# Constitutional rights violated, says LaRouche motion for bond on appeal

Citing substantial violations of their constitutional rights, on April 5 attorneys for Lyndon LaRouche and his six co-defendants filed a motion for bond pending appeal before the U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia. By presenting substantial issues of law and fact that should lead to reversal of their conviction, the defendants' arguments on behalf of their constitutional rights represent the most crucial fight for such constitutional protections in the recent period.

Submitting the 50-page appeal brief were: Attorneys Ramsey Clark and Odin Anderson, for Lyndon LaRouche and Dennis Small; R. Kenly Webster for Edward Spannaus; Brian P. Gettings for William Wertz; Michael Reilly for Paul Greenberg; Edwin Williams for Joyce Rubinstein; and James Clark for Michael Billington.

The International Commission to Investigate Human Rights Violations is rushing the major portion of the appeal brief, minus its appendices, into print, in order to alert the political and legal community, as well as the general citizenry, to the issues involved. Whether the U.S. devolves into a police state, or not, will depend substantially upon the outcome of this demand for release of political prisoner LaRouche and his associates, and their subsequent main appeal.

## Constitutional right to a fair trial

The appeal brief raises four major abuses of constitutional rights in the trial of the U.S. vs. Lyndon LaRouche, as it was heard in the Alexandria federal court under Judge Albert V. Bryan. As a result of the denial of these rights, "petitioners were denied the right to present a full defense to a fair and impartial jury." The following arguments summarize the issues raised:

A. The District Court denied petitioners a constitutionally adequate *voir dire,* thereby violating their Sixth Amendment right to a fair and impartial jury. The defense argues that the *voir dire* examination was not valid for probing the jury, and constitutionally inadequate.

The constitutional inadequacy led to at least five categories of reversible error by Judge Bryan:

1) The *voir dire* was unconstitutionally general;

2) The trial judge erroneously relied on jurors' subjective perceptions;

3) The trial judge failed to probe outside influences on jurors;

4) The defense was precluded from making effective use of their peremptory strikes, because it lacked adequate information about the prospective jurors;

5) The trial judge forced petitioners to waste precious peremptories.

B. By denying the defendants' motion for exculpatory material and granting the government's pre-trial motion *in limine,* the court deprived defendants of their constitutional right to present their case to a fair and impartial jury. This denial of constitutional rights meant that the defense was not allowed to fully develop the facts relevant to its case, in particular the pattern of activity by the government against the defendants, and the involuntary bankruptcies which the government had brought against the defendants' organizations.

C. The District Court erred when it refused to grant petitioners' motion for continuance and forced counsel to trial without affording them adequate time to prepare their defense. Thus the defense was given no more than one-third of the time it would have taken them to prepare the case, with the result that cross-examination was inadequately prepared, and, most importantly, there was inadequate time to permit defendants themselves to testify on their own behalf.

The overall context for these denials of constitutional rights is outlined in the factual background section of the brief. This section demonstrates that "this case is an outgrowth of (FBI Cointelpro), which culminated in an intense five-year program by what may be accurately characterized as a national multi-agency 'get LaRouche' task force. The task force was created following repeated instigation by, among others, former Secretary of State Henry Kissinger. . . . The political motivations apparent have received international attention and condemnation by prominent jurists and others."

The most egregious result of the constitutional inadequacy of the jury selection procedure, which left the jurors "essentially unprobed," was the fact that U.S. Department of Agriculture employee Buster Horton was seated, and later selected as jury foreman. It was learned subsequent to trial that Horton "is a member of a special unit in the United States Department of Agriculture, and is one of the USDA's representatives on a special inter-agency task force of approximately 100 persons. . . ." Horton was associated on this task force with Lt. Col. North and a representative of Assistant FBI Director Revell, both of whom were documented in the Boston trial as involved in anti-LaRouche operations.

# The case of the LaRouche jury

*What follows is an unabridged section of the motion filed on April 5, 1989 for Lyndon LaRouche and six co-defendants for bond pending appeal. The full brief is being published by the international Commission to Investigate Human Rights Violations.*

## III. ARGUMENT

The right to be tried by an unbiased jury is fundamental to our system of justice and serves as a critical guard against arbitrary and politically-motivated prosecutions. As the Supreme Court noted in Duncan v. Louisiana, 391 U.S. 145, 156 (1968):

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority . . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . .

The court below scoffed at the notion that this case might be politically-motivated, declaring it "errant (sic) nonsense" to even imagine that "this organization is a sufficient threat to anything, that would warrant the Government to bring a prosecution to silence them . . . ." [See App. at Tab #18.] This point was reflected in the judge's failure to take the necessary steps to protect the Petitioners' constitutional right to a fair trial by an unbiased jury. As is demonstrated herein, petitioners were denied the right to present a full defense to a fair and impartial jury.

### A. THE DISTRICT COURT DENIED PETITIONERS A CONSTITUTIONALLY ADEQUATE VOIR DIRE THEREBY VIOLATING THEIR SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY

As set forth in detail in the Factual Background, supra, Petitioners had been, for an extended period of time, targets of adverse publicity and vilification generated by the news-media and directed at audiences in the geographic area from which the members of the jury panel were selected. Given this fact, the district court should have taken particular care to conduct a thorough, searching voir dire in order to assure a fair and impartial jury. Instead, the trial judge took none of the precautions required in high profile cases. He refused to grant Petitioners additional peremptories, denied all pre-trial voir dire motions, would not permit counsel to question veniremen, relied on panelists' self-conceived assurances of impartiality, refused to conduct a sequestered individual examination of each juror, and refused to excuse for cause persons employed by or closely affiliated with the prosecuting agencies.[15]

#### *1. There Was No Valid Voir Dire Examination*

In light of the pervasive negative publicity as noted above, Petitioners submitted several pre-trial voir dire motions aimed and detecting jury bias. Specifically, Petitioners requested that the veniremen be required to fill out a questionnaire,[16]
and be asked specific questions; including, for example, whether they were ever approached by LaRouche associates in airports.[17]
fused to hear any argument, denied all such motions, and informed counsel that he would conduct the entire jury selection process himself.

This examination, conducted exclusively by the judge, was directed to the panel at large, and only those jurors who responded affirmatively to the court's general questions were questioned individually. Of the 12 jurors who were ultimately impaneled, only four were questioned individually. Furthermore, since the court limited itself to asking prospective jurors about prior exposure to publicity about this case only, none of the petit jurors was ever examined about their exposure to publicity not specifically related to this case, such as the publicity surrounding the Boston, Virginia, New York, or California prosecutions, the general publicity attacking LaRouche and his associates, or about encounters with supporters of LaRouche.

Once the court found the panel without exception, counsel were given a brief recess, and peremptory challenges were then exercised in a rapid-fire fashion. Due to the lack of useful information regarding the jurors, and the inadequate time to consult among themselves, defense counsel could not intelligently exercise the limited number of peremptories (10) afforded to them.

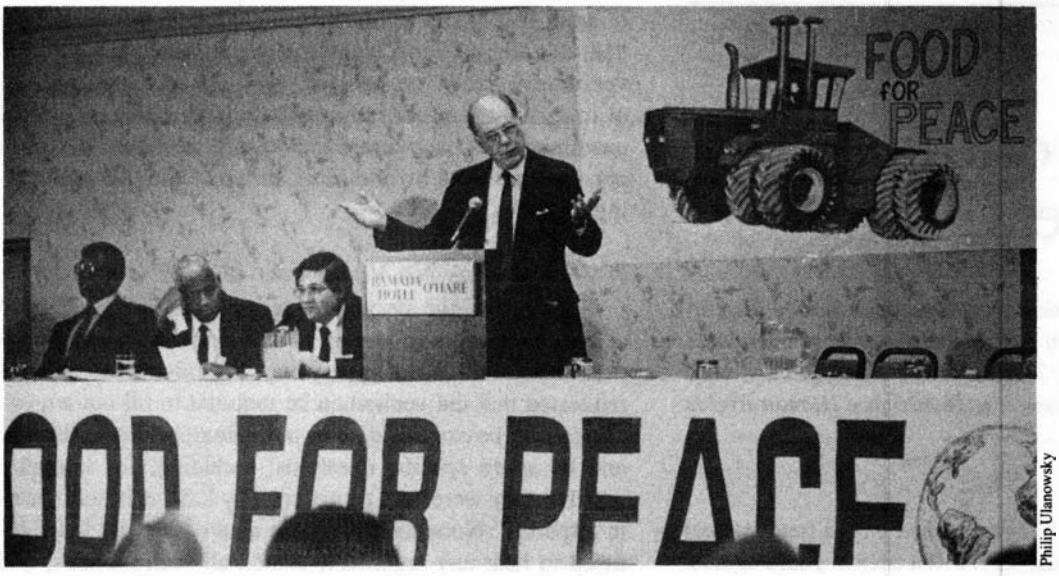
The entire jury selection process was completed in less than two (2) hours and occupies a mere sixty-eight (68) pages of the record.[18]

[15] Exemplary of the harmful consequences resulting from the trial court's superficial jury-selection process is the case of jury foreman, Buster Horton. Subsequent to the trial, Petitioners learned (for the first time) that Horton is a member of a federal multi-agency task force which included adversaries of LaRouche. The details of this are presented infra, at pp. 19–20.

[16] See App. at Tab #19.

[17] See App. at Tab #20, Questions Nos. 18, 19.]

[18] Compare Smith v. Phillips, 455 U.S. 209, 213 n.4 (1982) ("ten days of meticulous examination"); and Irvin v. Dowd, 366 U.S. 717, 727 (1961) (2,783-page voir dire record).




Philip Ulanowsky

*Lyndon H. LaRouche, Jr., speaking to a meeting of the Food for Peace organization in Chicago, Dec. 10, 1988, while his trial was under way in Alexandria.*

person panel summoned by the trial judge were immediately excused on "hardship" grounds.[19] Of the remaining 47, 25 admitted a knowledge of the case due to the pretrial publicity surrounding it.[20] The district court excused 19 additional veniremen, 16 of them because the publicity surrounding the case had caused them to form an adverse opinion or to otherwise doubt their own impartiality.[21] Seven of the veniremen so excused were permitted to openly declare in front of the remaining panel members that they had read, heard or seen something about this case which caused them to form an opinion of Petitioners so adverse as to preclude their impartiality. Defense counsel objected to these open court declarations on the ground that they had an inevitable polluting effect on the remaining panelists. [See App. at Tab #9, p. 12 and 35.] However, as with practically all other voir dire objections/requests interposed by the defense, the trial judge merely noted this objection and proceeded to conduct the truncated voir dire.

As a result of the narrow scope and brevity of the entire voir dire, the jurors were essentially unprobed. Moreover, since the trial judge denied Petitioners' post-trial motion to interview jurors, Petitioners still know relatively little about the jury. They did know, at the time of voir dire, that at least two of those impaneled—jurors Horton and Connor—were employed by agencies of the federal government, but that is virtually all they knew about them.

In fact, it was learned subsequent to trial, juror Horton, who served as foreman, is a member of a special unit in the United States Department of Agriculture, and is one of the USDA's representatives on a special inter-agency task force of approximately 100 persons. This task force deals with emergency preparedness and sensitive matters of national security under the auspices of the Federal Emergency Management Administration (F.E.M.A.).[22] Horton was associated on this task force with Lt. Col. North and a representative of Assistant FBI Director Revell, both of whom were documented in the Boston trial as involved in anti-LaRouche operations.

The USDA had also been the subject of more than 200 articles published by associates of LaRouche, many of which vehemently criticized Department of Agriculture policy.[23] In addition, LaRouche's campaign committees paid for two October 1988 prime-time, network TV broadcasts concerning the world food crisis. These broadcasts were specifically critical of the Department of Agriculture.[24] Because juror Horton was impaneled without ever having to affirmatively

[19] The district court excused all 28 veniremen without questioning them about the nature of their hardship. In so doing, the court deprived the defendants of jurors who may not have had any hardships but simply did not want to sit on the case, or whose hardship was insubstantial.

[20] Many more panelists may have had prior knowledge of LaRouche or his associates, but Petitioners have no way of ascertaining this, since the trial judge limited his inquiry to knowledge of this particular case. See Argument, infra.

[21] The district court excused for cause 2 employees of the IRS, one of the prosecuting agencies in this case, but refused to similarly excuse an FBI employee (Usery), a DOJ employee (Mitchell), and the wife of a retired FBI agent (Chapin).

[22] Additionally, had defense counsel known of Horton's F.E.M.A. role, he would have been challenged, as General Giuffrida, the former head of FEMA who left under disputed circumstances, was to be a defense expert witness on security issues.

[23] These articles were embodied throughout exhibits Petitioners attempted to introduce into evidence at trial.

[24] During the trial, Petitioner LaRouche spoke at a major "Food for Peace" conference in Chicago, organized by friends and associates of Petitioners. This "Food for Peace" movement has been denounced by a consortium of liberal and leftist organizations which work with the USDA units under Horton's supervision and also with the U.S. Department of Justice's Community Relations Service.

answer a question, Petitioners had no way of exploring his potential bias or the extent to which his governmental duties caused him to be exposed to anti-LaRouche operations.

### 2. *Constitutional Inadequacies of the Voir Dire*

The need to ensure that a criminal defendant receives a fair trial by an impartial jury becomes all the more important in a case like the present one which involves highly controversial public figures who have been the subject of extensive inflamatory publicity. Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin, supra at 725–728. Given the increased likelihood of impermissible outside influence, including pretrial publicity, it is imperative for the trial judge to exercise correspondingly greater care in all aspects of the trial relating to the outside influence "which might tend to defeat or impair the rights of an accused." Silverthorne v. United States, 400 F.2d 627, 637 (9th Cir. 1968). See also Wells v. Murray, 831 F.2d 468, 471 (4th Cir. 1987); Wansley v. Slayton, 387 F.2d 90, 92 (4th Cir. 1973); United States v. Milanovich, 303 F.2d 626, 629 (4th Cir. 1962).

In the instant case however, the court refused to undertake any serious effort to uncover bias and to ensure an impartial jury. The court's reasoning for this was candidly expressed post-trial, when the trial judge told counsel:

> [Y]ou know and I know that all this business about uncovering bias is just a smokescreen . . . for really selling your case to the jury, to these jurors ahead of time, and every good trial lawyer I have ever known will tell you that the place to get your foot in the door is during that voir dire . . . . . I think we have to recognize what this voir dire really is. [Emphasis added]

[See App. at Tab #21, p. 30–31.] The court's actions in this regard resulted in at least five categories of reversible error, as shown below.

#### a. *The Voir Dire Was Unconstitutionally General*

At least six federal Circuits have held that whenever there is a reasonable likelihood that individual jurors have been exposed to potentially prejudicial material, the district court must examine each prospective juror individually. See Silverthorne, supra; United States v. Schrimsher, 493 F.2d 848 (5th Cir. 1974); United States v. Bryant, 471 F.2d 1040 (D.C. Cir. 1974); United States v. Addonizio, 451 F.2d 49 (3rd Cir. 1971); United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969); Patriarca v. United States, 402 F.2d 314 (1st Cir. 1968).

In Silverthorne, for example, a case involving voluminous pretrial publicity, the Ninth Circuit expressed grave concern that "only five of the jurors impaneled were questioned individually by the court." Id. at 639. Because the pretrial publicity heightened the likelihood of juror bias, the Court found that the trial judge's voir dire examination should have been directed to the jurors individually. Specifically, the Court held that the trial judge should have engaged in:

> [A] careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors . . .

Id. at 639.

There is no doubt that the instant case raised a reasonable likelihood of juror bias due to outside influences. Like Silverthorne, the instant case was surrounded by prejudicial pretrial publicity. In addition, individual jurors here may have been influenced by prior contact with a LaRouche associate or their literature, or exposure to prejudicial publicity not specifically related to this case.[25] Only four of the jurors ultimately impaneled were ever questioned individually—i.e., one less than in Silverthorne—and none of the individualized questions had anything to do with either pretrial publicity or with any contact with, knowledge or opinion of Petitioners or their political movement.

The fact that none of the jurors impanelled responded affirmatively to the trial judge's inquiry regarding the exposure to pretrial publicity surrounding this case does not establish that all of them were in fact free of such exposure. Silverthorne, 400 F.2d at 640 (failure to respond to the court's general inquiries does not establish that the "publicity could not have prejudiced any member of the jury."). Any venireman wishing to conceal their bias could do so by simply failing to respond affirmatively to the trial judge's general questions. See McDonough Power Equipment Inc. v. Greenwood, 464 U.S. 548, 557 (1984) (Brennan, J., and Marshall, J., dissenting) ("the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias . . .' ") (citation omitted). Similarly, any panelist who was unaware of their prejudice, was reluctant to admit such prejudice, or who inadvertently failed to respond to the general questions, also remained undetected. See Kiernan v. Van Schiak, 347 F.2d 755, 779 (3rd Cir. 1965) (jurors are often "unaware of their disqualification in specific cases."); United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977) ("more frequently jurors are reluctant to admit actual bias"). Here the court below ridiculed efforts to probe for bias or prejudice as equivalent

[25] The likelihood of such a situation was recently demonstrated in the voir dire at the trial of a LaRouche political associate in Loudoun County, Virginia. There it was recognized that "LaRouche is a loaded term in this jurisdiction." [See App. at Tab #22.] Judge Vance Fry came to a similar conclusion in an unrelated Loudoun County case several years earlier, when he stated: "I would gather from reading the record in this case that LaRouche is not a popular person in this area." [See App. at Tab #23.]

to seeking a "psychiatric examination" of those jurors. [See App. at Tab #23.]

By refusing to permit counsel to examine jurors post-trial,[26] the judge diminished Petitioners' ability to demonstrate specifically the prejudicial impact of the judge's voir dire procedure. Nevertheless, two recently held trials, one involving Petitioners LaRouche and Spannaus in Boston and another involving a political associate of LaRouche held in Loudoun County, Virginia, demonstrate that when counsel were permitted to make adequate specific inquiry, initial pronouncements of impartiality by prospective jurors have not been sustained. [See App. at Tab #24.]

As experience illustrates, "general inquiries as to impartiality, when directed to the group as a whole, are unlikely to elicit admissions of partiality." Jordan v. Lippman, 763 F.2d 1265, 1281 n.19 (11th Cir. 1985). Therefore, recognizing that "we must spare no effort to secure an impartial panel," it was incumbent upon the trial judge in the instant case to conduct a careful examination of each juror. United States v. Dennis, 183 F.2d 201, 226 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951). His failure to do so constitutes reversible error.

### *b. The Trial Judge Erroneously Relied On Jurors' Subjective Perceptions*

In the absence of an examination designed to elicit answers which would provide an objective basis for the court's evaluation, "merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]." Silverthorne, 400 F.2d at 638 (citation omitted). In the instant case, the trial judge merely obtained jurors assurances and relied on them. He did not probe these assurances, nor did he allow counsel to do so. Compare United States v. Addonizio, 451 F.2d 49, 67 (3rd Cir. 1971) (The court dismissed on its own motion each prospective juror who indicated extensive exposure to pre-trial publicity, without regard to protestations of impartiality).

For example, in examining juror Chapin, whose husband is a retired FBI agent, the trial judge deemed the following exchange to be sufficient:

> A JUROR: My name is Lenora Chapin. My husband is a former Special Agent with the FBI, retired.
>
> THE COURT: Would that affect your ability to be an impartial juror in the case, in your opinion?
>
> THE JUROR: No.
>
> THE COURT: Thank you.

[See App. at Tab #9, p. 40.][27] It is clear that this exchange could provide no objective basis for assessing whether the fact that her husband is a former FBI agent actually impacted on juror Chapin's ability to be impartial. The judge made no effort to ascertain what the basis was for juror Chapin's "own opinion" of impartiality, and failed to ask even the most rudimentary of questions—e.g., whether juror Chapin's husband, or any of their FBI acquaintances, had ever participated in an investigation of LaRouche or his associates, or whether Mrs. Chapin could remain impartial if the FBI's credibility were impugned or the credibility of a particular FBI agent was attacked, or if she learned of the bitter adversarial relationship between the FBI and Petitioners over a 20-year period. Defense counsel ultimately had to use one of their ten peremptory strikes on Chapin.

The trial judge's failure to ascertain some objective basis upon which to evaluate each juror's impartiality, combined with his consistent reliance on jurors' self-assuring perceptions of their own impartiality, constitutes an impermissible abdication of responsibility, warranting reversal and an order for a new trial. While "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court," Irwin, 366 U.S. at 722–723, the determination of whether that "juror can [in fact] render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness without something more." Silverthorne, supra at 638 (quoting United States v. Largo, 346 F.2d 253, 257 (7th Cir. 1965) (dissenting opinion). Accord United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978) (the venireman is "poorly placed to make a determination of his own impartiality.") See also ABA Standards on Fair Trial and Free Press, Commentary at 8–44 (there is a "tendency . . . to exaggerate [one's] ability to be impartial").

Clearly, veniremen in high profile cases like the one at bar cannot be relied upon to provide an objective assessment of their own impartiality. Rather, after adequate questioning, the district court must make that final decision itself. United States v. Largo, supra at 257. In the instant case, the procedure was clearly deficient.

### *c. The Trial Judge Failed to Probe Outside Influences On Jurors*

Rather than recognizing the constitutional significance of juror voir dire in a highly publicized case, the trial judge herein considered the process merely a "smokescreen," and refused to afford counsel any opportunity to question prospective jurors. While it is within the trial court's discretion to conduct the voir dire itself, courts have recognized that this discretion is not unlimited, and that voir dire not con-

[26] On January 19, 1989, the trial judge denied defendants' post-trial motion to interview jurors.

[27] The exchange between the trial judge and juror Chapin is not sui generis. Rather, it provides an accurate example of the manner in which voir dire was conducted in this case. A similar deficiency occurred with respect to juror Mitchell, who revealed that as part of his routine at the DOJ, he reviewed "clippings" pertaining to LaRouche. The trial judge never pressed him on this subject, but rather accepted his equivocal protestation of impartiality. [See App. at Tab #9, p. 32.]

ducted by counsel has little meaning. United States v. Corey, 625 F.2d 704, 707 (5th Cir. 1980) (knowing what specific questions to ask is difficult for the judge, who lacks the same grasp attorneys have of the complexities and nuances of a particular case); Silverthorne, 400 F.2d at 638 (if trial court conducts voir dire, "he must exercise a sound 'judicial' discretion in the acceptance or rejection of supplemental questions proposed by counsel"); United States v. Lewin, 467 F.2d 1132, 1138 (7th Cir. 1972). Thus, if the district court insists on conducting the voir dire itself, it should at very least "give all deliberate deference to counsel's advantage of prior research and investigation" and put counsel's questions to the prospective jurors. Corey, 625 F.2d at 708. The court failed to do so in the instant case, having summarily denied the defendants' pretrial motions on this point.

Two of the most critical lines of inquiry proposed by counsel concerned (1) prospective jurors' exposure to the extensive prejudicial publicity not specifically tied to the case, and (2) whether any of the prospective jurors, members of their family or friends had any contact with members or the literature of the movement associated with LaRouche. Neither line of inquiry was ever pursued by the trial judge. Thus, it is plausible that some, if not all, of the 12 jurors impaneled had seen, inter alia, the NBC broadcast in which LaRouche was described as a mini Hitler, had read the Washington Post articles touting him as a political extremist and cult leader, or had been exposed to media charges that the "LaRouchies" were organizing indoctrination camps for children. It is equally plausible that some of the jurors, their family or friends, had encountered one of LaRouche's associates in a public forum, had been solicited for funds, had been contacted by phone or mail, or had read some of Petitioners' political literature.

The significance of Petitioners' proposed inquiry is best understood through an examination of the voir dire transcript itself. For example, in response to the query regarding publicity specific to this case, juror Stickel luckily volunteered the following non-responsive answer:

> THE JUROR: To the best of my recollection, this is about a religious group or camp in Loudoun County, Virginia.
>
> THE COURT: I am asking you what you have read or heard about it now.
>
> THE JUROR: I think that's what it is. I am—I am not really sure, but I think that's—the name rings a bell.
>
> THE COURT: Did you form any opinion as to whether they are guilty or innocent of the charges in this case as a result of what you may have heard or read?
>
> THE JUROR: (Pause) If that's what it is, I don't feel too good about it.
>
> THE COURT: If what is what it is?
>
> THE JUROR: It seems to me there was a lot of controversy in Loudoun County about this group of people in a religious camp that they had set up and they had guns and stuff and keeping people in.
>
> THE COURT: Did you form any opinion, do you think, that would affect your ability to be an impartial juror in this case?
>
> THE JUROR: It might, yes, sir.

[See App. at Tab #9, p. 25–26 (emphasis added)]. While the trial judge only asked about exposure to coverage of this case, the forthright answer of juror Stickel, which had nothing to do with coverage of this case, resulted in his excusal for cause. His awareness of the deprecating publicity generally surrounding LaRouche serves to show why adequate questioning of all jurors as to any and all media exposure was necessary.

Another juror, Richard Bradie, volunteered, again non-responsively, that while his impartiality had not been undermined by the things he had read about the case, he had formed an adverse opinion due to contact with LaRouche's associates at a public forum:

> THE COURT: Was reading the article or talking with your fellow jurors or anything else been such that would cause you to form any opinion as to the guilt or innocence of this defendant?
>
> THE JUROR: I don't believe so, Your Honor. But I did have what might be considered not a confrontation but a meeting with some members of Mr. LaRouche's party at, it was either at a school. I am not really sure where it was. At a table for contributions. That caused me to form an opinion at that time.
>
> THE COURT: Adverse to the group that you are being asked to contribute or in favor of them or—
>
> THE JUROR: Adverse.
>
> THE COURT: Would it affect your ability in this case to be impartial, do you think?
>
> THE JUROR: I would like to say no, but I believe that it would make me have an adverse reaction.

[See App. at Tab #9, p. 24–25 (emphasis added)]. Again, once this bias was inadvertently revealed, as with juror Stickel, the trial judge excused juror Bradie for cause. The candid, unsolicited response demonstrates that contact with members of the LaRouche movement might well induce a prospective juror to prejudge the defendants.

As exemplified by these two exchanges, the Petitioners' proposed lines of inquiry were not only appropriate, they were critical, and were designed to reveal relevant and useful information bearing not only on challenges for cause, but also to allow counsel to more intelligently exercise their limited peremptory challenges. But for the gratuitous, non-

responsive statements of jurors Stickel and Bradie, they could have been seated in this case. There is no way of ascertaining how many seated jurors may have held a similar bias which remained undisclosed because the proper questions were not asked. Given that a trial judge does not have unlimited discretion to ignore proposed questions, Lewin, 467 F.2d at 1138, the trial judge's failure to pursue these significant lines of inquiry constitutes reversible error.

### *d. Petitioners Were Precluded From Making Effective Use Of Their Peremptories*

The right to peremptorily challenge is recognized as " 'one of the most important rights secured to the accused.' " United States v. Rucker, 557 F.2d 1046, 1048 (4th Cir. 1977) (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)). In Swain v. Alabama, 380 U.S. 202 (1965), the Supreme Court explained that:

> The function of the challenge is not only to eliminate extremes of partiality . . . but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise."

Id. at 219. This function is vitiated whenever peremptory challenges are exercised without the benefit of adequate information upon which to rationally predicate challenges. United States v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977).

The voir dire conducted by the trial judge in this case did not afford counsel the opportunity to glean the information necessary to make effective use of their peremptory challenges. See United States v. Rucker, supra at 1049 ("adequacy of the court's voir dire examination becomes inevitably bound up with the defendant's opportunity to make reasonably intelligent use of his peremptory challenges"). In addition to all of the deficiencies previously addressed, the entire selection process was conducted so rapidly that counsel were unable to effectively use what little information they did possess, or coordinate its use with the six other counsel. [See App. at Tab #24.]

The case of juror Horton previously discussed serves to illustrate the fact that, in the present case, Petitioners were denied a meaningful opportunity to exercise their peremptory challenges. It is certain that Petitioners would have struck juror Horton if an adequate, probing voir dire had been conducted. This error requires reversal. United States v. Rucker, supra at 1049 ("A voir dire that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice.")

### *e. The Trial Judge Forced Petitioners To Waste Precious Peremptories*

It is well settled that forcing a party to exhaust his peremptory challenges on persons who should be excused for cause constitutes reversible error. United States v. Rucker, supra at 1049; United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976). See also Swain v. Alabama, supra. Petitioners were not only forced to use peremptory challenges on two such veniremen—jurors Mitchell and Chapin—but were effectively precluded from utilizing their final peremptory out of fear that a third venireman, FBI employee Usery, might be impaneled. Notwithstanding their protestations of impartiality, the trial judge should have excused these three jurors on the grounds of implied bias.[28]

At least five Justices of the current Supreme Court have recognized the application of the "implied bias" doctrine in exceptional circumstances.[29] Significantly, Justice O'Connor, the author of the "implied bias" doctrine, cited the "revelation that [a] juror is an actual employee of the prosecuting agency . . ." as an example of such "exceptional circumstances."[30] Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (emphasis added). Accord Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988) (adopting the doctrine of implied bias, but limiting it to extreme situations per the examples cited by Justice O'Connor).

After repeated requests by defense counsel that the judge excuse for cause jurors affiliated with agencies which investigated this case, the trial judge, knowingly or otherwise, applied the doctrine of implied bias by excusing jurors Schabacker and Kutzlo on the sole ground that they were employees of the IRS.[31] However, since jurors Schabacker and Kutzlo both protested their impartiality just as vigorously as jurors Mitchell, Chapin and Usery, there is no principled basis on which to explain the distinction drawn between IRS employees and those employed by the DOJ and the FBI.

Since Petitioners were only granted ten peremptories,[32] it was reversible error for the trial judge to force them to exhaust some of their peremptory challenges on persons who should have been excused for cause.

* * *

In summary, each of the five inadequacies set forth above provides separate sufficient grounds for reversing the convictions in this case and remanding for a new trial. Moreover, when the entire jury selection process is considered as a whole, the magnitude of the constitutional error committed is magnified. Simply stated, defendants were denied a constitutionally meaningful voir dire.

[28] See Footnote 9, supra.

[29] See McDonough Power Equipment v. Greenwood, 464 U.S. 548, 556–57, 558 (1984) (Blackmun, J., O'Connor, J., and Stevens, J., concurring) (Brennan, J., and Marshall, J., dissenting).

[30] In a recent decision, the Fifth Circuit found that there "is no dispute that [the juror] would have been challenged and excused for cause had he revealed that his brother was a deputy sheriff" in the office that had investigated the case. United States v. Scott, 854 F.2d 697, 698 (5th Cir. 1988). Thus, there is no reason to doubt that the implied bias doctrine extends to juror Chapin, whose husband had been an FBI Special Agent.

[31] See App. at Tab #9, p. 48.