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Testimony on Challenge (Cont'd)

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*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

Q. Now is there anything else about that exhibit that requires explanation, Mr. Wilkerson? (2194) A. I should like to interpret what would be the effect on the occupational distribution of eliminating persons who are in exempt occupations.

Q. Yes. A. The effect would be to increase by 1/10th of one per cent the proportion of executives among the gainfully employed; to reduce by 2.4 per cent the proportion of professionals, from 10.7 to 8.3

The Court: Just a second. Executives, plus 1/10th of one per cent?

The Witness: Equals 10 per cent.

The Court: Professionals—

The Witness: Less 2.4 per cent.

The Court: 2.4. Yes. Clerical and sales?

The Witness: It is 24.8 per cent, reduced by 1.0.

The Court: That is minus 1.0.

Mr. Sacher: That is increased.

The Witness: I am sorry. Increased by 1.0.

The Court: The professionals are minus?

The Witness: The professionals are minus. The clerical-sales is increased by 1.0.

The Court: Yes.

The Witness: It would be raised to 25.8 per cent.

Q. And the manual? A. And the manual workers, 54.6, would be increased by 1.3 per cent and would be raised therefore (2195) to 55.9 per cent.

Q. Now that is simply a reflection, is it not, Mr. Wilkerson, of the fact that by and large the occupations set forth in the exemption laws of the State of New York embrace the types of occupations generally falling within the category that we call professionals? A. That is correct.

Mr. McGohey: I object to the form of the question, this "by and large."

The Court: Sustained.

A. (Continuing) I think it should be—may I continue, sir?

*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

Q. Yes, if you will.

The Court: Well, I sustained the objection.

The Witness: I am not going—

Mr. Gladstein: Not to that question. I had interrupted him simply to point out something that I think is rather obvious, but since it is in the record as to who the exempt occupations are I won't press that question.

The Witness: I am observing that objection and I am going on to—

The Court: Well, the witness is telling me that he is going to take into account the fact that I have sustained the objection, and he will carry on nicely, (2196) irrespective of that, and have it in mind.

The Witness: Pardon me. I forget. I was not supposed to address you, but I forget about these things.

The Court: Well, you may address me, it is all right, as long as you do not begin elaborating so much as you did before. But you are doing very nicely this afternoon, and you just keep along the way you are going.

Q. Proceed.

The Court: And you need not feel any concern about addressing me. If you have something that disturbs you, as it did on one or two other occasions, that is perfectly all right.

The Witness: Thank you.

A. (Continuing) It should be pointed out that occupational exemptions in practice are taken nearly 100 per cent. The basis for that statement is that as we analyze the several thousand jurors listed on the panels here chosen for analyses, I believe at no point, with one exception, do we find listed any person whose occupation is among those legally exempt from jury service. The exception—I am thinking about occupational exemption now—

Q. Not women. A. That is right.

*Doxey A. Wilkerson—for Defendants on Challenge—
Preliminary Cross*

Q. You are thinking about occupations. A. The main exception, there may have been one or two (2197) others but they are trivial and hardly worth mentioning—I remember several times the occupation of editor came up, probably not a daily newspaper editor but some other character of editor. But almost never do we find exempt occupations presented on the jury lists.

Hence, the effect here of taking practically all—well, taking all gainfully employed persons as reported by the Census and subtracting them from the total of gainfully employed corresponds with what has been about the practice in the selection of jurors in the panels we analyzed.

Now, as you can see from the Exhibit 67-F, the effect of allowing for exempt occupations: in the occupational data previously reported here would be slightly, not much, slightly to increase the proportion of manual workers, and hence slightly to raise the blue column in the left part of Exhibit 67, and very slightly less, while the general effect is negligible in terms of the occupational pattern of gainfully employed workers as shown when you do not take into consideration those persons who are exempt by law, because of occupation, for jury service.

The next question we took up is the question—

Mr. McGohey: If your Honor please, might I ask a question at this point?

(2198) The Court: Yes.

Preliminary cross examination by Mr. McGohey:

Q. I am referring to Exhibit 67-F, your Table XII-A, Mr. Wilkerson. You have the column there, the second column from the left “In exempt occupations” and then you list a certain number for each of the categories.

Does that purport to be all of the exempt occupations?

A. Yes.

Q. Is it your claim that the census lists persons in accordance with all of the classifications in the statute of exemption? A. Oh, I follow you. No.

The Court: Oh.

*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

Q. Well, I understood you said that it did. A. I called attention to the fact but did not read it, thinking that the Court would not want this tedious detail, but appended to Table XII-A is a rather detailed statement.

The Court: That is the place where I have the blank sheet in this challenge.

Mr. Gladstein: We will supply that.

Mr. McGohey: Would your Honor like to look at mine while the witness is referring to it?

The Court: Yes.

Mr. Gladstein: I have an extra copy which the Court may have.

(2199) The Court: I like to follow these things closely.

The Witness: There were certain categories of exempt occupations for which specific census data was not available. In such cases estimates were made on the basis of collateral census data which are fairly reasonable, we think are reasonable estimates and bases, and if the Court wishes we would be glad to read through all of this detail. It is in the record.

The Court: There seems to be so many gaps and so much speculation about the way in which you reach these factual conclusions that it is almost getting a little bit too complicated for me. But so far I think I am almost abreast of it. But these gaps—

Mr. Sacher: What gaps is your Honor talking about?

The Court: I do not care to enumerate them at the moment, Mr. Sacher, but I have noted several as we went along. And I might in giving the enumeration perhaps not include them all, and I think it is better if I let the record speak.

Direct examination resumed by Mr. Gladstein:

Q. Will you continue, Mr. Wilkerson, please. A. On this point I should like to make clear the fact that there simply are not accessible, unless one calls (2200) all of

*Doxy A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

the population of New York State, precise figures for everything one needs in such analysis. And, as is customary in statistical procedures and research, and as is customary with the census itself, on the basis of the most reliable available data reasonable estimates are made. You will find, if you examine the estimates we then made up, that they are estimates which, if anything, are exaggerated in a way which is contrary to the interests of the defense in this case.

Q. Will you indicate why that is so and in what manner such data was taken into account? A. Well, the reason that is so is if the best possible estimate were made there could be controversy among experts as to whether this is precisely right or that. If we make the worst possible—not the worst possible, but certainly one which is obviously prejudicial to the defense, then there could hardly be any assumption on anybody's part that estimates were so made as to present a picture that is more favorable to the defense than otherwise would be true.

Q. Illustrate that, if you will. A. I could illustrate that much better, Mr. Gladstein, with reference to certain other groups of data we are going to present. In connection with exemptions I think the comment applies here less than it does elsewhere, because (2201) the estimates we made here were reliable estimates.

Q. Is there anything in the footnote which the Court's attention should be particularly directed to, Mr. Wilkerson?

The Court: I don't follow him at all when he says that if they had the exact figures it would necessarily be prejudicial to the defense and therefore this may be disregarded.

Mr. Gladstein: He did not say that, as I understand him, your Honor. He said he has made assumptions—wherever an assumption was required to be made because of the absence of figures, the widest possible assumption was made against the interest of the defense, and it was assumed in favor of the prosecution in this case, thereby exaggerating for the benefit of the prosecution the possible impact of that factor on these calculations.

Colloquy of Court and Counsel

The Court: Well, if the basic statistical data is inaccurate as to the inclusion of persons of certain age, under 21 and over 70; if it is inaccurate as to persons who may be illiterate and aliens and exemptions, and so on, I should think there would be a certain cumulative effect of those inaccuracies that would render the basic data perhaps not proper for the purpose. You see, there is the lack of coordination between this data that you are producing on the one hand and the (2202) jury lists on the other hand, and you are endeavoring to patch them up so that they can fit and be put into tables, and I am frank to say that as to this particular one here of exempt persons I should think any data, to be valuable, would have to be reasonably accurate, perhaps actually accurate.

Mr. Gladstein: Well, I submit that all of the tables and all of the data are not only reasonably accurate but as accurate as the census tables can make them and do make them, and we rely on those.

The Court: But the census figures are not made up for the purpose of jury selection. The census figures are made up for an entirely different purpose.

Mr. Gladstein: I appreciate that. However, we are addressing ourselves to each of the other possible factors that might differentiate the purpose for which the census figures were prepared and the purpose for which jurors are put on lists. And in each instance your Honor will observe we bring to the Court's attention and into the record whatever data is sufficiently available, making our calculations upon those, and wherever a gap exists we present, No. 1, the widest possible adverse impact, theoretically, against our case of that factor, and then we give the result.

The Court: That is the part I have not been able (2203) to quite understand, but perhaps I shall as we proceed.

*Doxy A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

By Mr. Gladstein:

Q. Let me call your attention, Mr. Wilkerson, to the second column from the left on 67-F. That is the column headed "In exempt occupations"? A. Yes.

Q. Where do those figures come from? A. Those figures came from census sources plus certain estimates with reference to specific minor categories which are not reported as such in the census.

Q. Will you indicate what those are? A. Yes. If you will read the note you will find, for example, that military officers was estimated by applying to the reported number of soldiers, sailors and marines in the Bronx and Manhattan the national percentage ratios of officers to non-commissioned personnel. The number of ships' officers and pilots was estimated by applying to the reported number of sailors and deckhands in the Bronx and Manhattan the national percentage ratios of ships' officers and pilots to sailors and deckhands.

Mr. McGohey: Might I ask a question: When you say, Mr. Wilkerson,—when you say "reported" do you mean reported in the census?

The Witness: I do.

Q. Is it correct that to the maximum extent to which (2204) census tables provide figures that can be used in this column designated "In exempt occupations" you did actually take and use those figures as given by the tables? A. That is correct.

Q. All right. A. It is further correct to point out, Mr. Gladstein, that the totals we are dealing with here are likewise very small; in terms of the proportion they constituted of the population represented in 67, really negligible.

The Court: Well, that is your conclusion.

The Witness: That is correct.

The Court: You have been repeating that as you go along, and, of course, the accuracy or reliability of that is one of the things that I am going to have to determine.

*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

Q. Can you indicate, Mr. Wilkerson, what occupations, if any, that are exempt were not to be found, or figures for them were not to be found in the the census tables?

A. I have called attention to some.

Q. Which are they? A. Pardon me, maybe I did not get your question correct. Will you repeat it?

Q. Well, you have already indicated that the census tables do give actual figures for the occupational breakdown for occupations that are covered by the New York statute dealing with exemptions, is that right? (2205)

A. That is right.

Q. All right. Now—

The Court: At least to some extent.

Mr. Gladstein: Yes.

Q. Now wherever such figures were actually made available by the census tables you actually used those figures as they are reported by the Government, is that right? A. Yes.

Q. Now, which, if any, of those occupations, those exempt occupations, appear in the census tables for which there are no figures?

The Court: I don't understand that. Do you mean, as you said before, which are the ones that are not tabulated in the census?

Mr. Gladstein: That is what I meant to ask. That is, which, if any, of the exempt occupations have no tabulated figures corresponding to them in the census tables.

The Court: You reversed yourself. You are probably getting a little tired, and I know just how that is; at the end of a session when you have had your witness on all day long you misspeak yourself once in a while, and that is quite all right.

Now, you understand the question?

The Witness: I understand the question. I have (2206) already called attention to the category of military officers, which is not a census category, and the basis on which that estimate was made. There are others.

*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

Q. Which are the others? A. The census reports on occupations do not separate authors who are not exempt from editors and reporters who are exempt. The total listing was included in the exempt group—do you follow me here?

Q. Yes? A. The effect of such a process was to include in the exempt occupations that we are taking out really more than actually is there. Since the census data on occupations list editors, do not separate authors, editors and reporters—

The Court: What did you do? Did you put the authors in too in this column?

The Witness: We eliminated the whole category.

The Court: You took them all out?

The Witness: Authors, editors and reporters.

The Court: So they are out.

Q. In other words, whatever the census tables and their figures show with respect to exempt occupations you placed into that second column from the right, is that right? A. So far as this particular group of occupations.

(2207) Q. Yes. A. Yes.

Q. In 67-F? A. Yes.

The Court: The particular group of occupations being authors, editors and reporters.

The Witness: That is right.

The census report for New York gives no data for the number of optometrists, embalmers, both of which are exempt occupations. We did inquire, however, of certain sources which I do not have listed here but which again, if the point is of such significance that it should be emphasized we would be very happy to provide in the special memo on it—

Mr. McGohey: May we have them stated.

Q. Did you say significant or insignificant? A. Significant.

*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

The Court: Yes. When you are dealing with statistics you have to get them right and you have to make them accurate, and it is unnecessary to say every once in a while these may be right, these may be wrong; if you want anything more we will give it to you. You can't do it that way. You better just make it the best you can.

The Witness: Let me, if I may, use here the same process we used with another minor matter earlier—

(2208) The Court: Now you are talking about optometrists and embalmers?

The Witness: That is right. We assured ourselves—and I will give you a memorandum tomorrow of precisely the basis on which this assurance came—that the number of optometrists and embalmers, exclude occupations, just about equals the number of authors, and hence the inclusion of authors—or rather, the exclusion earlier of authors who are not exempt balances and cancels out the inclusion of optometrists and embalmers, for whom there is no census data available.

(2209) Mr. McGohey: If your Honor please, may I ask if it can be stated now what are the sources from which the information about the embalmers and the optometrists came?

The Court: Yes.

Mr. McGohey: That is all I want now.

The Court: The witness says, "We assured ourselves from the data," and you say, "What is the data?"

Mr. McGohey: Yes.

The Court: I know. And he is going to give it to you. Mr. Gladstein does not mind your asking him.

Now, you go ahead, Mr. Wilkerson, and let us have the data that you got about the optometrists and embalmers as a result of which you found there were just about the same number of them as there are authors, because I really got fascinated by that.

*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

The Witness: If the Court please, I prefer not to deal from memory on several things about which specific information is requested.

The Court: Well, you can have that tomorrow.

The Witness: I shall provide specific memoranda on that subject.

This completes the illustration, Mr. Gladstein,—

(2210) Q. With respect to that table? A. (Continuing) As to the basis on which estimates in trivial numbers, really, in terms of the effect on the total had to be made because census data were not available. And I must insist once more that we are dealing here with numbers which, in relation to the total are statistically completely insignificant, and however one treated them would not alter at all the general picture we are presenting.

Q. In other words, when you deal with 1,711,908 gainfully employed people, as shown in column 1 of Exhibit 67-F, then the impact of the inclusion or exclusion of optometrists or embalmers who might be exempt would not have any effect on the percentage breakdown shown on 67? A. Even down to the first decimal point, that is true.

The Court: You keep saying that, but—

The Witness: It is verifiable—

The Court: (Continuing) I say to myself: Query.

Mr. Gladstein: We will supply a memorandum, your Honor.

Mr. Sacher: Statistically that is probably the equivalent of our de minimus, I think.

(2211) The Court: Well, I hope not. It may sometimes be straining at gnats, but I hope not this time.

By Mr. Gladstein:

Q. Now, another table was prepared and received in evidence as 67-C. Do you have that before you? A. I do.

Q. What does that represent in connection with this subject that you are discussing of the impact of exemptions? A. That table—

Colloquy of Court and Counsel

The Court: Just a moment. All right, I have it.

Mr. Gladstein: Do you have that, your Honor?

The Court: Yes, I have it.

Mr. Gladstein: That is XII-B.

The Court: Yes.

A. That table shows the distributions for three different groups among the four occupational categories we are dealing with. First, the distribution of persons chosen to serve on petit jury panels in the Southern District, 28 panels, but one used here as a representative sample.

Second, the percentage distribution of male gainful workers—this table, by the way, is of most significance after we concern ourselves with the exemption of women, but since you asked the question, (2212) I will go on.

The distribution of male gainful workers in non-exempt occupations; and, third, the distribution of all gainful workers in the four occupational groups.

Shall I interpret the table?

Q. Will you indicate what that shows? A. And in so doing it will be necessary to bring in the question of the sex exemption which is one of the issues this table goes with—

The Court: I think before we go to the sex exemption we had better take an adjournment until tomorrow morning at 10.30.

(Adjourned to February 2, 1949, at 10.30 a. m.)

(2213)

New York, February 2, 1949;
10.30 a. m.

The Court: Well, I am sorry to be late, gentlemen, but there was a big delegation of union people who wanted to see me, and there is always something or other coming up here, and so here I am.

man has asked for me to call your attention to the
Mr. Crockett: If your Honor please, Mr. Isserfact that he is detained on a matter associated with

Colloquy of Court and Counsel

the case. His clients as well as the other defendants agree that we might proceed in his absence.

I have handed up to the clerk, and I am sure your Honor will find on his desk, a list of the defense attorneys and the defendants whom each represents, as requested by the Court.

The Court: Well, what I really wanted you to get for me when I spoke to you yesterday was a sort of a little piece of cardboard to represent the way you were sitting at the table there, so that I could come to recognize each one of the defendants associated with his counsel. You know, when there are so many it is a little hard for me to get each one in my mind, and (2214) that is what I had in mind, some sort of a little thing, something like this blotter (indicating), that would show just where each one was sitting and what his name was. That is what I wanted to get, but there is plenty of time for that, so that we will let that drop right there.

Mr. Crockett: I would be glad to take care of that.

The Court: Thank you. And as to Mr. Isserman, unless Mr. McGohey objects, that is perfectly all right.

Mr. McGohey: Oh, no. I agree with that, your Honor.

The Court: Very well.

Mr. Cammer: If your Honor please, I should like to present a motion for leave to appear *amicus curiae* on behalf of three labor organizations, the International Fur & Leather Workers Union, the Mine, Mill & Smelter Workers Union, and the Food, Tobacco & Agricultural Workers Union. Copies of the motion were served upon counsel for both sides yesterday. I have the original motion here.

The Court: You just hand it to the clerk. And you had better step around to the reporter's desk and note your appearance.

(2215) Mr. Cammer: Pressman, Witt & Cammer, Esqrs., by Harold I. Cammer.

Colloquy of Court and Counsel

The Court: Now, Mr. McGohey, I do not desire argument on the matter but a statement of your position before I give consideration to this question.

Mr. McGohey: May I have a chance to look at these papers, which came in some time yesterday, your Honor?

The Court: Yes, you may.

Mr. McGohey: If the Court please, these papers appear to have been served on my office some time yesterday, February 1st. At the end of the papers, or on the next to the last page, following the pages which are described as a motion for leave to appear as amicus curiae, I find the paragraph entitled "Notice of motion," and it says, "Please take notice that the foregoing motion will be presented to the Honorable Harold R. Medina, the Judge presiding at the trial herein, on the 2nd of February 1949, at 10.30 a. m. in the forenoon of that day or as soon thereafter as counsel can be heard."

Frankly, your Honor, this is a practice with which I am entirely unfamiliar, although I have been at the bar for some years. As I understand the rules of this court we have two sets of rules. First of all, we have a set of rules called the Federal Rules of (2216) Criminal Procedure which, as your Honor will recall, were first adopted by the Supreme Court after a couple of years' study by the bar and the bench all over the country, and upon approval by the Supreme Court were thereafter approved by Congress. I do not recall offhand the name of the rule, the number of the rule, but I know the substance of it is that motions are to be made upon five days' notice. And those Federal Rules of Criminal Procedure also authorize the local district courts to make rules, to supplement rules for the local districts to supplement the general rules.

And there is a rule in this district that provides that motions are returnable on Monday in criminal causes.

The Court: Yes.

Colloquy of Court and Counsel

Mr. McGohey: Now those rules as I understand it are binding upon all persons, particularly are they binding on parties to criminal causes, namely, the Government on one side and defendants themselves on the other.

My first reaction is that I see no reason why there should be any exception made in behalf of persons who are not even defendants in the cause. If the rules bind defendants they certainly should bind those who are not defendants but who claim some interest in the (2217) proceedings.

But, now, I do not rest entirely on that question of procedure, your Honor. As far as I can find out from these papers I see no allegation in here except that these petitioners are advised that the outcome of the challenge in this case which is now being tried is a matter in which they are interested and—

The Court: Well, that goes to the merits. I think I would rather not hear anything having to do with the merits of this motion if there is a preliminary question such as you have raised. And as to the place where the motion is returnable and the notice, I see at the moment no answer to that. And the significance of what you say, as I take it, is that the Government does not waive any of those requirements. And so I think I shall address myself merely on this preliminary question and not as to the merits at all to counsel who made the motion.

I don't think, Mr. Sacher, as you arose to address me, I don't think it is of any concern to the defendants. This is a separate matter.

What have you to say about the place where the motion should be returnable and the time of notice to be given?

Mr. Cammer: First, with respect to the place, (2218) your Honor, it is my understanding that by an order made by Judge Knox all matters relating to this proceeding are delegated to you, have been referred to you, and I do not think under those circumstances that it would have been appropriate for me to make this application to the Judge at the

Colloquy of Court and Counsel

criminal part who would undoubtedly have referred me to you; and I think it was proper to come to you in the first instance in view of Judge Knox's assignment of you to this case.

Second, with respect to the time, while it is true that a five-day notice of motion is customarily necessary, I do not believe that that rule has application to a case actually on trial. During the course of the trial it is appropriate to make any motion without reference to the five-day notice; during the course of the trial I am certain that parties can make all kinds of motions without giving five days notice.

The Court: Well, of course, there is the distinction between those proceedings incidental to the trial on one hand and general motions on the other. I would think it quite clear that your motion is of the latter category. When during a trial lawyers object to evidence or make motions to strike, or motions of one kind or another, naturally there is no propriety in requiring notice, because notice would not be practicable.

(2219) But in such a motion as you are making I feel quite clear in my own mind that that is not one of those applications incidental to the trial itself. So that I shall deny the motion without prejudice and without passing upon the merits.

Mr. Cammer: Would your Honor be good enough, instead of denying the application, to set the return date over to February 6th, at which time the five-day notice will have been given?

The Court: Let me see what Mr. McGohey says about that, because I have a feeling that depends a good deal on the question of waiver here.

What do you say about that, Mr. McGohey?

Mr. McGohey: I have no objection to that. I will take it as a notice of motion returnable within the time.

The Court: I will do that. That seems perfectly reasonable.

Colloquy of Court and Counsel

Mr. Cammer: Are we to come back then on the 6th?

The Court: It is not customary to hear argument on motions for leave to submit briefs and make argument as amicus. So that you may be present then, submit the papers to me with any memorandum you have, and I will try to give the matter prompt attention. If there is (2220) anything at that time that I desire argument on I shall tell you, and for that reason I think it would be well for you to be present in court on that morning.

Mr. Cammer: The 6th is a Sunday, so—

Mr. McGohey: I take it that we will understand it will be returnable on the 7th.

The Court: We will make it the 7th, which is Monday.

Mr. Crockett: If your Honor please, I should like with the Court's permission to reserve the right to be heard before any decision is made on this motion. I think that the defendants have an interest in any matter pertaining to this trial in which the Government has an interest.

The Court: That I am not disposed—and when I say I am not disposed that is merely a nice way of indicating what my wishes are—I am not disposed to hear any oral argument on a motion for leave to submit a brief and make argument as amicus curiae. So that whatever interest you may have in the matter you may cover and your views may be expressed in a memorandum to be submitted to the Court at the opening of court on the date that the motion is now returnable. And that similar privilege, of course, is accorded to the other defendants who if they are aggrieved or interested (2221) naturally have that right without my saying so.

Mr. Sacher: May it please the Court, I have an application to address to your Honor in connection with this case.

The Court: Yes?

Mr. Sacher: On January 17th we served a subpoena duces tecum upon the clerk of this court for

Colloquy of Court and Counsel

the production of a variety of items which we regard as material and relevant to the adducement of evidence in support of the challenge.

Now, at an earlier stage, that is, prior to the service of the subpoena, we did have a certain amount of cooperation from the clerk; but it seems that he has since regarded the service of a subpoena as something in the nature of a hostile act, and consequently we no longer enjoy—

The Court: Maybe he viewed it against the background of some of those things you have been saying about him, but I think not.

Mr. Sacher: It may be, or, as they say in the South, it could be.

The Court: Now, what is it you want him to do that you feel he may have some reluctance to do?

Mr. Sacher: Pursuant to Rule 17-C—

The Court: This is the criminal rules?

(2222) Mr. Sacher: Yes, your Honor.

The Court: Just a second. 17-C?

Mr. Sacher: The last sentence of the rule.

The Court: Yes, I have it.

Mr. Sacher: It reads that "The Court may direct that books, papers, documents or objects designated in the subpoena be produced before the Court at a time prior to the trial or prior to the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Now, the subpoena which we served includes items which consist of original records in the office of the clerk, such as records commencing January 1, 1939, showing the dates when the names of jurors, petit and grand, have been placed in the jury wheel box; the number of names so placed on each occasion; the original file cards, lists and other records from which and showing the dates when the names of jurors, petit and grand, placed in the wheel box, had been drawn, and records relating thereto. Also the original file cards, lists and other records showing the names of persons who have qualified for jury serv-

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ice at any time since January 1, 1939, but who have not been called for jury duty or service, whether petit or grand; and finally, all lists, books, (2223) documents, maps and records used since January 1, 1939, as sources from which the names of jurors presently appearing on file cards or jury lists were obtained, and the records showing the numbers and dates of drawing upon or selection from said sources commencing January 1, 1939, to date.

Now, we propose that your Honor exercise the discretion vested in your Honor by Rule 17(c) so that we need not be delayed in the course of the presentation of our evidence so as to entail any unnecessary delay in the trial of the challenge. We think—

The Court: As I understand it, you want to have the papers here, and you have served a subpoena duces tecum. Now, ordinarily that would lead to the production of the papers in court and the offer of them in evidence. Now what you evidently want me to do is to direct that they be produced so that you may spend some days going through them and examining them and inspecting them, and doing things of that kind, as a preliminary to deciding later which ones you want to use and which

Now, that I consider to be not what was intended to be done by this rule.

Mr. Sacher: That is not the purpose of my request, your Honor. You have assumed that to be, but my (2224) purpose is the following, to obtain the material in advance under the supervision, of course, of the Court for the purpose of knowing what is in them so that we can facilitate the examination of the clerk himself if we should call him, to save the Court's time.

The Court: You put it that way, but it seems to me that taking your own statement of the case it means going through an investigatory process with all this material—I don't know how much there is of it, but I should imagine a good deal—and that would all be avoided by taking the normal course which you have chosen not to adopt here by putting

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on the witness stand those who administer the jury system and bringing our your testimony from them. Now, you have chosen to take this circuitous method, which is your right to do, of trying to prove discrimination without calling the persons who know all about it and who administer the system. And so, as you have chosen to do that, and have conducted rather extensive investigations to do that, all of which has resulted in what I consider to be considerable delay, I do not think I am going to take any action that will merely make more delay.

Mr. Sacher: No, your Honor. I am suggesting and I want it quite clearly stated on the record,—I am suggesting a course which must necessarily reduce the (2225) amount of time to be consumed in the adducement of evidence; and I want further to make it clear that if, as and when any clerk appears on the stand, and if those records should be material and necessary, as I am strongly persuaded they are, we shall ask for and insist upon the time necessary to explore those records in order—

The Court: I wish you would not use that expression “insist upon.”

Mr. Sacher: That means urging, that is all.

The Court: You know, you use it all the time.

Mr. Sacher: I don't do it all the time. I think the record should indicate that “all the time” to your Honor in this instance means once.

The Court: Perhaps when I used the expression “all the time” I used it in a rhetorical sense. But, anyway, I would like to have you understand that you will insist upon nothing.

Mr. Sacher: Well, we will urge that.

The Court: I will rule what is to be done.

Mr. Sacher: Well, I want to urge on your Honor, then, that so far as the consumption of time is concerned, the proposal we have laid before your Honor should commend itself as one which will curtail the consumption of time in the courtroom. We make that proposal so that we (2226) can send a corps of people in advance of the presentation of that material to examine it, to sift it for us, so that we

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can promptly go to what we want to offer in evidence without taking your Honor's time in a long search for material that will be necessary to be adduced.

Now, your Honor realizes that it covers a ten-year period, and there are thousands upon thousands of individual cards which will have to be examined and whose relevancy and materiality may be in issue. Now, if we can have the benefit of a preliminary examination we may save everybody a lot of time in doing the preliminary sifting and submitting to your Honor for adjudication only those questions in connection with those exhibits which we deem essential in the presentation of the challenge.

Now, I would strongly urge your Honor give consideration to this, perhaps not decide it at the moment, because there is this tremendous volume of evidence which will have to be presented as exhibits in the case. Consequently, we think we will join your Honor in an effort to shorten the trial of the challenge if we do get the benefit of this preliminary investigation. It is not a fishing expedition; we want essentially to separate the wheat from the chaff before we get into court.

(2227) The Court: It is part of the investigatory procedure that if it is to be adopted at all I should think would not properly be done during a trial, particularly one that has already taken as long as this one has in its preliminary stages. It seems to me at the moment merely something that will obviously make for more delay.

Now, before I hear from Mr. McGohey on this, have some of your colleagues something to add?

Mr. Sacher: I have just one observation to make, your Honor, concerning delay. While speed is a very commendable objective, I think justice is a greater one, and that if it be—

The Court: Well, it is nice to have you remind me of that.

Mr. Sacher: What is that, your Honor?

The Court: I say, it is nice to have you remind me of that.

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Mr. Sacher: Thank you.

Mr. Gladstein: Your Honor, may I supplement Mr. Sacher's remarks?

The Court: Yes, you may.

Mr. Sacher: I desire to pose to the Court a very practical question: The Court has assumed, without justification, that it was perhaps not the intention (2228) of any of the defendants to call as a witness in this case the clerk or a member of the clerk's office.

It must be apparent to your Honor that the identification of the kind of documentary material that Mr. Sacher has called to your Honor's attention, the kind called for in the subpoena duces tecum, which has already been served on the clerk's office, requires that someone from that office take the stand and identify that material.

Now, that material, I may say to your Honor—and I am quite sure the Court is aware of this as a fact—is quite bulky and consists of a large number of cards and other types of documentary material, ledger books, so forth and so on.

Now, as your Honor knows, it will be material, it will be right for us to conduct an examination which will, however, be time-consuming, because we will be directing attention to one after another of the particular documents, extracting those portions which are material to the issues here, and in the course of that consuming the time of the witness, of the Court and everybody else in order to have that evidence brought into the record.

It would be time-saving to have the benefit of prior discussions with the clerk present, of course, so that there could be developed an agreement upon those (2229) of the materials which are needed for the case. We have no objection to having somebody from the United States Attorney's office present when this takes place.

The Court: Perhaps if you indicated to me just what you proposed to prove by these records it might make some difference in my determination. At the moment it is a little puzzling to me as to just what you want to prove by all these records.

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Mr. Gladstein: Well, all I will say generally, your Honor, in answer to that question that I can say, is that these records relate to the issue of the system of selecting jurors in this court.

The Court: Well, you see, Mr. Gladstein, in this trial, different from any other I have ever heard of, when I, as the presiding Judge, ask one of counsel for the defendants what they expect to prove by this or that, they either refuse to answer or they do what you have just done, which is the same thing as refusing to answer.

Now, naturally, that does not incline me to exercise discretion in compelling the production of large masses of court records for fear that we may simply have more delay.

Now, let me hear what Mr. McGohey may say, unless there are some of the other counsel for the defense who would like to add something first.

(2230) Mr. Crockett: I only want to adopt on behalf of my clients the requests and the supporting arguments made by Mr. Sacher and Mr. Gladstein; and in addition I would like to point out, however, in answer to the Court's last question that basically what we expect to prove by the documentary evidence requested are the allegations contained in the challenge to the extent that the clerk may have any information to contribute to that proof. We wish to examine the documents beforehand in order that we might more intelligently question the clerk in order to bring out the evidence that will support the allegations in the challenge.

The Court: Yes, Mr. McGohey?

Mr. McGohey: If the Court please, I recall one day last week around the luncheon recess seeing Mr. McKenzie, the jury clerk, out here in the hall, and he told me he was here because there had been served on him by the defendants a subpoena duces tecum which called for his appearance on that day. Now, which day it was last week, I don't know.

Mr. Gordon: January 20th.

Mr. McGohey: I am informed it was on January 20th. But the subpoena would show what the

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date is and, of course, we know that he has not been called since that time.

(2231) Now, if I understand the description of the subpoena which Mr. Sacher gave this morning, it seems to me that it has been drawn quite broadly, and that it would include almost every kind and description of record in the clerk's office, and that it would probably include every piece of paper practically in the clerk's office.

Now, I submit that there is some discretion in the Court as to whether or not that ought to be all brought up here, or if it ought to be made the subject of a detailed inquiry at this time in the clerk's office to the extent that would probably simply paralyze all other operations that would go on in the clerk's office.

Now, it will be said, I suppose, that in the interest of justice and in the interest of determining whether or not the system is legal or illegal, that the question of time and the paralyzing of the other activities of the clerk's office is not so important; and if you could bring those two things into very narrow compass of one week, and that everything had to be decided that one week, I would suppose that there would be a great deal of validity to that argument. But I call your Honor's attention to the fact that it was back in November that a motion was made attacking the jury system; and then when it appeared that the trial, of necessity, had to go (2232) over until January, immediately the motion challenging the jury was withdrawn.

Now, the attack, as I understood it, that was leveled in that motion back in November was of as great extent as the motion which is being made and tried now. In other words, it was not an attack on a particular panel, but it was an attack on the entire list of jurors in the Southern District, and as this motion is an attack upon the system by which that list of jurors has been drawn—

The Court: With this exception, that their challenge then did not, as I interpreted it, attack the grand jury part which had already been the sub-

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ject of their motion before Judge Hulbert and the decision by him; and, of course, I still have reserved decision on your motion to strike a part of the present challenge that relates to the grand jury; but except for that it is quite right that it was practically coextensive with the present application.

Mr. McGohey: Yes, and I accept your Honor's amendment on that. It did not, as I recall it, include that.

Now, the record will show that anticipating just what is happening now, or the possibility that there might be some delay, I urged that the Court direct (2233) that if a challenge were to be made to the jury system and the entire panel of jurors, that it ought to be made sufficiently far in advance of January 17th, which your Honor set as the date for trial, so that it might be tried and determined in advance of that date in order that when that date came we could proceed with the trial.

Well, that was not done. But—

The Court: Oh, I remember just what they did. They said to me, "Your Honor, we have withdrawn the challenge and you are without power to make us go ahead with it now because there is nothing before you on the subject, and you have got no other alternative than to just stop where we are," which is what I did. So that your desire to have it tried then and preliminary to the trial was thus completely frustrated.

Mr. McGohey: Now, I call your Honor's attention to the allegations in the notice of motion which is now being argued—that is, the challenge—and to the statements in the affidavit in support thereof, and that affidavit is made jointly by counsel for the defendants. There is stated in there that they came upon some evidence, namely, the Toland report, on or about November 1st. Now, if that means anything it means to me that on the 1st of November counsel were going about the business of preparing for this challenge. And being capable attorneys, as (2234) they are, they were doing it as early as they could so that they would be as thoroughly prepared as they could be.

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Now, I call your Honor's attention also to the fact that the witness now on the stand, Mr. Wilkerson, has produced here copies of 28 panels of jurors going over a period of ten years; and if your Honor will recall, at the time that those panels were being put in evidence or marked for identification, it was Mr. Gladstein, I think, who brought out through the witness that those panels fell into three categories: some of those panels physically consisted of papers where the names and addresses had been written by some employee of the defense counsel when they came over into the office of the clerk and copied them from the lists already in the record where the clerk did not have additional copies.

So that it appears that the defense counsel were having access to the records in the clerk's office then. Now, whether that was in November or December does not make any difference because it was being done at some time prior to this.

Now, it is also a fact, I believe, that Mr. Gladstein has been in the office and has talked to the jury clerk. There are before you affidavits, I think, by Mr. Freedman to the effect that he has been in and (2235) talked to the clerk. Do you remember, I think it was last week you got those supplemental affidavits in opposition to my motion to strike?

The Court: Yes, I remember very well.

Mr. McGohey: Now, I am also informed that counsel themselves—that is, some of the counsel—and their representatives have actually examined the records in the clerk's office. So that it seems to me that what the counsel are asking for now is something that they have had access to; and bear in mind, your Honor, no charge has been made this morning that they have been refused anything.

Now Mr. Sacher did say that there was apparently a disinclination on the part of the clerk, but he did not specify what the disinclination is; and I am sure, your Honor, that it is a fact that those records are available to them and have been available to them at all times if they wanted to go down and look at them.

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And I urge upon your Honor that after we have been going through this trial of this issue of the challenge for ten or twelve days, that it is not appropriate for the Court to exercise its discretion in the way that is being asked so that we would, of necessity, have to stop now while this inquiry went on.

(2236) I think that if there is any lack of information concerning the records which is now bothering the defense it is because the defense has failed to avail itself of the adjournment which your Honor granted back in November in reference to the 60 days allowed. And I urge your Honor to deny the application.

Mr. Gladstein: May I say something for the record so that it will be straight?

The Court: Yes.

Mr. Gladstein: Thank you.

It was said by your Honor that because of a decision which defense counsel, and it happened to be myself, took back in November with respect to the first motion and challenge filed here, it was said that by withdrawing it, that motion, in effect I had frustrated Mr. McGohey's desire.

The Court: No, not just by the withdrawal, but by withdrawing it and then telling me, which was true enough, that I was wholly without power to make you go on.

Mr. Gladstein: Exactly. And I want to—

The Court: You said: We made our challenge and we have withdrawn it, and however much—this is the effect of it—however much your Honor and Mr. McGohey (2237) or anyone else would like to have this matter tried out preliminary to the trial you just can't do it. Now, that is what I call frustrating what Mr. McGohey was trying to do.

Mr. Gladstein: Exactly. Mr. McGohey was trying to get the Court to compel something to be done that the law did not permit. And when we pointed out that the Court was without authority or power to accommodate Mr. McGohey's desire contrary to the provisions of law and when the Court in agree-

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ment with what I pointed out had said, Yes, the Court was without authority, was without power to compel us to do something that the law was opposed to, that amounts to a frustration. I simply want the record to be clear about that. And that in frustrating Mr. McGohey's desires all that we did was to invoke the applicable principles of law.

But let me go on to some facts.

The Court: In the meantime, the question which might have been gone into at length before the trial was imminent is now before us immediately prior to the trial, when delay becomes a matter a little bit different than it would have been way back there in November or early December.

Mr. Gladstein: Well, now, that is what I want to address myself to.

(2238) The Court: However that may be, this is a matter for my discretion, and in the exercise of my discretion I deny the application.

Mr. Gladstein: But may I at least correct the record, as far as some statements Mr. McGohey has made about what has happened since November?

The Court: Yes, you may do that.

Mr. Gladstein: I desire the record to show that after November 1st an examination commenced of certain jury lists which were either copied from or purchased from or photostated in the office of the clerk or his designee. Those lists, some 28 altogether, as time went on, not 28 in one day because they were not obtainable in that manner, those lists, as the Court is now well aware, were subjected to an analysis for the purpose of establishing what the facts might be, whatever they were.

And as the exhibits now in evidence show they established among other things, for example, that about 50 per cent or more of all the jurors appearing on those lists were concentrated in the high rent, rich neighborhood of this city, and that the jurors came from that section. Now, this was a time-consuming process in respect to those lists alone.

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Thereafter, that evidence having been established (2239) as a result of study and analysis of these lists, I went to the office of the clerk, spoke with him and with the deputy clerk and advised them shortly prior to the commencement of these proceedings that I intended to subpoena certain original records from which the lists were taken, because obviously the lists containing the names, addresses, occupational descriptions, and so forth, although obtained from the jury clerk, although official as far as his office is concerned, are themselves secondary in the sense that the information contained on them came from prior records, that is to say, cards which are original records in the office.

And I stated at that time that in order to expedite the matter I would be very happy to have some conference, some discussion with the clerk in charge of these matters so that there could be shown to me the character of records kept and so that some discretion could be exercised in subpoenaing records that were needed, that were material, but at the same time not requiring the clerk to bring in everything.

Now as a result of this an arrangement was made for a subsequent conference, which was held. And I was allowed to spend I think perhaps an hour together with someone who was with me, looking at certain of the records and enabled to make certain notes as to the type (2240) of records.

Thereafter a subpoena was served, your Honor, and this subpoena covered the kind of original records which present evidence material to the issues being tried here. Naturally the subpoena did not direct itself to particular documents by particular date because I did not have that precise information. I had not been permitted to spend adequate time to make such notes in the office of the clerk.

Consequently, on Monday of this week, prior to the beginning of the proceedings, I spoke to the deputy clerk, and there were two deputies in the

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office at the time, and I brought with me someone for the purpose of making notations of the precise documents that were required here so as to release from the subpoena other documents that may not be needed here. At that time Mr. McKenzie advised me that he would not answer any questions, would not show me anything, would not assist in this effort to reduce in any feasible and practicable way the material called for by the subpoena, and said simply that he would speak to me in court when he responded to the subpoena.

Now all I am suggesting is that Mr. McKenzie apparently didn't agree to do what Mr. McGohey has now suggested he is willing to do. And I am perfectly (2241) willing to accept Mr. McGohey's suggestion, and I suppose Mr. McKenzie would also, and that is to avail ourselves of the opportunity of simply going to the office of the clerk and making such arrangements as are mutually agreeable in order to permit us to examine, make notations of, those documents which are required for the purpose of this case, and thereby eliminate from the effect of the subpoena duces tecum, which has already been served, such material as is not essential to be brought in here.

And we will make that effort, and we will see Mr. McKenzie, and will report what Mr. McKenzie has said here, and if Mr. McKenzie's viewpoint is different from that which he expressed on Monday of this week, your Honor, we will be very happy to proceed in that manner. If it is not, and if Mr. McGohey's representations of the likelihood of Mr. McKenzie's attitude is incorrect, then we will report it back to the Court this afternoon.

The Court: I really see nothing to do about this except that Mr. McKenzie didn't desire to talk to you, and after the accusations of corruption and illegality and everything else that you have made against him, frankly I am not a bit surprised that he should have felt that the better part of discretion was not to discuss the matter with you, so that then, whatever he was to say or not to say

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might be said on the witness stand. That (2242) seems to me a perfectly reasonable attitude.

As far as the rest of it is concerned Mr. McGohey evidently had it just about right. So that I adhere to my ruling.

Mr. McGohey, you have something to add?

Mr. McGohey: Your Honor, just this one thing. I should like the record to be quite clear as to what my attitude is. Mr. Gladstein says that he is going to go to the clerk and tell him what Mr. McGohey's views are. And I get the impression that Mr. Gladstein's views as to what my views are are substantially this: that I have said that I am sure that if Mr. Gladstein or other counsel go down now or some time today to the clerk that he is going to make everything available to him. I think that the clerk will do what all the clerks in this court do, that they will be courteous, that they will be as helpful to counsel as they can consistent with the performance of all their duties.

But I don't want there to be any doubt left in anybody's mind that my view is that all of this investigation and all of this inquiry, and all of this conference, and all of this ascertainment of what types of records and how many there are in the clerk's office, should have been done between the adjournment in November and January 17th, and perhaps some of them could have been (2243) done during the two days last week when we had an adjournment. I do not admit at all that there has not been some undue delay on the part of the defendants in getting the information.

Mr. Sacher: If the Court please, I think Mr. McGohey's most recent remarks require a brief rejoinder, and I shall be very brief as I know your Honor wants to take a recess.

The Court: At 11.30 we always take our little recess for the reporters' sake. But you may go ahead.

Mr. Sacher: All right, your Honor. We started late this morning.

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I just want to make this observation. It seems to me that the emphasis that is being put on the so-called time element overlooks completely the fact that what we are concerned with on this challenge is the question as to whether justice is being properly administered. That is what is involved in our challenge to this jury.

Now it seems to me, your Honor, that if justice is being maladministered then it can never be too late to come into a court in the United States and call attention to that fact. And if it takes a little time I respectfully suggest that there is no more worthwhile project on which this Court or any other court in the world can spend its time than to ascertain first whether the (2244) charge is true. That is important, terribly important. And the ascertainment of the truth or falsity of the charge is as essential to the administration of justice as the determination of the question itself.

Let it not be said that this Court was impatient in receiving all of the material, the relevant evidence in the determination of so important and basic a question to the administration of justice. We wish to cooperate with your Honor to the utmost consistent with the protection of the interests of our clients.

The Court: Perhaps no matter how much time we took, no matter how many documents we looked into, maybe it would be said anyway that people were being rushed.

Mr. Sacher: That really isn't the important—

The Court: If anyone can say that I have been conducting this trial in a way to rush people and to prevent them from having sufficient time to present their proof, well, I can't stop people from saying such things, but the record in my own judgment will completely refute any such charge.

Now, let us take the recess, and then we will go on right after that.

(Recess.)

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(2245) DOXEY A. WILKERSON, resumed the stand.

Mr. Gladstein: Before we commence, your Honor, may I take a moment to call the Court's attention to something?

Isn't Mr. McGohey going to be here?

Mr. Gordon: Go ahead.

Mr. Gladstein: Well, perhaps I shouldn't say this in Mr. McGohey's absence. Just as I don't like him to be frustrated I am sure he doesn't want me to be.

The Court: Have you got something pretty good?

Mr. Gladstein: I think so.

Yesterday Mr. McGohey called the Court's attention to a decision or a newspaper article referring to a decision of the Supreme Court. You recall that, your Honor?

The Court: Yes, I do.

Mr. Gladstein: Yes. Wholly inapplicable, of course, because it dealt with a State court matter. But nevertheless it was called to your attention.

The Court: My silence should not indicate that I think it is wholly inapplicable.

Mr. Gladstein: I understand that.

The Court: My "almost" silence.

Mr. Gladstein: Well, your objections to my (2246) statements, of course, are reserved.

The Court: Yes.

Mr. Gladstein: Today's New York Times carries an item that I commend to your Honor for its interest and for what it means. It is carried on page 30, and it refers to the fact that in Great Britain the Government has introduced a Bill to abolish what are there called "Special Juries" upon the ground that those special juries, the members of which are required, just as here they do have, to have certain property status. As the article says, they consist of squires, bankers, merchants, and so on. The Government is proposing to abolish all such juries in Great Britain. And as stated by a member of Parliament concerning such juries,

*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

“It is very well known,” she said, “that there is no justice of any sort in this country in relation to certain types of political cases that come before” such types of “juries.”

It is something that I think should commend itself to the Court in view of the character of this case and in view of the evidence already elicited concerning the type of jury system we have in this court.

The Court: Now there is one thing I wish I could get clear to defense counsel. This jury system that is here in the federal court does not provide for (2247) special juries. The special jury system that exists in the State of New York, pursuant to statute, which is commonly known as a Blue Ribbon jury, is not the system that we have in the federal courts at all. And you keep talking about this as a special jury. But that is just an interpretation. There is no such thing, as I understand the law.

Now, of course, we could go on like Alice in Wonderland here indefinitely; but please do not keep calling it a special jury so that I won't have to say, No, it isn't a special jury. But go ahead and prove with your witnesses and your documents what kind of jury it is, and then we will decide.

Mr. Gladstein: That is exactly what we propose to do and are doing, your Honor.

Direct examination by Mr. Gladstein continued:

Q. Now, Mr. Wilkerson, I think you had occasion to refer in your testimony to an exhibit that has been marked 20 for identification and which appears to be a “Market analysis of New York City” compiled by four newspapers. Do you recall that, sir? A. Yes.

Q. In what connection did you have occasion to utilize any of the contents of that document? A. In relation to the analysis of the geographical distribution of jurors in the several areas of New York (2248) we found this document very helpful in describing the character of the areas where jurors, by the maps, were shown to concentrate

*Doxey A. Wilkerson—for Defendants on Challenge—
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and the characteristics of areas where there were relatively few jurors, if any, to be found. That was one type of information.

Among other things, the New York City Market Analysis provides information concerning rents that are paid by blocks and even by parts of blocks in these areas, based upon 1940 data and certain supplementary data that the publishers of the document utilized.

Q. And in connection with the testimony that you will give here, as I understand it you had occasion to refer to the New York City Market Analysis in several matters?

A. That is correct.

The Court: Now we have left the subject of factors which will disqualify or exempt?

Mr. Gladstein: For a moment.

The Court: That is right. And we are now on a new subject. What would you call this new subject so that I can put it in my notes?

Mr. Gladstein: I just want to preliminarily have some testimony concerning this analysis and another document that I desire to offer for identification purposes.

The Court: All right. I thought you might (2249) indicate to me what this new subject was, but you will doubtless get to it after the description of these exhibits, which is perfectly all right.

Mr. Gladstein: Yes. Thank you.

Q. Now, do you know to what use generally, if at all, this New York City Market Analysis has been made in business matters or business affairs?

Mr. McGohey: I object, your Honor.

The Court: Sustained.

Q. Well, do you know what uses that analysis has been put to by business concerns in the City or by statisticians or by others who have occasion to deal with the type of data contained in that?

*Doxey A. Wilkerson—for Defendants on Challenge—
Recalled—Direct*

Mr. McGohey: The same objection.

The Court: Sustained.

Mr. Gladstein: Will you mark this for identification, Mr. Clerk?

(Marked Defendants' Challenge Exhibit 87 for identification.)

Q. I will show you Defendants' Challenge Exhibit 87 for identification which purports to be a "Survey of the New York City Market, Manhattan, Bronx, Brooklyn and Queens," published—copyright 1945 by the Consolidated Edison Company of New York, Incorporated. I will ask you to state, if you know, the contents of that exhibit. (2250) A. I do.

Q. In general, what is the nature of the contents? A. The exhibit includes considerable statistical material and graphic materials descriptive of different parts of New York City; such information, for example, as the rentals which are paid in different parts of the community, information concerning the racial composition of the population, the extent of alienage in the population, and many other social and economic data with reference to parts—to the whole community, and specifically to sub-sections of the community which are there subjected to analysis.

Q. Does the survey indicate the source from which the data contained therein dealing with aliens, population and matters of that kind you have mentioned come from? A. It does.

Q. What is the source indicated? A. For this particular data the United States Census, 16th Census, 1940. There are other types of data there which come from other sources.

Q. Did you have occasion to check such data contained in Exhibit 87 for identification with the Census tables? A. I did.

Q. Did you find them to correspond? A. For the most part. I do recall one error that we found in a table for (2251) the—in the Consolidated Edison.

Q. Do you recall which one it was, Mr. Wilkerson? A. I am not so sure. I may be able to check it.

Q. (Handing to witness.)

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Mr. McGohey: I object to any testimony about this document unless it is going into evidence.

Mr. Gladstein: We intend that it shall.

The Court: Yes.

Mr. Gladstein: That is, we intend to offer it.

The Court: You intend to offer it. I understand.

Mr. Gladstein: That is what I meant to say, your Honor.

The Court: That is right.

The Witness: I apparently did not mark it, Mr. Gladstein.

The Court: Well, the point is that you did your checking, and the fact that you found one inaccuracy is an indication that you did your checking, and you found the rest of it substantially accurate?

The Witness: That is correct.

A. (Continuing) One of the tables for the Bronx, just which one I am not sure, was in error, obviously a clerical error, but a matter of several hundred thousand. But that was the only error we found in the data that we analyzed (2252) here, and we analyzed quite a bit of it, and substantially it is correct.

Q. Does the survey, No. 87 for identification, contain maps? A. It does.

Q. What in general is the nature of the maps contained in the survey? A. Well, most of the maps there are maps which define health areas in the community. There are also maps indicating census tracts. There are also maps which indicate the average rental by blocks in different parts of New York.

Q. Now, health areas is an expression I think we have not heard heretofore in your testimony. Is there a particular and defined meaning attached to that expression? A. There is.

Q. All right. I will have occasion to come to that later in the testimony.

In what respect, if at all, did you have occasion to use any of the contents of No. 87 for identification in connec-

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tion with your testimony here? A. This (indicating) is No. 87?

Q. Yes. The Consolidated Edison Survey. A. We used it for such purposes as I indicated earlier; to note the rental characteristics and certain social characteristics of different parts of Manhattan and Bronx; particularly were we concerned with the characteristics (2253) of those areas where other data indicated to us many jurors proportionately are chosen and still other areas from which relatively few or no jurors come.

Q. And such data that you have just referred to as found in No. 87 for identification was part of the source utilized in connection with the preparation of your testimony dealing with rentals and with health areas; is that right? A. That is right.

Mr. Gladstein: I offer the document in evidence, your Honor.

Mr. McGohey: May I just ask a question preliminarily?

The Court: You may.

Preliminary cross examination by Mr. McGohey:

Q. You used the expression "social data" I think, Mr. Wilkerson. Did you? A. I did.

Q. Would you indicate to us what you mean by social data? A. By social data I have in mind quantitative information, which can be subjected to analysis here, relating chiefly to the relationships between people in a community or a part of the community. I might illustrate and contrast it with economic data. For example, whether or not a given area of New York consists of native whites exclusively, or almost, or partial, or if there is a considerable proportion of (2254) foreign-born whites, or if it consists very largely of non-whites or very little non-whites. These are illustrative of social data. The question—well, perhaps this serves your question, your purpose.

Q. And do you say, Mr. Wilkerson, that that information you get from—that this exhibit, rather, Exhibit 87—let me reframe it.

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The Court: Yes.

Q. Do you claim that this data which you say gives social data is, in turn, based upon census data? A. That is right. It gives other data, however—well, I have answered your question.

Q. Well, will you tell me about the other data? A. It provides first a convenient organization of census data which many sociologists in this town, for example, in universities here, utilize rather than census data to verify the accuracy of the data, and the convenience of organization, is utilized in preference of the data which one must go to for detail for original calculations.

The Court: You see, I always remember what the question was, and the question is, what is the other data?

The Witness: There is information here concerning construction and developments in different (2255) parts of New York which are not a part of census data. I am not trying to list all of the kinds of data here. Indeed, I don't think I could remember them all—

The Court: You see, that is the kind of business where you wander off that way, and all the time I am thinking of the question, which is, what is the other data? Now, the first part was construction and development matters. Now what is the rest of it?

Mr. Gladstein: I suggest the witness look through it.

Mr. Wilkerson, just look through the exhibit. So we won't have to rely on the witness's memory and—

The Court: Yes, and if you would not do so much of this thinking out loud and just answer and think before you answer, we could get it right down.

Mr. Gladstein: Your Honor, I think that is exactly what he has been doing, but I think the suggestion is now that in order to answer Mr. McGohey precisely the witness can just look through the docu-

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ment and indicate what its contents are.

The Witness: I think I mentioned already that rental figures are presented here which are useful; especially helpful are the maps—

The Court: That is the kind of thing “especially helpful,” and so on, and so on, and so on. (2256)
What is the other data?

By Mr. McGohey:

Q. Mr. Wilkerson, I understood you to say that there was some of the data in this document which was based, in turn, upon census data. A. That is right.

Q. And then that there was other data in the document which was not based on census data; and you were asked then what was this additional data not based on the census data, and my recollection is that you answered that the first item of data not based on census data was some data with respect to construction.

The Court: Construction and development.

Mr. McGohey: Construction and development.

Q. Now, I should like to find out, is there some additional type of data which is also not based upon census data?

A. That I utilized in my analysis?

Q. No, in the document now. A. I can testify only to what I utilized, and in terms of data, no; in terms of materials in the volume which you would not call data, yes. The maps organized by census tracts were very helpful to us in our analysis and were part of the information in this volume which we used which you will find in the census volume.

Q. I see. Now is there anything else? We have the construction and development data, and we have the census (2257) tracts that is made out there in the form of maps. A. I mentioned earlier the rents.

Q. And the rents. A. That is all that we had occasion to use.

Q. Now, will you tell us if you know on what is the data with respect to construction and development based,

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since you say it is not based upon census data? A. On reports of the New York City Housing Department,—I don't remember the exact title of it.

Mr. McGohey: I see. Well, subject to the reservation, your Honor, that I have been making, I have no objection to its admission.

The Court: Very well, it may be marked.

(Marked Defendants' Challenge Exhibit 87 for identification and received in evidence.)

Direct examination continued by Mr. Gladstein:

Q. Now I will direct your attention again for a moment, Mr. Wilkerson, to the New York City Market Analysis, which is Challenge Exhibit 20 for identification. You have already stated that to some extent in connection with your preparation for testimony here you utilized or referred to data contained in it, is that right? A. That is right.

Q. And the kind of data, please? A. First, maps of different sections of the city and descriptions of the (2258) general characteristics. Also by sections of the city information concerning population and its composition as workers, native white, foreign born white, Negro and other races.

Q. Does the exhibit indicate the source from which the census data, data concerning population, the data concerning racial composition of the population, and so on, is taken? A. Yes.

Q. What is that source? A. The 16th Census of the United States.

Q. Did you check it to ascertain whether that portion of the data that you utilized in Exhibit 20 for identification corresponded with the original sources, to wit, the census data? A. Those portions that we used, yes.

Q. What did you find? A. That they do correspond.

Mr. Gladstein: I offer that, your Honor.

The Court: That is in evidence already as Exhibit 20, isn't it?

Mr. Gladstein: I think for identification only.

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The Court: Oh, for identification only? Very well.

(Defendants' Challenge Exhibit 20 for identification received in evidence.)

Q. Mr. Wilkerson, there is already in evidence tabular data and some maps showing the geographical (2259) location of jurors in Manhattan and Bronx in respect of a certain number of panels, I believe 13, isn't that right?
A. That is right.

Q. However, it is your testimony that some 28 altogether were actually studied in respect of occupations, and so on, is that right? A. Yes.

Q. Now since— A. There is one error. The basic analysis which carry through were based on 28, but in this particular connection there are 29.

Q. Which connection? A. In the connection with the distribution of voters—or rather, of jurors among areas, Congressional District areas of Manhattan and the Bronx, the February—

The Court: I don't understand that at all. I think you are anticipating what Mr. Gladstein is coming to.

The Witness: Shall I react to your comment, sir?

The Court: No. I think if you just leave it to Mr. Gladstein—he is pretty smart—and if there is some little mistake he will clear it up.

Mr. Gladstein: Very well, your Honor.

The Court: You don't mind my saying that, Mr. Gladstein?

Mr. Gladstein: I am not sure. It depends on what the effect is going to be on me, your Honor. It is (2260) not an abstract matter.

The Court: I hope it has a good effect.

By Mr. Gladstein:

Q. Now, of the 13 maps that were received in evidence, it is correct, is it not, that one of them dealt with the

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panel of February 1, 1949? A. That is right.

Q. And the other 12 maps referred to panels which were included within the basic 28 panels, is that right? A. That is correct.

Q. So that there was left without any tabulation of data here in the record 16 panels, is that correct? A. That is right.

Q. That is, with respect to their geographical location, right? A. Yes.

Q. Now, since the proceedings began—

Mr. Gladstein: Oh, my attention is called to this: Let the record show, if this is correct, that these remaining 16 panels are panels for which no maps were made.

The Witness: That is correct.

Q. Now, have you done anything to indicate, however, the geographical location of the jurors on those 16 panels? A. We have.

Q. What did you do? A. For each of those 16 panels we located by procedures described earlier the residents by Congressional Districts and prepared a table which (2261) indicates the number of jurors in each panel living in a particular Congressional District, and also the percentage.

Q. Yes.

The Court: What is the number of that table?

The Clerk: Defendants' Challenge Exhibit 88 for identification.

The Court: Oh, it is not in yet?

Mr. Gladstein: No.

The Court: Now, this takes into account the 16 panels that are not included in those other charts?

Mr. Gladstein: Maps.

The Court: Maps.

Mr. Gladstein: For which no maps were made—photographs of maps. That is right, your Honor.

(Marked Defendants' Challenge Exhibit 88 for identification.)

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Recalled—Direct*

By Mr. Gladstein:

Q. Now I show you, Mr. Wilkerson, Challenge Exhibit 88 for identification. Do you have a copy of it? A. I have a copy of it.

Q. And I will ask you to identify it. A. This is a table indicating the residences of jurors by Congressional Districts in Manhattan and Bronx on 16 federal petit jury panels in the Southern District—

(2262) Mr. Gladstein: Will you raise your voice, Mr. Wilkerson. Mr. McGohey is complaining.

Mr. McGohey: I am not complaining. I am just stating that I have difficulty in hearing; it may be my fault; and you would oblige me if you kept your voice up.

Mr. Sacher: If only Mr. McGohey would pay me that compliment.

The Court: Well, it might be.

Mr. McGohey: I think the answer is that Mr. Sacher keeps his voice up.

The Court: Well, he does, and it is a good thing, like everything else, in moderation.

Now, let us try to keep our voices up, Mr. Wilkerson, and that is all that Mr. Gladstein is asking you right now.

By Mr. Gladstein:

Q. Now, will you indicate for the Court—the Court has a copy of this—just how this was arranged. Is there something that requires explanation or does it speak for itself? A. I think it is fairly evident—I can explain the nature of it, if you wish.

Q. Would you do that in a general way? A. To illustrate: With the panel of January 17, 1940, we indicate on one line that there are no jurors in the (2263) 16th Congressional District; 62 in the 17th Congressional District; 11 in the 18th; 2 in the 19th, and so on; 2 in the 22nd; and it goes on down for all of the Congressional Districts in Manhattan and Bronx.

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And on the second line for the panel of January 17, 1940, are indicated percentages of the total for the panel corresponding to the numbers just above. They show, to illustrate, that no jurors, of course, in the 16th; that the 62 jurors in the 17th Congressional District on that panel represented 42 per cent of the total in Manhattan and Bronx—

Mr. McGohey: Total of jurors, Mr. Witness?

The Witness: All persons called on federal petit—on that particular panel.

Mr. McGohey: That is, 42 per cent of the particular panel?

The Witness: That is right.

The Court: That is right.

Mr. McGohey: Thank you.

The Witness: And in the 22nd Congressional District, Harlem, the two jurors on that panel represent 1.4 per cent of the total on that panel; and as this is done for each of the Congressional Districts for January 17, 1940, it is also done for each of the other 15 panels shown on the table.

Q. Now, those panels run through each year, is that (2264) right, from 1940 into 1948 and include a number of panels in the year 1948? A. Yes, into 1949.

Q. And one for January 4, 1949, correct? A. That is right.

Mr. Gladstein: I desire to call the Court's attention with respect to this exhibit that the jurors who came from the 17th Congressional District represented in respective panels such figures as these: 42 per cent of the jurors; 59 per cent; 56.2 per cent; 37.8; 56.5 per cent, and so on down the line; where as in contrast as to the 22nd District Harlem, the percentages have already been mentioned as to one by Mr. Wilkerson, of 1.4 per cent; the next was zero per cent; the next is .4 of one per cent; the next is 1.6 per cent; then zero per cent again; and then .9 of one per cent; there is one that is 3.9 per cent; and then the next is .9 of one per

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cent; and then three in a row that are zero per cent; and then on the next page they go from 1-½ per cent to 1.8 per cent and down to .9 of one per cent.

Your Honor will find similar percentages as to some of the other Congressional Districts, particularly the 24th.

I offer this—

Q. Oh, I want to ask you: are you able to testify that these are correct tabulations and correctly portray (2265) what this exhibit purports to represent? A. Yes.

Mr. Gladstein: I offer it, your Honor.

Mr. McGohey: May I ask just one question, if your Honor please?

The Court: Yes.

Mr. McGohey: Would you tell us, Mr. Wilkerson, what Congressional District lines did you use in making these computations for each of these panels?

The Witness: Those which are defined in the manual for the State Legislature in 1947, I think it is or is it 1945? I don't remember.

Mr. McGohey: You mean the lines as they were laid down in 1944?

The Witness: That is right, yes, and as they have been since then.

Mr. McGohey: That is for all of the panels shown on that table?

The Witness: That is right.

Mr. McGohey: The Congressional lines as laid down for 1944?

The Witness: Yes.

Mr. McGohey: Thank you.

No objection, subject.

(Defendants' Challenge Exhibit 88 for identification received in evidence.)

(2266) *By Mr. Gladstein:*

Q. While we are on the subject of geography, was anything done to indicate from a study of the 28 basic

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panels or any others, or any of them, the locations of the jurors as those locations are given on the clerk's lists who reside in Westchester? A. Yes. We made analysis of certain panels so far as—we analyzed the residences of Westchester jurors on certain panels and prepared one or two, possibly three tables dealing with that subject, perhaps more; I have them here; and also a map indicating the residences of Westchester jurors.

Q. Now I will ask you this first, Mr. Wilkerson: As you examined the jury lists what did you find as to the percentage of all jurors on those lists who come from Westchester? A. Generally, Westchester jurors represent about 15 per cent of the total on each panel. This is an average figure.

Q. And the other 85 per cent are jurors who live either in the Bronx or Manhattan? A. That is correct.

Q. That is a general average, is that correct? A. Correct.

Q. Now with respect to Westchester jurors—

The Court: Have there been orders by some Judge of the court excluding Rockland and the other (2267) counties pursuant to that section of the statute?

Mr. Gladstein: Your Honor, I am sorry, I didn't hear the first two words of the question.

The Court: Well, you see, the Southern District includes other counties besides Westchester, Bronx and Manhattan.

Mr. Gladstein: I know, it runs almost to Albany.

The Court: And I gather from the way you put the question that there probably had been orders made by one or more of the judges pursuant to the statute on that subject to the effect that those people from Rockland, and so on, need not come down.

Mr. Gladstein: Mr. Crockett can supply an answer to that.

Mr. Crockett: If your Honor please, I am aware of the statute, and I made a personal check with the clerk's office. The clerk assures me that no such order has ever been entered; that at one time several years ago it was thought, I think, by Judge Hand, that there had been such an order, and they

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had traced the records back to the days when they wrote out orders in longhand, and they have been unable to find any such orders specifically designating the counties from which jurors should be drawn.

Mr. McGohey: Will the Court hear me for a (2268) second on that point?

The Court: Certainly.

Mr. McGohey: That very question, your Honor, came up in this district recently in the case of *United States vs. Gottfried*—

The Court: *United States vs. Gottfried*?

Mr. McGohey: Yes, G-o-t-t-f-r-i-e-d. I do not have the citation handy; I may have it here, but if I haven't I can get it for you.

It is a case which was tried in this district, and there was a challenge there to both the grand and petit jurors on the ground that there had been an illegal exclusion of qualified persons from jury duty if they came from north of Westchester County.

The Circuit Court passed upon that question; Judge Learned Hand, the senior Judge, wrote the opinion; and he does say in that opinion that he had a recollection—I think he says in the opinion that he had a recollection that there was an entry of an order, but if there be no formal order entered he held there that the long-continued practice of calling jurors from districts nearer to the court house rather than calling them from the whole district had the sanction of an order.

The conviction was affirmed; the jury system was approved; the Supreme Court denied certiorari at least (2269) once, maybe denied rehearing. I shall have the citation for your Honor.

The Court: Thank you.

Mr. Gladstein, I can put that question out of my mind now, or do you think that is involved in this case?

Mr. Gladstein: Wel, I think it is. I am sure Mr. McGohey will agree from all of the panels that we have examined we find that the jurors who served here came from three counties, Westchester, Bronx and Manhattan, and they do not come from the north-

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ern counties. I am wondering whether we can't agree that that is the fact, that is the fact as we have found it to be.

The Court: Well, I was interested in knowing whether your challenge is based on that at all. I had thought not. You have now introduced a little proof on it, and I thought this was a good time to nail it down and see whether it is in or whether it is out.

Mr. Gladstein: One of the points that we raise in our challenge, your Honor, but not confined to this aspect, is—

The Court: Then you say the point is in?

Mr. Gladstein: Yes, I was about to answer that it is in on the question of geographical discrimination but not confined to the point that your Honor is addressing (2270) to me—that is, the question of exclusion of jurors north of Westchester—

Mr. McGohey: May I interrupt for just a minute?

Your Honor, the citation in the case of *U. S. vs. Gottfried* is 165 Fed. (2d) page 360; certiorari denied at 333 U. S. 860; petition for rehearing of the petition for certiorari denied, 333 U. S. 883.

The Court: Thank you.

Mr. Sacher: May I have your Honor's attention a moment?

The Court: Yes?

Mr. Sacher: Perhaps we can save time on this phase of the case. If the Government will stipulate that jurors for the Southern district are drawn exclusively from the three counties, Manhattan, Bronx and Westchester, we will be quite happy to say that it is not one of the grounds of our challenge that jurors are not summoned from any other county.

Mr. McGohey: If the Court please, I can't stipulate that because the record would make a liar out of me. There was a witness on the stand yesterday from Nyack, and I think that the panels will also show one or two more, how many I don't know, I haven't counted them, from other districts, and I do know, as a matter of my own experience that there have been jurors here from other (2271) counties, so I can't stipulate to that.

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The Court: All right.

Mr. Sacher: Then I did not understand what the point of the Gottfried decision is. I noticed one of those who appeared yesterday, Mr. Cantrell, comes, I think, from Rockland County, but your Honor will observe that originally he was summoned living in one of the three counties, which was either New York or Westchester, and he has probably been carried over.

Now, the point is that if we understand that the challenge is directed to the three counties, and that the Government is not going to claim that it also summons them from other counties, why, we can expedite this thing. Otherwise, we are not in a position to stipulate.

The Court: I think perhaps I should have said nothing, but it occurred to me that I might reduce the area of conflict. But I might just as well relax and realize that everything that is covered by your challenge is involved.

Mr. Sacher: Well, the only thing I want to point out is that every time we make what might be called a beautiful effort at cooperation somebody frustrates us, in this instance Mr. McGohey.

The Court: Well, you know, when you ask a man to make a stipulation and he says no, I always (2272) thought that ought to put an end to the matter. But somehow or other things go on and on. So the stipulation is not made, and we are now back to Mr. Wilkerson, who has had a little rest here in the meantime, and Mr. Gladstein will proceed.

Mr. Gladstein: I got so interested in what was being said that I forgot the last question and answer, your Honor. May I have the reporter read it?

Mr. McGohey: Thank you very much for the compliment.

The Court: The last question was that generally the Westchester jurors represent about 15 per cent of the jurors in the panels.

Mr. Gladstein: All right.

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Recalled—Direct*

By Mr. Gladstein:

Q. Now, which of the jury panels did you examine, Mr. Wilkerson to ascertain where in Westchester the jurors lived? A. We examined six panels.

Q. Which were those? A. Panels of November 3, 1948; November 15, 1948; December 7, 1948; December 20, 1948; January 4, 1949, and January 17, 1949, the first listing only.

Q. In other words, at the time that you took those six panels they were six successive panels of the latest dates available to you; is that correct? (2273) A. That is correct.

Q. Now, how did you go about tabulating the figures, the data that you did tabulate? A. It was necessary first to ascertain the residence of the jurors on those panel lists, which we did, tabulating them by communities within Westchester.

Q. Now, the information for the juror's residence was, I take it, obtained from the actual jury lists; correct? A. That is correct.

Q. As given by the jury clerk? A. Yes.

Q. Now then, you tabulated the location of those jurors in the particular community in which they lived? A. We did not do that for all jurors but for those living in seven communities we did make such a tabulation.

Q. All right, which were the communities? A. They were the communities of Scarsdale, Bronxville, Larchmont—

The Court: Wait a minute. Scarsdale, Bronxville—

Mr. Gladstein: And Larchmont.

The Court: And Larchmont.

Mr. Gladstein: Yes.

The Witness: Yonkers.

The Court: Yes.

The Witness: New Rochelle, Mount Vernon, and White Plains.

By Mr. Gladstein:

(2274) Q. And was your study and your tabulation of these facts obtained from the jury lists put into tabular form? A. They were.

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The Court: Did you take the political sub-divisions as established by law, or did you decide from such data as you examined to fix these community lines in your own mind? You took the political subdivisions as established by law?

The Witness: That is correct.

Mr. Gladstein: I believe that this exhibit which I am about to ask the witness about is attached to the moving papers and is to be found designated as Table P-4.

Q. Is that right, Mr. Wilkerson? A. That is right.

Mr. Gladstein: Perhaps, however, it ought to go in as a separate exhibit at this time, and I will ask the clerk to mark it.

(Marked Defendants' Challenge Exhibit 89 for identification.)

Q. Now I will show you No. 89 for identification, Mr. Wilkerson, and I will ask you to state if this is the exhibit that was prepared in the manner that you have just indicated with respect to the residences of certain of the jurors living in Westchester County as shown by the six panels mentioned in your testimony? A. That is the exhibit.

(2275) Q. And are these tabulations correct? A. They are.

Q. They accurately portray what they purport to represent? A. Yes.

Mr. Gladstein: I offer it in evidence, your Honor.

Mr. McGohey: May I have just a minute, your Honor, to look at this?

The Court: Yes.

Q. While Mr. McGohey is studying the exhibit I would like to ask you a question or two about it, Mr. Wilkerson: There is a column that has figures referring to population, 21 years and over. From what source were those figures obtained? A. They were obtained from the 16th Census of the United States.

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Q. Now, the column that is designated "Number of Jurors" refers, I take it, to the actual number of jurors shown on those panels which, according to the panel listings, reside in the various towns referred to? A. That is correct.

Q. Now, what do the figures, or what is the source of the data appearing in the third column designated "Jurors per 10,000, 21 years and over"? A. That is a calculation. It is a ratio between columns 1 and columns 2 in such a manner as to show that for every 10,000 persons 21 years and over in a given (2276) community of Westchester there were on these six panels so many jurors. I think I should comment—

The Court: I don't get that at all.

Q. Will you explain that to the Court? A. I would like to, yes.

The Court: You say there were 50 jurors in Scarsdale out of 8838, which you say was the population in 1940, 21 years and over; and then the third column shows that the jurors per 10,000, 21 years and over, is 56.6 per cent of 8838, and I just don't understand what this ratio is that he has been talking about.

Mr. Gladstein: I can help you. It seems very clear to me.

The Court: Well, you tell me yourself.

Mr. Gladstein: Well, your Honor has overlooked the designation on column 3 which says "Jurors per 10,000." You see, that is a number figure, the 10,000, and the percentage figure that comes down—

The Court: Well, now, just listen a moment, Mr. Gladstein. 8838 is less than 10,000, isn't it? So when you say "Jurors per 10,000" the 50 in Scarsdale would be less than one per cent because 8838 is less than 10,000.

Mr. Sacher: It is not a percentage figure; it is a number figure. If there are 50 jurors for 8800, (2277) what the exhibit says is there would be 56.6 for 10,000 inhabitants 21 and over.

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Recalled—Direct*

By Mr. Gladstein:

Q. Is that right, Mr. Wilkerson? A. That is correct.

The Court: There would be?

Mr. Gladstein: Your Honor, if you look at—

Mr. Sacher: If you divide the figure from—

The Court: Just a second. Now you can't both be talking at once here. I am willing to listen to both of you, but not at once.

Mr. Sacher: If you reduce the figure of 10,000 to 5,000, then you can cut all the figures under that column in half also, there would be 28.8 jurors for every 5,000 inhabitants then. The ratio is the same.

Mr. Gladstein: I suppose we should have let Mr. Wilkerson do it in the first place.

The Court: Well, maybe it is better to let him do it. I have't got it yet, and I admit I am probably stupid about it, so don't get worked up over it, and I will understand it after he explains it a little further.

Now, you go ahead, Mr. Wilkerson, and tell me about it yourself.

The Witness: What we are dealing with here is simply a mathematical ratio—

(2278) The Court: That is right.

The Witness: (Continuing) Which asks the question—

The Court: What is the ratio between 50 and 8838?

The Witness: No—yes. Actually you will find in terms of the process—well, let me tell you and go on. It would be easier, I think, your Honor, to take one that does have more than 10,000 and then to come back to some that have fewer than 10,000 to illustrate the procedure.

The Court: All right.

The Witness: In Yonkers, there was a population, 21 years of age and over, 1940, of some 97,000 people—97,305. There were, however, only 23 jurors on these six panels in the community of Yonkers. Now, if you were to find out how many jurors there

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are per 10,000 population, 21 and over, you would have to figure first how many 10,000s are there in the 97,000 for Yonkers.

The Court: And we come out there are 9.7?

The Witness: That is right.

The Court: Yes?

The Witness: You would then find how many jurors there are for each such 10,000.

(2279) Mr. Gladstein: By dividing the 9.7 into the 23—

The Witness: Into the number of jurors.

Mr. Gladstein: Into the 23.

The Court: All right.

The Witness: And you come out 2.4.

Now, in this instance it is easy to see because Yonkers has more than 10,000, but the mathematical operation is exactly the same when you use a community of fewer than 10,000 and provides comparable ratios in that it shows the number of jurors per 10,000 population.

If, for example, there was one juror and a 10,000 population in Scarsdale, there would be one juror per 10,000 21 years of age and above. But if there was one juror—

The Court: Well, let us stick to that. One juror in a place with a population of 10,000, then what would you get in that third column?

The Witness: You would get one.

The Court: That is just what has been bothering me. You have 50 there in Scarsdale and you get 56—

(2280) The Witness: Let me illustrate. Suppose, however, you had in Scarsdale or in one of these communities not 10,000 but 20,000 people aged 21 and above, but only one juror: now you would not get a one in your third column; you would get .5.

The Court: Yes, I think I have got it.

Mr. Gladstein: So where you have a community that shows the population less than 10,000, your Honor, the ratio of jurors per 10,000 is going to

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be a figure larger than the actual number of jurors as shown there. In other words, the ratio between the figure in the first column to the figure in the second is the same as the ratio of the figure in the third column to the designation above 10,000.

The Court: All right.

Mr. Gladstein: It is suggested that I say the ratio between 50 and 8,838 is the same as that between 56.6 and 10,000. That is what I said in different words.

The Court: Check.

Mr. Gladstein: Check, all right.

By Mr. Gladstein:

Q. Now will you indicate what the fourth column represents? A. The fourth column of figures is a simple percentage ratio. It indicates that of the total number of jurors (2281) in Westchester, the proportion to be found in each of these seven communities and also in all other Westchester communities not represented on this table, rather, not specified—

The Court: Those percentages of the jury panel restricted to Westchester County only?

The Witness: That is correct.

Q. And what is the final column? A. And the final column is a percentage ratio based upon the population 21 years of age and over in 1940, and shows for each of these communities, and for those communities not specified here but also in Westchester the proportion of the population 21 years and over that live in such communities. For example, Scarsdale had 2.2 per cent of the population 21 years of age and over in 1940.

Q. But on these panels was represented by 17.4 per cent of the total number of jurors involved, is that correct? A. That is correct.

Q. Now, in contrast, Yonkers, which had 24.8 per cent of the population 21 years old and over, had 8 per cent of the jurors, is that right? A. That is correct.

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Q. Again, Bronxville, which has but 1.3 per cent of the population of voting age, 21 and over, had 12.8 per cent of the total of jurors? A. That is right.

(2282) Q. And similarly in the case of Larchmont, which had 1.1 per cent of the population 21 years and over, it had 10.1 per cent of the jurors on those panels, is that right? A. That is correct.

The Court: You don't need to read them all because they are right in the tabulation.

Mr. Gladstein: I renew my offer. I did offer it in evidence, and Mr. McGohey wanted to study it.

The Court: Yes.

Mr. McGohey: With the same reservation, no objection.

The Court: Very well.

(Defendants' Challenge Exhibit 89 for identification received in evidence.)

Q. Now, did you obtain any other data concerning particularly those towns or cities, Yonkers, Scarsdale, Bronxville and Larchmont? A. I did.

Q. What other data did you obtain and from what source? A. From the 16th Census of the United States we sought certain information that provided a few characteristics of these four Westchester communities.

Q. What type? A. Perhaps I should point out the purpose and nature.

Q. Would you do that? A. Yes. We had observed that the three small communities, Scarsdale, Bronxville (2283) and Larchmont, though comprising only 4.6 per cent of the population 21 years of age and older, had residing within them 40 per cent of the jurors, whereas the community of Yonkers, whose population is four or five times that of all three of the other communities is approximately 25—it is 24.8 per cent of the total population in Westchester County 21 years of age and over had only 8 per cent of the jurors on these panels. So we sought to get from collateral census data certain information which would tend to characterize on some bases the three

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communities which had a high incidence of jurors on Federal panels and several of the larger communities which had relatively few jurors.

The particular things that we were interested in were the question of population; we inquired into the educational level as measured by number of school years completed, median years of school years completed.

Q. From what source was such information available?

A. All of these data came from the 16th Census of the United States, 1940, Second Series, Characteristics of the Population, New York. We also inquired into the occupational distribution.

By the Court:

Q. Now, in that first one you used a phrase and I didn't quite get it. It sounded to me like median or (2284) something. A. That is right. Would you care for me to—

Q. I wish you would explain that a little because I did not understand it. A. There are various measures of the central tendency in any statistical distribution. The one most commonly used is the average. If we have a column of figures for example and we want one figure to express the central tendency of the whole, the average we generally speak of; we speak of average rent or average income representing the whole group. Another such measure of central tendency is the median. Now, specifically the median is that point in a distribution—

Q. Is that m-e-d-i-a-n-t? A. No. M-e-d-i-a-n. (Continuing) —is that point in a distribution of measures from the highest to the lowest above which 50 per cent of the cases fall and below which 50 per cent of the cases fall. Or, in other words, the median measure is exactly the middle measure in a distribution series.

Q. Now, did you use some word about education when you were describing that? A. I did.

Q. Now, that is what I did not get. A. The median number of years schooling for residents of these different communities we inquired into.

Q. That is, whether the average person only went through second grade or through second year high school,

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(2285) and things of that kind? A. Or, more precisely, whether the median person did.

Q. Well, you had better make your statement over again then so I can understand what it was you said, because I did not hear it at the time. A. Perhaps it would help your Honor for me to differentiate between average and median in terms of their meanings in statistical analysis. Would you care for me to do so?

Q. What I really started to do was to find out what it was you said that I did not hear. A. All right.

Q. And then we got off on to this and that, and I got the impression you were dealing with something about education and I did not hear it. So just tell me that phrase again. A. All right. What we ascertained was the median number of years in school attended by residents in the four communities here subject to analysis.

By Mr. Gladstein:

Q. Was that obtained from the Census? A. It was.

Q. And they are obtained here from the figures that were obtained from the Census designated within the Census Tables as median figures? A. They are.

Q. I see. Will you continue, please? A. I do not know whether I called attention, I believe I did, to the fact that we analyzed the occupational (2286) distribution of the gainfully employed persons in these several communities with several sub-analyses concerning certain types of occupations. These are types of data that we assembled in Table W-1 for the four communities we are here talking about. I believe that is all you asked me. Do you want me to describe—

Q. In the table itself what classification or designations did you use occupationally for the study? A. We used the same general classification we have been using in other occupational analyses.

Q. I notice— A. Proprietor.

Q. Excuse me. A. Proprietors, managers and officials, professional workers, eliminating however clerical workers and including certain of the manual worker categories

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which were represented in substantial numbers in those areas.

Q. In other words, there was a breakdown of the manual workers as we have been using that expression here? A. Not completely, but in general, yes. This does not purport to be the kind of an occupational analysis we have been making on jurors, but we deliberately selected, and the table indicates, selected certain occupations to compare with certain other occupations for certain purposes which we were seeking to satisfy.

Q. Now in doing so did you take exactly the same (2287) kinds of designations, group designations that the Census uses? A. That is correct, we did.

Q. And the figures for those groupings were taken also from the Census, is that right? A. Yes.

Q. You did this for each of the four communities that you have mentioned, is that correct? A. Yonkers, Scarsdale, Bronxville, Larchmont.

Q. Have you checked these figures to ascertain whether they accurately represent what they purport to represent? A. I have.

Q. And are they accurate? A. They are.

Mr. Gladstein: I have been talking about this as though it were marked for identification and it has not been. I will ask the clerk to mark it now.

(Marked Defendants' Challenge Exhibit 90 for identification.)

The Court: It seems to me that all this speculative data indicates the utter futility of having any system of jury selection based on such materials as you have here. Why, you would never be able to select jurors that would represent the kind of proportional representation that you speak of here, and if you got it off on population then somebody else would want to do it on race, then they would have to find out just how many people of different races were on it, and the whole thing (2288) would be in a perfect mess.

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Mr. Gladstein: If you did it fair and square and did not try to discriminate in the first instance against any group, be it racial, social, economic or anything else, then you would have no trouble, your Honor, because you would get in an honest, normal, random fashion representative groups and people in groups from all sections and classes of the community.

The Court: Well, you have assumed, by proving all this long series of speculations, that that demonstrates that there has been a wilful and, as you and your colleagues have characterized it, corrupt system of selection. But it does not seem to me that it tends to prove that. It tends merely to prove that there is not a proportion. And the law in many cases has said that you do not have to have a proportion and that the jury selection is not necessarily to be upon any such basis.

Mr. Gladstein: The law also says that a jury and the jury system from which jurors come must be so administered as to provide for truly representative bodies, and that there shall be no exclusion in whole or in part of any groups within the community on any basis of social or economic, or racial or geographical consideration, as well as the others that we have mentioned. And we are—

(2289) The Court: Well, it may be, but this kind of speculative data that you are figuring up now, on every chart that comes in he leaves out this, or he changes that, and it seems to me to wind up in utter confusion.

Mr. Sacher: May I—just a moment. Inasmuch as I have a slight familiarity with Westchester I would like to point out that what we are saying here and what the Westchester exhibit proves, and we will have evidence to show, is that Scarsdale, Bronxville and Larchmont represent the three communities in Westchester in which there is the greatest concentration of wealth in the county and that its population of 4.6 of the entire county's population results nevertheless in a selection of jurors

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which is equal to over 40 per cent of the total juror population.

And what we are saying here is that the three Westchester communities happen to have more than 40 per cent of the Westchester jurors because the clerk in this court picks from among the rich. That is what we claim and that is what we claim this exhibit proves.

Mr. McCabe: I should like—

The Court: On that basis we will take a recess until 2.30.

(Recess to 2.30 p. m.)

(2290)

AFTERNOON SESSION

DOXEY A. WILKERSON, resumed the stand.

* * *

Mr. McGohey: If the Court please, I desire to ask permission to interrupt the witness now on the (2291) stand because I desire to call to the Court's attention some facts concerning a pamphlet which I believe was distributed outside the court house today; and I ask leave to call to the stand a witness who was handed this pamphlet that I want to call to the Court's attention.

The Court: Pamphlets handed outside the courtroom today?

Mr. McGohey: The court house.

The Court: The court house?

Mr. McGohey: Yes, your Honor. It related to the trial and to the charges which are now on trial before your Honor as to the composition of the jury.

It purports to be a document put out by the New York State Committee Communist Party, 35 East 12th Street.

The Court: Well, I think if it is a matter of that character that it is wiser if I refer the matter to one of the other judges, Mr. McGohey. I do not

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desire to have anything come up here which may by some twist of circumstances have some bearing upon my qualification to sit in this case. I have no notion what the matter is that you refer to but I think perhaps it is better for me to refer it to one of the other judges.

Mr. McGohey: Very well, your Honor.

(2292) The Court: I will take that under advisement, and I will hear anything that you may care to say now, as long as you do not discuss the merits of the matter that you have to bring up; but anything you may desire to say about my thought that I should refer it to one of the other judges I shall listen to.

Mr. McGohey: It seems to me, your Honor, that this paper that I am talking about has a bearing and contains comments about the very matter which is presently on trial before your Honor.

The Court: Well, you see, that might lead possibly to contempt proceedings or some other kind of proceedings, and it is my judgment that it would be the better part of wisdom and discretion and judicial conduct generally on my part if I refrained from considering such matters at this time. I will take the matter under advisement and decide what I will do about it later.

Mr. McGohey: Well, I shan't press it now, your Honor. I understand that I reserve the right to bring it to the Court's attention later, if I am so advised?

The Court: Yes, you may do so.

Mr. McGohey: Thank you.

Mr. McCabe: I assume, your Honor, that if your Honor decides to refer that pamphlet to another judge, your Honor will also refer to that same judge other news (2293) comments, editorial comments and other comments which, as Mr. McGohey says, has a direct bearing on the matters which are before your Honor. We have a nice selection of articles that might join that article, your Honor, and when your Honor is taking it under advisement I wish

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we would have the opportunity to submit to your Honor certain articles for reference to this judge who is yet to be selected.

The Court: Well, it seems difficult to have anything started here without getting into some more or less long discussion. If there is any matter that anyone considers requires action by the authorities, I suppose there is nothing to prevent their taking the normal course in such matters. All I am trying to say now is that I would like to proceed with what I have got to try here and not get tangled up with something extraneous even though it may have some bearing on the matter before me. And so I am going to just try to keep my hands off everything else for the time being.

Mr. Gladstein: With the Court's permission I would like to withdraw Mr. Wilkerson temporarily for the purpose of accommodating two witnesses who are under subpoena and who will be short witnesses, and whom we would like to release as soon as possible.

The Court: Any objection, Mr. McGohey?

(2294) Mr. McGohey: No, your Honor.

The Court: Very well.

(Witness temporarily suspended.)

Mr. Isserman: I would like to call Mr. Harry Rosten to the stand.

HARRY ROSTEN, called as a witness on behalf of the defendants on the challenge, being duly sworn, testified as follows:

Direct examination by Mr. Isserman:

Q. Mr Rosten, are you presently employed? A. Would you speak a little louder, please? I am hard of hearing.

Q. Are you presently employed? A. Yes.

Q. And for what? A. The New York Times.

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Q. Is that the New York Times Company which publishes the New York Times? A. Yes.

Q. What is your present capacity with the New York Times? A. I am research manager.

Q. How long have you been working for the New York Times? A. 22 years.

Q. I show you Challenge Exhibit No. 20 which is in evidence in this case and ask you if you are familiar with the exhibit? A. Yes.

Q. Did you have anything to do with the preparation of that exhibit? A. Yes.

(2295) Q. Would you tell us what you had to do with its preparation? A. This was prepared cooperatively by four New York newspapers, and I helped in the planning and assembling of the data.

Q. At the time you did, were you then the research manager of the New York Times? A. No.

Q. What was your position at that time? A. I was assistant to the promotion manager.

Q. What was his name? A. Ivan Veit.

Q. Did your duties include research work of various kinds when you were assistant to the promotion manager? A. Yes.

Q. Was it in that capacity that you worked on the exhibit which is before you? A. Yes.

Q. Was that exhibit prepared exclusively by the New York Times? A. Was this prepared exclusively?

Q. By the New York Times. A. No, it was prepared cooperatively with three other newspapers.

Q. Which three other newspapers were involved? A. The Journal American, the Mirror and the News.

Q. Now in the course of your work in connection with the exhibit, did you have occasion to work with personnel from the three papers in question in supervising and laying out the project which appears in that volume? (2296) A. Yes.

Q. With whom did you work on the Daily News? A. I worked with Sherman Storer.

Mr. McGohey: Pardon me for just a minute.

If the Court please, I should like to inquire, if I may, the purpose of this line of examination. This exhibit is already in evidence.

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The Court: Yes. I was wondering myself.

Mr. Isserman: If Mr. McGohey tells us now that he will not move that it is not included in a reservation to strike and that the data in it may be used, I think my examination would be cut short. And the reason why, your Honor, we are proceeding with this witness is that the survey contains certain data which is taken from the Census and certain data and information which is not taken from the Census and which was prepared under the supervision of this and other persons. And we are seeking to establish the weight of the data, whether or not it is taken directly from the Census figures.

The Court: Well, I have noticed a disposition here to anticipate some things that may be later brought out by your adversaries, and I see no occasion to press testimony of this kind until the occasion rises to do so. If someone attacks the accuracy of the document Exhibit 20 then it seems to me to be time enough to do this, (2297) and that time may never come.

Mr. Isserman: Of course the—

Mr. McGohey (To Mr. Isserman): May I?

That is just the point I make, your Honor. It is true that I have made a reservation with respect to every one of the exhibits that has been put in either for identification or in evidence by the witness Professor Wilkerson. But until such time as I move to strike it seems to me that the exhibit is in the case for all purposes.

The Court: It is in.

Mr. Isserman: May I be heard, your Honor?

The Court: I think you had better go to something else, Mr. Isserman.

Mr. Isserman: I would like to be heard for a moment, if I may.

The Court: Yes, you may have it.

Mr. Isserman: We are desirous of authenticating some of the data in the exhibit through this witness. At the time the motion to strike is made it may be made on the ground that certain data has not been

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authenticated, or the Court may reject certain data after the case is closed on the ground that it has not been authenticated. And we desire to authenticate the data in the exhibit before the Court so that it will be given the weight and (2298) the credibility to which it is entitled. That has not been completely done by Mr. Wilkerson who had no part in the preparation of the exhibit in question.

Mr. McGohey: Yes; but, your Honor, I press the point that at this stage of the record there isn't any challenge to that.

The Court: Well, I understand that, and it seems to me quite clear that the paper is in evidence, the book or whatever it may be, Exhibit 20 is in evidence, and if objection is made to this line of proof at this time I will sustain the objection.

Mr. McGohey: Well, I do object to it, your Honor.

The Court: I will sustain the objection.

Mr. Gladstein: May I be heard, your Honor?

The Court: Well, yes, a little bit.

Mr. Gladstein: Now, if the Court please, when testimony is being produced that refers to documentary material which it is sought to introduce in evidence a part of the requirement of the law is that sufficient authenticity be attached to the document to permit it to be introduced.

I have never heard of an United States Attorney saying, when a document was offered, "Well, I haven't any objection now but I desire to reserve possible objections later on; that is to say, if I think of (2299) something at some future time I want to reserve the right to move to strike it out," without being required, even by the Court, to indicate the possible ground upon which such a reservation of right to move to strike is made.

Now it seems to me very plain that Mr. McGohey is here toying with possibilities. This witness or other witnesses—

The Court: Well, he has got some competition in that.

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Mr. Gladstein: Well, we are not going to let him toy. We are very serious about this.

The Court: Oh, well, I know.

Mr. Gladstein: We are quite serious.

The Court: You take over the courtroom any time, but I am here running the court, so don't say, as you and Mr. Sacher are apt to do: you insist on this and we are going to do this. You are going to do what I tell you to.

Mr. Gladstein: Well, I am going to remain serious, regardless of what your Honor tells me.

The Court: That is right.

Mr. Gladstein: And one of the things I am most serious about is the very thing that has now happened. That is to say, that we are permitted to go ahead and put on proof with a secret reservation being made all the time (2300) by Mr. McGohey, not indicating the possible ground upon which he may later, at some later point in the proceedings, when it is not possible for us perhaps to obtain the witness who is now here, offer a ground to the Court for striking out a document upon the ground that perhaps that something in it has not been authenticated by the person who prepared it.

It is for that reason that we have the right either at this time, not in anticipation but as to our affirmative, positive case—we have either the right to have testimony from the witness with respect to the document so as to prevent any question of the valid reception in evidence of the document, or at least we ought to have from Mr. McGohey, if he objects to the testimony of this witness, we ought to have from him a forthright and frank statement to the effect that he isn't hiding in reserve any possible claim to be brought out, dusted out and offered to the Court in the future that some technical defect in the authentication or identification of the document entitles him to move to strike it all out at a later point in the proceedings.

I therefore ask the Court, despite the ruling that has been made, and because I am most serious about

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it, and I feel that I am right as to the law, I ask you to require the United States Attorney to state as of record (2301) whether or not his objection to the testimony of this witness is based upon his agreement that nothing that the witness is about to say or has said in reference to authentication of the exhibit before him is being considered by Mr. McGohey as a possible or potential ground for moving to strike the document out.

We don't want to have this case develop in such a manner that Mr. McGohey can say, Well, a proper foundation was not laid and so I move to strike, and then have the Court perhaps say, Motion granted, with nothing else in the record. This is why we want to have this, when it goes into the record, nailed into the record so that no motion can appropriately be made and no order can properly and unlawfully be made to strike from the record that exhibit.

The Court: Do some of your colleagues wish to be heard?

Mr. Sacher: Yes, since your Honor invites it. I would like to observe that the procedure which I have seen here is the most unusual that I have observed in 25 years of practice. No District Attorney and no lawyer has the privilege of making reservations concerning some ultimate attack he may make on an exhibit. Every lawyer, including United States attorneys and district attorneys, (2302) should state at the time an offer is made as to whether he has or has not an objection, and if he hasn't then the exhibit goes in, subject to no subsequent qualification or striking.

The Court: Mr. Crockett, would you like to say something?

Mr. Crockett: I have only one comment to make, your Honor. I have listened very carefully to the proceedings during the whole time this was going on and what surprises me, frankly, your Honor, is the frequency with which Mr. McGohey will make an objection and the Court will sustain the objection without asking Mr. McGohey to state the reasons

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for his objection or giving us an opportunity to suggest to the Court the reasons why the objection should be overruled.

The Court: Well, the amazement of counsel amazes the Court.

Mr. Crockett: Well, aside from that comment I stand and my clients stand by the arguments that have been made by the other attorneys.

The Court: Well, you know it is an extraordinary thing to sit here and listen to you lawyers keep telling me about this and that and the other thing—"Never heard of it before" and "So strange," and so on. I say it happens every day, not only in this court but in other (2302-A) courts. And I sustain the objection.

Mr. McCabe: Your Honor, will you look over to this side to see whether I have something to say?

The Court: Mr. McCabe, I am sorry.

Mr. McCabe: Unaccustomed as I am.

The Court: I did not mean any discourtesy. But if you would like to please me do not repeat what either Mr. Isserman or Mr. Sacher and Mr. Gladstein have said.

(2303) Mr. McCabe: No, I will leave to them the authorship of the splendid words which they have uttered, and I shall adopt them.

But I would like to call attention to the fact that the presence of this witness on the stand I think has some bearing on a phrase which your Honor used this morning and used on several occasions, and that is as to speculative data. Does your Honor recall that phrase?

The Court: Yes. I think I used it in a different connection than the authentication of the figures in exhibits.

Mr. McCabe: This witness, I believe, was called to demonstrate that some of the data used by the witness who preceded him on the stand was not speculative, and I say that practically all of the data which we have introduced so far from being speculative is entirely factual, capable of corroboration and, in fact, impossible of denial.

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The Court: Well, almost any phrase or word that anyone uses can be twisted into meaning just the opposite to what meaning is intended. I recall no comment by me to the effect that any of the data was inaccurate or speculative. It was the conclusions, the processes that are reflected in these charts, with their omissions, with the hiatus that appeared here and there, (2304) leading to conclusions. I do not remember either Mr. McGohey or I indicating that the figures were not properly made up as a matter of mathematics, which is, I take it, the point under discussion. But however that may be, the exhibit is in evidence; it is going to remain in evidence. The reservation that Mr. McGohey made I considered a reasonable and proper one, and there the matter will rest.

Mr. McCabe: That suits me, your Honor.

Mr. Isserman: If the Court please, I would like to offer to prove that if this witness were allowed to answer the question which your Honor has overruled, that he would state that Mr. Storer of the Daily News collaborated in the preparation of the exhibit in question.

The Court: I think he already said that.

Mr. Isserman: Then I will ask him the next question:

By Mr. Isserman:

Q. Did anyone on the Journal American work directly with you in the preparation of Challenge Exhibit No. 20?

Mr. McGohey: Same objection, your Honor.

The Court: Sustained.

Mr. Isserman: If allowed to answer, this witness would state that Mr. Greisman, research director of the Journal American, participated in the preparation of the (2305) survey in question.

Mr. McGohey: I object to the form of the question and move to strike it, your Honor.

Mr. Sacher: It is not a question. It is an offer of proof.

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The Court: I don't think I will strike it. There is no answer.

Mr. Sacher: This is an offer of proof.

Mr. McGohey: Oh, I am sorry, I didn't know that I thought he was stating a question.

The Court: Very well.

Q. Mr. Rosen, I call your attention to the section of the survey, Challenge Exhibit 20, which is the third page or the fourth page from the lefthand cover, entitled "New York City Market Analysis, Sources and Methods," and ask you whether that page accurately sets forth the sources from which the market analysis, Challenge Exhibit 20, were obtained, and the methods used by you and your associates in preparing the same? A. Let me see the pages.

(Mr. Isserman indicates pages.)

The Witness: These pages (indicating)?

Mr. Isserman: Yes, indicating the pages I have referred to.

The Witness: Yes.

(2306) Q. Now, in the preparation of the survey in question, did you use persons equipped to handle census data? A. Did I use census data?

Mr. Isserman: May the question be repeated, please?

(Question read.)

A. Yes.

Q. Now I call your attention to a page in the analysis entitled "Manhattan 3 Lower East Side," and ask you whether the designation "Lower East Side" descriptive of a map and material on that page was a designation taken from the census data with which you and the persons under you worked? A. The delineation of that area of Lower East Side was not taken from the census data. The census data came to us in tracts. Tracts are smaller areas than this. We, the New York newspapers, cooperatively about 25 years ago broke New York City into 116 districts.

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Each of these districts was a combination of whole census tracts. The Lower East Side, this district that you refer to, is a combination of census tracts compiled by the New York newspapers; the combination of tracts is something that was made up by the New York newspapers. The information from each tract is taken from the census added together to get this information.

Q. Now, is that true of the other charts in the (2307) analysis relating to Manhattan and the Bronx which have such place names as the one just given, Lower East Side, Hell's Kitchen, Chelsea, Plaza section, Queensboro Bridge, and so on? A. Yes.

Q. And what was the principle by which these census tracts were gathered into these districts with the place names which you have indicated? A. Well, there are two factors involved there: Usage, I guess—well, usage. For instance, coming back to Lower East Side, one of the factors involved was what people considered was the Lower East Side. We would not take any part of Hell's Kitchen and call it Lower East Side.

The second part of the decision in setting up these areas was homogeneity of the population in each area. For instance, we expected that Lower East Side would be packaged a little different from Chelsea; that Chelsea would be a little package, based on population characteristics, different from the Plaza district, and so on.

Q. And did you consider in breaking New York into these 116 districts with place names—did you consider the size of the area in relation to the accuracy of the situation it would reflect? A. The size of each area depended mostly on factor No. 1, which was usage. Lower East Side was a section that was commonly considered (2308) as portrayed here (indicating). If we combined Lower East Side and then some other area, it would be two sections in common usage. On the other hand, if we divided Lower East Side in half we would be arbitrary in taking something that—we would have to create something. There were no definite limitations in the size of the areas. They range from very small to very large. They were purely arbitrary selections on the basis of trying to get the homogeneous unit of families living in that area which were of a certain characteristic, either income or racial characteristics.

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Q. When you used the word “arbitrary” is that in relation to size? A. No, to homogeneity.

Q. In other words, the guiding factor was homogeneity, is that correct? A. Yes. There are two factors. I said first was common usage in the name. When anybody talks about Williamsburgh they think of a certain area. We could not go beyond the Williamsburgh area and call it Williamsburgh because it wasn’t considered Williamsburgh by the people living there. So we had to limit it in that respect; and the second factor, as I said before, was the factor of homogeneity. Of the two homogeneity probably was the most important.

Q. Now, will you tell us in what sense you used the word “arbitrary” just a moment ago? (2309) A. Well, we had—we just sat around and decided what we would do. I mean, we had no other basis except our opinions. I mean there was nothing based on the census or other already established fact from which we based our definitions.

Q. In other words, in determining area you had no prior designation of any kind as to the limits of any particular area? A. That is right.

Q. In determining its homogeneous nature, did you or did you not rely on census data? A. Yes, we did.

Q. Now, the chart before you is the Lower East Side. What is the northern boundary of that? A. East 14th Street.

Q. And in your consideration of the Lower East Side your group of research persons did not consider that the area above East 14th Street should be attached to the Lower East Side? A. There are two points about that. It may be possible that some areas above 14th Street could now be classified as Lower East Side. There are two points against defining that. One is that people above 14th Street might not consider they are living in the Lower East Side; business people located above 14th Street might not consider that the Lower East Side; and the second factor and the more important is that for comparison purposes—work like this has been done for (2310) three successive decades—we would rather have the definition of the areas the same as they were in 1920 and 1930.

Q. Now, just north of the 14th Street line there is a Stuyvesant Square section. You are familiar with that, aren’t you? A. Yes.

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Q. And would you say from your research experience in connection with this market analysis and your experience generally, that that Stuyvesant Square section is homogeneous to the Lower East Side, or does it have special characteristics? A. You are talking about the Madison Square Section?

Q. No, Stuyvesant Square. A. Oh, Stuyvesant Square? Is there a district—

Q. I don't know if you have a section by that name but I am referring now to the actual area around Stuyvesant Square. A. Your question is, do I think that the characteristics of that is like the Lower East Side?

Q. Yes. A. I don't know.

Q. You have no personal knowledge of that? A. No.

Q. Now I call your attention to the fact that on each of the sections designated by numbers in the Atlas and place names—let me go to the Lower East Side again, page 3 or plate 3—there is on the lefthand corner a map in colors and on the righthand side of the map a (2311) tabulation of various figures and an explanation of those colors; and I ask you now if you can tell me from what source the figures given in the tabulation and the items explaining the colors on the map were taken? A. Only from the tabulation, that is all you want me to talk about now?

Q. That is right. A. That is taken from the Census of Population and Census of Housing 1940.

Q. Now I call your attention to the descriptive matter which appears on the bottom of plate 3, Manhattan, Lower East Side, and which appears similarly on other plates in the compilation, and ask you the source of the descriptive matter which purports to describe the area pictured on the map. A. The descriptive material at the bottom is a short one or two-paragraph description of the general characteristics of that particular district, and it was written by one of the four people who were involved in the compilation of the book, and was based on the census material which is in the table and on our own knowledge of the district at the time.

Q. Now, can you tell us the purpose for which the exhibit, the market analysis, Challenge Exhibit 20, was prepared by the New York Times and three other newspapers? A. Why we produced this book?

Colloquy of Court and Counsel

Q. Yes. A. We produced it as a contribution to (2312) manufacturers and retailers, real estate people, banks and other businesses in New York and in other parts of the country to give them a better understanding of the characteristics of New York and the different sections of New York.

Q. And can you tell me how the market analysis, Challenge Exhibit 20, is used by these persons to whom you have just referred?

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

The Court: Sustained.

Mr. Isserman: Your Honor, the purpose of this question, or—does your Honor want to hear me on it first?

The Court: I will hear you, but it seems rather simple. If there is something you wish to add I will listen to it.

Mr. Isserman: Yes, just a sentence or two to the effect that the purpose of this question is to indicate reliance of persons who use the market analysis, including manufacturers and retail establishments and advertisers, on the data in it for business purposes in their daily work.

The Court: Well, I don't consider that proper proof of the accuracy of the document.

Mr. Isserman: I would like to make an offer of (2313) proof, if your Honor please.

Mr. McGohey: Your Honor, the witness is being asked what use somebody else makes of the document.

The Court: I know.

Mr. McGohey: Obviously he is incompetent to testify.

Mr. Isserman: He knows what use they make of it.

The Court: I say, no matter who used it, that does not prove it was made up accurately.

Mr. Isserman: If your Honor please, there is a line of cases which holds that compilations which are used in business from day to day, which include studies and market reports and price quotations, matters of that kind, and which are generally relied

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upon in the community, are evidentiary, even though secondary in nature. And it is under those cases that I am seeking to show the purpose—

The Court: I am sorry that I let you withdraw Mr. Wilkerson, and I will not extend that privilege to any other witness after this one. You will go back to Mr. Wilkerson, and we will finish with him.

Mr. Isserman: Except that I have one official of the Consolidated Edison Company here that I would like to call.

The Court: That official will not be called until after Mr. Wilkerson is finished.

(2314) Mr. Isserman: I will so advise him.

Now, I would like to offer to prove that this witness if allowed to answer this question would answer that manufacturers in connection with their business used the Market Analysis to determine the areas into which they sent their salesmen; that chain retail organizations use it as an aid to determining the location of retail stores; that persons going into business use it for the purpose of determining the area in which they should locate the particular business they have in mind; that realtors and persons otherwise interested in real estate or mortgages use it in order to make appraisals and to get the character of the neighborhood and to get an estimate of the rentals of the particular areas.

Mr. McGohey: I would object to such proof as I have objected to it before.

By Mr. Isserman:

Q. Now just one more question, Mr. Rosten: Your testimony as to plate 3 designated Lower East Side is equally applicable from the standpoint of the method used in preparing the plates and the descriptive material and getting the data for all the other plates in the book, is that correct? A. Yes.

Mr. Isserman: Cross-examine.

Mr. McGohey: I have just one question.

(2315) Will you wait just a minute, please, sir?

The Witness: Surely.

*Harry Rosten—for Defendants on Challenge—Cross,
Redirect*

Cross examination by Mr. McGohey:

Q. Mr. Rosten, you testified that these areas were made up on the basis of some standard of homogeneity. A. Yes.

Q. You don't mean by that, did you, that everybody in a given area was exactly alike? A. It is possible. Of course not.

Q. And isn't it a fact that the book shows for the various areas the various types of people that live in that neighborhood and those areas? A. Certainly.

Q. And the various rental standards that are in those neighborhoods, and in some cases the various races? A. Yes.

Mr. McGohey: I have no further questions.

Mr. Sacher: I have one question, if I may, your Honor.

Redirect examination by Mr. Sacher:

Q. What did you mean by the word "homogeneity," please? A. Well, groups of people, I suppose, that in the aggregate, when you count them, in the aggregate are more like to each other than another group that is also a homogeneous group. I am afraid that is not a very good answer.

Q. Now, do I understand you correctly to say that the (2316) descriptive names that you have given to the various areas in this exhibit 20 have been in use for 30 years; is that correct? A. I am not sure whether it is 30 years or 25 years or so, because I was not involved in the preparation of these before this one. I know that there was one other book before this based on the 1930 census, and some kind of similar thing was done based on the 1920 census, but I am not sure whether it was exactly like this.

Q. Has the area that you have designated as the Lower East Side been changed as compared with prior books which were issued of the same kind on the basis of the 1920 or 1930 census? A. The Lower East Side, as far as I know, has never been changed.

Mr. Sacher: That is all.

Mr. McGohey: No further questions.

Sherman M. Hall—for Defendants on Challenge—Direct

Mr. Isserman: No further questions. Thank you, Mr. Rosten. That is all.

(Witness excused.)

Mr. Isserman: Now, if the Court please, I have outside Mr. S. M. Hall of the Consolidated Edison, and because of your Honor's ruling I would ask that he be excused for today to return tomorrow?

Mr. Gladstein: I would like to ask your Honor to please reconsider that, for this reason: Mr. Hall (2317) will be testifying, as I understand it, concerning an exhibit which—

The Court: If I thought we would be finished as quickly as Mr. Rosten I might let you bring him in.

Mr. Isserman: He might even be shorter, your Honor. He is only a short witness.

The Court: All right, I will reconsider it and let him come in.

Mr. Isserman: Would you call Mr. Hall, please.

Mr. Gladstein: We may have short witnesses in the future but not tall ones, is that it, your Honor?

SHERMAN M. HALL, called as a witness on behalf of the defendants on the challenge, being first duly sworn, testified as follows:

Direct examination by Mr. Isserman:

Q. Mr. Hall, where are you presently employed? A. Consolidated Edison Company of New York, Incorporated.

Q. And how long have you been employed by that company? A. 21 years.

Q. What is your present title with the company? A. Staff assistant.

Q. How long have you had that title? A. Two and a half years.

Q. What title did you have before that? (2318) A. Assistant director of economic research.

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Q. And as assistant director of economic research did your duties involve the compilation and editing of Challenge Exhibit 87 in this case, which is entitled "Consolidated Edison Survey of the New York City Market"? A. They did.

Q. Did you have any prior experience at the time you made this compilation in the same work? A. I supervised the preparation of a similar survey in 1936 for the Borough of Brooklyn for the Brooklyn Edison Company.

Q. And what was your connection with the survey which is in front of you? A. I was in charge of the compilation of this survey.

Q. I call your attention to page 7 of the survey running over to page 8 entitled "The Facts Behind the Survey," and ask you if that page accurately states the sources from which this survey was obtained? A. That is a summary of the sources from which the data were obtained.

Q. I call your attention also to page— A. In addition to other things.

Q. You say in addition to other things? A. Yes.

Q. Such as— A. Mentioned on the page.

Q. You mean on particular pages there will be some reference to certain other sources—oh, I am sorry, (2319) I didn't get your answer. What were you referring to when you said in addition to other things, Mr. Hall? A. Page 7 includes sources of the data, census tracts, health area, map presentation and other things.

Q. But the statement does include the sources which were relied upon? A. It is a summary of the sources, that is true.

Q. Now, I call your attention to the foreword, and ask you if that is a fair statement of the purpose for which the survey was issued? A. That states the purpose, correct.

Q. And that appears on the inside of the first page of the book, does it not? A. It does.

Q. Now I call your attention to page 12 of the exhibit and show you a series of compilations of figures on population, population by race and nativity, population by age groups, and ask you whether the material contained in the tabulations on that page were obtained from census data? A. The material on this page and the data were taken from

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the 1940 census with the exception of the estimates shown for the years 1941, 1942, and 1943.

(2320) Q. And those estimates appear in the box labeled "Tabulation 1900-1943" in the upper lefthand corner of the page, is that correct? A. That is true.

Q. Now can you tell me on what basis those estimates were made? A. They are routine estimates based essentially on the number of electric bills rendered.

Q. And your company is engaged constantly in estimating the population of New York City? A. That is routine operation with us.

Q. And done regularly? A. Done regularly.

Q. I call your attention also—

Mr. Isserman: I just have one more, your Honor.

Q. —to a chart entitled "Manhattan-average monthly rent of occupied dwellings," page 23, and call your attention first to the legend describing the colors used on the map, which indicates the source, "U. S. Bureau of Census 1940," and ask you if that indicates that the rentals were taken from that census as shown on this map? A. Most all of the rental values shown on the map were copied directly from the census publications, with the exception of one or two places where large apartment houses have been built since the census was taken, and in those cases we made our own estimates.

Q. And I call your attention to the statement in the (2321) lower righthand corner of page 23 reading as follows:

"Values for tracts 2, 4, and 162 have been adjusted to account for Vladeck and East River houses which were completed after the 1940 census was taken."

Is that the adjustment you refer to? A. That is correct.

Q. Was that adjustment made on the basis of the information the company obtained as to the rentals of those areas? A. It was based on information obtained from these projects themselves.

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The Court: From the what?

The Witness: From the housing projects themselves, the management of these projects.

Q. Now I ask you whether the notation which I have called your attention to in respect to Estimate of Population and the notation in respect to the Vladeck houses is illustrative of the type of adjustment which is made wherever such notes appear throughout the book. If that puzzles you let me put it another way. A. It puzzles me.

Q. Isn't it true that wherever an adjustment was made from the 1940 census figures in the compilations which appear in the book in front of you, that there is a note explaining the nature of the adjustment? (2322) A. I would say in the majority of cases that is true. I can't recall, four years ago, whether we had one or two exceptions.

Q. And whenever the adjustment was made it was based on data which you obtained— A. That is right.

Q. —and made a calculation from? A. Right.

Q. I call your attention to certain maps which appear in the pocket in the rear of the book, and particularly to a map of Manhattan and to a map of the Bronx, and ask you if those maps, which purport to show rentals in color, are taken from the figures in the book applicable to the various sections described in the book? A. The basic data for these two maps mentioned were taken from publications of the United States Bureau of the Census.

Q. And where adjustments for rental have been made in the sectional maps in the exhibit itself, are those adjustments reflected on the over-all map which appears in the map pocket? A. The same type of adjustments appear on this map (indicating).

Mr. Isserman: Cross-examine.

Mr. McGohey: May I have this paper marked?

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

Harry Rosten—for Defendants on Challenge—Cross

(2323) *Cross examination by Mr. McGohey:*

Q. Would you look at this booklet that has just been marked Government's Challenge Exhibit S for identification, Mr. Witness (handing)? A. I have looked at it.

Q. Is that a book put out by the Consolidated Edison Company? A. It was.

Q. Are you familiar with it? A. No.

Q. Did you have anything to do with its preparation?
A. No, sir.

Q. Do you have any occasion to use it in your work?

A. No, sir.

Q. You are not familiar with it in any way? A. No, sir.

Q. Very well.

Mr. McGohey: Will you pardon me for just one minute, please?

Q. Now with respect to Defendants' Challenge Exhibit 87 which you have before you, you described some rental areas that are indicated on the maps, I think you said, by various colors. A. Right.

Q. Those rental areas are based on average rentals in the areas, are they not? A. They are copied from census publications, and, of course, the Census Bureau, determines the figure in their own manner.

Q. Yes; but as used in that exhibit they do not purport to represent the rental for each house in the area, do (2324) they? A. The Census Bureau calls them the average rent in that block.

Q. Thank you. And that is the sense in which you used them in making up those tables and maps? A. That is correct.

Mr. McGohey: Thank you. I have no further questions.

The Witness (To the Court): May I ask a question, sir?

The Court: What is that?

(The witness spoke to the Court out of the hearing of the reporter, and off the record.)

(Witness excused.)

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(Mr. Isserman spoke to the Court at the bench out of hearing of the reporter and off the record.)

Mr. Isserman: Is the witness excused now? I am not quite clear.

The Court: Yes, he is excused.

Mr. Isserman: Well, then—

The Court: You go right on with Mr. Wilkerson.

Mr. Isserman: Yes. We are through with the interruption.

The Court: He (referring to witness Hall) said he would like to come in and sit around for a little while and I told him he could do it.

(2325) Mr. Gladstein: Does your Honor wish to take a recess at this time?

The Court: Yes. This is the time for our 3.30 recess.

(Short recess.)

DOXEY A. WILKERSON, resumed the stand.

Mr. Gladstein: At the noon recess, your Honor, I believe I had offered in evidence, and I do not recall whether a ruling has been made on it, the Exhibit 90 for identification. I believe that is the one. I now offer it.

The Court: Yes, I have a little memorandum in my notes about Exhibit 90, indicating that I didn't understand it. And I take it that you are going to bring that up right now.

Mr. Gladstein: Yes.

Mr. McGohey: If your Honor please, before it is received in evidence I should like to have Mr. Gordon ask some questions about it.

The Court: Very well.

Mr. Gladstein: About the exhibit?

Mr. McGohey: Yes.

The Court: Yes.

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Preliminary Cross*

Mr. Gladstein: All right. Do you have a copy of it, Mr. Wilkerson?

(2326) The Witness: I do.

Preliminary cross examination by Mr. Gordon:

Q. Mr. Wilkerson, you have noted on Exhibit 90 for identification four communities in Westchester County; is that right? A. That is right.

Q. Yonkers, Scarsdale, Bronxville Village, and Larchmont Village. A. Yes.

Q. Are those the same communities that you have listed on Exhibit 89? A. Those four are listed on Exhibit 89 and three others are also listed on Exhibit 89.

Q. I think you said that you took the definition of the various towns and villages as being the political subdivision? A. For purposes of this particular exhibit—

Q. Which one? A. Exhibit 90.

Q. Yes. A. Yonkers data refer to these data listed in the 16th Census for the community of Yonkers.

Q. Yes. A. And that is true for the other three communities also.

Q. Now all the census data then is based upon the political subdivision? A. As recognized by the United States Census.

Q. Now take Exhibit 89 in which you have made reference to jurors taken from six selected petit jury panels. Are those jurors also referred to by political subdivisions? A. They are.

(2327) Q. And where did that information come from? A. That information is based upon the boundaries of the communities or community as shown on a map that is generally in use in this area designating the boundaries of these communities.

Q. By that do you mean that you took the residence of the juror and plotted it on a map to see where he lived?

A. When that was necessary. In most cases it was not necessary because the juror gave his residence as Yonkers, or as Scarsdale, Bronxville, or Larchmont.

Q. That was the point that I had in mind. Now, did you take into consideration the fact that the Post Office

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of Scarsdale serves not only the village of Scarsdale but, as well, part of New Rochelle, part of Yonkers, part of Greenburgh, and part of East Chester? A. We did that. And the point of your question I readily understand. We had, for example, many jurors who listed as their Post Office one of these communities whose actual address we found, through examination of a street map, for the communities, was in a neighboring community, hence we were guided in each case. We checked each case.

Q. Well, that is what I want to know. A. We were guided in each case by the street address of the juror which we located on a map of the community.

Q. Well, now, did you do that with respect to all (2328) of these areas? A. The four areas on Exhibit 90?

Q. I am talking about 89 which lists seven areas plus another one which is not defined. A. We did that on all. You are talking about our table here, P-4. Yes.

Q. Yes. A. Yes, that is right.

Q. Every juror who lived in Westchester, you looked up his address? A. That is correct.

Q. And you took into account the fact that Bronxville includes Yonkers, New Rochelle and East Chester? A. That is correct.

Q. What does Larchmont include? A. I don't know what—what do you mean, what does it include? There is a community known as Larchmont.

Q. Well, does the Post Office include any other district? A. I do not know what the Post Office includes, and that was of no major significance to us because we were concerned with street addresses.

Q. Then I take it that anybody who gave Scarsdale as his address and actually lived in, say, Greenburgh, would be included under what on Exhibit 89? A. We made no analysis of the community of Greenburgh, and I don't know the community of Greenburgh. However, this I can say, if he gave as his address a street address which is within the boundaries of Scarsdale, whatever may be the Post (2329) Office serving that area, he was located in the community where he resides.

Q. And what was the map that you used for that?

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Mr. Gladstein: We are coming to that.

A. The map is to be placed here shortly.

Q. I take it the map has not been identified among the exhibits which you have used? A. That is right.

Direct examination continued by Mr. Gladstein:

Q. Now Mr. Wilkerson, is there a correlation between 89 and 90 that should be pointed out to the Court? A. I think there is, Mr. Gladstein.

Q. Would you do that, please?

Mr. Gladstein: Do you have one of these exhibits, your Honor?

The Court: I have them both before me.

Mr. Gladstein: Very well.

A. Exhibit 89 points out that three communities have a much wealthier incidence of jurors on the panels here analyzed, the communities of Scarsdale, Bronxville and Larchmont, all of which are relatively small communities, as indicated by the data on Table P-4 or Exhibit 89; that those three communities get a preponderance of jurors in relation to their population, and that larger communities, Yonkers, New Rochelle, Mount Vernon, White Plains, which were the ones we used here for comparison, (2330) with populations ranging from 28,999 to more than 97,000, as compared with the range in the other three communities, from 4,000 to almost 9,000—that the four larger communities have relatively few jurors, despite their very much larger population.

And we sought to find certain factors that would give us an index into the nature, a partial index into the nature of those three communities where the incidence of jurors is greatest in comparison to at least one of the other communities, the largest one, the City of Yonkers. And that is the significance of Exhibit 90.

I would point out, from the information on Exhibit 90, that whereas the median number of years completed in school for the people who live in Yonkers is 8.7 years, which means that half of the people have completed more

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and half have completed less than 8.7, the median for the small community of Scarsdale is 13.5 years for male residents and 12.4 years for female residents; the equivalent approximately of one year in college for one year in college and more for half of the population of Scarsdale. That is of the men, and more than high school for more than half of the women. The corresponding numbers of years school completed in Bronxville is 12.7 and in Larchmont 12.4

(2331) It is also important to point out here an item C with its sub-totals on Exhibit 90 makes possible this comparison; that in Scarsdale we are dealing with a community more than half of whose gainfully employed residents are executives or professionals, as we have here defined those terms in our analysis. In the community of Bronxville 61 per cent. I need to qualify that statement a little bit. Of those gainfully employed persons, excluding domestic servants in the community, 57 per cent in Scarsdale are executives and professionals, 61 per cent in Bronxville are executives and professionals, and 46 per cent in Larchmont are executives and professionals.

I call attention to this because this, of course, is a rather unusually high proportion of executives and professionals. You will note for the Southern District as a whole executives and professionals together comprise just about one-fifth of the population. But here it is near one-fourth, or rather, one-half and more.

In the larger community of Yonkers, however, these categories comprise, again bearing in mind that we are eliminating domestic service from the calculations, 24 per cent; whereas manual workers, other than domestic servants, comprise 48 per cent of the gainfully employed population in Yonkers. They comprise only 14 per cent (2332) of the population gainfully employed in Scarsdale, 14 per cent in Bronxville, and 19 per cent in Larchmont.

These data, in and of themselves, indicate something about the characteristics of these communities, because it is rare communities in the Southern District or any place else where you find such large proportions of executives and professionals. A statement which can readily be borne out by recourse to the census data that we are here utilizing.

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And it tends to fit in with the remarks made by one of the defense attorneys towards the close of the morning session. As is generally known, these three communities are relatively exclusive, elite communities, where for the most part—

Mr. McGohey: If your Honor please, I object to that characterization by the witness.

The Court: Yes. Sustained.

That is what I told you yesterday not to do, go rambling along and bringing in argumentative matter.

Q. Have you completed the correlation of the two tables, Mr. Wilkerson, or is there something to add? A. I think there is something to add.

Q. What about the domestic servants? A. That is just what I am about to call attention to. You will note in the—

The Court: The latter part of the answer (2333) will be stricken.

Mr. Gladstein: When you say “the latter part” you mean the last sentence, your Honor?

The Court: Yes. The part that Mr. McGohey objects to.

Mr. Gladstein: Except it is not clear in the record. I think he said “characterization.” That is to say, he was referring to a couple of adjectives in the last sentence.

The Court: It is the characterization that I am striking. That is right.

Mr. Gladstein: All right.

A. (Continuing) You will note in the large community of Yonkers, from which you will remember proportionately few jurors are chosen in relation to population, domestic servants comprise five per cent of all gainfully employed persons. In the community of Scarsdale, however, domestic servants comprise 31 per cent of the population. In Bronxville, 24 per cent. In Larchmont Village, 19 per cent.

There is a significance to this figure which is not readily seen perhaps and to which I should call attention. You

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have observed it elsewhere, and I think I should mention this by means of interpreting this figure.

In wealthy areas one finds a much higher proportion of domestic servants generally residing than he does in (2334) areas which are relatively lower in income than what I am calling wealthy residential areas. They represent a—

Mr. McGohey: If your Honor please, I object to this line and I move to strike this last observation.

The Court: Strike it out.

Mr. McGohey: About wealthy districts and how many people live there. There is no basis in fact for that in the record.

The Court: Motion granted.

Q. These domestic servants are in part living-in help who reside in and on the premises where they work as domestic servants? A. That is correct.

Mr. McGohey: I object, your Honor.

The Court: How does he know whether they live in?

Mr. Gladstein: You know it, your Honor, I know it. Everybody knows that a person who is a domestic servant living in the residence of an executive, that he or she is there because they are live-in help. That is no secret.

The Court: I don't know it at all and I don't know what you mean by it being a secret. How am I to know when they live in and when they don't live in?

Mr. Gladstein: Does your Honor have—

The Court: There may be less domestic servants now than there were and lots of young married people (2335) do their own work and all that. But what has that got to do with it? You said that everybody knows they live in; I say everybody doesn't know, and I am one of the ones who doesn't know. And I don't really think that the witness knows.

Mr. Gladstein: Has your Honor ruled on my offer? Is 90 admitted? I do not recall.

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The Court: If all you mean is that certain inferences can be argued from these data that you have here, that is a perfectly proper thing for you to do. The objection is that the witness should not do the arguing but leave that for counsel to do. He is supposed to be testifying to facts.

Mr. Gladstein: Very well.

Does the record show that 90 is in evidence?

The Court: No, it has not been marked yet but it will be. Here it is (handing). This is the original. It may be marked now.

(Defendants' Challenge Exhibit 90 for identification received in evidence.)

Q. Now you made reference a few moments ago to a map that was prepared in connection with the last exhibit or two dealing with Westchester; is that right, sir? A. That is right.

Mr. Gladstein: Will you, Mr. Clerk, mark this (2336) for identification, please.

(Marked Defendants' Challenge Exhibit 91 for identification.)

Q. Now, Mr. Wilkerson, calling your attention to Exhibit 91 for identification, is that the map to which you have reference? A. That is the map.

Q. That shows the residences of certain Westchester jurors, is that so? A. That is right.

Q. Briefly, and in a general way, was it prepared in a manner similar to that which you have described in reference to other maps already in evidence? A. It was prepared in precisely the same manner.

Q. And each of the pins represents the location of the residence of a juror on one or another of the panels covered by this map, is that right? A. That is right.

Q. Which are the panels that were covered? A. The January 4, 1949, panel, and the first listing for the January 17, 1949, panel.

The Court: So the recital there "All January 1949 panels" is to be understood with that exception

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of the second drawing of January 17th—that is not included.

Mr. Gladstein: That is right. It was prepared prior to the coming out of the second panel.

(2337) The Court: That is right.

Mr. McGohey: Might we have the exhibit marked accurately to reflect that, if your Honor please.

Mr. Gladstein: I think so.

The Court: You can just take a pencil, Mr. Gladstein, and cross out the word "A." Maybe it is that typewritten part that may serve the purpose.

Mr. McGohey: Your Honor, I suggest that we ought to have the dates in January that relate to the panels.

Mr. Gladstein: All right. I will write them right on.

Do you want to give them to me, Mr. Wilkerson?

The Witness: January 4th.

Mr. Gladstein: (Writing) Yes?

The Witness: And the first listing for January 17th.

Mr. Gladstein: I have written on here the numbers "4 and 17 (after first listing)" so as to indicate the two panels in January 1949 that are involved.

Q. Have you checked this for accuracy, Mr. Wilkerson?

A. I have.

Q. Do you have any tabulated data concerning the map?

A. No.

Q. Will you point out to the Court where the concentrations (2338) of pins are to be found? A. Inspection of the map indicates that the pins in the community here designated, which is Bronxville, tend to cluster more than they do, let us say, in this area (indicating), which is Yonkers. The same is true with this very small sample for the community of Larchmont. And it is true, by and large, for the community of Scarsdale.

It should be pointed out here, I think, Mr. Gladstein, that this is a small sample pictorial representation which, if based upon a larger sample, would provide much more striking clusters.

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Mr. McGohey: I object to that, your Honor, and move to strike it out.

A. We have—

The Court: Well, as a matter of fact, they don't look like clusters at all to me. They seem to be very well distributed.

Mr. Gladstein: May I suggest that your Honor use the magnifying glass that I provided you with the other day? Because I have no trouble at all in seeing quite a little cluster within the confines of Bronxville, quite a cluster here in the little area of Larchmont, in fact, a very distinct cluster in Scarsdale, and very little in Yonkers. And although this is true, that you do not find on this map the kind of a proximity (2339) of pin on pin as you do in Parkchester or as you do in portions of the 17th Congressional District in Manhattan, that simply is because the houses are closer together in Manhattan and in Parkchester.

The Court: There is a lot of undeveloped territory around there.

Mr. Gladstein: Yes, where there aren't any houses.

The Court: That is right.

Mr. Gladstein: That is right. And where there aren't any houses there are spaces between the pins. But where you have houses you will find the pins are clustered in Larchmont, Scarsdale and Bronxville. But you don't have a cluster—

The Court: In between those area is where most of the undeveloped land is. But, anyway, I can see it, and you have got it in evidence.

Mr. Gladstein: Yes.

The Court: And whatever inferences are to be drawn is just a matter of argument. And I think that is what Mr. McGohey's objection is too.

Mr. McGohey: Well, a little sharper than that, if your Honor please. My objection is to the testimony or to the statement made by the witness that this was a small sampling and that if something

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else had been done (2340) another result would appear.

The Court: That is right.

Mr. McGohey: That is what I am moving to strike.

The Court: I grant that motion.

Mr. Sacher: May I just ask your Honor to permit the witness, before you strike it, to state the basis for that? Because I think it is the statistics in prior exhibits that underlie that statement, and see if that is so. If not, I will consent.

The Court: Mr. Sacher, it is just a matter of argument. I can see myself, without his telling me, that if you multiply the number—

Mr. Sacher: I think you are right.

The Court: —of panels you get exactly the same thing in the others; you have more pins in those places.

Mr. Sacher: Except as a poker or pinochle player would say, “You get it in Spades.”

The Court: Get it in what?

Mr. Sacher: In Spades.

The Court: Oh. Well, I used to play pinochle but I have forgotten about it. Maybe I ought to take that up again some day. It was a pretty good game.

Q. Now I want to call your attention, Mr. Wilkerson, (2341) to a little row of—as I count them—six red pins at the extreme top of this map, No. 91 for identification, and I will ask you to tell the Court what they represent.

Q. This part reproduces only the lower part of Westchester and the pins at the upper margin are Westchester jurors who live in areas that are not shown on this particular map.

Q. That is, they are north or above the upper extremity or northern extremity of the present map, as shown on 91 for identification? A. Yes.

Mr. Gladstein: I offer it in evidence, your Honor.

Mr. McGohey: Will you excuse me just a minute?

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(Defendants' Challenge Exhibit 91 for identification received in evidence.)

Mr. McGohey: If your Honor please, I would like to ask counsel on the record, I take it there will be no objection to allowing us to make a photograph of that at the end of the session?

Mr. Gladstein: None at all. We have the same reservation to move to strike the photograph if you do not provide us with a copy, Mr. McGohey.

Mr. McGohey: You make your motions and reservations, and I shall make mine.

(2342) Mr. Gladstein: I thought it was about time we got a reservation once in a while.

The Court: Mr. Gladstein, you were very accommodating that way, and I appreciate it. That is all right.

By Mr. Gladstein:

Q. Now, earlier today, Mr. Wilkerson, we had occasion to mention the term "health areas." Do you recall that?
A. Yes.

Q. Is that a term to which there is attached a definite or particular meaning? A. Yes.

Q. Is there a place where we can find some official definition of that expression? A. There is.

Q. Where? A. In the United States, the 16th Census, volume on Population and Housing and Statistics for Health Areas, New York City.

Q. Would you be good enough to read that definition? I assume it is a brief one. A. It is.

Q. Will you read that, please, into the record? A. "Health Areas"—I am reading from page 1 of Challenge Exhibit for identification—

Q. It is only in for identification? A. It is so marked.

Q. And that is a document that was used in connection with the preparation of your testimony? A. That is right.

(2343) Q. It is an official Government publication, is it? A. It is.

Mr. Gladstein: I offer it in evidence, your Honor.

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(Defendants' Challenge Exhibit 10 for identification received in evidence.)

The Witness: The definition of "Health Areas" that appears on page 1 of Challenge Exhibit 10 is as follows:

"Health Areas are small sections, having an average population of about 25,000, into which the City of New York has been subdivided for statistical and local administrative purposes. Although this subdivision into health areas has been more or less arbitrary, several principles have been followed in general in laying them out. Each health area consists of one or more adjacent census tracts. Each health area is designed to include an area fairly homogenous in population characteristics. The health areas are intended to remain unchanged from census to census and thus to make possible studies of changes of the social and economic characteristics of the population within small sections of the city. However, the 1930 and 1940 statistics"

for a number of the areas, the description goes on to (2344) say, there were some changes made.

"Current and long range planning by public and private organizations is facilitated in many ways by the use of health area statistics. In the study of small neighborhoods within the city, health area figures provide a valuable source of factual material, especially when census data are supplemented by records collected by local agencies. Health area statistics may be used as a basis for the computation of race, and of significant indexes of economic and social characteristics of the various sections of the city."

I think it is not necessary to read further, Mr. Gladstein.

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Q. What you have read, with the exception of one point which you indicated you were summarizing, is just what appears in that official document? A. That is right.

Q. Now, do you know whether, say, the Consolidated Edison Company, for example, in putting out its survey, which has been received in evidence here as No. 87, makes use of health area information and health areas in preparation of some of its material? A. It does for the various Boroughs of New York.

Q. Now, did you take any of the health areas of the (2345) Borough of Manhattan and subject them to any study for the purpose of ascertaining where jurors chosen to serve in this court reside in respect of those particular health areas so chosen? A. We did. We made such an analysis for 12 sample health areas in the Borough of Manhattan.

Q. Well, now, what are those health areas, and in what districts are they to be found? A. Health area 41 is in the Congressional District—do you want the specific boundaries?

Q. Do you have a tabulation showing which they are?
A. I do.

Mr. Gladstein: All right.

Mr. McGohey: Pardon me. If your Honor please, I object to this line of questioning on the ground that as far as appears now it can't have any relevance to the issue being tried before your Honor. I do not know what the relevance is between exclusion of jurors and description of health areas and counting of people in health areas.

Mr. Gladstein: I would be very glad to help Mr. McGohey have an understanding of that, and I trust the Court as well.

The Court: Well, he is not asking for assistance. He has made a motion; and if you desire to oppose the motion you may state whatever you have to (2346) urge upon the Court in opposition.

Mr. Gladstein: Yes. Well, now, the witness—

The Court: Don't do it under the guise of helping him.

Colloquy of Court and Counsel

Mr. Gladstein: I thought that might be one of the by-products.

As your Honor already is aware of, the testimony of witnesses establishes, and documents already received in evidence establish that there is in existence such a thing as a health area, which is a particular section or area in a town or community which consists, in turn, of people, houses, about whom there seems to be certain common characteristics, be they racial, be they social, be they economic. These health areas, therefore, in contrast with each other cover the entire Borough are important as a more detailed background of just where the social, economic, racial and other divisions of the community exist. That is to say, the distribution of the people. Even more detailed than within Congressional districts. So that—

The Court: Now, would you let me see that exhibit 10 for a moment? I would like to read that definition.

Mr. Gladstein: Yes.

The Court: And I would also like to see that (2347) Exhibit 87, the Consolidated Edison survey, if you will be good enough to open it to the place where there are some of these health areas described, and let me study it for a moment.

Mr. Gladstein: I call your Honor's attention particularly—and your Honor will want to see other portions of this, I am sure—in Exhibit 87, which is the Consolidated Edison Survey, at page 21, you will notice there is there a numeral of the various health areas in Manhattan, giving the population within each, the native white proportion of the population, the non-white, and other characteristics concerning the population. And your Honor will notice by observing the figures that these areas are homogeneous or tend to be homogeneous in character, as it says, and that there are great and tremendous contrasts between particular health areas (handing to Court).