court in which he stated on the strength of this affidavit, and Mr. Connell's, I believe, that grand jurors or all jurors in this court—I don't recall distinctly at the moment whether it was all or grand jurors—are selected exclusively from voting registry lists.

The Court: I understand that, Mr. Sacher.

Mr. Sacher: Now the point I am making—

The Court: I understand that you could argue that the affidavit was perhaps misleading.

Mr. Sacher: No. I say it was false and untrue—

The Court: All right.

Mr. Sacher: —designed to deceive the Court. That is my charge. And this witness has just ad-

1925

Colloquy of Court and Counsel

mitted that the affidavit was false in respect to jurors from Westchester County.

The Court: And I say it is not.

(3851) Mr. Sacher: You mean the witness says it is false and you say it is not false?

The Court: You are talking about perjury, Mr. Sacher. That is a very serious matter.

Mr. Sacher: I have not yet mentioned perjury. A perjury requires intent and knowledge, and I have not yet charged it to this witness. Not yet.

The Court: Well, I see nothing in the affidavit, taken with the testimony here, which justifies the characterization here that it is false. I could see how you could argue that he should have put that in—

Mr. Sacher: Should have put what in, your Honor?

The Court: —should have put in about the Westchester business, which is what you were talking about.

Mr. Sacher: I don't know what there is in Westchester. He has not said yet.

The Court: He has testified here to me all along as to the Westchester situation, that they did not take the lists of registered voters there because they had no appropriation of funds for that purpose, and while the expense was slight I could see no reason why he should take money out of his own pocket and buy things that were to be used in an official capacity.

Mr. Sacher: I implore your Honor, may I not (3852) proceed with the witness?

The Court: Yes, but I am not going to let you characterize something as false—

Mr. Sacher: I did not. He did, your Honor. He said it is false.

The Court: I know—

Mr. Gordon: I object, your Honor. Counsel was the one who did the characterizing.

The Court: He asked him the question—

Mr. Sacher: And he said yes.

1926

Joseph F. McKenzie—for Government on Challenge—Cross

The Court: —and the witness said yes, that it was false, and that is just what led me—I am supposed to be here protecting the witness in a reasonable way—

Mr. Sacher: How about the defendants, your Honor?

The Court: The defendants too, certainly.

Mr. Sacher: All right.

By Mr. Sacher:

Q. Now I show you Exhibit 179 and ask you to look at page 1 of that exhibit and tell me to what month of what year that page refers. A. This starts on January 29, 1947.

Q. That was before the drawing of the grand jury which indicted these defendants, is that right? A. That is correct.

(3853) Q. Will you be good enough to look at page 1 and tell me whether there is reference to any source from which Manhattan and Bronx jurors were selected; that is, the names of potential jurors were selected other than registered voting lists? A. It says Manhattan Telephone Directory.

Q. How many times does it say Manhattan Telephone Directory?

The Court: On that page?

Mr. Sacher: On that page, your Honor.

A. Twice.

Q. How many hundreds of names were selected from the Manhattan Telephone Directory according to the entry on that page 1? A. On February 26 there was 125 and on February 27 another 125.

Q. That makes a total of 250, is that right? A. That is correct.

Q. Now will you be good enough to look at page 2 of Exhibit 179, and will you tell me what month and what year that page 2 covers? A. March of 1947.

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