Prosecuting*

Irving Younger**

Every federal judicial district—there are ninety-one of them plus three for the territories—has a United States Attorney, and every United States Attorney has assistants, but to be an Assistant United States Attorney for the Southern District of New York is to be a touch above the rest, or so Assistant United States Attorneys for the Southern District of New York have always believed. Because the Southern District of New York includes Manhattan, it gets a good deal of the country's major litigation. Lawyers practicing and judges presiding in the Southern District of New York tend, on the average, to surpass their colleagues elsewhere in respect to acumen and energy. Similarly distinguished above their competitors in other parts of the country are the criminals who ply their trade in the Southern District of New York. What goes on in the courtrooms of the Southern District of New York seems somehow to be weightier, more imposing, and frequently more eccentric than what goes on in the courthouses of the other districts. In the midst of it all, representing the United States of America in every civil lawsuit brought by or against the federal government and prosecuting every criminal case filed in the Southern District of New York, is the office of the United States Attorney for the Southern District of New York. Assistant United States Attorneys in that office see themselves as unique, incomparable with any other group of young lawyers, Knights of the Round Table sworn to lives of honor, swords drawn to do battle for justice, whose numbers over the years have included the likes of Felix Frankfurter and Thomas E. Dewey.

When I joined it, the office was divided into two divisions, one for civil cases, the other for criminal. Assistants in the civil division did more varied work than those in the criminal; assistants in the criminal division tried more cases than those in the...
My ardor for courtroom conquest was moderated neither by experience nor by judgment, and I asked to be assigned to the criminal division. I was.

The office did not have a separate appellate unit. Each assistant handled the appeal in any case he had tried, writing the brief with one other assistant, usually senior to him, and making the oral argument on his own, all under the modest logistical supervision of the chief appellate attorney.

On the day I became an assistant, the chief appellate attorney was awaiting the arrival of the appellant's brief in United States v. Stone, an appeal from a sentence of eighteen months' imprisonment imposed in the United States District Court for the Southern District of New York on January 8, 1960, following a trial which resulted in a conviction on both counts of an indictment charging Stone with concealing assets from a trustee in bankruptcy and with making a false oath in a bankruptcy proceeding. When the brief arrived, it would have been logged in and the appeal assigned in normal course to the assistant who had tried the case.

Appellant served his brief a few days later, but the Government's normal course was no longer a possible course. The assistant who had tried the case had been injured in an automobile accident and was going to be confined to his bed for many weeks. What to do? Find a substitute for him, of course, and let the substitute handle the appeal though he hadn't tried the case. Who could take on such an assignment, which would be on top of the existing work-load of whoever got it? Someone with a light load. Was there an assistant with a light load? Yes. Who? Me, with a load of zero because I'd become an assistant only a few days before. So the Stone appeal became my initial assignment in the United States Attorney's office, which is how it happened that I argued my first appeal before I tried my first case.

An older assistant worked with me on the brief. We found writing it a tricky job, principally because Stone was represented by Archibald Palmer.

Archie (as everyone called him) was short, globular; and of a green-brown complexion. Not much given to dressing with care, he appeared in court looking rather like an upright Galapagos tortoise in a street beggar's second-best weekday suit. Indoors or out, except when the judge was actually on the

bench, Archie wore a black Borsalino with brims extending no less than ten inches past his ears, a hat a Mafia chieftain might have hesitated to wear lest he frighten his consiglieri and but- termen. Archie's voice was that of a bull elephant in *musth*, and his legal skills, so far as we law review editors in the United States Attorney's office could see, nil. Incoherence was his style, confusion the consequence of whatever he said. He seemed to do no research. If he needed an authority, he'd cite one or another of the Southern District's celebrated cases whether or not it had anything to do with the point in conten- tion. His trial method was to spout words the way an open fire hydrant gushes water until he got what he wanted or until a judge with a voice louder than Archie's told him to shut up and sit down.

All of which made it very difficult for my collaborator and me to pinpoint the target at which we were supposed to aim. Reading the record and Archie's brief on appeal, we couldn't quite put our finger on the issues he had raised. I suppose that what we did finally was figure out the issues we would have raised were we representing the defendant and then respond to those issues. The upshot, I suspect, is that poor Michael Stone got more help from us, his prosecutors, than from his own lawyer. Unless, that is, his own lawyer intended us to do precisely that.

Stone sold dresses, conducting business through a corpora- tion of which he and his wife were officers. On June 24, 1955, the corporation filed a bankruptcy petition, and on November 17, 1955, a trustee was appointed. On February 1, 1955, the business had 816 dresses on hand. Between that day and the day the petition was filed, 13,658 dresses were received from manufacturers. Of this total of 14,474 dresses, Stone could ac- count for 12,608. Concealment from the bankruptcy trustee of the balance of 1,866 dresses or their proceeds was the gist of the indictment's first count.

Between early 1954 and March 1955, Stone's wife, Anita, had made advances to the corporation totalling $13,480. The Government claimed that the corporation had repaid $5,220 in the year before the filing of the bankruptcy petition. The peti- tion, sworn to by Michael Stone, listed repayments of loans by the corporation in the preceding year, but omitted the repay- ments to Anita. This omission was the gist of the indictment's second count.

My collaborator and I saw two major problems in the case.
First, while the evidence of the missing 1,866 dresses was uncontroverted, nothing showed that Stone still had the dresses or their proceeds in his possession either on June 24, 1955, the date the petition was filed, or on November 17, 1955, the date the trustee was appointed. On what basis then could a jury have concluded that Stone had concealed assets from the bankruptcy trustee, as the first count charged? Second, at trial Stone testified in his own defense about the missing dresses. On cross-examination, when he was impeached with arguably inconsistent testimony he had given the grand jury, Archie leapt to his feet demanding access to the minutes of all of Stone's grand jury testimony. Judge Levet, who was presiding, said, "I don't know of any rule of law that requires that." Archie responded by launching into a discussion of the trial of Alger Hiss. Judge Levet cut him short with a forthright, "The application is denied." The trouble was that the application should have been granted.

A technical solution to each of our problems occurred to my collaborator and me. With respect to the first, we urged a rebuttable presumption— that a thief continues to possess property he has stolen, an idea we teased out of United States v. Olweiss, a case in which the Second Circuit, in an opinion by Learned Hand, seemed to assume the existence of such a presumption without saying so. With respect to the second problem, our position was that Archie's application to inspect the grand jury minutes was too confused to satisfy Rule 51, Federal Rules of Criminal Procedure, which requires a litigant to make known the grounds of the relief he seeks, and that, even if the application should have been granted, the error was harmless.

Oral argument was set for June 10, 1960. A few days before, Archie notified the clerk that he would submit appellant's side of the case on his brief. I was disinclined to forgo my first chance to stand before a court and hear myself talk. (Moving my friend's admission the preceding January hardly counted.) I told the clerk that I would argue.

On the morning of the 10th, I was seated in one of the leather armchairs scattered for lawyers' use around the well of the Second Circuit's courtroom on the seventeenth floor of the United States Courthouse. Judge Lumbard presided; on his right, Judge Waterman; on his left, Judge Friendly, just beginning his ninth month on the court. The Stone case came second on the calendar.

2. 138 F.2d 798 (2d Cir. 1943).
The lawyers in the first case were finished. They shuffled up their papers and vacated the long counsel table placed parallel to the bench and about six feet in front of it. “United States against Michael Stone,” intoned Mr. Fusaro, the Clerk of Court, from his perch between the table and the bench.

“Ready for the Government,” I said, moving up to the table.

Mr. Fusaro turned to the judges. “Your Honors,” he said, “appellant in this case submits on his brief.”

“Very well,” Judge Lumbard replied. “We’ll hear from the Government.” He paused and said, “Judge Hand will preside over this argument.” With that, Judge Waterman got up, opened the door set into the wall behind the bench, and disappeared through it. The door remained open. Judge Lumbard moved from the middle chair to the one Judge Waterman had vacated. Through the open door came Learned Hand, slowly moving to the middle chair on the two crutches made necessary by the arthritis from which he suffered in his old age. Once seated, with nothing but his head and shoulders visible above the bench, he looked sixty, not the eighty-eight he was.

In those latter years of his career, Judge Hand read every brief filed in the Second Circuit and would participate in a case if it caught his interest. Perhaps the citation of Olweiss was the feature of Stone that explained his appearance on the bench. Whether or not it did, there he was. I paid no attention to Judges Lumbard and Friendly. I really wasn’t aware of them. I knew only that I was to argue my first appeal before Learned Hand.

I got up and stood at the lectern. “May it please the court,” I said. “My name is . . . .” Before I could say what it was, Judge Hand asked me a question. I don’t remember the question and I don’t remember my answer. The truth is that I remember nothing of the next half-hour. During the argument, I was in a kind of ecstasy which blotted out any recollection of what had occurred while I was in it. I came to as Judge Hand was leaving the bench, Judge Waterman was returning, and Mr. Fusaro was calling the next case. No longer behind the lectern, I was standing beside it, pressing myself against the edge of the table as if trying to get nearer the court.

JTY³ was still clerking for Judge Weinfeld, who had sent

³ Judith T. Younger, wife of Irving Younger, and a professor of law at the University of Minnesota Law School.
her to the Second Circuit courtroom to watch. She told me that my argument had consisted entirely of a catechism by Hand. Judges Lumbard and Friendly had said nothing and, apart from my responses to Judge Hand’s questions, neither had I.

The court’s opinion came down on July 18, 1960. It was unanimous, and Judge Friendly wrote it. As to the first count, Judge Friendly said, the presumption of continuing possession was enough to get the Government’s case to the jury, but the failure to give defense counsel the minutes of defendant’s grand jury testimony was error. Judge Levet knew what defense counsel was talking about, so Rule 51, Federal Rules of Criminal Procedure, was satisfied, and the error wasn’t harmless. As to the second count, there was no error, for the defendant’s grand jury testimony involved only the vanishing dresses, not the undisclosed loan repayments. Since the sentence had been eighteen months on each count concurrently, no new trial was necessary. Stone would go to prison on the second count, not the first.

A week or two later, Archie filed a petition for rehearing in which he argued, so far as I could make out, that an examination of the corporation’s financial records showed that the undisclosed loan repayments had in fact never been made and hence the bankruptcy petition wasn’t false. My response for the Government was succinct: this was an argument that should have been made to the jury, not to the Second Circuit after affirmance of the conviction. Judge Friendly agreed. Writing for the panel, he said that the contentions advanced in the petition for rehearing “concerned an issue of fact properly for the jury.”

Archie petitioned for certiorari. On December 19, 1960, the Supreme Court turned him down, but he came close. Chief Justice Warren and Justices Black and Douglas would have granted certiorari. Short just one vote, Archie petitioned the Supreme Court for rehearing. His petition was denied without comment or dissent.

That was the end of the line for Michael Stone, I thought. I sent Archie a notice fixing a day for Stone to report to the United States Marshal to begin serving his sentence. A week before that day, Archie made a motion for a new trial on the ground of newly discovered evidence. It was clear that his newly discovered evidence consisted of the corporation’s finan-

4. Stone, 282 F.2d at 553.
cial records, exactly the evidence that had been before the jury at the trial, but now carefully analyzed as they had not been then. The records appeared to show, as Archie explained them to Judge Levet, that the corporation had repaid no loans to Anita Stone. “This is not newly discovered evidence,” said Judge Levet. “It’s newly discovered argument, and you should have discovered it and made it to the jury at the trial. It comes too late. Criminal cases have to end sometime, and now is the time for this one. The motion for a new trial is denied. The defendant is ordered to surrender to the Marshal one week from today. Further, I certify that any appeal from this order would be frivolous, and I will not entertain an application for a stay or for a continuance of bail.”

Judge Levet’s last sentence may have had some impact on Archie. He made no application to Judge Levet or to the Second Circuit for a stay or for bail. Instead, in early May 1960, Michael Stone surrendered to the Marshal and was sent to the federal prison in Danbury, Connecticut, to serve his sentence. What Archie did was to file a notice of appeal from Judge Levet’s denial of his motion for a new trial.

Archie’s brief to the Second Circuit laid out his new analysis of the corporation’s financial records. I wrote the Government’s brief alone. It was a page and a half long and said that the defendant was making evidentiary arguments which should have been made to the jury. On June 8, 1961, the case was submitted to a panel consisting of Judges Lumbard, Goodrich (visiting from the Third Circuit), and Friendly.

A few days later, my office telephone rang. I picked it up. “Irving,” said the voice at the other end, “this is Judge Friendly.” It was the first time a judge had ever called me, and I found myself short of breath.

“Yes, your Honor,” I managed to say.

“I want to talk to you about this Michael Stone matter,” the judge said. “You know, when it was before us the first time, I had real doubts about it, but Judge Hand finally convinced us.”

“Yes, your Honor,” was all I could get out.

“Well, I’ve been reading Palmer’s brief, and, Irving, I’m troubled. I think the Government may have convicted an innocent man.”

“Yes, your honor,” from me again.

“So what I think you ought to do is consent to a new trial. We’ll enter an order saying just that—new trial on consent—
and it will have no adverse precedential effect on the Government. Then try Stone again, and maybe you can convict him, but do it fair and square.”

I had taken courses in law school with legal philosophers; I had spent two years at Paul, Weiss, working for the ablest lawyers I’d ever known; by the day Judge Friendly called me, I had been an assistant for over a year, sizing up judges, talking to juries, dealing with the FBI; but nothing prepared me for this. I paused for a moment and tried to figure out what I thought. My response, I decided, should be strictly lawyerlike.

“No, your Honor,” I said. “I can’t do that. I’ve got an obligation to my client, and my client has won this case. I don’t think it would be proper for me to give away my client’s victory.”

“All right,” said Judge Friendly. “No one can force you to consent. We’ll just have to decide the appeal.”

Decide it they did. The per curiam opinion was filed on June 20, 1961. Its cadences are Judge Friendly’s:

The facts alleged in the affidavits attached to defendant’s notice of motion for a new trial dated April 29, 1961, if believed by a jury as they might well be, would seriously undermine any basis for convicting defendant on Count 2. . . . Recognizing the limitations upon the scope of our review of an order denying a new trial, . . . we think nevertheless that under all the circumstances the denial here was erroneous. The new trial will, of course, include Count 1 of the indictment, the conviction on which was previously held to be subject to reversal for failure to furnish defendant with a copy of the grand jury minutes . . . .

The Government sought neither rehearing nor certiorari. Michael Stone had already served almost two months in prison. That seemed enough, and we never retried him.

Reflecting on it all, I realize now that Judge Friendly had tried to teach me a lesson I needed to learn. Good lawyers love a technical point, but they never forget that there are times when a technical point must give way to something else, the something else Judge Friendly, an unsurpassed technician of the law, had in mind when he called me that morning in June and asked me to consent to a new trial for Michael Stone.

* * *

Just as the office did not have a separate appellate unit, it had no separate training program for new assistants. None of us had ever tried a case as of the time of swearing in. We all possessed a certain dexterity with the books, but the sorts of

things a lawyer learns from books are different from the sorts of things a lawyer needs to know when he tries a case. The tradition was that Assistant United States Attorneys learned how to do it by doing it. To lessen the shock of the initial plunge, we were encouraged to spend our first few days in the office watching a senior assistant at work.

I walked around the corridors looking for someone to watch, and I found him. Kevin Thomas Duffy, who had been in the office for a year or two, was in the final stages of getting ready for a trial. I asked him whether I might sit in his office and look on. "Sure," he said.

The defendants were charged with running an operation whereby, for a fee, they took civil service examinations for others. Kevin had already prepared the Government's principal witnesses. In those last couple of days before trial, he was wrapping up loose ends, including the preparation for giving testimony of a man I shall call Allen Peters.

Peters was in his late twenties. He worked for the post office as a mail handler. Among his co-workers was one of the defendants. Peters had taken his daughter to the park one morning on his day off. In the park, he saw his co-worker, the defendant, talking to a man Peters didn't recognize. He wasn't close enough to hear what they were talking about. All he could say is that they talked. Peters' testimony would take no longer than three minutes, and defense counsel would probably have no cross-examination.

Kevin explained to me that Peters would be his first witness. The case was fairly complex, and, in complex cases, he said, you sometimes start with a witness who's a "teaser." The teaser's testimony is brief and easy to understand, but the jury doesn't quite see what it adds up to. Their curiosity is aroused, which spurs them to pay close attention to the rest of the Government's case.

The trial started on the following Monday. Kevin invited me to sit with him at counsel table, and I did.

The jury was selected. "So that's how it's done," I thought. Kevin delivered his opening statement to the jury. I'd never heard an opening statement before. Each defense lawyer delivered an opening statement. I listened now, not as a perfect novice, but as something of a critic.

The judge said to Kevin, "You may call your first witness, Mr. Duffy."

Peters was waiting in the witnesses’ waiting room. A deputy marshal went to get him. There was silence in the courtroom.

Kevin poked me in the ribs with his elbow. “You examine him,” he whispered in my ear.

Kevin was wise not to tell me too far in advance that I was about to make my debut. I got up and started to walk the fifteen feet from counsel table to the lectern. The muscles around my knees seemed to have lost their tensility, and my breath came in gasps. My heart pounded so hard it hurt my teeth. I realized that I was close to being very sick.

The deputy marshal ushered Peters into the courtroom. “Raise your right hand,” said the clerk, who swore Peters to tell the truth and told him to be seated.

I had made it to the lectern, where I held on tight lest I fall down. Thirty feet in front of me was the witness stand, a plain wooden chair on a platform elevated an inch or two off the floor. Peters was in the chair.

Struggling to catch my breath, hoping I’d be heard above the pow-pow-pow of my heart, I looked at Peters and got ready to ask, “What is your name?”

Before I could say the words, Peters gulped. His eyes opened wide as saucers, they turned up to the ceiling, and, in one smooth movement, he slid off the chair and onto the floor, out cold. I had struck a witness unconscious before asking him a single question.

It’s probably a good thing Peters passed out. One of us was going to go, and, when Peters went first, he saved me. The lawyer for the United States of America ought not to faint dead away in front of the jury.

* * *

Courtroom 318 was the calendar part for all criminal cases. Upon being indicted, a defendant was arraigned there. If he pleaded guilty, the case was adjourned to give the Probation Department time to prepare a presentence report and, on the adjourned date, still in 318, he’d be sentenced. If he pleaded not guilty, the case was adjourned while both sides got ready for trial. On the adjourned date, the judge presiding in 318 assigned the case to some other judge in some other courtroom. Defense counsel and the assistant immediately went to that other courtroom, where the other judge gave them the actual date and hour for starting the trial. The procedure today is en-
tirely different, but the cumbersome system I've described was adequate for the case loads of 1960.

After about three months as an assistant, I had a full complement of cases of my own. In most of them, the defendant pleaded guilty. In a few, in order to permit additional investigation, I had agreed with defense counsel to an adjournment to the late summer or early fall. In only one case had the defendant pleaded not guilty and asked for no more than the usual interval to prepare for trial. The adjourned date was a date in late June. For that week, it turned out, the judge presiding in 318 was Judge Weinfeld.

Having stayed with him for a second year, JTY was still his clerk. As the law clerk's husband, I wasn't an unfamiliar figure around Judge Weinfeld's chambers. Whenever the Judge worked late, which was frequently, JTY worked late with him, and, when I came to chambers to take her home, the three of us ended the evening with coffee and tales, mainly told by the Judge, about days of yore in the Southern District of New York.

The case was called on the trial calendar. "Ready for the Government," I said.

"Ready, your Honor," said the lawyer for the defendant.

Judge Weinfeld put his head down so that no one in the courtroom could see his face. "I'm assigning this case to myself," he said. "We'll start next Monday at 10 a.m. in courtroom 605."

The Judge knew that it was my first trial. The charge was forging an endorsement on a United States Treasury check, the evidence was straightforward, and the defendant's guilt, I thought, was as plain as could be. But the jury, after deliberating for an hour and a half, acquitted.

Judge Weinfeld asked me to see him in chambers. Because he'd told JTY to stay out of the courtroom, she hadn't watched the trial and couldn't tell me how I'd done. The verdict was the only comment I had on my performance, and it was no rave.

In chambers, the Judge asked how I felt about the trial.

"I felt fine until the verdict," I said. "I don't see how they could have found him not guilty."

"Neither do I," said the Judge, "but that's what juries are for. You tried the case well and you shouldn't worry about anything else. As a matter of fact, you're fortunate to have lost your first trial."

"Fortunate? Why fortunate?" I asked.
“Because now you’re not likely to develop a notch-in-the-belt mentality. Since you’ve lost your first, you know you can’t ever have a perfect score, which means you won’t start keeping score to begin with. Keeping score is a dangerous thing for a prosecutor. A prosecutor shouldn’t care what the verdict is. The United States wins every time a case is well tried by its lawyer. The outcome is irrelevant. Aim for one thing and one thing only. Try your cases well, that’s all.”

If Judge Weinfeld said I’d tried my first case well, I was ready to believe him. But mere personal satisfaction wasn’t my sole concern. I had found it exhilarating to make of the disparate and miscellaneous details presented in the investigative report something coherent, to organize them in accordance with the requirements of law as a musician organizes notes in accordance with the requirements of sonata form. Trying the case, I’d given shape to the chaos of reality, turned it into drama, with a plot, characters, dialogue, a climax and a denouement, a cunning representation in the courtroom of the transaction outside the courtroom which constituted the subject matter of the case.

Standing in front of the jury, delivering my opening statement, I’d spoken fluently. I’d known what to say. The flow of language had been steady, copious, and to the point. Here, in the courtroom, I’d discovered a place where words were commanded by art. Here then was the place for a poet. This was the place for me. If there was anything in the law for which I was fit, it was the trial of cases.

My decision to leave Paul, Weiss and become an Assistant United States Attorney had been a lucky one. The United States Attorney’s office was preeminently an office where young lawyers could try cases, and for the next two years I tried them. Taking no vacations, working seven days a week and most nights, I tried twenty-five cases and argued five appeals.

* * *

The interest of one of those twenty-five cases lay, not in the trial, which was next to nothing, but in the oddity of human nature the case laid bare.

At the time I became an Assistant United States Attorney, there lived in Crompond, New York, a village several miles north of New York City, a successful and intelligent proprietor of hardware stores named Victor Sharrow. Managers bought and sold the merchandise; accountants kept the books; and
Sharrow, as president, found that the business made few demands upon his time and energy. Looking about for something to occupy him, he decided to study law.

He went to the New York University School of Law, where he attended classes full-time, bringing to his school work a concentrated steadiness beyond that of the typical law student, perhaps because he was twice the age of the typical law student. Taking constitutional law, for example, Sharrow did not rest content with merely reading the opinions in the case book; he read the Constitution itself. And in the Constitution he made was to him a remarkable discovery.

The fourteenth amendment, he found, contained more than the Due Process Clause quoted in the opinions. After speaking of due process in the first section, the amendment went on in section 2 to provide as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . . But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.6

This excited Sharrow. He had learned that "shall," in a legal document, denotes a command. Then section 2 meant that it was compulsory for the representation in the House of Representatives of any state that disenfranchised its adult male citizens to be proportionally reduced. Since everyone knew that, for decades, some southern states had been making it difficult or impossible for their black citizens to vote, section 2 of the fourteenth amendment was no mere curiosity. The events which would trigger its application had occurred. But had the section ever been enforced? Sharrow went to the library. The answer, he learned, was no. From the day of the adoption of the fourteenth amendment to the present, no state had had its representation in the House of Representatives reduced on account of the disenfranchisement of its black adult male citizens.

Ever an enthusiast, Sharrow had found his cause. He devoted all of his hours outside the classroom to the study of the second section of the fourteenth amendment and the consequences of its nonenforcement. After graduation from law school, he did not bother to take the bar examination. Instead,

he threw himself into the writing of a book arguing that, in view of the mandatory language of section 2, the failure to enforce it rendered the House of Representatives illegally constituted, which being so, no federal statute enacted since the adoption of the fourteenth amendment was enacted validly. He entitled his book, *Unconstitutional Congressional Government,* and, when every publisher to whom it was submitted rejected it, Sharrow paid a printer to run off several hundred copies. He sent the first of them to Chief Justice Earl Warren with a note asking the Chief's assistance in vindicating the fourteenth amendment.

The Chief graciously replied, thanking Sharrow for the book, stating that he had read it with interest, and pointing out that, as a federal judge, he could assist only if a case or controversy were presented to him.

Taking the Chief's last comment as a hint, Sharrow now went looking for a case or controversy. In connection with the decennial census, the Bureau of the Census was distributing to as many of the nation's householders as it could find a form entitled, "Advance Census Report for the 1960 Census of Population and Housing." The form asked questions about the persons living in the household of the person filling out the form, from the answers to which the Census Bureau would tabulate the population of each state. The form contained no questions designed to ascertain whether anyone was being denied the right to vote. Sharrow, as head of his household, received an Advance Census Report. He knew at once that the necessary case or controversy had fallen into his lap. All he had to do was wait for the enumerator to call, and, on April 6, 1960, she did.

Her name was Irene Miller. A housewife who lived in an adjoining town, Mrs. Miller listened as Sharrow told her that he had neither completed the form nor would supply the requested information orally. He explained that the House of Representatives was unconstitutionally apportioned because the adjustment required by section 2 of the fourteenth amendment had not been made, and, inasmuch as the census form did not ask about twenty-one year old male citizens who had been denied the right to vote, the statute providing for the taking of the census was unconstitutional.

Mrs. Miller's training did not extend to anything so vivid as this. Nonplussed, she left, returning a week later to ask Sharrow one last time whether he would answer the questions.
Sharrow replied that he “had not changed his mind in what he wanted to do.” What’s more, Sharrow had written and now gave to Mrs. Miller an affidavit justifying his behavior in these words:

As a person who is deeply devoted to civil rights and the upholding of the Constitution of the United States, on April 6, 1960, I specifically and personally refused to answer the census enumerator, Mrs. Irene Miller, of Crompond Road, Croton-on-Hudson, New York, in order specifically to raise a constitutional case and controversy to determine whether the census law was constitutional.

Not long after, Sharrow was indicted for violating Title 13, U.S. Code, § 221(a):

Whoever, being over eighteen years of age, refuses . . . to answer, to the best of his knowledge, any of the questions . . . submitted to him in connection with any census . . . shall be fined not more than $100 or imprisoned not more than sixty days, or both.7

This provision, in essentially this form, had appeared in the original census statute enacted by the First Congress. No one in the history of the republic had ever before been indicted under it for refusing to be counted. Sharrow was the first.

His case was assigned for trial to United States District Judge Thomas F. Murphy. Sharrow waived a jury and represented himself. The Government’s case consisted in Mrs. Miller’s testimony and various items of judicial notice. Sharrow’s defense consisted in himself. He took the stand and, at great length, expounded his views. The census statute, he said, did not provide for the comprehensive enumeration required by the second section of the fourteenth amendment and hence he was not required to supply the information demanded by the 1960 census form. Judge Murphy asked Sharrow how he thought the census should have been conducted. Sharrow replied that the enumerator should have inquired of each adult male citizen whether he was being denied the right to vote and that, since the question was not asked, proper figures couldn’t be obtained for apportioning the House of Representatives in accordance with section 2 of the fourteenth amendment. This flawed taking of the census, Sharrow concluded, deprived him of equal protection and of the right to be governed by a constitutionally elected Congress.

As Sharrow stepped down from the witness stand, Judge Murphy said that he did not need to hear summations. “Are you ready for my decision,” he asked Sharrow. Sharrow replied that he was.

Without a pause, Judge Murphy said, "I find you guilty." Turning to me, he asked, "Do you see any need for a probation report?"

"No," came my answer.

"Mr. Sharrow," said the judge, "if you're ready, I'll impose sentence right now."

Sharrow was seated at the counsel table. "I'm ready," he said.

Judge Murphy looked over his half-glasses at Sharrow. "Stand up," he said. Sharrow stood up. "I sentence you," intoned the judge, "to pay a fine of $100."

Sharrow said nothing. He walked around the counsel table and stood where lawyers stand for a side-bar conference. From his right trouser pocket he withdrew a roll of twenty dollar bills. With his left hand he flicked five of them onto the bench.

"That won't be necessary," said the judge. "I'm paid every two weeks. Just give it to the clerk on your way out."

Sharrow did so. He accompanied the clerk to the clerk's office and, while waiting for the clerk to write out a receipt, filed a notice of appeal.

Sharrow appeared in the United States Court of Appeals on May 2, 1962, and argued his own case. I handled the government's end of the appeal. Chief Judge Lumbard and Judges Waterman and Friendly made up the panel. On September 28, 1962, Judge Waterman's opinion for himself and Judge Friendly came down.

Irrespective of the Fourteenth Amendment's mandate the Congress, in the present state of the law, is not required to prescribe that census-takers ascertain information relative to disfranchisement . . . . The reduction of a state's representation in the House of Representatives as provided by Section 2 of the Fourteenth Amendment has been described as a "political question" of the kind that has been considered unsuitable for judicial determination . . . Whether this classification is to survive the recent decision of the Supreme Court in Baker v. Carr . . . need not be determined by us in this case. The denial of the suffrage is a complex question, and it has been thought inappropriate to use census forms in order to obtain information relative thereto . . . . We hold that there was nothing unconstitutional in the omission from the census form of a question relating to disfranchisement.8

A few days later, Chief Judge Lumbard filed a concurring opinion:

There is no language in the Constitution which directs that the Con-

gress designate the census questionnaire as the means to determine disfranchisement. . . . I agree with Judge Waterman that the statute under which Mr. Sharrow was convicted is constitutional. This is the only question we are called upon to discuss.9

Sharrow filed a petition for certiorari. The Supreme Court denied it. He moved for rehearing. The Court turned him down. At this point, Sharrow surrendered. He stopped fighting. The battle was over.

When Victor Sharrow abandoned the lists, section 2 lost its only champion. To this day, there is no one to speak up for it. A quaint corner of the Constitution, read only by the antiquarian, section 2 is of no consequence whatever. It's sad, though, to think of what might have been.

*   *   *

For most of my cases in the United States Attorney's office, the trial itself, not the events preceding it, was the field of interest. In United States v. Salazar,10 for example, the background facts were simple and unexceptional.

To become a regular employee of the United States Post Office, one had to take and pass a Civil Service examination. The questions posed were of the multiple-choice variety, the answers to be marked on a sheet adapted to grading by computer. From January 18, 1958, through August 7, 1958, thirteen such examinations were conducted by the Civil Service Commission in Manhattan and the Bronx.

At that time, minimal formalities were required of aspirants for appointment. A person desiring to take the examination picked up an application and an admission card at the office of the Civil Service Commission. The admission card was good for a particular examination, and the candidate had only to present himself, the application, and the card at the specified place and time. No identification was necessary.

Once seated, the candidate received the preliminary examination papers, consisting of a declaration sheet, a register card, and a notice of rating. The candidate printed his name on the declaration sheet and copied the declaration sheet's identification number on all the other papers, including the application. Then the examination began. When it was over, the candidate signed the certificate of honesty on the declaration sheet.

It came to be known at the Morgan Annex Post Office in late 1957 and early 1958 that temporary employees who did not

9. Id. at 80.
10. 293 F.2d 442 (2d Cir. 1961).
qualify for Civil Service appointment would lose their jobs. Many such employees found that they could not pass the examination. To their need, Max T. Salazar repeatedly responded.

One Anthony Travali paid Salazar $100 to take the examination for him. Salazar guaranteed a passing grade. Upon receiving a notice of failure, Travali complained to Salazar, who lived up to his guarantee by taking and passing another examination in Travali's name. A handwriting analyst at the FBI laboratory determined that the handwriting on both sets of examination papers was the handwriting of Salazar.

Salazar made similar arrangements with others—Caesar L. Wilson, Dino A. Zaino, and Odilio Zaino, to name just three. The FBI laboratory determined that the handwriting on the examination papers for all of these men was the handwriting of Salazar.

Salazar's lawyer was Carson Dewitt Baker, a former judge of the New York City Municipal Court. I knew nothing of him except that he was dignified and friendly. The judge before whom we tried the case was Gregory F. Noonan.

In my opening statement, I told the jury that the Government's case would consist mainly of the various sets of examination papers and the testimony of four witnesses—Anthony Travali and Dino Zaino, who would recount their dealings with Salazar, Postal Inspector Burke, who would describe the investigation he had conducted, and the FBI documents examiner, who would demonstrate to the jury that the handwriting on the examination papers was Salazar's. Baker waived his opening.

I called Travali and Zaino, both of whom testified as expected. Baker asked questions on cross-examination of Travali intimating that Salazar was the "fall guy" for a ring of gamblers, usurers, and examination-takers operating in the Morgan Annex Post Office. On cross-examination of Zaino, he suggested that Zaino and Salazar were personal enemies, having once engaged in a fist-fight at work. Things seemed to be going smoothly for both sides; things changed with the testimony of the FBI documents examiner. As the witness explained his conclusions with respect to the handwriting on the test papers, Salazar leapt from his chair at the defense table. "That is a lie, Your Honor," he cried. "I didn't write nothing like that in there. I didn't take an examination for nobody but myself. How can he stand there and lie like that?"

Baker pulled Salazar down into his chair. Judge Noonan benignly remarked to Salazar that outbursts such as that would
do him no good and cautioned the jury to disregard the defendant’s exclamations as an understandable symptom of excitement and tension.

The Government having rested, Baker began the defense by calling Salazar to the stand. He asked Salazar to describe his duties as a postal employee, and Salazar balked.

Q. Now, during the year that you worked as a temporary employee, what were your duties?
   A. I did every kind of work in the post office, sir.

I did everything. You want to define everything?

Q. Well, you didn’t act as postmaster, did you?
   A. No, sir.

Q. So you didn’t do everything?
   A. Well, what I meant—I didn’t do everything.

Baker attempted to get over this rough spot by leading his client. (A lawyer “leads” a witness by asking questions that suggest the answer the witness should give.)

Q. Did you route mail?
   A. I did.

Q. Did you work on the chutes?
   A. I did.

Q. Did you handle the mail?
   A. I handled the mail.

Next, Salazar expressed some hesitancy about approximating the date of his own Civil Service examination.

Q. After being at the Morgan Annex Post Office for a year, you took the examination.
   A. That is about right, sir.

Q. Sir?
   A. That is about right. I can’t—I don’t know exactly.

Judge Noonan reassured him.

The Court: You don’t have to give us the exact date. Give us your best recollection.

Salazar: I can’t, Your Honor. I would be making it up.

The Court: I don’t want you to make anything up.

Salazar: That is just it. I don’t want to make anything up. I want to tell the truth.
The Court: That is why I say, I want to give you a little leeway. Don't try to fix the date if you really can't. In other words, don't go out on a limb and say it was January 2, 1958. Say it was somewhere in the beginning of 1958, if that is your best recollection. Now, do you understand what I mean?

Salazar: Yes, sir, I do.

The Court: I am trying to help you.

Salazar: Yes, sir, I understand that.

After some further questioning on peripheral matters, Baker sought to elicit from Salazar a direct assertion that he had had nothing to do with Government Exhibit 63, a slip of paper bearing Salazar's name and address, which Zaino testified he had been given by Salazar. Salazar's answers were equivocal.

Q. Now, I show you, sir, Government Exhibit 63. What does it contain?
A. It contains a name, an address, and I believe a phone number.
Q. It contains the name “Salazar”?
A. It looks like it.
Q. Did you live at 507 East 140 Street, Bronx, New York?
A. Yes, sir.
Q. Did you have telephone number LUDlow 5-4206?
A. Yes, sir.
Q. Did you write on this piece of paper?
A. No, sir.
Q. Did you deliver this paper to anyone?
A. No, sir. I don’t know if I did or not.

Judge Noonan tried to help.

The Court: Are you saying, Mr. Salazar, you may have told somebody in the post office what your home address was, and phone number, somebody who was friendly with you socially, but it wasn't any of the men who've testified here?

Salazar's reply was unappreciative.

Salazar: I'm not trying to say that at all. I would like to put it in my own words. My phone number is in the book and only my close friends at the post office who weren't here at all—
The Court: That is what I mean.
Salazar: No.

The Court: This may have originated as a result of somebody who didn’t testify here.
Salazar: No, sir.

The Court: Maybe he wrote it down and left it behind. Is that what you mean?
Salazar: No, I don’t mean that at all.

At this point, Baker took over from the judge, asking Salazar whether he had heard the testimony of a Government witness who had described how Civil Service examinations are administered. Salazar’s answer must have taken Baker by surprise.

A. I don’t believe I heard it, no. No, I don’t believe I heard it.

Moving on, Baker elicited from Salazar an outright denial of having taken an examination for any person other than himself and an express contradiction of the testimony of the Government witnesses. Now Baker sought to develop the defense of frame-up by asking Salazar to describe the fight he had had with Dino Zaino.

Q. Tell us the circumstances under which you had that fight with Zaino.

A. Well, I used to help fellows with—the other employees and men already on the job with their exams. There was exams coming up, and we all used to help them, just—it wasn’t anything that would take a long time. They had either a Civil Service exam review book or a plain exam practice sheet, and I think I helped Mr. Zaino once or twice. And then he says, being that I know about this, why didn’t I take the examination for him? I couldn’t take no examination, because I know what the consequences are. I couldn’t take an examination for nobody.

Suddenly breaking off his narration, Salazar sped away on his own.

A. Let me add this, also being that I have never been arrested—

Baker tried to bring him back, admonishing Salazar to remain seated and answer the questions put to him.

After some further colloquy, Salazar reverted to the tack of refusing to admit that he had heard the testimony of a Government witness, despite Baker’s reminder that Salazar had
been in court throughout the trial. The most Baker could get was a grudging "maybe" that the witness had testified.

By now, Salazar's direct examination had lost all momentum. Whatever his reasons, he had decided to refuse to give responsive answers even to Baker's most innocuous questions. The jury had been looking on through all of this. Perhaps out of fairness to Salazar, Judge Noonan intervened.

The Court: Let me ask you, Salazar—don't misinterpret my remarks, either you or the jury—but you seem to be bearing a bit of a chip on your shoulder. I mean, you feel you want me and the jury to believe that all these people in the Post Office Department and the United States Attorney's office and the postal inspectors are in a gigantic conspiracy to frame you?

As Judge Noonan spoke, I realized that the jury was hanging on his every word and that the Court of Appeals might view his remarks as something less than judicious. I stood up and caught his eye. Motioning toward the jury, I shook my head slightly from side to side, as if to say, "Not in front of them, Your Honor." Judge Noonan paid no attention to me.

When Salazar responded to the judge's question, he dashed whatever hope Judge Noonan may have entertained of resolving the extraordinary problem Salazar had himself created, for Salazar grasped the opportunity to make overt his hitherto merely implicit challenge to Baker's skill and probity. First, he questioned Baker's decision to put him on the stand at the beginning of his case.

Salazar: There is a lot of things yet that haven't been brought to light. Now, with no reflection on my attorney, whom I have the highest respect for, plus everybody here, I want to know now, sir, is it procedure to put the defendant on the stand before he calls his witnesses?

Second, he suggested that Baker was withholding evidence.

Salazar: My lawyer has on his desk some evidence which I gave him on my behalf.

Baker found himself in an apparently distressing position. To come to his own assistance, he would necessarily have had to impeach his client, running the risk of dissipating such strength as the defense possessed. But if he did nothing, his integrity would remain impugned, while the jury might draw inferences adverse to Salazar or otherwise react unfavorably to him. Judge Noonan might have thought that, in these circum-
stances, he had an affirmative obligation to take charge, which is what he did.

With regard to Salazar's attack upon Baker's decision to put him on the stand first, Judge Noonan warned Salazar that he was making a serious accusation.

The Court: Well, now, I think that that question is clearly indicative of what I said, chip-carrying, only it goes a little bit further. It is almost, Mr. Salazar, a slanderous and libelous remark.

In view of Salazar's almost continuously insulting demeanor to Baker, the judge's warning came a bit late.

Judge Noonan next tried to explain away Salazar's conduct.

The Court: I really feel that perhaps you spoke as a result of pique or the result of fear, and that seems to be going through your mind, too.

The judge suggested to Salazar that he apologize. When Salazar replied by declaring that the judge had misunderstood his attitude, Judge Noonan—anxious to get on with the trial—himself apologized to Baker.

As to Salazar's accusation that Baker was withholding favorable evidence, Judge Noonan listened to Baker's statement that the evidence in question was hearsay and therefore inadmissible.

Baker: The defendant has some affidavits there, and he doesn't know that I can't get affidavits into evidence. That is the problem.

The judge tried to explain matters to Salazar.

The Court: The evidence you say you have is in the form of affidavits?
A. Yes, sir.

The Court: Mr. Baker, being a lawyer, knows that he is not allowed to offer in evidence affidavits, to be read in the course of a criminal case.
A. I didn't know that, sir.
The Court: You didn't know that?
A. No.
The Court: Well, you can't. I can tell you now you may not, as a general rule, and specifically in this case, offer affidavits. The persons who gave you affidavits could come and testify.
When Salazar began to argue with him, Judge Noonan commented, “Well, there is no point in discussing it further. I see we have a legal scholar on our hands.”

My cross-examination followed:

Q. Mr. Salazar, take this pad and pencil. Will you print at the top of the page your own name?
A. [Witness complies.]

Q. Then would you write your name?
A. [Witness complies.]

Q. Then write today’s date. Today is September 30, 1960.
A. [Witness complies.]

Q. Have you written it out?
A. Yes, sir.

Q. Then would you write it out in numbers, ninth month, 30th day, 60th year?
A. Ninth month, 30th day, 60th year.

Q. Mr. Salazar, I hand you Government Exhibit 2 in evidence, a declaration sheet bearing the name of Anthony Travali. Did you fill that out?
A. No, sir.

Q. Did you or did you not take that examination for Mr. Travali?
A. No, sir, I did not.

Q. Mr. Salazar, I am drawing a circle around some of the printing which appears on this paper, Government Exhibit 2. Will you read to the jury exactly what appears in that circle?
A. “NY”

Q. Read the periods, too.
A. “N period.”

Q. Is there a period after the “Y”?
A. I don’t see none there?

Q. You will agree there is none there?
A. I agree there is none there.

Q. Mr. Salazar, I show you Government Exhibit 5 in evidence. This is an application sheet that bears the name of Anthony Travali. Did you fill it out?
A. No, sir.

Q. Did you or did you not take that examination for Mr. Travali?
A. No, sir, I did not.
Q. Mr. Salazar, I am drawing a circle around some of the printing which appears on this paper, Government Exhibit 5. Will you read to the jury exactly what appears in that circle?
   A. "NY"
   Q. Read the periods, too.
   A. "N period."
   Q. "Y"?
   A. "Y"
   Q. Is there a period after the "Y"?
   A. I don't see none there.
   Q. You will agree there is none there?
   A. I agree there is none there.
   Q. Mr. Salazar, I show you Government Exhibit 59 in evidence. This is an application sheet that bears your own name. Did you fill it out?
   A. Yes, sir.
   Q. This is the application sheet for your own examination?
   A. Yes, sir.
   Q. It's your own printing?
   A. Yes, sir.
   Q. Mr. Salazar, I've drawn a circle around some of the printing which appears on Government Exhibit 59 in evidence, your own application sheet. Will you read to the jury exactly what appears in that circle?
   A. "N,Y"
   Q. Is there a period after the "Y"?
   A. No, sir.
   Q. Just as there is no period after the "Y" on both of the Travali declaration sheets?
   A. Right.
   Q. Mr. Salazar, a few minutes ago you wrote and printed some words and numbers on the top sheet of this pad, didn't you?
   A. That is right.
   Q. Your Honor, I tear off the top sheet, ask that it be marked Government Exhibit 81, and offer it in evidence.
   The Court: It will be received.
Q. Mr. Salazar, here is Government Exhibit 2 in evidence, a declaration sheet for an examination taken in the name of Anthony Travali on January 18, 1958. Did you fill that out?
   A. No, sir.

Q. Mr. Salazar, do you see the date of the examination written on that declaration sheet?
   A. I see it.

Q. What does it say?
   A. It says, "1-18-58."

Q. How are the numbers separated?
   A. By dashes.

Q. Not by diagonal lines?
   A. Not by diagonal lines.

Q. Have you ever seen a date written in numbers where the numbers were separated by diagonal lines?
   A. I might have.

Q. When you write a date in numbers, how do you separate the numbers?
   A. I don't know.

Q. I show you Government Exhibit 81 in evidence, the sheet of your own writing. The last thing you wrote on that page is today's date in numbers, isn't it?
   A. That's right.

Q. How are the numbers separated?
   A. By dashes.

Q. Mr. Salazar, I show you Government Exhibit 5 in evidence, a declaration sheet bearing the name Anthony Travali. Did you fill that out?
   A. No, sir.

Q. Would you read to the jury the date of the examination as it appears on that sheet?
   A. "3-6-58."

Q. The numbers are separated by dashes, aren't they?
   A. Yes, sir.

Q. Did you take that examination?
   A. No, sir.

Q. Mr. Salazar, I show you Government Exhibit
27 in evidence, a declaration sheet. Whose name appears on it?
A. Caesar Wilson.
Q. What is the date of the examination?
A. It says 4-18-58.
Q. In numbers?
A. Yes.
Q. How are the numbers separated?
A. By dashes.
Q. Did you take that examination?
A. No, sir.
Q. Did you fill out that paper?
A. No, sir.
Q. Did you take an examination for Dino Zaino?
A. No, sir.
Q. I show you Government Exhibit 31 in evidence, a declaration sheet. Whose name appears on that paper?
A. Dino Zaino.
Q. What is the date of the examination?
A. 5-2-58.
Q. In numbers?
A. Yes.
Q. How are the numbers separated?
A. By dashes.
Q. Did you fill that paper out?
A. No, sir.
Q. Did you take an examination for Odilio Zaino?
A. No, sir.
Q. I show you Government Exhibit 35 in evidence, a declaration sheet. Whose name is on that paper?
A. Odilio Zaino.
Q. What is the date of the examination?
A. 7-30-58.
Q. In numbers?
A. Yes, sir.
Q. Separated by dashes?
A. Yes, sir.
Q. Did you fill out that paper?
A. No, sir.
I have no further questions, Your Honor. After this, the case proceeded uneasily to a conclusion. The jury returned a verdict of guilty, and Judge Noonan sentenced Salazar to a year and a day in prison.

In the course of the skirmishing, Baker had expressed his gratitude to Judge Noonan for his assistance: “I was in a most embarrassing position. I didn’t know what to do. I didn’t want to appear to let him down in front of the jury.”

On appeal, however, Salazar had new counsel, who argued in the Court of Appeals that Judge Noonan had improperly injected himself into the trial, making comments in the jury’s presence that could only have prejudiced the jury against Salazar.

I wrote the Government’s brief. The gist of it was expressed in this paragraph:

We concede that the trial judge, during his lengthy exchange with Salazar, used a turn of phrase or a sentence which, in the artificial illumination of afterthought, he might better have otherwise expressed. To balance these few unstudied remarks, the record vouchsafes a series of instances in which the judge came to the assistance of a flustered and floundering defendant, a scrupulously impartial jury charge, and, we submit, overwhelming evidence of guilt. So long as this Court requires, not a perfect trial, but simply a substantially just trial, there can be no warrant for reversal here.

The panel before which we argued the appeal was presided over by Chief Judge Lumbard, himself a former United States Attorney. Salazar’s lawyer spoke. Then it was my turn. I’d hardly stood up when Judge Lumbard was on me. “Mr. Younger,” he asked, “are you really going to try to support this verdict?”

“Indeed I am,” I replied. My argument was the argument I’d made in the brief. Maybe Judge Noonan could’ve handled it better, but the trial was basically fair, and that’s all the law requires.

The Court of Appeals reversed Salazar’s conviction and ordered a new trial. Judge Lumbard’s opinion makes it clear that the decisive factor in the reversal was that Judge Noonan was prone to doing this sort of thing, and the appellate court had to curb him. Said the opinion:

[It is abundantly clear that the remarks of the judge were wholly unnecessary; they were not called for by the defendant’s conduct on the stand. By attributing to Salazar the argument that the Post Office Department and the United States Attorney’s Office had joined together to frame him, the judge made Salazar’s eventual fate at the hands of the jury almost inevitable. . . . See the strikingly similar case]
of United States v. Woods [in which Judge Noonan had interrogated Woods pretty much as he'd interrogated Salazar, with the result that the Court of Appeals reversed Woods' conviction]. By making gratuitous and unnecessary comments which sarcastically and relentlessly discredited Salazar for questioning his counsel's judgment, the judge made Salazar's defense seem contemptible and ridiculous in the eyes of the jury. 1

While we were before Judge Noonan, the thought had crossed my mind that it was all a performance designed to subvert the trial and assure appellate reversal of the inevitable jury verdict of guilty. The thought became something close to a belief when the case was tried again, following the Court of Appeals' decision.

Judge MacMahon was the judge; I was the prosecutor; and there was no defense lawyer. Salazar announced at the beginning of the trial that he would represent himself.

Because the prospective jurors hadn't yet been brought into the courtroom, Judge MacMahon was free to question Salazar about the prudence of his decision.

"You're not a lawyer, are you, Mr. Salazar?" he asked.
"No, sir."
"Have you ever tried a case?"
"No, sir."
"Have you ever seen a case tried?"
"Only my own, last time."
"Do you know the rules of evidence?"
"No, sir."
"The prosecutor, Mr. Younger there, does know the rules of evidence, and he's tried a good many cases. Do you think you're a match for him?"
"I'm not a match for him, your Honor, but I don't have to be. No matter what Mr. Younger says, I'm going to be declared innocent."
"How can you be so sure?"
"Easy, your Honor. The truth is I'm innocent."
"Well, you can take the witness stand and testify that you're innocent. But I think Mr. Younger may have some cross-examination for you, and there may be Government witnesses who say you're not so innocent after all."
"Your Honor, Mr. Younger can't cross-examine me if I don't testify."

11. Salazar, 293 F.2d at 444.
“That’s right. But if you don’t testify, you can’t tell the jury that you’re innocent.”

“I don’t have to tell them, your Honor.”

“You mean you’ve got witnesses other than yourself who are going to say that you are innocent?”

“Yes, sir. Two of them.”

“Mr. Salazar, under the rules of evidence, there are things your witnesses are permitted to say and things they’re not permitted to say. Let’s make sure we don’t have problems in front of the jury. Why don’t you give me some idea of the testimony you expect from these witnesses of yours?”

“Yes, sir. They’re going to testify that the jury in my first trial found me innocent.”

Judge MacMahon paused. I thought it best for me to say nothing.

Further questioning by the judge established that Salazar’s defense was double jeopardy, that he’d been acquitted by the other jury, and that, apart from this contention, he didn’t dispute the Government’s case. Accordingly, Judge MacMahon suggested that the present jury be asked to decide only one thing—what was the other jury’s verdict? If they said the other verdict was guilty, Salazar would be guilty in this case, and if they said it was not guilty, Salazar would be not guilty. I agreed. So did Salazar.

My case rested on the testimony of the court clerk who had recorded in the official docket the verdict Judge Noonan’s jury had returned and of the stenographer whose notes showed that the foreman had said, “We find the defendant guilty.”

Salazar’s two witnesses were friends of his who said that they’d been in court when the verdict was returned and had distinctly heard the foreman say, “Not guilty.”

Judge MacMahon instructed the jury to determine what the earlier verdict had been. Doubtless full of wonder at the mysterious workings of the law, the jury deliberated for about three minutes and returned to announce that, in their considered opinion, the earlier verdict had been guilty.

Judge MacMahon’s sentence—the same year and a day, but with immediate eligibility for parole—was remarkably light, given that Judge MacMahon is not famous for an easy attitude toward convicted defendants. The case ended there. Salazar took no appeal from his second conviction. “Why should I,” he must have asked himself. “I came close to beating Civil Service, and I beat the courts hands down.”
I tried most of my cases in the United States Attorney’s office to juries, an experience that inspired a faith in them which has stayed with me over the years. Like everyone else, jurors make mistakes, but less frequently than do judges or lawyers. Their collective ability to understand what a case is really all about, to see some essential fact the lawyers may have missed, to find a decent resolution of the controversy, is astonishing. And “astonishing” is an accurate description of the jury’s verdict on George Brown, as I shall call him, a man I prosecuted in the summer of 1961.

Newspaper accounts of the sentencing described Brown as an actor and model. He was neither. He was a homosexual who was kept by a wealthy older man I shall call Norman Miller.

Miller owned a large house in Westchester County, just to the north of the New York City line. On the walls of that house hung Miller’s collection of paintings and drawings, among the best in the country. Miller lived there with Brown for several months, after which, having grown tired of Brown, Miller announced one morning that he was leaving for Europe the next day and that, when he returned in two weeks, Brown was to be gone.

Miller did leave for Europe the next day, and, a few days later, Brown moved out. On May 9, 1961, the day before Miller was to return from Europe, Brown went to the house at a time when he knew the housekeeper would be away. Letting himself in by the key he still had on his keyring, he removed from the wall a large Degas pastel especially cherished by Miller. Brown put it in the back seat of his car and drove to lower Manhattan, where he proceeded to the office of a company specializing in the shipment of works of art and had the pastel sent to himself at his parents’ home, a bungalow on a dusty street in a small town in southern Texas.

The housekeeper noticed the next day that the picture was gone. She brought the loss to Miller’s attention when he arrived from Europe, and Miller called the FBI. The FBI recovered the pastel in Texas. Brown was vacationing with friends in New Hope, Pennsylvania. There the FBI found him. Upon being asked whether he knew anything about the Miller burglary, Brown replied, “Yes, I stole the pastel.” Asked why, he said, “I was compelled to prove to myself my worth as a human being.”
Brown was indicted for causing to be transported in interstate commerce property known by Brown to be stolen. He pleaded not guilty by reason of temporary insanity. His psychiatrist testified that, at the time he took the painting, Brown was suffering from “situational reactive mental agitation with great anxiety and depression” and was both unaware of the nature and quality of his conduct and unable to tell right from wrong.

My job, I thought, was to present the Government’s case in such a way as to focus the jury’s attention upon the theft and the great value of the thing stolen, pushing into the background as much as I could the relationship between Brown and Miller, the termination of which unquestionably supplied Brown with a motive. I had to shape these events to make it the story of a crime, not the tale of a lovers’ spat. If the jury saw it as a crime, they would convict. If they saw it as a lovers’ spat, they would acquit.

First, I decided not to call Miller as a witness. I told him, in fact, to stay home during the trial. A courtroom confrontation between Miller and Brown would only emphasize to the jury that these men had once been erotic partners. I proved the disappearance of the pastel through the housekeeper’s testimony.

Second, to make the picture the heart of the case, not the quarrels of Brown and Miller, I had a large wooden easel built and set up, with the judge’s permission, against the wall directly opposite the jury box. The day before the trial started, I placed the pastel on the easel and covered it with a king-size bedsheets I’d brought from home. When the prospective jurors walked into the courtroom, that was the first thing they saw. When the jury was sworn and seated in the jury box, they were staring at it. When the housekeeper testified, I questioned her as follows:

Q. Was May 9 of this year your day off?
A. Yes, it was.
Q. Where did you go that day?
A. To New York, to visit my married daughter.
Q. Did you return that night?
A. No.
Q. When did you return?
A. I stayed over with my daughter and returned the next morning.
Q. When you entered the house the next morning, did you notice something?
A. Yes.
Q. What?
A. The picture that had been on the living room wall near the piano wasn't there.
Q. Have you seen the picture since then?
A. No.
Q. Up to the present moment?
A. No.
Q. Would you recognize it if you saw it again?
A. Yes.
Q. Please step down from the witness stand and go over to that object.
A. Yes. [Witness walks to covered easel.]
Q. Don't remove the bedsheet. Just look under it at whatever the bedsheet is covering. Have you done so?
A. Yes.
Q. Please return to the witness stand.
A. [Witness returns to the witness stand.]
Q. Do you recognize whatever it is the bedsheet is covering?
A. Yes.
Q. What is it?
A. The missing picture.

I used the same line of questioning with the FBI agents who had recovered the pastel in Texas and with the appraiser who told the jury the painting's worth in the market. (It isn't a federal crime to transport stolen goods in interstate commerce if the goods aren't worth more than $5,000. The Degas was.)

By the time I was done, the jurors were panting to see that pastel. At the end of my case, I offered it in evidence. The judge received it, whereupon I whipped off the bedsheet and, as the jurors gazed upon it at last, I said, "Your Honor, the Government rests."

Finally, it was necessary to meet the testimony of Brown's psychiatrist. Where a defendant raises the issue of insanity, the prosecution must prove beyond a reasonable doubt that the defendant was sane at the time he committed the crime. To counter the testimony the jury had heard from Brown's psychiatrist, I had to put a psychiatrist on the stand in rebuttal, and I
did. He was Richard Williams, as I shall call him, a psychiatrist for about seven years who had examined Brown twice in connection with this case. Dr. Williams's opinion as to Brown's psychiatric condition was "that it is quite evident on examining him that his attitude and general behavior, his manner, are consistent with his own history of many homosexual involvements. This is a large part of his mental content, also. And it was my impression that he was describing himself very well in saying that he was a practicing homosexual. It is definitely my opinion that he is sane, that he is not psychotic. He is a homosexual, but he is not psychotic, and his intelligence is normal, and the working of his nervous system is normal."

Dr. Williams went on to say that Brown undoubtedly was in a state of emotional turmoil when he entered Miller's house and stole the picture. The doctor and I proceeded as follows:

Q. Do you have an opinion, Doctor, as to whether this emotional turmoil that you have referred to would have rendered Mr. Brown incapable of distinguishing right from wrong?

A. I honestly think if I could answer that I would be wiser than Solomon. Love upsets anyone, no matter what kind and where. I think everybody has undergone that. I think Brown is as entitled to be upset by it as the next citizen, but I don't know why more so.

Q. So in your opinion, Doctor, the emotional upset Mr. Brown was experiencing this past May was the common lot of humanity?

A. Well, the homosexuality is not common, but the emotion, the anxieties, occur in all kinds of situations, sooner or later, to almost everyone, I imagine. There was nothing unusual in Brown's situation except that the basic cause of his upset was homosexual. If this were a heterosexual affair, there would be nothing out of the ordinary about it. That it was homosexual doesn't make it any different.

This last bit of testimony became the crux of my final argument to the jury:

What happened to George Brown is a commonplace of existence. If you're going to live in this vale of tears, it's going to happen to you. Homosexual, heterosexual, whatever! The sex of Brown's lover is beside the point. The point is that he'd had a disappointment in love, and it happens to everyone—to you, to me, to
Dr. Williams, even to the judge—and to some of us it happens more than once, it happens over and over. It’s painful when it happens. You’re upset, you’re distraught. Your heart may be breaking, and everyone knows that’s an awful thing to have to experience. But it doesn’t give you a license to steal! And that’s exactly the argument the defense asks you to buy. Because his lover told him he didn’t love him any more, he had a right to steal an enormously valuable picture. Well, I don’t think you’re going to tell him he had that right. I think you’re going to tell him that theft is wrong, wrong, wrong, however much your lover has hurt you, however much you want to hit back and hurt him, hurt her.

I finished my argument around noon. The judge charged the jury immediately after lunch, and by 2:30 the jury had begun to deliberate. The afternoon became the early evening—no verdict, no question from the jury. At 6:30, the judge sent the jury to dinner. They resumed deliberating at eight. Nine, ten, eleven o’clock. The judge came down to the courtroom from his chambers.

“Gentlemen,” he said to defense counsel and me, “I won’t send the jury home or to a hotel until they ask to go. If they’re willing to keep at it this late, let’s let them.”

Midnight, one, two. At a quarter past two the jury announced that they had arrived at a verdict. The courtroom filled quickly. A good many reporters were present, mainly out of curiosity. Newspaper coverage of the trial had been virtually nonexistent, perhaps owing to the papers’ unwillingness to print a story about homosexuality. (Times have changed.)

The verdict was guilty. As the jury foreman announced it, Brown fainted. He came to in a few seconds and began to sob.

The judge discharged the jury. “Mr. Brown,” he said, “I’m worried about your state of mind and the possibility that you may try to injure yourself. It’s now 3 a.m. on Saturday morning. I’m going to remand you to the custody of the United States Marshal, and you will be held at the Federal Detention Headquarters until Monday morning, when I’ll impose sentence.”

The marshal led Brown away. Defense counsel went along, his arm protectively around his client’s shoulder. The judge left the bench, and I rushed out of the courtroom. Several jurors were in the lobby waiting for an elevator. I approached
them and said, “Now that the case is over, I can talk to you and you can talk to me if you like.”

“O.K.,” one of them replied.

“That was a long, tough deliberation,” I said.

“It was.”

“What gave you trouble, the psychiatrists’ testimony?”

“Not at all. When we walked into the jury room and sat down around the table, we agreed at once that there was nothing to this claim of temporary insanity. It was pure hogwash.”

I paused. “Then let me ask you,” I said, “what took ten hours to decide?”

“Oh, you see,” the juror responded, “we weren’t going to convict him if he did it out of spite. We don’t want to condone theft, but if Brown stole the pastel just to get even with Miller, we weren’t going to tag him with a federal felony conviction. But if he did it for pecuniary reasons, if he did it to make money, then we were going to find him guilty. It took us all that time to come to a unanimous conclusion that he did it for money.”

“What was the basis of your conclusion? What evidence is there that he did it for money?”

“Oh, it’s there, even though you didn’t talk about it in your summation, Mr. Younger, and we had to figure it out for ourselves.”

“I’m sorry I let you down and I apologize, but tell me what the evidence is.”

“The FBI found Brown in New Hope, Pennsylvania, right?”

“Right.”

“So after Miller told him to get out, he lived in Pennsylvania?”

“At least some of the time. The rest of the time he stayed with friends in New York.”

“We assumed that he did. But now, where did he ship the pastel?”

“To Texas, at his parents’ address.”

“Yes, to his parents in Texas. Did he live there?”

“No.”

“Then why did he send the pastel there?”

Since I’d never thought of this point, my answer was lame. “I guess he wanted his parents to take care of it.”

“What would his parents in that cow-town know about tak-
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ing care of a Degas? And how would Brown ever have explained to them his suddenly coming into possession of a picture worth a quarter of a million dollars?"

"Well, why do you think he shipped it to Texas?"

"To be able to take it easily across the border to Mexico. And everyone knows Latin America is where you go to sell stolen art."

The elevator arrived, and I said good night to my ingenious jurors.

On Monday morning, the judge took up the question of sentence. It was clear to him, as it was to me, that Brown wasn't an evil sort. With no great gifts of intellect or character, he had come to New York and fallen in with people like Miller. It was the social environment of New York that led to Brown's troubles, and the way to relieve those troubles was to remove him from New York.

"I sentence you," said the judge, "to the maximum, imprisonment for ten years." Brown tottered. The judge quickly continued. "But I suspend execution of the sentence and place you on probation for the maximum, five years. This probation will be unsupervised. You will not be required to report to a probation officer so long as you stay out of difficulties with the law. There is a special condition to this unsupervised probation, however. The special condition is that within one week you leave New York and, for the five-year period of probation I've imposed, you stay out of New York."

This was, in fact, a sentence of banishment, the only one I know of in modern times. But the judge was a very wise man. Brown took no appeal; he left New York; and I've heard he's doing well in the new life he started elsewhere.

* * *

The Southern District of New York has been the scene of a number of trials that were themselves political events. Hiss,12 Rosenberg,13 and Dennis14 come instantly to mind. In this company, Seeger15 may not stand out, but it had its points, and, in any event, it was mine.

The Committee on Un-American Activities of the House of Representatives came into being in 1938 and existed, under one name or another, until 1975, when the House voted to abolish it. In October 1947, the Committee held hearings in Los Angeles on Communist infiltration into the movie industry, hearings that generated enormous news coverage and featured the refusal to testify of ten screenwriters and producers known as "the Hollywood Ten." Four years later, the Committee returned to California for a second round, equally well publicized but less spectacular than the first. In 1955, the Committee decided to turn its attention eastward, to the legitimate theatre and the possibility of Communist subversion of the stages of Broadway. It sent a subcommittee to hold hearings in New York City, and before that subcommittee, on August 18, 1955, appeared folk-singer Peter Seeger. He was asked ten questions about his political affiliations, to which the following is typical of his answers.

I am not going to answer any questions as to my associations, my philosophical or religious beliefs or my political beliefs, or how I voted in any election, or any of these private affairs. I think these are very improper questions for any American to be asked, especially under such compulsion as this.

At the request of the Committee, the full House of Representatives voted to cite Seeger for contempt of Congress and asked the Department of Justice to indict him for that crime, a misdemeanor which carries a penalty of one year in jail. Because the hearings had been held in New York, the proper venue was the Southern District of New York, and there, on March 26, 1957, the indictment was returned. It read as follows.

The Grand Jury charges:

INTRODUCTION

The Committee on Un-American Activities of the House of Representatives, having been duly created and authorized by the Legislative Reorganization Act of 1946, Public Law 601, Section 121(q)(1)(A)(2), (60 Stat. 828), and House Resolution 5, 84th Congress, on or about the 8th day of June, 1955, pursuant to said authorization, directed that an investigation be conducted of Communist infiltration in the field of entertainment in New York.

Pursuant to said direction, in or about August, 1955, in the Southern District of New York, a duly constituted and authorized subcommittee of said Committee was holding hearings. In the course of said hearings, and on or about the 18th day of August, 1955, defendant Peter Seeger, having been summoned by the authority of the House of Representatives to give testimony, appeared as a witness before said subcommittee and was asked certain questions pertinent to the ques-
tion under inquiry which pertinent questions the defendant deliberately and intentionally refused to answer.

The allegations of this Introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition designate the particular pertinent question which was asked of the defendant and which he refused to answer.

COUNT ONE

May I ask you whether or not the Allerton Section was a section of the Communist Party?

COUNT TWO

Did you take part in this May Day Program under the auspices of the music section of the cultural division of the Communist Party?

COUNT THREE

Did you sing this particular song on the fourth of July at Wingdale Lodge in New York?

COUNT FOUR

Were you chosen by Mr. Elliott Sullivan to take part in the program on the weekend of July Fourth at Wingdale Lodge?

COUNT FIVE

Did you take part in that performance?

COUNT SIX

Have you been a member of the Communist Party since 1947?

COUNT SEVEN

Will you examine it please and state whether or not that is a photograph of you?

COUNT EIGHT

It is noted that the individual mentioned is wearing a military uniform. That was in May of 1952, and the statute of limitations would have run by now as to any offense for the improper wearing of the uniform, and will you tell the committee whether or not you took part in that May Day program wearing a uniform of an American soldier?

COUNT NINE

Did you also teach at the Jefferson School of Social Science here in the City of New York?

COUNT TEN

Are you a member of the Communist Party now?

Seeger pleaded not guilty a few days later. In May, his lawyers moved for a bill of particulars wherein the Government would specify in detail the legal basis of the subcommittee's authority to hold hearings and ask the questions Seeger had declined to answer. Their motion was granted. The Government's bill of particulars read as follows:

In addition to Public Law 601 and House Resolution 5, 84th Congress, which are pleaded in the indictment, the Government will offer the following in order to establish the authority of a subcommittee of the Committee on Un-American Activities to conduct, in August of 1955, in New York, an investigation into Communist infiltration in the field of entertainment in New York, and the authority of the parent committee to authorize such an investigation:


c) Rules of the House of Representatives for the 84th Congress.


f) The minutes of a January 20, 1955 executive session of the Committee on Un-American Activities adopting a resolution empowering and authorizing the chairman to appoint subcommittees composed of three or more members, a majority of whom to constitute a quorum, for the purpose of conducting any and all acts which the Committee as a whole is authorized to perform.

g) The minutes of the June 8, 1955 meeting of the Committee on Un-American Activities which indicate that the Clerk was directed to proceed with the investigation of entertainment in New York, a preliminary investigation having been authorized earlier.

h) Oral testimony as to an organizational meeting of the Committee on Un-American Activities in January 1955, at which a preliminary investigation into Communist infiltration in the field of entertaining in New York was authorized.

i) The full transcript of the Hearings of the subcommittee of the Committee on Un-American Activities in New York on August 15, 16 and 18, 1955 (Parts VI and VII).

j) The minutes of an executive session of the Committee on Un-American Activities on June 27, 1956, at which a report of facts relating to the refusal of Seeger, Sullivan and Tyne to answer questions was reported to the Committee.

k) House Reports 2918, 2919 and 2920 relating to the appearance of these individuals before the subcommittee, and House Reports 634, 635 and 636, agreed to July 25, 1956, relating to the certification of these reports to the United States Attorney.

l) Speaker's letters to the United States Attorney certifying the contempt and transmitting the reports and resolutions.

After some further preliminary skirmishing, the case came to rest. Defense lawyers are almost always content to let matters drag. They like to say that "the longer the whiskers on a case, the likelier an acquittal," and Seeger's lawyers acted accordingly. The Department of Justice had done what the House of Representatives asked—indict Seeger—and presumably was no longer under pressure to vindicate the Committee on Un-American Activities. The hysteria of the early 1950s—McCarthyism, as we now call it—had crested in December 1954,
when the Senate voted its censure of the Senator from Wisconsin. Whether the Department of Justice would just as soon have proceeded no further, perhaps dropping the case altogether after a suitable number of years had gone by, I don’t know. I do know that the Seeger file had been relegated to the back of a drawer in a storage cabinet in the United States Attorney’s office and that, as of the day I was sworn in, nothing was happening in the case and nothing was contemplated.

In November 1960, John F. Kennedy was elected President. In January 1961, leadership of the Department of Justice shifted from William P. Rogers, the Republican Attorney-General, to Robert F. Kennedy. Before long, word went around the corridors of the United States Attorney’s office that the new Attorney-General wanted the Seeger case pushed to a conclusion. The file was retrieved from the back of its drawer in a storage cabinet and assigned to me. My instructions were to ignore the whiskers on the case—it was now more than four years old—and try it.

I wrote defense counsel, telling them to get ready. They were distressed, I’m sure, to hear that the case had suddenly come to life, but there was nothing they could do about it. The trial began on March 27, 1961, before Judge Thomas F. Murphy.

To convict anyone of contempt, the Government must prove that the defendant intentionally refused to answer questions he was obliged by law to answer. In essence, the law requires anyone called before Congress to answer Congress’s questions. If the questions are asked by a committee of Congress, the Government must prove that Congress properly delegated its authority to the committee. If the questions are asked by a subcommittee of a committee, the Government must prove that Congress properly delegated its authority to the committee and that the committee in turn properly delegated its authority to the subcommittee. Rather like tracing the course of a bubble floating on the surface of the Mississippi from its source in Lake Itasca to its debouchment into the Gulf of Mexico, the prosecutor must show that authority descended from stage to stage and finally transformed the question asked of the witness into a question the witness was no longer legally free to decline to answer.

When I first read the indictment, I was uneasy. It said that on June 8, 1955, the Committee on Un-American Activities “directed that an investigation be conducted of Communist infiltration in the field of entertainment in New York” and that the
subcommittee that actually held hearings was "dually constituted and authorized."

Couldn’t it have been stated more precisely, I asked myself. Turning to the bill of particulars, I was disturbed. Nothing in paragraphs (f), (g), or (h) said that the Committee had authorized the subcommittee to hold hearings, and I thought it should have said just that, in so many words. In the course of preparing for trial, I went to Washington to talk to the Committee’s director and counsel, Frank S. Tavenner. He assured me that my concern was unnecessary. The Committee’s files contained the necessary authorization to the subcommittee, he remarked, and he’d send it to me in a few days. He did.

Had I been a member of Congress, I would have cheerfully voted to abolish the Committee on Un-American Activities. It was, in my view, a mindless affront to the intellectual freedom protected by the first amendment, but no one asked for my views, and, in any event, they were irrelevant to my role as prosecutor. What I might say as a lawyer trying a case had nothing to do with what I might think as a citizen. Even so, my plan for the trial was to prove the necessary elements of the charge of contempt of Congress and nothing more. I would do nothing to raise the issue of Seeger’s membership in the Communist Party or his activity on behalf of Communist causes. I would try the case solely on the basis of the law applicable to such cases as laid down by the Supreme Court. No tub-thumping. But if defense counsel wanted to play that game, I’d be ready to play, too.

I felt a slight increase of tension when I walked into the courtroom to start the trial. Every seat was occupied. Seeger had a large following, especially among young people, and March 27, 1961, fell in the spring recess of most colleges and universities in the East. For the first time, I was about to try a case to a packed house.

Seeger’s counsel was a distinguished New York lawyer named Paul L. Ross, who, several years earlier, had run for mayor on the ticket of the American Labor Party. I’d met him in the course of restoring the case to life, and he now introduced me to Seeger, a tall, thin, pleasant-looking man.

Judge Murphy supervised the process of selecting a jury in a no-nonsense manner, and within an hour the jury was empanelled.

Proceeding directly to the opening statement, I told the jury that the case involved neither Seeger’s political beliefs nor
his social philosophy. The only issue before you, I said, is whether the defendant committed contempt by refusing to answer questions put to him by a properly authorized subcommittee of the Committee on Un-American Activities. This case does not involve whether or not the defendant is a member of the Communist Party, I said in winding up. That should have nothing whatsoever to do with your verdict.

Ross's opening statement was to the effect that the Committee on Un-American Activities merely wanted to keep Communists out of the entertainment industry, an objective unrelated to any valid legislative purpose.

With that, the trial proper began.

The Court: Call your first witness.

Mr. Younger: May I begin by asking the Court to take judicial notice of Section 121B(1Q) of the Legislative Reorganization Act of 1946?

The Court: Yes, I will.

Mr. Younger: May I have your Honor's permission to read that to the jury?

The Court: Yes.

Mr. Younger: I am reading from Volume 60 of the United States Statutes at Large, at page 828, Section 121B(1Q) of the Legislative Reorganization Act of 1946 which deals with the powers and duties of committees of the House of Representatives.

"Committee on Un-American Activities.

"The Committee on Un-American Activities as a whole, or by subcommittee, is authorized to make, from time to time, investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, (3) all other questions in relation thereto that will aid Congress in any necessary remedial legislation."

Your Honor, the Government calls Frank S. Tavenner, Jr.

After Tavenner was sworn, I proceeded as follows:

Q. Mr. Tavenner, what is your present position?

A. I am Director of the Committee on Un-American Activities of the House of Representatives.
Q. How long have you held that position, sir?
A. Since September 1, 1960.
Q. Were you connected with the Committee prior to that time?
A. Yes, I was.
Q. In what positions?
A. I have been counsel for the Committee for a number of years.
Q. When did you become counsel for the Committee?
A. I first became counsel May 1, 1949.
Q. I gather, then, that you were counsel for the Committee in January of 1955?
A. Yes, sir.
Q. Can you tell us which Congress of the United States convened in January of 1955?
A. The Eighty-fourth Congress.
Mr. Younger: Your Honor, may I have this document marked for identification, please?
(Government Exhibit 1 marked for identification.)
Mr. Younger: Your Honor, I offer Government Exhibit 1 in evidence.
The Court: Received.
(Government Exhibit 1 for identification received in evidence.)
Mr. Younger: Your Honor, may I read Government Exhibit 1 in evidence to the jury?
The Court: Yes.
(Mr. Younger reads to the jury.)
Government Exhibit 1 was House Resolution 2 of the Eighty-fourth Congress, passed January 5, 1955, attesting that the House had convened and elected Sam Rayburn of Texas as Speaker of the House.
Q. Mr. Tavenner, are you personally familiar with the functions and duties of the Speaker of the House of Representatives?
A. Yes, I am.
Q. Will you tell the Court and jury, briefly, what those functions and duties are?
A. Well, the Speaker presides over the House when it is in session. He determines, among many other things, to what committee bills are to be referred
which are introduced, and various business administrative features of the Congress.

Q. Is your answer applicable to the 84th Congress?
A. Yes, sir.

Mr. Younger: Your Honor, I ask that this document be marked Government Exhibit 2 for identification, and may I have this document marked Government Exhibit 3 for identification.

(Government Exhibits 2 and 3 marked for identification.)

Mr. Younger: Your Honor, I offer Government Exhibits 2 and 3 in evidence.

The Court: Both received.

(Government Exhibits 2 and 3 for identification received in evidence.)

Mr. Younger: Now, your Honor, may I read Government Exhibit 2 in evidence to the jury?

The Court: Yes.

(Mr. Younger reads to the jury.)

Government Exhibit 2 was a certificate attesting to the authenticity of Government Exhibit 3, the Rules of the House of Representatives.

Mr. Younger: And, your Honor, may I read the front cover of Government Exhibit 3 in evidence to the jury?

The Court: Yes.

(Mr. Younger reads to the jury.)

Q. Mr. Tavenner, I hand you Government Exhibit 3 in evidence, the Rules of the House of the 84th Congress, and I ask you whether or not those Rules provide for the Committee on Un-American Activities?
A. Yes, sir, they do.

Q. Can you find the rule which specifically so provides?
A. Here it is.

Q. Have you found it, sir?
A. Yes, sir.

Q. What rule is that?
A. Rule 17. It is Rule 11, Section 17.

Q. Will you read that rule to the jury?
A. "Committee on Un-American Activities."
“(a) Un-American Activities.
“(b) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make, from time to time, investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.”

Q. Mr. Tavenner, do you know whether or not certain members of the House of Representatives of the 84th Congress were designated to serve on the Committee on Un-American Activities?

A. Yes, sir. I know that they were.

Mr. Younger: Your Honor, I ask that this be marked Government Exhibit 4 for identification.

(Government Exhibit 4 marked for identification.)

Mr. Younger: I offer Government Exhibit 4 in evidence.

The Court: I will receive it.

(Government Exhibit 4 for identification received in evidence.)

Mr. Younger: Your Honor, may I read Government Exhibit 4 in evidence to the jury?

The Court: Yes.

(Mr. Younger reads to the jury.)

Government Exhibit 4 was a certificate by the Clerk of the House of Representatives listing the congressmen appointed to the Committee on Un-American Activities for the Eighty-fourth Congress.

Q. Mr. Tavenner, do you know whether or not the Committee on Un-American Activities had adopted its own rules of procedure to govern its work during the 84th Congress?

A. Yes, it did.

Mr. Younger: Your Honor, I ask that this be marked Government Exhibit 5 for identification.

(Government Exhibit 5 marked for identification.)
Q. Mr. Tavenner, I hand you Government Exhibit 5 for identification. Will you tell the Court and jury what that is?

A. This is a set of rules. It was reduced to writing by action of the committee in July of 1953—July 15th. It is composed of rules that had been in effect for quite a period of time, and it is the first set of written rules in the House of Representatives for any committee.

Q. Were these rules in effect at the time of the 84th Congress?

A. They were.

Mr. Younger: Your Honor, I offer Government Exhibit 5 for identification in evidence.

The Court: I will receive it.

(Government Exhibit 5 for identification received in evidence.)

Government Exhibit 5 was a copy of the Rules of the Committee on Un-American Activities.

Q. Mr. Tavenner, do you know whether or not the Committee on Un-American Activities for the 84th Congress passed a resolution authorizing the Chairman to appoint subcommittees?

A. Yes, sir, it did, at the organizational meeting of the 84th Congress.

Mr. Younger: Your Honor, may this be marked Government Exhibit 6 for identification?

(Government Exhibit 6 marked for identification.)

Mr. Younger: Your Honor, I offer Government Exhibit 6 for identification in evidence.

The Court: I will receive it.

(Government Exhibit 6 for identification received in evidence.)

Mr. Younger: Your Honor, may I read this exhibit to the jury?

The Court: Yes.

(Mr. Younger reads to the jury.)

Government Exhibit 6 was an excerpt from the Committee's minutes for January 20, 1955, reflecting the adoption of a resolution pursuant to which the Committee authorized its chairman to appoint subcommittees.

Q. By the way, Mr. Tavenner, referring to this
resolution which has just been read to the jury and which has been received as Government Exhibit 6 in evidence, do you know whether or not a quorum of the full Committee on Un-American Activities must be present before the committee may pass such a resolution?

A. Yes, sir. The quorum would be a majority.

Q. Do you know the source of that answer, sir?

A. I think it is in the rule itself.

Q. You mean the Rules of the House of Representatives?

A. Yes.

Q. Mr. Tavenner, I note from the extract of the minutes that you were personally present at the committee session on January 20, 1955.

A. Yes, I was.

Q. And can you tell us, from Government Exhibit 6 in evidence, whether a quorum of the committee was present?

The Court: It shows a quorum was present.

Mr. Younger: It does, on its face.

Your Honor, may this document be marked Government Exhibit 7 for identification.

(Government Exhibit 7 marked for identification.)

Mr. Younger: Your Honor, I offer Government Exhibit 7 for identification in evidence.

The Court: Received.

(Government Exhibit 7 for identification received in evidence.)

Mr. Younger: Your Honor, may I read this exhibit to the jury?

The Court: Yes.

(Mr. Younger reads to the jury.)

Government Exhibit 7 was an excerpt from the Committee's minutes for June 8, 1955, showing that the Committee directed the clerk of the Committee to investigate "communist infiltration in the field of entertainment in New York."

Q. Now, Mr. Tavenner, Government Exhibit 7 in evidence, the extract from the Committee minutes that was just read to the jury, refers to an investigation of Communist infiltration in the entertainment field. Do
you know whether or not the investigation was carried out?

A. Yes, it was.

Q. Do you know whether or not hearings were scheduled on that investigation in New York?

A. Yes, sir.

Q. Do you know whether or not the Chairman of the full Committee appointed a subcommittee to hold those hearings?

A. Yes.

Mr. Younger: Your Honor, may this be marked Government Exhibit 8 for identification?

A. (Continuing) It is my recollection that that was done at a Committee meeting.

(Government Exhibit 8 marked for identification.)

Mr. Younger: Your Honor, I offer Government Exhibit 8 in evidence.

Government Exhibit 8 was the Committee's authorization to the subcommittee Tavenner had told me reposed in the Committee's files. It was an excerpt from the Committee's minutes for July 27, 1955, stating that "the hearings on communist infiltration in the entertainment field to be held in New York City were set for August 15, 16, 17, and 18 and the subcommittee appointed." This was the authorization in so many words whose absence from the bill of particulars had disturbed me. I had no idea why the Committee hadn't sent it to the United States Attorney's office in November 1957, when the bill of particulars was prepared. The excerpt bore a verifying certificate from the clerk of the House of Representatives dated October 29, 1959. Tavenner had mailed the document to me about two weeks before the start of the trial, and I'd given Ross a copy.

Ross made the most of this exhibit.

Mr. Ross: If your Honor please, before I make an objection to the admission of this document into evidence, I would like your Honor's permission to examine the witness concerning this particular exhibit.

The Court: Did he certify it?

Mr. Ross: I beg your pardon?

The Court: Did he certify it?

Mr. Ross: No, he did not certify it, but the fact of the matter is that this exhibit does not contain or is
not referred to in the bill of particulars furnished by the government in connection with this case, and under the circumstances the exhibit is not admissible in evidence under all of the authorities that I have been able to find.

The Court: Do you want a mistrial? Do you plead surprise?

Mr. Ross: I don't want a mistrial. The question here is the right of the government to—

The Court: I would think the government is entitled to prove anything it has by way of establishing the crime charged. You might be surprised by its proof because they did not tell you about it in the bill of particulars, and I suppose that you would be entitled to an adjournment for that reason.

Mr. Ross: No, but he is testifying to this, and I want to show the fact that we are prejudiced not particularly in reference to surprise, but in reference to the right of the defendant to be informed at the earliest possible opportunity of those matters which the government has and which are in the chain of proof to establish his guilt, and here, for the first time, the government presents a resolution, a copy of which is only furnished to me at my request with the other documents, I think, about two weeks ago.

The Court: You have had it for two weeks, have you?

Mr. Ross: Yes, I have, your Honor, and there is nothing that I was able to do about the question of the authenticity of the certification. I feel that I have a right to examine into the circumstances under which this exhibit is presented for the first time to me two weeks ago, and which is now offered to this court.

The Court: Let me see the resolution.

(A pause.)

The Court: The application is denied. Exhibit 8 is received in evidence.

Mr. Ross: May I reserve the right of cross-examination on this subject?

The Court: You may cross-examine when it is your turn.

Mr. Younger: Your Honor, may I read Government Exhibit 8 in evidence to the jury?
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The Court: Yes.

Mr. Younger: In this case I ask your Honor's permission to read the Clerk's certification as well.

The Court: Yes.

(Mr. Younger reads to the jury.)

Q. Now, Mr. Tavenner, do you know whether or not the hearings mentioned in the exhibit I just read to the jury were actually held?

A. They were.

Q. When were they held, sir?

A. They began August 15th in New York City.

Q. Until when did they run?

A. I believe through the 18th.

Q. What year, sir?

A. Of 1955.

Q. Where in New York City were the hearings held?

A. In this building, and it seems to me that it must have been this room. I think I recognize the layout.

Mr. Younger: Your Honor, may these documents be marked Government Exhibits 9 and 10 for identification.

(Government Exhibits 9 and 10 marked for identification.)

Mr. Younger: Your Honor, I offer Government Exhibits 9 and 10 in evidence.

The Court: I will receive them.

Mr. Younger: Your Honor, at this time I propose to read the defendant's testimony taken at that time to the jury.

Government Exhibits 9 and 10 were the printed record of the subcommittee's hearings in New York City on August 15, 16, 17, and 18, 1955. Tavenner and I read aloud Seeger's testimony before the subcommittee, Tavenner reading the questions he himself had asked at the time, and I reading Seeger's answers.

Ross began his cross-examination of Tavenner with Government Exhibit 8.

Q. Mr. Tavenner, you testified on direct examination, about the adoption of a resolution of July 27,
1955, which was Government Exhibit 8. Do you recall that?

A. Yes, sir.

Q. Now, the original book of entry of the Committee, is that a looseleaf book in which the minutes are typed in or is it a bound volume?

A. It is a looseleaf volume.

Q. Now, was the original of this resolution, that is of this transcript, does it contain other matters than those which are referred to in the resolution itself where the asterisks appear?

A. That is correct.

Q. So that this is a report of a meeting of the Committee in which other matters were also handled?

A. Yes.

Q. Was that a regular meeting of the Committee or a special meeting? Would you know that?

A. It was a special meeting.

Q. Now, the special meeting—was that called on particular notice in writing to the members of the Committee?

A. Yes, sir, on written notice.

Q. Do you have any copy of the written notice here?

A. No, I don’t.

Q. Now, this resolution, Government Exhibit 8, was not referred to in the opening statement [at the subcommittee hearings] by the Chairman, was it?

A. I don’t think it was.

Q. Can you recall whether or not you ever forwarded a copy of this resolution to the United States Attorney’s office?

A. No, but I did send it to the Clerk of the House for certifying.

Q. And that was on or about the 29th day of October, 1959?

A. That is correct. But the Clerk couldn’t get it out, according to my recollection, until January, though I was after him about once a week during the intervening period.

Q. Well, now, it shows—
The Court: Can't we cut this short? Are you trying to show that it was not before the grand jury?

Mr. Ross: Yes.

The Court: Mr. Younger, could you concede that it wasn't before the grand jury, if the indictment was in fact filed in 1957?

Mr. Younger: I think we can, your Honor.

The Court: Yes. All right.

Mr. Ross: The government concedes that it was not—

The Court: I think they would almost have to. This is something that was certified in 1959, the indictment was filed in March, '57, you have trapped him, yes.

Ross went on to questions about the Committee's interest in black-listing Communists in the entertainment industry, to none of which did Tavenner give an answer helpful to the defense.

When the cross-examination was over, Tavenner left the stand and I proceeded with proof that the procedural niceties following Seeger's refusal to answer the subcommittee's questions had been observed.

Mr. Younger: Your Honor, may this document be marked Government Exhibit 11 for identification?

(Government Exhibit 11 marked for identification.)

Mr. Younger: Your Honor, I offer Government Exhibit 11 in evidence.

The Court: I will receive it.

(Government Exhibit 11 for identification was received in evidence.)

Government Exhibit 11 was an excerpt from the minutes of the Committee on Un-American Activities for June 27, 1956, showing that the Committee voted to ask the House of Representatives to cite Seeger for contempt.

Mr. Younger: Your Honor, may this be marked as Government Exhibit 12 for identification?

(Government Exhibit 12 marked for identification.)

Mr. Younger: Your Honor, I offer Government Exhibit 12 in evidence.

The Court: I will receive it.
Government Exhibit 12 for identification was received in evidence.

Government Exhibit 12 was the report of the House of Representatives entitled, "Proceedings against Peter Seeger."

Mr. Younger: Your Honor, may these documents be marked Government Exhibits 13 and 14 for identification?

(Government Exhibit 13 marked for identification.)

(Government Exhibit 14 marked for identification.)

Mr. Younger: Your Honor, I offer in evidence Government Exhibits 13 and 14.

The Court: I will receive them.

(Government Exhibit 13 for identification was received in evidence.)

(Government Exhibit 14 for identification was received in evidence.)

Government Exhibit 13 was House Resolution 636 of the Eighty-fourth Congress, directing the Speaker to send the House report on Seeger (Government Exhibit 12) "to the United States Attorney for the Southern District of New York, to the end that the said Peter Seeger may be proceeded against in the manner and form provided by law."

I picked up Government Exhibit 14 and turned to the jury.

Mr. Younger: Ladies and gentlemen, Government Exhibit 14 reads as follows:

"The Speaker's rooms, House of Representatives, U.S., Washington, D.C.
"To the United States Attorney, Southern District of New York.
"The undersigned, the Speaker of the House of Representatives of the United States, pursuant to a House Resolution 636, Eighty-fourth Congress, hereby certifies to you the refusal of Peter Seeger to answer questions before a duly constituted subcommittee of the Committee on Un-American Activities of the House of Representatives conducting an investigation authorized by Public Law 601, Seventy-ninth Congress, and House Resolution 5 of the Eighty-fourth Congress, as is fully shown by the certified copy of the report (House Report 2920) of said committee which is hereto attached.
"Witness my hand and the seal of the House of Representatives of the United States, the City of Washington, District of Columbia, this twenty-sixth day of July, 1956."

This document, ladies and gentlemen, is signed by Sam Rayburn, the Speaker of the House of Representatives.

Your Honor, the Government rests.
The defense case consisted of six witnesses. Two of them were asked about blacklisting and replied, in effect, that they knew nothing about it. The other four were character witnesses, witnesses who testify that the defendant has a good reputation. (Since 1975, a character witness in a federal case has also been permitted to testify to his own good opinion of the defendant.)

Seeger's first character witness was Helen Parkhurst. Direct examination by Mr. Ross:

Q. May I ask you, Doctor, please speak up? I have difficulty hearing, as you know. What is your occupation?

A. Editor, author and broadcaster.

Q. And what has been the nature of your associations as an editor? What schools have you been associated with?

A. I founded the Dalton School and I was head of it from 1916 to 1942, at which time I went to Yale to be a part of the department of education.

Q. And what have been your activities in connection with writing in the field of education?

A. I have written four books: Education on the Dalton Plan, which is in sixteen languages; Works Rhythms in Education; Exploring the Child's World, which is just recently in its seventh edition and was published by the Department of Information—the Agency of Information, in German, for dissemination abroad to show the American way of life; Education on the Dalton Plan, was the first one. I am currently engaged in writing two more which will be out this fall.

Q. Now, do you know Peter Seeger?

A. I know Peter Seeger.

Q. How long have you known him?

A. All his years, really. He was about one or two when I first knew him.

Q. And did he at any time attend the Dalton School?

A. Yes, he did.

Q. Do you know his family?

A. I know his—I knew his grandparents, I knew his father, I knew his mother, I knew his brothers. I knew the whole family.
Q. Do you know other people who know him?
A. Yes, many people.
Q. Now, do you know what his profession is?
A. Yes.
Q. Tell us.
A. I know of him as a musician and a singer.
Q. Now, are you familiar with his general reputation? Are you familiar with his general reputation?
A. Yes. Yes, I am.
Q. Well, are you familiar with the general reputation in the community in which he lives?
A. Yes.
Q. Are you familiar with his general reputation in the professional circles in which he moves?
A. Yes.
Q. Now, will you tell us what his general reputation is as to character and integrity?
A. Excellent.
Q. Will you tell us what his general reputation is for conducting himself as a law abiding citizen?
A. As far as I know, excellent.
Q. Will you tell us what his general reputation is for loyalty and adherence to the principles of our Constitution?
Mr. Younger: Objection.
The Court: No. I will allow that.
What is his reputation for loyalty and adherence to the Constitution?
The Witness: Your Honor, I have asked many, many people in different parts of the country and it is excellent. It is excellent.
Mr. Ross: No further questions.

The last question and answer angered me. I'd wanted to try the case without getting into Seeger's membership in the Communist Party, and I thought I had done so. But through Parkhurst's testimony about "loyalty and adherence to the Constitution," Ross was suggesting to the jury that Seeger wasn't a Communist. Though that was a game I didn't want to play, if I had to I would.

In a case called Michelson v. United States,16 the Supreme

Court held that a character witness, who testifies to his knowledge of the defendant's reputation, may be asked whether he's ever heard of some particular thing about the defendant tending to contradict what the character witness has said of the defendant's reputation. First, however, the prosecutor must show the judge that the something he proposes to ask the character witness about is probably true. This is what I did:

Mr. Younger: Mr. Ross, will you approach the bench with me?

(Discussion at the bench.)

Mr. Younger: Your Honor, I will have only one question on cross, but I will present it at the bench first rather than in the jury's hearing.

I would ask this witness whether she ever heard that Peter Seeger was a member of the Communist Party. I think it is proper cross considering the last question which was allowed.

The Court: I have to ask you whether you have information which is a basis for asking that.

Mr. Younger: I will make that representation in detail.

(In open court.)

The Court: We are going to take a short recess and we will be back in five minutes.

(In the robing room.)

The Court: Would you repeat, again, your statement?

Mr. Younger: Your Honor, what I am proposing to ask this witness on cross-examination is the following question: Have you heard whether or not Peter Seeger is a member of the Communist Party or was a member in the period between 1948 and 1955?

The basis of this question is as follows: Your Honor, Herman Thomas, an FBI informant, who testified for the Government in a Smith Act case in the Eastern District of Pennsylvania called United States against Kuzma, this Mr. Thomas having been a member of the Communist Party as an undercover agent, on September 12, 1949, identified Seeger as a member of the Communist Party.

In addition, Lewis F. Budenz, formerly the managing editor of the Daily Worker and former Communist
Party member, in 1949 identified Seeger as a member of the Communist Party.

The Court: I will permit it.

(Jury present.)

(Witness Parkhurst resumed the stand.) Cross-examination by Mr. Younger:

Q. Dr. Parkhurst, you have testified that Peter Seeger's reputation for loyalty and adherence to the Constitution is excellent?
A. Yes.

Q. Now, Dr. Parkhurst, have you ever heard that Peter Seeger, sometime after 1947 and before 1956, was a member of the Communist Party?
A. Recently.

The next two character witnesses were the producer of Seeger's phonograph records and an Episcopalian priest from Seeger's home town. I didn't cross-examine them.

The last character witness—and the last witness in the case—was Harold Taylor.

Direct examination by Mr. Ross:

Q. Dr. Taylor, where do you live?
A. In Bronxville, New York.

Q. What is your profession, sir?
A. An educator and author.

Q. Are you at the present associated with any educational institution?
A. No, I am not.

Q. Are you associated with any institution at all?
A. With the Institute for International Order.

Q. Prior to that were you associated with any educational institution?
A. Yes.

Q. What institution were you associated with?
A. Sarah Lawrence College.

Q. In what capacity?
A. As president.

Q. How long were you in that capacity?
A. From 1945 to 1959—14 years.

Q. During that period of time did you get to know Peter Seeger?
A. Yes.
Q. Did you see him frequently?
A. Two or three times a year.
Q. Do you know other people who know Peter Seeger?
A. Yes, many.
Q. Have you talked with those people about Peter Seeger?
A. As one talks about one's friends, yes.
Q. Those people that you talked with, were they people who were acquainted with him in connection with his professional work and otherwise?
A. Some were, and some weren't.
Q. Are you familiar with his general reputation in the professional circles in which he moves?
A. Yes.
Q. Will you tell us what his general reputation is as to character and integrity?
A. Excellent.
Q. Will you tell us what his general reputation is for conducting himself as a law-abiding citizen?
A. Excellent.
Q. Will you tell us what his general reputation is for loyalty and adherence to the principles of our Constitution?
A. Excellent.

Mr. Ross: Your witness. Cross-examination by Mr. Younger:
Q. How long have you known Mr. Seeger?
A. Ten years, I would say.
Q. I gather then that you have been generally aware of his reputation for about ten years?
A. Yes.
Q. Have you ever heard that Peter Seeger was a member of the Communist Party between 1947 and 1956?
A. I have heard it stated.
Q. Still and all, you are prepared to state that his reputation for loyalty and adherence to the Constitution is excellent, his reputation, sir?

There was a long pause, after which Taylor said, "Yes."

The final arguments were elaborate repetitions of the opening statements. Judge Murphy charged the jury, explain-
ing to them the laws on contempt of Congress. At 3:30 p.m., the jury began deliberating. At 4:55 p.m., they had a verdict. Seeger was guilty on all counts of the indictment.

A week later, Seeger, Ross, and I were all before Judge Murphy again.

Mr. Ross: The defendant is ready for sentence.

The Court: Yes. All right.

Mr. Younger: May I proceed, your Honor?

The Court: Stand up, Mr. Seeger.

Mr. Younger: May it please the Court, on March 29, 1961, which was Wednesday of last week, this defendant, Peter Seeger, was convicted by a jury on all ten counts of an indictment charging contempt of Congress committed on August 18, 1955, in this city.

The statute under which this indictment was framed is Section 192 of Title 2, U.S. Code, and this statute provides, in substance, that any person who refuses to answer proper questions posed by any committee of either House of Congress shall be deemed guilty of a misdemeanor and shall be punished, and now I am quoting: "By a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.”

The circumstances surrounding the commission of this crime were developed by the Government in the course of presenting its case at the trial, and I shall not rehearse them here.

Instead I propose to bring to the Court's attention those facts relevant to the question of sentence not brought out at the trial.

Your Honor, Peter Seeger is 42 years old, having been born in New York City in 1919. He has been married for some 20 years and is the father of three children.

At the present time he resides with his family in Beacon, New York, and has done so for at least the last six years.

The defendant graduated from grammar school and high school in Connecticut, and attended Harvard University from 1936 to 1938 but did not receive a degree.

He served in the United States Army from 1942 to 1945 including more than one year of combat duty in
the Pacific theatre. He received an honorable discharge with the rank of Technician 5th Grade.

Since 1945 or thereabouts Peter Seeger has earned his living as a professional singer of folk songs, and, except for the crime of which he now stands convicted, the defendant has no criminal record.

Now, as your Honor knows, the defendant committed this crime by refusing to answer questions put to him by the Committee on Un-American Activities, questions dealing with his Communist Party membership, his activities in behalf of the Communist Party, and his responsiveness to Communist Party direction and control.

Because it bears upon the gravity of this offense, I would like to bring to your Honor's attention the information in the Government's possession concerning these subjects.

Before doing so I wish to make clear that I am aware that under present federal law mere membership in the Communist Party and participation merely as an entertainer in Communist Party activities are not crimes.

The information I have on these matters does, however, indicate the extent to which the defendant could have been of service to the Committee on Un-American Activities in the discharge of its duties had he chosen to answer the Committee's questions. In this sense this information bears upon the gravity of the offense.

First with regard to Peter Seeger's Communist Party membership, the government's information is as follows:

In September, 1949, Herman Thomas, a Federal Bureau of Investigation undercover agent, identified the defendant as a member of the Communist Party.

In 1950, John Lautner, formerly the Chairman of the New York State Review Commission of the Communist Party, stated that he knew Peter Seeger as a Communist Party member in the period 1947 to 1949.

In addition to these men, Louis P. Budenz, formerly the managing editor of the Daily Worker,
has identified Peter Seeger as a member of the Communist Party in 1949.

Now, if your Honor please, with regard to the defendant's participation as an entertainer at Communist Party activities, the government's information is as follows:

Between June, 1947, and October, 1955, Peter Seeger appeared as a singer or as an entertainer singing folk songs at a minimum of 24 separate events sponsored by organizations designated by the Attorney General pursuant to Executive Order 10450, and which hence may fairly be described as subversive.

I will not list these 24 events, but I wish to inform your Honor of the names of some of the sponsoring organizations:

The American Peace Crusade
The American Youth for Democracy
The California Labor School
The Committee for a Democratic Far Eastern Policy
The Families of the Smith Act Victims
The Joint Anti-Fascist Refugee Committee
The Jefferson School of Social Science
The Labor Youth League
The Communist Party itself.

This record, your Honor—and I refer not only to the defendant's Communist activities but to his education and his upbringing as well—this record bespeaks an individual who had a special obligation to provide the information needed by the Committee in its investigation of Communist infiltration into the entertainment field.

By refusing to provide that information, by committing the crime for which he has been convicted, he has not only placed himself in contempt of Congress but has breached one of the most serious obligations of American citizenship.

I concede that this was something strong coming from one who himself would have voted to abolish the Un-American Activities Committee. Still, as I've pointed out, what a lawyer
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says ought not to be confused with what the lawyer personally believes. Anyway, Ross had been the first to wave the flag.

The Court: Mr. Ross?

Mr. Ross: May it please the Court, I merely want to refer to that portion of Mr. Younger’s remarks which deals with the alleged identification.

I think that the mere identification by Mr. Thomas, which, I understand, was in a case in Philadelphia which was reversed by the Court of Appeals, and by John Lautner, whose reputation for truthfulness has been questioned in many quarters, as well as by Mr. Budenz, should not be taken by your Honor as evidence of facts but merely as evidence of the fact that these individuals so stated.

I might say with respect to Mr. Lautner that the Court of Appeals, in the case of United States v. Silverman, when it reversed the conviction, indicated that Mr. Lautner, who was a witness for the Government, did not indicate that in any way any activities which he observed in connection with his membership in the Communist Party were illegal, subversive or of a kind which did violence to the concepts of our Constitution. I merely wanted to place these matters in the record.

Secondly, that as to any of the organizations referred to as organizations which were on the Attorney General’s list, I want to call your Honor’s attention to the fact that no final finding was made in connection with these organizations until long after the events of which Mr. Younger spoke.

And thirdly, that the Attorney General’s list itself was intended by the government, as I indicated to your Honor, to be merely one of the factors which the government was to take into account in determining the eligibility of persons for employment in the government, and it was never intended to be a source for proscription against an individual who otherwise comported himself in a legal manner.

Now, with these remarks I leave the defendant to your Honor’s care.

The Court: Mr. Seeger, do you have anything to say before I pass sentence on you?

Defendant Seeger: I do.
The Court: You may.

Defendant Seeger: Thank you very much, your Honor. After having heard myself talked about pro and con for three days, I am very grateful for the opportunity to say a few words, unrestricted words, myself.

Firstly, I want to thank my lawyer deeply for his masterly preparation and presentation of my defense. He has worked over long weeks and months, and done all this knowing that it is beyond my power to pay him adequately for his work.

I believe that he and great legal minds like Justice Hugo Black and Dr. Alexander Michaelson, and others, have stated far better than I can the reasons that they believe that the First Amendment gives an American citizen the right to refuse to speak upon certain occasions.

Secondly, I should like to state before this Court, much as I stated before the Committee, my conviction that I have never in my life said or supported or done anything in any way subversive to my country.

Congressman Walter [the Committee’s chairman] stated that he was investigating a conspiracy. I stated under oath that I had never done anything conspiratorial. If he doubted my word, why didn’t he even question it? Why didn’t he have me indicted for perjury? Because I believe even he knew that I was speaking the truth.

Some of my ancestors were religious dissenters who came to America over 300 years ago. Others more recently were abolitionists in New England in the 1840’s and 50’s, and I believe that in choosing my present course I do no dishonor to either them or to the people who may follow me.

I will be 42 years old next month and I count myself a very lucky man. I have a wife and three healthy children. We live in the house we built with our own hands on the bank of the Hudson River, a very beautiful place.

For over 20 years I have been singing folk songs of the American people and people of other lands to people everywhere. I am proud that I never refused to
sing for any group of people because I might disagree with some of the opinions held by some of them.

I have sung for rich and poor, for Americans of every political and religious opinion and persuasion, for every race, color and creed.

The House Committee wanted to pillory me because it didn’t like some few of the many thousands of places that I have sung. Now, it so happens that the specific song whose title was mentioned in this trial was not permitted to be sung at the time. It is one of my favorites. The song is apropos to this trial, and I wondered if I might have your permission to sing it here before I close.

As he said this, Seeger bent down, reached under the counsel table, and pulled out his banjo. Without a pause, Judge Murphy said, “You may not.”

Seeger put the banjo on the table and continued:

Well, perhaps you will hear it some other time. A good song can only do good, and I am proud of the songs that I have sung. I hope to be able to continue to sing them for all who want to listen to me, Republicans, Democrats, or Independents, for as long as I live.

Do I have a right to sing these songs? Do I have a right to sing them anywhere?

The Court: Is that all you wish to say?

Defendant Seeger: It is, sir.

The Court: Would you want to tell me now whether you are now or whether you ever were a member of the Communist Party?

Defendant Seeger: I decline to speak.

The Court: Thank you.

The sentence of the Court is that you will be sentenced to a term of imprisonment for one year on each count, to run concurrently, of which you stand convicted, and that you pay the cost of the prosecution, and that is, I repeat, one year on each count, each count to run concurrently, and the defendant should pay the cost of the prosecution.

Mr. Ross: May I be heard, your Honor, on an application to continue the defendant on bail pending appeal?

The Court: No. I will deny that motion.
Mr. Ross: Well, may I be heard on the question before your Honor makes a final ruling?

The Court: Yes. I will hear you now.

Mr. Ross: There is no case that I know of involving contempt, the finding of contempt, against this or any other committee of Congress, in which the court has not granted bail pending appeal, particularly in view of the fact of the very important legal questions which are present in this case, and which I respectfully submit were urged in good faith and ought to be heard by the Court of Appeals.

The Court: Well, if the Court of Appeals want to grant bail, you can go there; it is only a couple of floors away.

Mr. Ross: Would your Honor permit him to remain on bail so that I can go to the Court of Appeals today to—

The Court: No. He is now committed.

Seeger picked up his banjo and handed it to his wife. With a marshal at either arm, he was led away to the courthouse lock-up where he spent no more than an hour in custody. His lawyers went from Judge Murphy's courtroom to the Court of Appeals, which granted their application for bail pending appeal. Seeger had dinner at home that evening.

The appeal was argued on April 9, 1962, and the Court of Appeals filed its opinion six weeks later, reversing the conviction because the indictment failed to spell out the authority of the subcommittee whose questions Seeger had refused to answer. The following passage is the crux of the Court of Appeals' opinion:

The first paragraph of the indictment purports to relate the substance of a resolution passed by the Committee on Un-American Activities on June 8, 1955 directing the subcommittee to conduct the investigation. The second paragraph then states that "pursuant to said direction" the subcommittee conducted the hearings at which Seeger appeared as a witness. But the resolution of June 8, 1955 (Government Exh. 9, p. 2260) was not such an authorization to the subcommittee. It was merely a direction to the parent Committee's clerk to proceed with an investigation. . . . The resolution of July 27, 1955 (Government Exh. 8), which actually purports to authorize the subcommittee to proceed with
the hearings was nowhere mentioned. In other words, instead of a "clear," "accurate" and "unambiguous" allegation of the essential facts indicating the subcommittee's authority, the indictment contained a wholly misleading and incorrect statement of the basis of that authority. This not only runs afoul of accepted notions of fair notice, but goes "to the very substance of whether or not any crime has been shown." . . .

The possibility that a defendant might obtain this essential information by means of a bill of particulars does not affect our conclusion. A bill of particulars cannot repair a fatal defect in an indictment, because the defendant has a constitutional right to a fair and accurate accusation by indictment; and there is no unconditional right to a bill of particulars. Furthermore, in the instant case, although the trial court did order the Government to specify the basis of the subcommittee's authority in a bill of particulars, the vital resolution of July 27, 1955 (Government Exh. 8) was not produced in compliance with that order.\footnote{Seeger, 303 F.2d at 484 (citations omitted) (emphasis in original).}

That ended the \textit{Seeger} case, and I wasn't disappointed. My sympathies lay with Seeger. If I had been on the Court of Appeals, I would have voted with the other judges to reverse the conviction, but I would have urged them to write a different sort of opinion. In the \textit{Seeger} case, the Court of Appeals neither condemned the Un-American Activities Committee nor acknowledged a witness's right to refuse to answer questions about the witness's political beliefs and activities. The Court based its reversal on a technical ground, a ground smacking of pettifoggery. Had the Court chosen to write a more forthright opinion, it would have said that the Committee's investigation and Seeger's indictment were phenomena peculiar to the McCarthy days, that those days had come to an end, and that the Court was not going to contribute to their revival even by so little as an affirmance of this conviction.

In July 1962, two months after the Court of Appeals' reversal of Seeger's conviction, I stood on a Fire Island beach with my friend, Duck. I had caught the peg to first that put him out in our championship game. I had stayed with his parents in London before heading for Salzburg. Duck's father had been on the edges of the Un-American Activities Committee's investigations in Hollywood.
"How could you," he asked. "How could you prosecute Pete Seeger for doing what the Constitution gives him a right to do?"

"That's not why the Court reversed his conviction," I said, "though I agree with you that the Constitution gives him a right to do what he did."

"Then how could you prosecute him?"

Trying to answer Duck, I struggled to explain my thoughts on the responsibilities that go with being a trial lawyer. I spoke for a good ten minutes. I don't remember the words I used, and they probably weren't very good. But if I'd been able to, this is what I would have said. I believe it still.

No trial lawyer hasn't been asked about the morality of representing an evil client. The question goes as follows: "How do you accommodate your own sense of right and wrong with vigorous advocacy on behalf of someone or something loathsome?" The answer is that no accommodation is necessary. A lawyer's own moral sense requires of him nothing else but vigorous advocacy, without regard to the moral quality of the client or the cause. This exigent moral sense originates in the lawyer's decision to be a professional advocate.

As Oliver Cromwell said to the General Assembly of the Church of Scotland, "I beseech you, in the bowels of Christ, think it possible that you may be mistaken." Life and the affairs of living are so tangled, the world not only stranger than we imagine but stranger than we can imagine, that all questions are conundrums, no answers "correct." It is certain that parallel lines never meet? No. Does water freeze at thirty-two degrees fahrenheit? Only probably. Shall I marry? Who can say? And yet the world's work must be done. One Oblomov is enough. Thus we learn a conventional certitude, acting as though all were light by blinking the shadow. A simple proof demonstrates that parallel lines meet, but, on the assumption that they do not, the architect builds the skyscraper. Despite his knowledge of statistical mechanics, the engineer designs the refrigerator to maintain a constant temperature of thirty-one degrees. Le coeur a ses raisons que la raison ne connait point, and families are raised.

Still, a feigned composure sometimes goes slack. After a while, the struggle to stay afloat seems too hard, and the uncertainty of things laps high. To think is to suffer this fear and

18. "The heart has its reasons which reason cannot understand."
trembling. Hence members of the three professions are afflicted.

The physician is master of medicine. This afternoon he saved a life. But the life is the life of Hitler. Was he worth saving? Would it not have been better to let him die?

The clergyman has learned the cure of souls. This afternoon he solaced one in terror. But the one in terror is a Manson. Was he worth comforting? Would it not have been better to leave him to his agony?

The lawyer, as Samuel Johnson puts it, “has acquired the art and power of arranging evidence and of applying to the points at issue what the law has settled.” This afternoon by his advocacy he persuaded a jury to return a verdict of not guilty. But the client is noxious. Was the verdict worth winning? Would it not have been better for the lawyer to decline to involve himself in the case?

None of these questions has a sure answer. Perhaps one should save a Hitler, shrive a Manson, defend a guilty client; or perhaps not. There is no way to tell, and the very inquiry may be nothing more than a trick of our nervous system, organized as it is on the algorithm of either/or.

All of us, however, from time to time need the skill of one or the other of the three professions. I am sick: I want health. I am troubled: I want tranquility. I have a case: I want to be heard. The physician, the clergyman, and the lawyer are trained to help me accomplish my desires, but should they stop to ask whether it is good that it be done—which my body deserves the healing, my soul the calming, my case the hearing—they will never find a sure answer and, in their doubt, lose the name of action.

The professions do not relish this prospect, nor can society abide it: society stands too much in need of the physician, the clergyman, and the lawyer to tolerate their impotence. Each of the professions therefore demands of its members a commitment that will permit them to do the job for which they have been trained. It is a commitment of the greatest difficulty, and its difficulty lies precisely in the acknowledgement that, since one’s own moral sense may impede professional practice, a professional practitioner must put aside his own moral sense. It is, accordingly, a commitment to make no moral judgments. It is a

commitment to assume a certainty willed but possible (rather than seek a certainty reasoned but impossible) that the life is worth saving, the soul worth calming, the case worth hearing.

The physician's commitment is embodied in the Hippocratic Oath:

"The regimen I adopt shall be for the benefit of my patients . . . and not for their hurt . . . Whatsoever house I enter, there will I go for the benefit of the sick."

The clergyman's commitment is embodied in Paul's advice to the Romans:

"Dearly beloved, avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord."

The lawyer's commitment is embodied in no single document, but inheres in the lawyer's obligation to give any client and any cause his advocacy, regardless of his own moral judgment, because the question whether the client or the cause deserves a hearing is too profound for men to answer.

When I finished talking to Duck, he looked down, dug at the sand with his foot, and said, "It doesn't make sense to me and I don't understand it. The fact is you're the guy who prosecuted Pete Seeger. That's a guy I don't want to know. This friendship is over." I haven't seen him since that day.

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20. Romans 12:19 (King James).