

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

The Witness: They are not named on the table itself.

Mr. McGohey: May I inquire, are they different from the six panels we were talking about this morning?

Mr. Gladstein: Well, this morning we were talking about panels that went back into 1947.

Mr. McGohey: That is all I am trying to find out.

Mr. Gladstein: Whereas now he is talking about six panels concerning which he had 1948 registration figures—

The Court: That is right. He may indicate which ones they are.

Mr. McGohey: That is all I wanted to find out.

Mr. Gladstein: That is just what he is going to tell you.

The Witness: The panels were those on November 3, 1948; November 15, 1948; December 7, 1948; December 20, 1948; January 4, 1948 and January—

Mr. McGohey: 1949, you mean?

(2507) The Witness: 1949, thank you, and January 17th, the first listing, 1949, representing altogether—well, those were the panels—

Q. Six panels? A. That is right.

Q. Now, are the tabulations made and the data appearing on No. 98 for identification true and correct? A. They are.

Q. And fairly and accurately state what they purport to represent? A. They do.

Mr. Gladstein: I offer it.

Mr. McGohey: Objection.

Mr. Gladstein: Does your Honor wish to see it before passing on it?

The Court: I have it before me, I am studying it. Just a moment.

Mr. Gladstein: Very well, your Honor.

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The Court: What does that expression “major excluded areas” mean?

Q. Mr. Wilkerson, will you answer the Court?

The Court: You have got the Congressional Districts, 18, 19, 22, 23 and 24, and in parenthesis there—

The Witness: Those happened to be the Congressional Districts from which the fewest number of jurors are chosen, so we grouped them together as (2508) the major—

The Court: So you used the designation “major excluded areas” despite the fact that there were some jurors from each of those areas?

The Witness: That is correct. As I said, from which relatively few were chosen.

The Court: I know you say there are relatively few. Now, let me just look through this. This chart has nothing to do with political affiliations, has it?

Mr. Gladstein: No, it does not have any breakdown of Republican Party, Democratic Party or American Labor Party, your Honor.

The Court: I will overrule the objection.

Mr. Gladstein: Very well.

(Defendants’ Challenge Exhibit 98 for identification received in evidence.)

By Mr. Gladstein:

Q. Now, Mr. Wilkerson, what does No. 98 in evidence show that does not appear on its face and requires explanation or being pointed out to the Court for its attention?

A. I am sorry, Mr. Gladstein, but I don’t have a copy of that before me. Could you make one available?

Mr. Gladstein: I will let you have the one that is actually in evidence, Mr. Wilkerson (handing).

(2509) The Witness: Thank you.

Challenge Exhibit No. 98—

The Court: Now, that other one before was the enrolled political affiliations, wasn’t it, those two that were marked 96 and 97 for identification?

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Mr. Gladstein: 97 has no breakdown as to political parties, only 96, and I think in view of your Honor's ruling that No. 97 should be received in evidence, and I will renew the offer if your Honor wishes to look at it now. There is no breakdown as between political party registration on it.

The Court: I have it right before me. Of course, you have no way of knowing other than by the number of votes for such and such a Republican or such and such a Democrat who are the Republicans and who are the Democrats and the American Labor, and so on; you would infer that from statistics of voting as to who voted for this candidate and that candidate—

Mr. Gladstein: No, your Honor.

Mr. Sacher: No, your Honor.

The Court: (Continuing)—plus the date as to enrolled political affiliations.

Mr. Gladstein: Well, it would not be a plus at all. You would simply determine whether a man was a (2510) Republican Party affiliate, a registered Republican, by going to what are called the registry lists—

The Court: I say, and then you get the affiliated Republicans.

Mr. Gladstein: Yes.

The Court: Now, how would you tell who were the other Republicans and the other Democrats and so on? Only by seeing the votes for one candidate or another.

Mr. Gladstein: I don't think so.

Mr. Wilkerson, will you address yourself to the Court's question as to whether the total number cast for a particular candidate was taken into account, and if so—

The Witness: Yes, but not for the purpose the Court mentions.

The Court: Well, what is occurring to me is that conceivably there might be a lot of citizens who

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voted for whom they chose. They might vote for one Republican on one line and for a Democrat on another line, and so on, and it would not seem clear to me that they were Republicans or that they were Democrats or that they were American Labor Party persons; and the whole thing as to politics, reasoning backwards as you seem to do, seems to me so confusing and speculative as not to have (2511) probative force.

Mr. Gladstein: Well, your Honor, we were not doing that.

By Mr. Gladstein:

Q. Would you please do this, Mr. Wilkerson: explain to the Court just what the method was in connection with these figures the Court has mentioned?

Mr. McGohey: What table are we talking about?

The Court: We are talking now about 96 and 97 for identification. Without giving the figures you are to tell me the method you pursued.

The Witness: Is 96 labeled P-3?

Mr. Gladstein: No, P-2, and 97 is labeled P-1.

The Court: That is right.

Mr. Gladstein: 98, which is labeled P-3, has been received in evidence, but that is not the subject of the Court's question.

The Witness: So the question is the table labeled P-2?

Mr. Gladstein: Yes.

Q. What was the method that you used there? A. All right. The Board of Elections has records available for the registration of all voters who enroll for this or that political party; and information concerning the political enrollment of persons chosen (2512) to serve on jury panels was obtained by checking their names on the official lists of enrolled voters by parties in the Board of Elections records. That takes care of column 3, for example—no,

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wait a minute. Oh, I see. This is the one which deals with the vote, pardon me. The comments I just made do not refer to the data of this table; I was thinking of a different set of data. I am sorry, your Honor.

This table—

Q. Which one, please? A. I am talking about the one labeled P-2, and I don't know what exhibit number—

The Court: It is 96 for identification.

The Witness: 96. This table indicates the percentage of the total Congressional vote in each Congressional District cast for the Republican Party in one column and for the American Labor Party in another column. This is—

The Court: Now let me just ask this right there: you see the witness looks and sees that a certain candidate was running for Congress in such and such a district, and somebody votes for him and he is on the Republican ticket. Now how do you know whether it was not a Democrat who voted for him, and, vice versa, in some of the other cases, a Republican voted for a Democrat? You see, you have so many people—perhaps it does not (2513) look that way to politicians; perhaps it does—but there are a great many people who will vote for whoever they think the best candidate is, and it may well be that a person who is a Democrat may vote for a man running for Congress on the Republican ticket, or is that crazy?

Mr. Crockett: Your Honor, I think a reading of the witness's last answer will indicate that he did not say what your Honor seemingly thought he did say. The statement that he originally made with regard to one exhibit he took back, saying he was speaking about the wrong exhibit. He did not repeat that with reference to this—

The Court: Yes, but now he says that he did not get it from the registration lists of those who enrolled as Democrats or Republicans or American Labor Party people but he got it from the Board of

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Elections statistics of who voted the Republican ticket or the Democratic ticket—that is, the Congressional ticket.

Mr. Gladstein: He used both of those sources for different tabulations, your Honor.

The Court: Well, I say whichever one he used for whichever purpose, it does not seem to me that it proves anything. I am going to stick to my ruling.

Mr. Gladstein: Well, let me ask you this, (2514) your Honor: the question is not I trust—the question in your mind is not that we are trying to prove that a Republican always votes for a Republican or a Democrat always votes for a Democrat who is running for office. That is beside the point. We are not seeking to create the basis for inferences to be drawn along that line. That is not the question, your Honor. The question simply is this: if it is an established fact that year in and year out, for example in the 17th Congressional District, Republican candidates are the ones who win, they are the ones who receive the support of the people who live in that area, the people who live in that area are the Republican Party people in Manhattan—

The Court: Why don't you just put in evidence the book that has the statistics of the Board of Elections and let it go at that instead of all this roundabout way of doing it.

Mr. Gladstein: Well, we will offer that too.

The Court: So I will exclude these charts as I have.

Mr. Gladstein: Now I want to ask you about 98. I asked you a question. Do you have it in front of you?

The Witness: 98 is the one labeled P-3, yes.

Q. Now, will you state what that shows? A. Did you ask me what it shows?

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(2515) Q. Yes. A. Exhibit 98 shows that in the Congressional Districts for Manhattan and Bronx 1,386,918 votes were cast in 1948. And in four of those Congressional districts here labeled the Major Excluded Areas, the 18th C.D., 19th C.D., 20th, 23rd and 24th—five C.D.'s, the vote cast was 42 per cent of the total vote cast in Congressional elections in those two Boroughs. However, on the six jury panels here analyzed those jurors who live in these five major excluded areas, the 18th, 19th, 20th, 23rd and 24th Congressional Districts, constitute only 10.2 per cent of the jurors chosen for service.

It shows also that outside of these five excluded congressional districts, and by excluded we do not mean 100 per cent excluded, but we mean those areas from which relatively very few jurors are chosen, that outside of those areas 58 per cent of the vote was cast in Congressional elections of 1948 but approximately .9 of the jurors came from those areas, specifically 89.8 per cent.

Q. Now Mr. Wilkerson, did you make any effort to follow through on the facts shown by this latest Exhibit 98 to ascertain the particular political party breakdown that would be found both as to population and as to jurors in the districts referred to in the No. 98 in (2516) evidence? A. We did. We sought and did determine the number of persons voting, or rather, supporting the several political parties in this '48 Congressional election.

The Court: You don't mean to say that you knew for whom these jurors voted?

The Witness: I have not said anything about jurors at this point, your Honor. I said we determined how many people in these Congressional districts voted the Republican ticket, the Democratic ticket, the American Labor Party ticket.

The Court: For Congressman?

The Witness: For Congressman.

The Court: You are not bringing in the other persons that ran in particular elections, but just the Congressmen?

The Witness: These are Congressional election data only.

Colloquy of Court and Counsel

Mr. Sacher: May I interrupt just a moment, your Honor, to observe that, after all, the statute, Section 1864, speaks only of party affiliation and not for whom a person votes. Therefore, it is of no consequence that Republicans may vote for Democrats, and vice versa. The question is, what is the party affiliation? And therefore the witness's emphasis of (2517) party enrollment I think is the decisive question.

The Court: Well, you see, there is no proof before me that the man who put these things in the box knew anything about any party affiliation. You want me to reason backwards about that.

Mr. Sacher: No. All we want to do first is to establish that there is such a thing as party affiliation, and then to ask him whether he made it. Now, that is not backwards.

The Court: I guess we all know there are party affiliations.

Mr. Gladstein: But we have a right, your Honor, to show both parts of the charge in this case. One is the intent to create and run a system in a certain way, and the other is that that intention when carried out in the system brings about a certain product. Now we are engaged in presenting proof of that product.

As a matter of fact, to recall to your Honor's mind what you yourself said before you became a Judge—it was said to the United States Supreme Court, and I am sure it was just as true now as it was then—your Honor called attention to the fact that it is useless to call the jury clerk or the jury commissioner and put a question to him such as, “Did you intentionally discriminate”? Because, as your Honor said to the United (2518) States Supreme Court, “They uniformly deny such intention to discriminate.” Of course, they deny it. You wouldn't expect them to do anything else. Therefore—

Colloquy of Court and Counsel

The Court: Well, you know, I have said before the Supreme Court didn't agree with me in that case.

Mr. Gladstein: They didn't say that they disagreed with that.

The Court: And I got licked.

Mr. Gladstein: You got licked on another reason.

The Court: Now, I would infer from that that the argument had perhaps less force than it seemed to have.

Mr. Gladstein: But I think I should try and persuade your Honor that the force of your agreement in the Fay case is just as great today as it was then. And at that time it was fully accepted by the Supreme Court.

The Court: I was the one who got licked.

Mr. Gladstein: You got licked on something else, and I want to remind you what it was.

The Court: Now you tell me what I ought to do. But I was the man who got licked, and I remember it perhaps a little more forcibly than if I was just a member of (2519) the general public. In any event, it didn't go down with the Court very well because the opinion indicates quite clearly that they thought the contrary.

Mr. Gladstein: No. If your Honor will recall, four of the nine Justices—that is just short of a majority, that is true, but four out of the nine; let us start with four—

The Court: Just a teeny weeny little bit of difference—four men said yes and five said no. I know all about that.

Mr. Gladstein: Four of the nine Justices, and your Honor will recall who they were—Justices Black, Murphy, Rutledge and Douglas—agreed with your Honor's position.

Now, Justice Jackson who wrote for the five who constituted the majority did not refer to this portion of your brief at all. And what he said was that the clerk and the commissioner testified to the

Colloquy of Court and Counsel

proposition that they did not intentionally discriminate. And Justice Jackson pointed out that while they were interested witnesses, and he remembered that they were interested witnesses, nevertheless there was nothing in the record to dispute them.

Now one of the things that disputes a man's statement on the stand is the tangible documentary (2520) proof of what he has done. Recently there was another case that came down from the Supreme Court in which Justice Jackson switched his viewpoint on the question of how much weight you attach to what happens in the composition of the jury. And in effect—that is the *Frazier vs. United States*, which we will have occasion—I don't know whether your Honor has seen it.

The Court: You know, as soon as I get one book out and I find the place, you are off on another one.

Let me see if I can find that *Frazier* case. I had that here just a while ago.

Mr. McGohey: That is the one in the *Law Week*.

The Court: I know. I have the slip sheet here.

You know, I have so much material around here that I think I will have to be a magician.

Well, that is amazing.

Mr. Gladstein: Judge, can I read the passage from the *Frazier*—

The Court: No. Just wait a second and see if I can find it. I have the Supreme Court slip sheet.

Mr. McGohey: I will be glad to let you have my copy, your Honor.

(2521) The Court: You know, I had mine all marked up.

Mr. Gladstein: That is what I thought.

The Court: And I thought maybe it would be necessary to refer to something. But it has got away from me somewhere.

Have you got the slip sheet there?

Mr. McGohey: No, I haven't.

The Court: Let me just take one more look around here.

Colloquy of Court and Counsel

Mr. McGohey: I just didn't want the law clerk to get in trouble for not bringing it down.

The Court: Well, he won't get in trouble—I am pretty nice to my law clerk.

Mr. McGohey: I think you are nice to everybody.

Mr. Sacher: I was just going to express the prayer—would he were as nice to defense counsel.

Mr. McGohey: Well, you see I included you, but you disagreed with me.

The Court: There seems to be a conspiracy up here.

Mr. Gladstein: We are not members of that. We have been trying to do everything to give you enlightenment rather than keep the law and the majesty thereof from you, Judge.

(2522) The Court: Well, it looks like I have been robbed. Well, I guess the law clerk is guilty.

Well, there is nowhere else to look, so I guess I will have to take Mr. McGohey's copy.

Now, let me see what there is to be found in that Frazier case.

Mr. Gladstein: Now your Honor will recall that what Mr. Justice Jackson was pointing out in that case was a number of very pertinent things here. In the first place, he called attention to the fact that the result of operating a system of jury selection is something that ought to be closely examined without regard to what anybody says about original intention, because, he says, if that result looks pretty bad, well, then we ought not to tolerate it, especially in view of the supervisory authority which you have in federal courts as distinguished from this question of paying deference to the rights of States in matters of this kind.

The Court: Are you referring to his dissenting opinion?

Mr. Gladstein: Yes. But he was the justice who wrote the opinion against you, the one that you say you got licked on, in the Fay case.

The Court: I did get licked.

Colloquy of Court and Counsel

(2523) Mr. Gladstein: Yes.

The Court: There is no question about that.

Mr. Gladstein: But I want to point out that Justice Jackson in the Frazier case calls attention—and if Justice Jackson does, that means that you have four justices who were with you in the Fay case and now these views of Justice Jackson in a federal court case, as distinguished from what you had in the Fay case, which was a State court case.

Mr. McGohey: Your Honor, may I point out that Justice Rutledge, who was among the four in the Fay case, becomes the majority in the other case. So that—

The Court: I think you gentlemen are getting in a little too deep for me, because I must not speculate too much about my superiors, and just how they may line up here or line up there. But I will study that.

Now we will take a little recess until tomorrow morning at half past ten.

(Adjourned to February 4, 1949, at 10.30 a.m.)

(2524)

New York, February 4, 1949;
10.30 o'clock a. m.

* * *

(2526) Mr. Gladstein: * * * Now, yesterday as we were concluding, your Honor—by the way, did you find your copy of the Frazier decision?

The Court: Yes, my secretary had it upstairs.

Mr. Gladstein: So you have not been robbed after all. It seemed curious to me that with 402 policemen around the courthouse at the opening of this case that a thing like that would have been committed, your Honor. But I wanted to call your Honor's attention to the language of Mr. Justice Jackson in discussing the composition of the jury—

Colloquy of Court and Counsel

The Court: Just a second. I had Mr. McGohey's copy that I took upstairs with me last night, and he wants it back, and I suppose that has been left upstairs.

Mr. McGohey: That may be upstairs, your Honor. Don't hold it up on that account.

The Court: Yes, I am afraid, Mr. McGohey, that is upstairs.

Mr. McGohey: That is all right, your Honor. Let us not delay on that account.

The Court: Show me what is the part you have in mind.

Mr. Gladstein: The copy I have is the advanced (2527) opinion of a lawyer's edition.

The Court: I know. Now get going from the beginning of his opinion which appears at page—

Mr. Gladstein: Page 184.

The Court: But I have the slip sheet here, and it is a short opinion. There is paragraph 1, paragraph 2, paragraph 3, 4, 5 and so on.

Now, which paragraph is it you are reading?

Mr. Gladstein: Well, there are a number that I want to call the Court's attention to, but you recall—

The Court: Well, you are going to start with what paragraph?

Mr. Gladstein: The very first.

The Court: Very good.

Mr. Gladstein: Now, your Honor will recall that in that case because of the system that they used in Washington, D. C. where about half of the people called to serve on juries are Government employes, that the situation is such that it is possible and sometimes happens that the 12 people who sit in a case in which the United States is a party, a majority, or perhaps all of them may be Government employes.

The Court: Yes. Now what you are trying to prove to me now is that the Supreme Court has held in substance here that the majority of them are likely to (2528) hold that when the jury officials of any district testify they probably lie. That is what you have been contending.

Colloquy of Court and Counsel

Mr. Gladstein: No. I said this, your Honor, that Mr. Justice Jackson pointed out that the question of the original intent in the Frazier case was not decisive, and you will notice that at page 185 he makes this statement for example—

The Court: This is paragraph 1 of the dissenting opinion of Justice Jackson. Now you have skipped to another paragraph?

Mr. Gladstein: No. I will take that first one.

The Court: I think you had better.

Mr. Gladstein: He says:

“On one proposition I should expect trial lawyers to be nearly unanimous: that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury. A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts.”

Now, I pause at this point to make this note: that what Mr. Justice Jackson is saying is that the result can be bad regardless of what the original intent was, (2529) and that is fortified by what he says in that portion of the opinion at 185, page 185—

The Court: Paragraph?

Mr. Gladstein: The last paragraph on that page.

The Court: But you see, the book you have—

Mr. Gladstein: I will count them, your Honor. Paragraph No. 6.

The Court: Starting with the words “This condition”?

Mr. Gladstein: That is right, your Honor. He says:

“This condition makes it obvious that, if jury service is put on virtually a voluntary basis and qualified persons are allowed to decline jury service at their own option, the panel will become loaded with Government employes. If this undue concentration of such jurors were accomplished by any device which excluded nongovernment

Colloquy of Court and Counsel

jurors, it unquestionably would be condemned not only by reason of but even without resort to the doctrine that prevailed in *Ballard v. United States*, *Thiel v. Southern Pacific Company* and *Glasser v. United States*.

(2530) “Is the result more lawful when it is accomplished by letting one class exclude themselves, stimulated to do so by the incentive of such a dual system of compensation?”

Now, here, in other words, is what Mr. Justice Jackson was saying: he was saying that since the Government employes in Washington, D. C. continue to get paid their regular salary when they serve in the jury box, whereas nongovernment employes, such as manual workers, do not, and are therefore required to accept the per diem of now \$4, and therefore feel that they might not be able to afford to serve as jurors, the clerk had been excusing such people, just as in the *Thiel* case where the clerk testified, the jury commissioner testified that he had originally called—he had called manual workers, but they had asked to be excused, and he had excused them.

The Court: Yes. And he went on to say, that is the commissioner in the *Thiel* case, that as a result of his experience in prior years he had decided and had actually excluded them all.

Mr. Gladstein: In that he didn't call them. That is right. In that he didn't call them.

The Court: Well, he said he excluded them all.

Mr. Gladstein: Well, not all, not 100 per cent, (2531) because, your Honor—

The Court: Well now, Mr. Gladstein I am not disposed to hear any more argument on this. I think I know what you have been contending. And I can see that it gets a little complicated when you read from this dissenting opinion and that dissenting opinion and claim that one of the Supreme Court Judges held one way back in one year and that a certain dissent that he made in another case shows maybe he will vote differently when another case comes up.

Colloquy of Court and Counsel

But I think we had better stick to our proof now and then we have the argument. Now we want to get through with the facts.

Mr. Gladstein: I was about to read from a majority opinion and call attention to the—

The Court: That you will kindly reserve until later.

Mr. Sacher: May I briefly address your Honor on something that I think is of moment in regard to the procedure to be followed?

The Court: Is it something you think I do not already understand.

Mr. Sacher: Well—

The Court: If it is something that you have some reason to believe that I do not understand already, (2532) I will hear you.

Mr. Sacher: What I am addressing myself to at the moment is the question we had discussed yesterday afternoon. That was the question as to the matter of the sampling and the matter of utilizing the occupational descriptions and census data in regard to people on the various panels.

Now, I want to make reference to the majority opinion in the Fay case because I do believe it has particular pertinence to the problem we have before us.

The Court: I am not going to permit you to do that. I can almost recite that Fay case backwards. I know all about it. I was in the case, as you gentlemen have said again and again. I have read the opinions backwards and forwards and I know what is in there. And I am not disposed to hear any more argument about what is in that case or listen to quotations from these opinions that I have already read at least 20 or 30 times.

Mr. Sacher: I do not intend to read them, your Honor. I wish rather to refer to certain sections which I would ask your Honor to be good enough to read.

The Court: Very well.

Mr. Sacher: Because I believe that they are of great pertinence. In particular, I have reference

Colloquy of Court and Counsel

to (2533) that portion of Judge Jackson's opinion which your Honor will find in that section of the opinion where notes 14 and 15, the footnotes, appear with the tabulations.

The Court: Yes, I have it.

Mr. Sacher: Now what I have particular reference to is the following: in the course of that section of the opinion Mr. Justice Jackson has occasion to make several observations dealing with the following: 1. That there didn't appear to be a sufficiently precise designation of the occupational status of the jurors who were on the special panel, but your Honor will observe that what the defense in that case was permitted to do was to demonstrate the occupational status to the extent that it was reflected on the lists of the court of each of 2700 of those who constituted the special panel.

Secondly, Mr. Justice Jackson observed that there hadn't been presented anything indicating that the composition, occupational composition that is to say, of the special panel was any different from the occupational situation or composition of the entire reservoir of some 60,000 jurors from among whom the special panel was drawn.

Now it seems to me that that is of great moment to us in this case because what we are concerned (2534) with is to present the proof in such manner that we will not be subject to the criticism that we did not properly and adequately exhibit to the Court on the record the total composition of the entire body of jurors from among whom the various panels are drawn. As a matter of proof—

The Court: Now, Mr. Sacher, I may not without a little trouble find the page, but I think I could if I chose, where you told me almost the identical thing in almost the same identical words, and I marked in the book the passage that you have now referred to again. Now, I have the matter in mind. And it is just one of those things, that if I don't agree with you or your colleagues you think probably you need to repeat it four or five times. Now I have got the point and I really do not want to hear any more argument on it.

Colloquy of Court and Counsel

Mr. Sacher: I do not wish to contravene your Honor's wishes in that regard. I wish only to make this observation—that I think that for the first time yesterday we had occasion to refer to the question of the adequacy of the 31 panels as a proper and typical sampling of, 1, all the panels and, 2, the entire jury lists. And it does seem to me that while it may be quite proper for your Honor to say that “I decline (2535) to indicate what is or isn't sufficient”—

The Court: Well, it is not my business to tell you—

Mr. Sacher: Precisely.

The Court: —just what charts to get up and just what evidence to produce.

Mr. Sacher: I appreciate that your professorial days are perhaps over, but the point I make—

The Court: Well, who can tell?

Mr. Sacher: You never can tell.

The Court: I may be back teaching. This judge business—

Mr. Sacher: Ain't what it's cracked up to be.

The Court: —is pretty tough.

Mr. Sacher: But what I would like to say, your Honor, is this. It seems to me that while we do not have the right to ask the Court for guidance we may properly ask the Court for indulgence in presenting to it that quantum of proof which the Court has made necessary, either by its declination to say “Enough MacDuff” or by simply saying, “I do not regard what is in as being adequate, there are gaps in your proof,” et cetera.

The Court: Well, I now say, “Enough MacDuff.”

Mr. Sacher: All right, sir; and I will sit down.

(2536) The Court: That settles that point.

Now, Mr. Gladstein, you get back on the job with those witnesses that you told me this morning you were going to call.

Mr. Isserman: If the Court please, I would like to call Congressman Marcantonio to the stand.

Vito Marcantonio—for Defendants on Challenge—Direct

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

Direct examination by Mr. Isserman:

Q. Congressman, you are an elective Congressman of the United States Congress, are you? A. I am.

Q. What district? A. 18th Congressional District, New York.

Q. Are you absenting yourself this morning from your Congressional duties? A. I am not. The House is not in session.

Mr. Isserman: May we have a moment or two while certain exhibits are being brought in?

The Court: Certainly. What is the first one that you are going to use? Let us have the date of the panel.

Mr. Isserman: February 1st, 1949.

(2537) The Court: Oh, the '49 one. Now just a second. That is Exhibit 66.

Now I think if the clerk would move that, or somebody move it over so it is not right behind the witness—just move it over there so I can look at it. That is it.

Mr. Gladstein: Does your Honor have the magnifying glass that we presented?

The Court: I have.

Mr. Gladstein: We don't want to take it away from you but just temporarily borrow it.

The Court: Well, it is for the use of all.

Mr. Isserman: Why don't we leave it here? I may have occasion to use it.

The Court: All right.

Mr. Isserman: I am still waiting for the panel to which I had reference. It is being brought out.

The Court: Now you can't get any more of them on there (indicating blackboard).

Mr. Isserman: No, I am not trying to. I am simply trying to rearrange them so that the one I am talking about will be in a position to see it.

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Mr. McGohey: If the Court please—I beg your pardon—before the questioning starts, last week, or the early part of this week, rather, we had prepared photographs of various challenge exhibits including Defendants' Challenge Exhibit (2538) 69, which I see is now on the board. I have had a second photograph taken in a manner which shows up the red pins on there. 65 I am talking about.

And I should like to offer this to your Honor, and I have a copy for the defendants. Because I think in looking at it it makes it easier to understand the exhibit.

The Court: Yes.

Mr. McGohey: The first picture showed all of the pins in the same color.

The Court: As I remember Exhibit 65 it is intended to represent the two drawings of January 17th. Is that right, Mr. Gladstein?

Mr. Gladstein: Yes, sir.

The Court: That is, the difference in the color of the pins.

Mr. Gladstein: That is correct, your Honor.

The Court: Thank you, Mr. McGohey.

Mr. Gladstein: May it be said for the record that the red pins appear to show up not as empty spots and are not to be taken to mean empty spots, but they look like bubble gum, blown up a little bit.

Mr. McGohey: Well, they are a different shade than the others.

The Court: Don't mention that bubble gum. (2539) If my grandchildren are found with any more of that bubble gum I am likely to take some proceeding against them. And I don't think these look like bubble gum either. They look like pins to me, and they are very clear.

Mr. Gladstein: They look like a bunch of grapes.

Q. Now, Congressman, I call your attention to Exhibit No. 66, Defendants' Challenge Exhibit No. 66, which is entitled "Residence of Jurors—Panel of 2-1-49, Federal Petit

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Jury, Southern District of New York” and call your attention to an area bounded by the East River and marked with black boundary lines with an “18” in the center, and ask you if that is the Congressional District which you represent? A. It is.

Q. How long have you represented that district? A. Well, to be specific, I have been representing that district, the northern part of that district, from 1934 to date, and the full district from 1944 to date. I am serving my seventh term. That district was reapportioned in 1944.

Q. Before it was reapportioned did the northern part of the district which you represented then bear the name of the 18th? (2540) A. No. It used to be the 20th Congressional District. From 99th Street up to 127th Street used to be the 20th Congressional District, and then it was extended down to 59th Street. And it is now known, since 1944, as the 18th Congressional District.

Q. Do you reside in the district? A. I do. I live at 231 East 116th Street.

Q. How long have you resided in the district? A. It was there I was born.

Q. Prior to your election as Congressman, that is your first term, were you engaged in political activity in your district? A. I was. Since 1922.

Q. And what did that political activity consist of? A. I managed several Congressional campaigns for my predecessor, Fiorello LaGuardia.

Q. Did you in the period prior to your becoming a Congressman for that district engage in various community activities in the district? A. I did. I was engaged in settlement work and in tenants work.

Q. What occupation did you have before you became a Congressman? A. I have been an attorney.

Q. And did you practice as an attorney with many of the residents of that district? A. I did.

Q. After becoming a Congressman did you in addition (2541) to the political activity in that district engage in various community activities? A. I have.

Q. Have they occupied a substantial portion of your time? A. Definitely.

Q. Would you give us some idea as to the nature of these activities? A. Well, I have organized committees

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for obtaining of a high school, housing projects, and various educational activities for the adults.

Q. Have you in the course of your legislative experience been concerned with the problem of housing in your district? A. I have.

Q. And how did that concern manifest itself?

Mr. McGohey: I object to this line of questioning—

The Court: Sustained.

Mr. McGohey: —as irrelevant.

Mr. Isserman: Will your Honor hear me on it?

The Court: No.

Mr. Isserman: I would like to offer to prove that if this witness would be allowed to answer he would answer that he was concerned with a study of housing—

The Court: Now, Mr. Isserman, instead of following the customary procedure, where an attorney asks a question the relevancy of which appears on its face or the irrelevancy appears on its face, the Court rules and there is an end to it—in this trial counsel, that (2542) is to say you and your colleagues, have developed this new business of proceeding to then make an offer of proof in which you state on the record the answer that you expect to get. And I am not going to permit that. This is just a preliminary question of little significance.

Mr. Isserman: Well, it is—

The Court: And I have ruled against it. I will hear no argument. I will hear no offer of proof as to this question.

Mr. Isserman: Will your Honor hear the cases bearing on offers of proof which indicate that this is appropriate under the circumstances?

The Court: No. I think I am pretty familiar with the elementary principles having to do with such matters. You are just qualifying the witness now for something, and I do not regard that particular inquiry as of any moment. So you go right ahead with the next question.

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Q. Are you familiar, Congressman, with housing conditions in your district? A. I am.

Q. Are you familiar with the type of buildings in your district? A. I am.

Q. Upon what is that familiarity based?

Mr. McGohey: Objection.

The Court: Sustained.

(2543) Mr. Isserman: If your Honor please, I am constrained again to make an offer of proof, unless your Honor rules that I may not.

The Court: Well, you had better go ahead and get down to what proof you want from him and if somebody claims he is not qualified then it will be time for us to go into that.

Mr. Isserman: All right.

Q. Will you tell us, Congressman, from the standpoint of the type of houses in your district, what its composition is? A. With the exception of about 30 to 40, at most, elevator apartments, the district is in the main about 90 per cent tenements, with the exception of a few renovated brownstone houses. And there are two housing projects, low cost housing projects in the district; the East River houses, located at 102nd to 105th, and from First Avenue over to the river, and the James Welden Johnson low cost housing project located at 112th Street to 115th Street, from the east side of Park Avenue to the west side of Third Avenue.

(2544) Q. Now can you tell us how long these houses and projects have been in existence?

Mr. McGohey: Objection, your Honor.

The Court: I don't quite get the point of that. If there is some point to it I might allow the question.

Mr. Isserman: The point is, we want to show the existence of these houses during the period when jurors were drawn and the composition of the persons in those houses.

The Court: And I suppose that, in turn, will lead to our dragging through all the different

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changes in construction in the district from 1940 to date.

I think I will sustain the objection.

Mr. Isserman: Will your Honor hear me on it?

The Court: No.

Mr. Isserman: Well, I would like to object to your Honor's characterization of the testimony by the use of your Honor of the expression "dragging through." We are trying to present evidence here, and I would like to argue my right to ask this question and to put on record what I intend to prove by it.

The Court: Yes, that is what I ruled you may not do.

Mr. Sacher: Your Honor, it seems to me that (2545) the interrogation as to the witness's qualification is necessary not only to qualify him but to establish the weight that is to be attached to his testimony, and it seems to me that Mr. Isserman's inquiries are directed not only to qualifying the witness but to show an extent of familiarity which will give the weight which ought to be attached to that testimony.

Mr. Isserman: And I might say, your Honor, much more than that, we intend to show that these two particular housing projects here—

The Court: Mr. Isserman, you may not recall but I have ruled that you may not state anything further as to this line of proof. You will proceed. You have your exception, and you may go on to some other subject.

Mr. Isserman: Do I understand that I may not ask one question about the housing projects to which the witness has referred?

The Court: That is right.

Mr. Isserman: And that your Honor will hear no other proof in respect to that?

The Court: Well, I may later on after we have more evidence. That is something I will decide then.

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Mr. Isserman: I will make an offer of proof, then, if the Court please, as to these two housing (2546) projects to the effect that if the witness were allowed to answer this question and the following questions which would be put concerning these houses, that these houses contained approximately—

The Court: Mr. Isserman, you are doing just what I told you not to do. Now that has happened so persistently here in this trial that it has made a very definite impression on me. You may remember that some time ago I had occasion to remark that I felt that there had come into my mind for the first time a thought that a wilful, persistent and deliberate attempt was being made for delay. I can find no other explanation for the way counsel have been conducting themselves in dragging this matter out; and in paying no attention to my rulings, no matter how trivial and inconsequential the particular matter may be. Now I hope you will bear in mind that matter because I may be literally forced to take some sort of action here merely to protect the administration of justice from frustration. And so I hope you will now proceed to some other subject.

Mr. Isserman: I object to your Honor's characterization of the conduct of counsel; to the statement that this is an effort to drag this matter out; to the statement that this is a persistent effort at delay, and state for the record that it is a persistent (2547) effort to put the facts in evidence and to protect the rights of my clients to the point at which I am certain that the Court has ruled that I may not proceed further. It was not clear from the Court's rulings, particularly the Court's statement that the Court would come to an offer of proof later, when I asked if the Court was precluding offer of proof, and the Court did not state that it was, that I continued to make it. I am now convinced that this Court will not allow me to make an offer of proof on this subject, and I will therefore desist.

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Mr. Gladstein: Your Honor, may I say something about offers to prove?

The Court: You may not.

Mr. Gladstein: But, your Honor, I would like to suggest some cases to your Honor that you ought to look at—

The Court: Well, I have had that suggestion addressed to me a little while ago and I have rejected it. Now I think perhaps you gentlemen would do well to let the matter rest as it is now and proceed with the interrogation of the witness so that we may get some testimony relevant to the issue that is before me.

Mr. Gladstein: If the Court please, there are cases and cases which show that unless counsel makes (2548) an offer of proof—and the offer is not required to be in writing—

The Court: Mr. Gladstein, did you understand that I indicated that I did not desire to hear any further argument on the point?

Mr. Gladstein: All right. I understand, your Honor, except that I wanted to call your Honor's attention to a specific authority.

The Court: Yes, and that is what Mr. Sacher wanted to do just a little while ago.

Mr. Gladstein: This was on another matter entirely. We are now talking about offers to prove.

The Court: I am not disposed to hear any argument or hear any suggestions at this time, and I direct that Mr. Isserman proceed to interrogate the witness on some subject other than this low cost housing to which he has been addressing certain questions.

Mr. Gladstein: My only suggestion then, is this: since your Honor won't permit me to refer to the authorities, then I refer to a practical suggestion, and that is if instead of consuming time in arguing as to whether or not we have the right to make the simple statement for the record as to what the witness would say if he were permitted to answer the question to which (2549) the United States Attorney has objected, and which objection has been

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sustained—if instead of doing that we were simply allowed to follow the normal, usual routine procedure that takes place even before juries. Many a time a question is asked—

The Court: You see, Mr. Gladstein, I am the one who has to decide about procedure here; and I hear from time to time from you and your colleagues how wrong I am and how little I know of procedure, and perhaps you are right; but the common method is for counsel to state his position, the Court rules, and then go on. If there is error then it may be corrected.

Mr. Gladstein: Yes—

The Court: So you will please desist from further argument.

Mr. Sacher: Does your Honor—

The Court: Now Mr. Sacher, I do not desire to hear you now, so—

Mr. Sacher: No, I am not going—

The Court: —so please—

Mr. Sacher: But you have characterized my conduct as well as that of trial counsel, and I wish to deny it on the record, and I wish to say that your Honor is aware of the fact that there are 40 or 50 newspapers here, and on the threshold of Congressman (2550) Marcantonio's testimony you have taken occasion to say that his testimony is being introduced for the purpose of dragging and delaying the trial; and I say—

The Court: Did I say that?

Mr. Sacher: Well, you imply that very broadly. If your Honor wishes to deny it I shall be glad to have the denial. But I got the impression very distinctly that your Honor's observation was made just on the threshold of the Congressman's testimony and that it was designed to color the effect and impression to be given to it, and I do not believe, your Honor, that that is appropriate.

The Court: If you are only trying to provoke me, Mr. Sacher, you are wasting your time.

Mr. Sacher: I am not. I am provoked because you characterized our conduct and I am simply rising

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to reply to it. I did not characterize your Honor's conduct. You have characterized ours.

The Court: That is what the Court is supposed to do—

Mr. Sacher: I don't think so.

The Court: —when there is occasion for it. Now, you vigorously deny it. No counsel who I have ever known to misbehave himself says that he admits that he is misbehaving. Naturally, the more you have in stalling (2551) and delaying tactics the more vigorously the man proceeds to deny it and uses up more time. I don't expect anybody who does something of that character to admit it, but I think mine is the function of making the decision.

Mr. Sacher: Well, ours is not the function to stand here and be accused by your Honor. I submit that that is not according us a fair trial when throughout these proceedings you persist in characterizing testimony whose materiality and relevancy you have not yet ascertained—you proceed to characterize it on its threshold as constituting stalling and delaying; and I submit, your Honor, that the proprieties would require that the Court exercise the same restraint that counsel is asked to exercise.

The Court: Well, you see, you and your colleagues have apparently adopted a new technique in criminal cases by which instead of the defendants who are indicted being tried, the Court and all the members of the court are the ones who must suffer the excoriations and accusations of counsel. But I think, perhaps, with patience there will be an end. So you will please let the matter drop there, and Mr. Isserman will proceed with his questions.

Mr. Isserman: I will proceed, your Honor, (2552) but I am again constrained on behalf of my clients to object to your Honor's remark characterizing the questioning which I am indulging in, or suggesting that the questioning is a stalling and delaying tactics, and to the description of this challenge to a jury, which under the law we have a

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right to make on behalf of our clients, as a new technique—

The Court: You have been at it three weeks now. I think possibly if you go on arguing this way we will be here the rest of the year on this challenge. But I think I shall take some steps to prevent that.

Mr. Isserman: I would like to complete my objection to the characterization of the jury challenge as a new technique, and your Honor's last statement that your Honor will take steps to prevent what is merely our effort to put in evidence the facts, and the fact that it takes three weeks or ten, your Honor, makes no difference in the administration of justice.

The Court: Well, perhaps we had better let each one of the counsel for the defendants say a word or two now, because they look as though they desire to state their positions too.

Mr. McCabe, would you like to say something?

Mr. McCabe: I had not intended to say anything, your Honor, but as long as your Honor invites it I (2553) would like to express a thought that has been going through my mind for several days: your Honor will recall that your Honor criticized me several times and criticized fellow counsel for referring to the jury system in the Southern District of New York in terms containing many adjectives, such as corrupt, illegal and unfair.

The Court: Did I criticize you for that?

Mr. McCabe: I think you did, and I think your Honor said "You will please observe that merely by your calling it corrupt or illegal or unfair that does not make it so."

The Court: Yes, and I heard so much repetition of that that I got the impression that it was being made for consumption out of the court instead of in the court, and that perhaps some of you thought that this idea of repeating accusations of that character, however extravagant, might have some effect elsewhere; but I do not remember criticising you

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for making the charge that you have made here. You have a right to do that, and that is what we are trying out.

Mr. McCabe: You see, your Honor, since that was so far from our minds I wondered how that came to your Honor's mind, and now it has become—

The Court: It might be prejudice, I suppose?

(2554) Mr. McCabe: No, it has become clear to me that your Honor is doing the very same thing. Your Honor by constantly referring to our tactics as delaying tactics; by referring to evidence which seems to me to be very clear and precise, as being confusing, and referring to gaps in the testimony—I think that your Honor seems to have in his mind doing the very thing which you, I think unjustly, indicated that we might be doing. It seems to me that your Honor's words, that constant repetition of our new techniques and delaying tactics, and dragging things out and rambling on, that that is addressed—

The Court: Well, maybe I do ramble a little now and then, but I think that may be the privilege of the Court.

Mr. McCabe: Yes, but I say that it seems to me that that is what is in your Honor's mind, and that also may very well be addressed to someone outside of this courtroom, and I think that the record, if reviewed by some other authority may indicate unusual degree of tolerance in the face of particularly annoying tactics, which I don't think we are guilty of.

The Court: Well, I guess you can go on, Mr. Isserman.

(2555) *By Mr. Isserman:*

Q. Now, Congressman Marcantonio, you mentioned the existence of tenement houses in the district which you represent. Will you tell us what you mean by that term?

A. A tenement is a walk-up mutual dwelling; in most cases electricity has been installed long after it has been constructed; new plumbing facilities have been put in; rents

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range around \$32 to \$35 for an average five-room tenement apartment—

The Court: \$32 to \$35 for an apartment?

The Witness: \$32 to \$35 for a five-room apartment.

The Court: For a five-room apartment?

The Witness: Yes, that is right.

Q. From your own experience and knowledge do you know the age of these tenement houses to which you refer?

A. I should say that most of those tenements were up when I was a little boy, and very few have been built—definitely very, very few have been built since the war; in fact, I can say that no tenements have been built since the war; and prior to the war we have had no tenements built. I can safely say that these tenements have been in existence since the early 1900s, 1910, and many prior thereto. Some of these tenements go all the way back to the latter part of the last century.

(2556) Q. Now do you know approximately the number of people in your district? A. The Census of 1940 showed that there were 297,000 people residing in my district.

Q. Have you, in the course of your work, had occasion to consider the changes in population since that time?

A. Judging by the voting population I assume that there has been a slight increase in population since 1940.

Q. From your own experience can you tell us approximately what percentage of the people in your district live in the type of tenement house that you have described?

A. Well, over 90 per cent.

The Court: Yes, he testified that over 90 per cent were in tenements with the exception of a few renovated brownstone fronts, and that there were about 30 to 40 elevator apartments; is that right?

The Witness: That is correct.

Q. Now, do you know the number of registered voters in the last election? I mean persons who registered to vote in your district? A. Yes. 104,000.

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Q. And about how many voted? A. About 100,000.

The Court: What was that last? 100,000 voted?

The Witness: Yes.

The Court: 104,000 registered and 100,000 voted?

The Witness: Yes.

(2557) Q. Now, have you had occasion to examine from time to time in the course of your work in the district, to examine the elevator apartments which you had reference to? A. I have.

Q. And are you able to tell us the character of those buildings?

Mr. McGohey: I object, your Honor. I do not see the relevance of that.

The Court: Well, I think I will take it.

A. Yes, they are 16, 14-story elevator apartments; door-man, canopy, terraces, penthouses—

The Court: Well, I thought you were going to tell us about the rents.

The Witness: The rents—yes, I will go into that too. In certain sections, for instance in the Gracie Square section—

Mr. McGohey: I beg your pardon. Just a minute. If the witness is going to read from a paper, may I ask to have it marked for identification?

The Court: Yes.

Q. Are you reading from notes in your own handwriting? A. No, I am not. My stenographer made them in my office. I dictated it to her.

Q. And you are using these to refresh your recollection? A. Correct.

(2558) Mr. Isserman: What number would that be?

The Clerk: 99.

(Marked Defendants' Challenge Exhibit 99 for identification.)

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Q. Would you proceed, please? A. The apartment houses which I have described which are located in the Gracie Square section, the rents there average around \$40 a room and up; and the apartments there are quite large.

Q. You mean in the number of rooms? A. In the number of rooms. They have more than one bathroom facility, servant quarters, and so forth. In the 86th Street section in the 500 block they have a slightly smaller rental; that is, from about \$32 to \$45 per room.

The Court: Per room?

The Witness: Per room.

A. (Continuing) There again the apartments are large. Servants' quarters.

Then you have isolated buildings here and there. In other words, you have a situation where you have tenements in one square block and then jutting out in that portion of that block will be one of these elevator apartments houses, 14, 15, 16-room apartment houses.

Mr. McGohey: Do you mean 16-story apartment (2559) houses?

The Witness: Story, that is right.

Q. When you referred to the Gracie Square section, can you tell us just what you mean by that? A. The Gracie Square section is right near Carl Schurz Park.

Q. And is that a section where there is an aggregation of these buildings? A. Definitely.

Q. Now, is there any street in your district above which this type of elevator apartment is not present? A. Yes. I should say that north of 99th Street there are no such apartments. There is one at 1274 Fifth Avenue, they have an elevator there, but the rentals are not high. That is an all-Negro apartment house. Then there are two apartment houses, 1200, 1212, 1214—1200, 1210, 1212 Fifth Avenue all can be characterized as swanky elevator apartments. Outside of that I know of none other.

Q. Now, can you give us the approximate street location of the so-called swanky apartments you just made reference to? A. That is 100, 101 and Fifth Avenue.

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Q. And that Negro apartment house, is that on Fifth Avenue too? A. That is on 109th Street and Fifth Avenue.

Q. Now, have you finished your description of the (2560) rentals of these apartments? A. Well, they are scattered. In other words, what I have given you, the rentals of these apartments where they are clustered in one particular section. There are some, as I stated before, that are scattered. For instance, there are two facing the Julia Richman High School at 68th Street off Second Avenue. That is quite expensive.

Mr. McGohey: How much, may we find out?

The Witness: Well, about \$35 a room.

The Court: Well, I think you have sufficiently described the character of the district.

By Mr. Isserman:

Q. Now, did you have occasion at the request of counsel in this case to examine the place of residence of persons called to serve for jury service in this district on the panel of February 1st, 1949, which was represented on these maps as Challenge Exhibit 66?

A. I have.

The Court: Just a second.

Will you read that.

Q. (Read.)

The Court: We will take our usual ten-minute recess.

(Short recess.)

(2561) *By Mr. Isserman:*

Q. Now I call your attention to a grouping of pins on Challenge Exhibit 66 in the lower lefthand corner of your district, there is a grouping of five pins in the area of 66th and 67th Streets. Did you examine the places of residence of the jurors represented by those pins? A. To be more accurate, that should be 68th Street.

Colloquy of Court and Counsel

The Court: The top one is 68th?

The Witness: The lower one is 68th.

The Court: The lower one is 68th? All right.

The Witness: That is 68th Street, the 300 block.

Q. What is the name of the juror listed on that panel?

A. John Stuart Kellogg is one; Archibald—

Q. Well, let us take one at a time. I think that will be easier.

Mr. McGohey: May I interrupt for just a moment? Do I understand, your Honor, that the Congressman is now testifying with respect to the residence location of particular jurors on the panel for February 1, 1949, as shown on Exhibit 66?

The Court: That is exactly what I understand he is doing.

Mr. McGohey: May I then ask for the list, the (2562) panel list which was, I think, marked for identification—

Mr. Isserman: I think it is in evidence.

Mr. McGohey: —and from which that map was made.

The Court: Yes. We can pause for a moment until that is located and you have it before you.

Is someone getting it?

Mr. Sacher: We have to send to the office to get it. It will take us a few minutes. Shall we proceed?

Mr. Isserman: May we continue with the questioning subject to any check of the appearance of his name on the list?

The Court: Let us see what Mr. McGohey says. Is that satisfactory to you, Mr. McGohey?

Mr. McGohey: If that list is in evidence, your Honor, I think I ought to have it for the purpose of checking as the witness reads to make sure that the testimony relates to a name actually on the list.

The Court: Yes. I think exhibits should be here every day. I do not think it is right to take some of the exhibits or leave them home or at the office. I think we should have all the original exhibits here every day.

Colloquy of Court and Counsel

Mr. Isserman: I think, your Honor, that was a matter of inadvertence in this case. I think the others (2563) are here.

The Court: I don't doubt that.

Mr. Sacher: Mr. McGohey, I think there may be one available in the clerk's office.

The Court: Well, what do you say, Mr. McGohey? Are you willing to go ahead?

Mr. McGohey: Well, I would like to wait then. If the exhibit that was put in is not here I would like to send to the jury clerk's office and get a copy of that panel.

The Court: Yes, do that.

Now, are you going on to a number of others, Mr. Isserman in the same way?

Mr. Isserman: Yes. I could go to another if another list is here.

The Court: You see, none of them are here, and I thought instead of having Mr. McGohey send for one and then wait ten or fifteen minutes while he waits for another one, that you might tell him the ones you are coming to and we can get them all together.

Mr. Isserman: There are three here I want to inquire about: February 1, 1949; January 17, 1949, which is two drawings, and December 7, 1948.

Mr. McGohey: Your Honor, before we go any (2564) further this thought occurs to me. I don't know myself whether or not the list of jurors for the panel of February 1, 1949 was ever introduced in evidence by the defense.

The Court: Well, I know, I have it right before me, and there is only one of them that is actually in evidence and that is Exhibit 26. All the others have merely been marked for identification. But I am going to permit the Congressman to describe the character of the dwelling of the jurors who, according to the record, are stated to live at certain places—

Mr. McGohey: Oh, I don't object to that.

The Court: —and get a reasonable amount of that. Whether I am going to let him go ahead and

Colloquy of Court and Counsel

do that indefinitely, I don't say, but I think it is perfectly proper to have a certain amount of that. And as to the accuracy of the record and whether he really lives there or not, why, that is something different, but I think you may proceed upon the assumption that if the list states a juror and gives that address, that that is correct. Now, if you will send for those three we will just wait a moment or two until they come down and then we can go on.

(2565) Mr. Isserman: There are two for January 17th.

The Court: Yes. The three that you are going to start with are this February 1st, 1949 and the two drawings for January 17, 1949.

While we are waiting, Mr. Sacher, I wonder if you could get me that exhibit that contains the voting statistics.

Mr. Sacher: 96-7.

The Court: Here it is, 19 for identification. That is the one I suggested yesterday that you might place in evidence to get the basis for your statistics for that. I would like to glance at it. Is that here? It is the annual report of the Board of Elections of the City of New York, 1946.

Mr. Sacher: I will get it for you in a moment your Honor.

Mr. Gladstein (Handing to Court): 1946 figures.

Mr. McGohey: If the Court please, I now have the original record from the clerk's office.

The Court: All right.

Mr. McGohey: In that connection there has been testimony with respect to the manner in which Defendants' Challenge Exhibit 66 has been prepared, the testimony by Mr. Wilkerson I believe. And I ask that counsel for the defendants be directed to bring in the list which their (2566) witness used in preparing Challenge Exhibit 66 so that it may be marked for identification, because my examination of the list of exhibits discloses that no copy of the panel for February 1, 1949, has been marked for identification.

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Mr. Gladstein: We will be glad to do that.

Mr. Sacher: It is being brought over, Mr. McGohey.

The Court: Yes, I so direct. And counsel have stated that they will do that.

Mr. Isserman: Also, as soon as they get here, we will offer all of them in evidence.

The Court (To witness): Now you are starting with Mr. Kellogg whose address was 333 East 68th Street. And the witness will describe the character of that dwelling.

The Witness: 333 East 68th Street is located in the 40th Election District of the 8th Assembly District. It is a 15-story, elevator, apartment house, canopy. And I think I have testified as to the rental. If not, the rentals average about \$35 and up per room.

The Court: What was the occupation of Kellogg?

The Witness: Well, I would have to refer to the list.

Mr. Isserman: You may refer to the list.

(2567) The Court: Yes.

The Witness: I am not testifying as to my own knowledge.

The Court: I know. I realize that. You are just taking what appears on the record as to that.

The Witness: Exactly, sir, as it has been given to me by defense counsel.

The Court: I understand.

Mr. McGohey: Your Honor, may we then have marked for identification the papers from which the witness is refreshing his recollection?

Mr. Isserman: We have no objection to that, if there is any purpose to be served by it.

The witness is referring to four typewritten sheets.

The Witness: And these cards, notes that I made on them.

Mr. McGohey: And those are your own?

The Witness: These are my own.

Colloquy of Court and Counsel

Mr. Isserman: These four typewritten sheets I would like to have marked for identification perhaps as one exhibit, A, B, C and D.

The Witness: Except that my secretary wrote out the names on the back of the cards.

Mr. Isserman: Which purport to be lists of (2568) jurors taken from the panels about which the Congressman will be initially questioned.

(Marked Defendants' Challenge Exhibit 100-A, B, C and D for identification.)

Mr. Gladstein: I have now a copy of the February 1, 1949 panel obtained from the clerk's office. And it may be marked and put in evidence now.

The Court: Just wait until the clerk finishes what he is doing. And I think it is a good idea to have that marked for identification right now and make the list complete.

Mr. Isserman: May this be marked for identification? It is the petit jury list February 1, 1949, Southern District of New York, as obtained from the clerk's office.

Mr. Gladstein: Either that or a copy made from it.

Mr. McGohey: No objection, your Honor.

The Clerk: Defendants' Challenge Exhibit 101. In evidence?

Mr. Isserman: I would like to offer it in evidence, your Honor. I may as well do it now.

Mr. McGohey: The witness who prepared Exhibit 66 is not here to state whether this is the list which he used in preparing 66. I should think there ought to be (2569) some statement or representation by counsel with respect to that fact.

Mr. Isserman: Mr. Gladstein, would you make that statement?

Mr. Gladstein: Yes. That is right, your Honor.

The Court: When Mr. Wilkerson returns you will have him vouch for the accuracy of that exhibit, I take it.

Mr. Gladstein: Very well.

Colloquy of Court and Counsel

The Court: Or in some other fashion. It is your statement to the Court that that is prepared accurately and is a correct copy of the original list?

Mr. Gladstein: Yes.

Mr. McGohey: And that it is the list which was used in preparing Defendants' Challenge Exhibit 66.

Mr. Gladstein: Well, all of the maps, all of the exhibits which are maps were prepared for the purpose of showing on them pins corresponding to the residence locations of jurors, whose addresses and names appear on the panels, the dates of which correspond to the maps.

The Court: Yes. You see, all that Mr. McGohey is concerned with at the moment is to get a statement that Mr. Wilkerson will testify that when he got up Exhibit 66 this was the list, namely the one just marked for identification—what was it? 101 for identification—that he used in preparing the chart.

(2570) Mr. Gladstein: That is my understanding, and I will have him testify.

The Court: Very well.

(Marked Defendants' Challenge Exhibit 101 for identification.)

Mr. Isserman: If the Court please, because of Mr. Gladstein's greater familiarity I would like to have him offer the balance of the lists which have been marked for identification. There is no reason why they should not be in evidence. I think it would facilitate matters.

The Court: Very well. I see no objection to doing that.

Mr. McGohey: There is none, your Honor.

The Court: You may offer them all in a batch and the clerk will mark them all together. Just strike off the identification mark.

Mr. Gladstein: Yes, I don't think he has them all, so I will have them brought here.

Vito Marcantonio—for Defendants on Challenge—Direct

By Mr. Isserman:

Q. Now we were talking about John Stuart Kellogg. I think you had given his address and building. And would you tell us now what his occupational classification is as indicated on the list furnished to you by counsel? A. As indicated on a list furnished to me, publishing (2571) manager, Prentice-Hall, Inc., 70 Fifth Avenue.

Mr. Isserman: I would like to state for the record, if you please, that in giving this list to Mr. Marcantonio we used the classifications as we found them on the jury lists which are or will be in evidence.

The Court: Yes. While we were waiting Mr. Marcantonio has handed me these little cards and I have noted them in my notes, and it would be a convenience to me if you would take the 12 that he has reference to in the order that I have got them in my notes, unless you have some other reason.

Mr. Isserman: No. I was going to do it by groupings. But I think it makes no substantial difference.

Q. So, would you take them in that order?

The Court: Yes. I will just say what the next one is and he can go along. The next one is John Forster who lives at 520 East 118th Street. Then, if you will give the character of the building and the man's occupation we will go on from one to another.

The Witness: 520 East 118th Street is in the upper section of the district. It is the 22nd Election District of the 16th Assembly District. It is an old tenement. His occupation according to this list furnished me is that of toolmaker, Westinghouse Electric Company, (2572) Bloomfield, New Jersey.

The Court: The next one is Mrs. Adele Halpern, 152 East 94th Street.

The Witness: Mrs. Adele Halpern, housewife. It is a modern dwelling, 12-story apartment house, elevator, at 152 East 94th Street.

The Court: The next one is Jacques Albert.

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Q. Have you any information on the rental there, Congressman? A. I do not. But it is definitely a modern apartment house, 12-story, elevator apartment house.

Q. And one in the group of about 30 that you mentioned, is that right? A. That is right.

The Witness: What is the next one?

The Court: Jacques Albert, 318 East 69th Street.

The Witness: That is a brownstone building. No, I can't make out from the appearance at this time whether it is a private dwelling or a rooming house. I know it is an old brownstone building, brownstone house, what we would ordinarily call a private house; but it may be a rooming house and it may not be. It may be a private brownstone house. But sometimes those houses are used also as rooming houses.

His occupation is sales correspondent, (2573) Mathieson Alkali Works, Inc., 60 East 42nd Street.

The Court: The next one is Gerald Kenneth Hayward at 308 East 79th Street.

The Witness: Gerald Kenneth Hayward resides at 308 East 79th Street. It is a 16-story apartment house, elevator, canopy. It is in the rental class of \$28 to \$40 average per room. He is a floor man, Manhattan Savings Institution, 7 Rockefeller Plaza.

The Court: And the next one is Archibald Holderman at 315 East 68th Street.

The Witness: Yes, he lives in the same building as another juror. We might as well take both up at the same time.

The Court: What is the other juror?

The Witness: David Lovell.

The Court: Oh, yes. David Lovell.

The Witness: Now, Mr. Holderman,—

Mr. McGohey: Pardon me. Would you wait just a minute until I find it on the lists?

The Witness: Yes.

Mr. McGohey: David Lovell?

The Witness: That is right.

Mr. McGohey: Yes. Thank you.

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The Witness: They both reside at 315 East 68th Street. This is also a 16-story elevator apartment (2574) facing the Julia Richman High School located in the 40th Election District of the 8th Assembly District; canopy, elevator apartment; and rentals here are \$35 and up.

Mr. Sacher: Per room?

The Witness: Per room.

The Court: Per room, yes. I understood that.

The Witness: His occupation is—

Mr. McGohey: Which?

The Witness: Holderman; we are speaking about Mr. Holderman now. Executive, Newcomb-Holderman.

The Court: I didn't quite get that.

The Witness: Newcomb, N-e-w-c-o-m-b Holderman.

The Court: Does it show what that business is?

The Witness: It does not. It doesn't indicate.

Mr. McGohey: Does it indicate what address he conducts the business at?

The Witness: It seems to me as though it is the same as his home address, 315 East 68th. According to this list it says "Same." And underneath it it says "Newcomb-Holderman."

By Mr. Isserman:

Q. Referring to that house, you took a personal view of that house? A. I did.

(2575) Q. Is it one of the small or large apartments? A. Large apartments.

The Court: This David Lovell's occupation is what?

The Witness: David Lovell is a banker. Laurence M. Marks & Company, 49 Wall Street. I have described the building as an elevator apartment.

The Court: Now the next one is Mrs. M.—it looks like K-a-c-h-l-e-r, at 500 East 83rd.

The Witness: Yes. This building is not an elevator apartment but it is one of the—I think

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renovated is the best word to describe it. I have no record of the rental. It is located on the southeast corner of York Avenue and 83rd Street; 16th Election District of the 10th Assembly District.

The Court: What does it show?

The Witness: Housewife.

The Court: The next one is—

Mr. McGohey: Pardon me, your Honor, before you go on there. The original list which was brought up from the jury clerk seems to indicate the spelling of that juror's name is K-a-e-h—

The Court: Oh yes. I thought that sounded kind of funny. K-a-e. Very well.

Now the next one is Morris Knight of 430 East (2576) 88th I think.

The Witness: This building is located in the 26th Election District of the 10th Assembly District. Also one of these renovated houses. I have no record of the rental. He is a food checker at Janssen Graybar Hofbrau.

The Court: The next one is Lyman Brewster Ives.

Mr. McGohey: I would like to ask, do you know if the Janssen Graybar Hofbrau is a restaurant?

The Witness: I believe it is. The next one, sir—

The Court: Is Lyman Brewster Ives. I am not sure that that is spelled "Ives" but as well as I could make out your handwriting—

Mr. Isserman: We can check it.

The Witness: Yes. Lyman Brewster Ives, I-v-e-s.

The Court: That is what I thought.

Mr. McGohey: That is the way it appears on the original list, your Honor.

The Court: Yes.

The Witness: He lives at 167 East 87th Street, according to the list. This also is an elevator apartment house, ten-story, canopy, located in the 12th Election District of the Tenth Assembly District. He is (2577) in the real estate business at 745 Fifth Avenue, Culver Hallyday & Company—H-a-l-l-y-

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d-a-y & Company, that is the way it is spelled on this list. It is an elevator apartment house.

The Court: Have you something to indicate the rental there?

The Witness: I am looking at my—I can't, sir. I don't.

By Mr. Isserman:

Q. Did you see the house yourself? A. Yes, I did.

Q. Is it one of the houses described as a tenement house, or the other kind? A. Oh, no, by no means. This is an elevator apartment house.

Q. Modern house, is it? A. Definitely.

The Court: Now the next one is Alfred Traemel, T-r-a-e-m-e-l, of 336 East 71st.

The Witness: Correct. This is also a recon-verted house. It is in good shape. It is not an elevator apartment house. He is a music teacher, Music School of Music at 238 East 105th Street.

Mr. McGohey: I think your Honor spelled that name T-r-a-e. On the original list it appears as T-r-o-e.

The Court: T-r-o-e.

Mr. McGohey: May I ask a question of the (2578) witness?

The Court: If it is agreeable to Mr. Isserman. Have you any objection?

Mr. Isserman: No.

Mr. McGohey: Is the Music School of Music in your district also?

The Witness: Yes, it is.

The next one is Keith S. McHugh. He lives at No. 10 Gracie Square, which is the 18th Election District of the 10th Assembly District. This is one of what we call in my district super-swank.

The Court: This is super-swank?

The Witness: That is right. Rents range there from forty to sixty dollars a room.

The Court: A room?

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The Witness: Per room. It is partly cooperative.

Mr. Isserman: Are they small or large apartments?

The Witness: You need a bicycle to get through them. This gentleman, his occupation, he is vice-president of American Tel. & Tel.

The Court: Now that leaves you one more also in Gracie Square, Robert Wason, of One Gracie Square.

The Witness: That is right.

(2579) Mr. Isserman: Is that super-swank too, Congressman?

The Witness: Yes. They are just two buildings apart. Also facing Carl Schurz Park.

14-story, elevator, and has complete works. The rentals here, forty to sixty dollars. And also partly cooperative. He is listed here as an executive, Manning Maxwell & Moore, Incorporated, Chrysler Building, New York.

By Mr. Isserman:

Q. Does that, Congressman, complete the list of the jurors in your district as furnished to you on Challenge Exhibit 66? A. According to this certificate there are only twelve names of jurors on this February panel who reside in my district.

Q. Now have you made a similar study for the jurors on the panel of January 17, 1949? A. I have.

Q. And how many—

The Court: Is that the first drawing, or both together?

The Witness: Well, I can't say. This is—one is drawn December—January 7, 1949, and the other one drawn November 17, 1948.

The Court: Those are the two. You are taking them together?

(2580) The Witness: I have those together.

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Q. Do you want to take up one at a time? What is the most convenient for you? A. I am afraid I have them bunched together.

Q. In other words, you are now giving us the jurors on the panel of 1-17-49, those drawn on November 17th, as well as those drawn in January? A. Correct.

The Court: That is Exhibit 65.

Mr. Isserman: Correct.

The Court: Now I think it would help me if I could do what I did before—if he would give me the cards right in the order in which he is going to take them up and let me get their names down in my notes.

Q. You have no objection to it? A. No, not at all.

Mr. Gordon: Your Honor, may I call your attention to the fact that the Congressman has testified about, what I count up, 13 jurors as having been given him by counsel for the defendants as living within his district.

The Court: That is right.

Mr. Gordon: Whereas the panel for February 1, 1949, Exhibit 66 seems to have 16 pins within his district.

Mr. Isserman: If your Honor please, Mr. Gladstein just called that to my attention. We will make a check. Some of the pins are so close to the line that they may be very close to the other. But we will (2581) check that very carefully and put in whatever correction is necessary.

The Witness: All I can say is, all these addresses I have given are definitely in my district.

The Court: That is all right.

Mr. Gordon: No question about it.

The Court: The question is, whether there are three more of them, and that will be checked up.

Mr. Isserman: We will check the exhibit with the list, your Honor.

The Court: The point is that there are 16 pins and the Congressman has been testifying about 13 of them. Is that right?

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Mr. Gordon: Yes. There seems to be a 20 per cent margin of error.

The Court: Yes. But they will clear that up probably in a few moments.

Mr. Isserman: Yes; there are a few pins that are so close to the line they may be over on the other side of the street of the district and so on. But we will check that and make it precise.

The Court: That is all right.

Mr. Crockett: I move that the statement "20 per cent margin of error" be stricken. I think what counsel intended to say was that 20 per cent was not (2582) covered by the Congressman's testimony. That does not necessarily mean that it is an error.

The Court: Well, I think I understand about it, Mr. Crockett. It is just bringing to my attention that there is what appears to be a slight discrepancy, which is very readily remedied, and Mr. Isserman will address himself to that. So that there is no misunderstanding.

Mr. Isserman: We certainly shall.

The Court: Now the first of those is Alfred Hayes.

The Witness: Alfred Hayes resides at 425 East 86th Street. This is a 16 story elevator apartment, canopy, doorman. Rentals there range from thirty-two to \$45.

Mr. Crockett: Is that per room, per month, Congressman?

The Witness: Per room. That is, in that area.

Q. In what area? A. That 425 East 86th Street area, there, those particular apartment houses on 86th Street.

Q. Is there any distinguishing characteristic about the houses on 86th Street? A. Well, these houses are very large apartment houses, known for large apartments, servant quarters, and so forth.

Q. Are they in the Gracie Square section? A. No. (2583) This is 86th Street.

Mr. Hayes is a banker, New York Trust Company.

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The Court: Now, William Morrison, I think is the next one.

The Witness: 100 Broadway. New York Trust Company, 100 Broadway.

The next one is William Morrison, who lives at 171 East 81st Street. This is one of the older elevator apartment houses known as the Webster, located in the 11th Election District of the 10th Assembly District.

Mr. Morrison is a clerk. There is no business address given for him here.

Q. Is that one of the elevator type apartments? A. Yes, it is one of the old elevator type of apartments.

Q. Still within the group of 30 you are talking about? A. Definitely.

Mr. McGohey: Is there any information about the rental there?

The Witness: 180?

Mr. McGohey: 171.

The Court: 171 East 81st.

The Witness: No, I haven't. The next one is—

Q. May I ask you this, are you sufficiently familiar with the rentals in your neighborhood for you to tell us (2584) whether the rental in that building is more than \$35 per room? A. I don't want to venture a guess on that particular apartment. It is an old apartment house. It is a well kept elevator apartment. But I don't want to guess at the rental there because I am not sure.

The Court: Otto Kramer.

The Witness: Otto Kramer lives at 311 East 70th Street.

Mr. McGohey: 72nd, isn't it?

The Witness: 72nd Street.

The Court: Yes, I have 72nd Street.

The Witness: 311 East 72nd Street. Elevator, doorman, canopy. Located in the 49th Election District of the Eighth Assembly District. Rentals there are \$35 and up.

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Q. For what? A. Per room. Mr. Kramer is a mill agent.

The Court: A what? A mill agent?

The Witness: A mill agent, according to this list here.

Q. Is the company given? A. Yes. J. L. Stifel & Sons, Incorporated, 40 Worth Street.

Q. How do you spell Stifel? A. S-t-i-f-e-l.

The Court: The next one is Donald Ashbrook.

The Witness: Donald Ashbrook lives at 145 East (2585) 92nd Street, which is located in the 63rd Election District of the Ninth Assembly District. It is eleven stories, elevator, canopy, doorman. He is listed here as textiles, Decorative Fabrics Company, 320 Broadway.

The Court: The next one is George Harrington.

Q. Have you any information on the rental on that? A. I don't. Not on that building.

Q. You know the character of the building, though? A. Yes, I have described that. It is a very well-to-do building. 151 East 110th Street is where Mr. Harrington lives. This is a renovated tenement.

The Court: Renovated what?

The Witness: Tenement.

Mr. McGohey: Harrington, is that the name?

The Witness: Harrington. He is a teacher, Institute for the Crippled and Disabled.

The Court: Now the next one I am not sure I got—

The Witness: Edward—

The Court: Oh, I beg your pardon.

Mr. McGohey: May I?

The Witness: Yes.

Mr. McGohey: Is there any information about the rental in the place where Mr. Harrington lives?

(2586) The Witness: No, I don't have any.

The Court: The next one I think is Edward Bilkey, but I am not sure about the spelling.

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The Witness: Edward H. Bilkey, insurance, 55 Liberty Street.

Mr. Isserman: That seems to be the spelling on the list, B-i-l-k-e-y.

The Witness: H. E. Bilkey & Company. He lives at 145 East 92nd Street. This is an 11-story, elevator, canopy, doorman, 63rd Election District of the Ninth Assembly District.

The Court: And the rental?

The Witness: I do not have any rental on my list, but it is a very well-to-do apartment house, sir.

The Court: How about his occupation?

The Witness: It says insurance, H. E. Bilkey & Company, 55 Liberty Street.

Mr. McGohey: That is H. E. Bilkey Corporation, is it not, Congressman?

The Witness: On my list it says Company.

Mr. McGohey: I do not think it makes any difference except that the list shows H. E. Bilkey Corp.

The Court: Yes.

Mr. Isserman: We accept that correction.

The Court: The next one I think is Paul Standard.

(2587) The Witness: Paul Standard lives at 445 East 65th Street. It is a six-story walk-up apartment. It faces York Avenue, but it is a very modern one; I imagine this is one of the last built in that section; it is the newest one of the tenements all around it. Even though it has no elevator it is a comparatively new apartment facing York Avenue. 445 East 65th Street.

The Court: How about the rent?

The Witness: I have no rental record.

The Court: You have nothing about the rentals?

The Witness: No, I do not, not on that building.

The Court: How about his occupation?

The Witness: He is a journalist, Penguin Books, Incorporated, 36 Central Park West.

The Court: Next comes Stephen Stackpol.

The Witness: Stephen Stackpol lives at 249 East 81st Street; brand new building; no elevator. I have no rental record.

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By Mr. Isserman:

Q. How many stories is it, do you know, offhand? A. I should say about six stories.

The Court: Swanky?

The Witness: No. I would say modern.

(2588) The Court: How about his occupation?

The Witness: His occupation? Stackpol, Administrator, Carnegie Corporation of New York, 522 Fifth Avenue.

Q. May I ask you one question: You used the word "modern" with respect to the type of building. Just what do you mean by that? A. Well, I would not put it in the class of tenements and I would not put it in the class of these large elevator apartments that I have described. I would put them in between.

The Court: Now, the next one is, I think, Albert Swerling, but I can't make that out very well.

Mr. McGohey: Swerling.

The Witness: Swerling.

The Court: S-w-e-r-l-i-n-g?

The Witness: Yes. Lives at 152 East 94th Street.

The Court: 84th, isn't it?

Mr. McGohey: No.

The Witness: I have 94th.

Mr. McGohey: The list shows 94th.

The Witness: It is 94th on the card, sir.

The Court: All right.

The Witness: 152 East 94th Street; very modern, 12-story elevator apartment.

(2589) The Court: How about the rentals?

The Witness: I have no record of rental on that building.

The Court: And the occupation?

The Witness: Exporter—

Mr. Gladstein: I might say at that point, your Honor, concerning the occupation of Mr. Swerling, that a check of the Register of Directors and Executives—

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Mr. McGohey: Oh, I object to this now. The witness is testifying, and I don't think we ought to have any testimony from counsel.

Mr. Gladstein: No testimony. I wanted to refer you to a document—

Mr. McGohey: I move to strike it, your Honor.

Mr. Gladstein: I am referring to something that has been identified in evidence, Poor's Registry, and I simply wanted to call attention at this point when the man's name was mentioned, to the contents of that Directory of Directors, that is all.

The Court: Is that something in evidence?

Mr. Gladstein: I do not think it has been received but it has been marked for identification.

The Court: Then it is not in evidence, but that you can come to later. That is all right.

Mr. Gladstein: It was just a good opportunity (2590) for your Honor to take this information down.

The Court: You can call it to my attention later.

Mr. Gladstein: All right, will your Honor make a note regarding Mr. Swerling and also regarding Mr. Bilkey—

Mr. McGohey: If your Honor please, I press the objection on the ground that it is irrelevant, and the document that is being talked about is not in evidence.

The Court: Strictly speaking, that is so, Mr. McGohey, but I do not think any great harm is done, and I think you just better let that go now—

Mr. Gladstein: And take it up later?

The Court (Continuing): We have been getting along so nicely here for the last few minutes or so that I would rather let that matter pass and not rule, and we will go on.

The Witness: According to the exhibit before me, Mr. Swerling is an exporter executive at Dayton, Price & Company, Limited, No. One Park Avenue.

By Mr. Isserman:

Q. While you have not got the rental of the house in question, can you relate it in appearance to Gracie Square

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that you have talked about? A. Yes. Very modern, (2591) elevator and twelve-story. I would put that in the swanky class.

Mr. Isserman: I think it is a word your Honor first used here the other day.

The Court: Well, I don't like to get something started here, but I doubt it. I might have. Anyway, I think we better go ahead. It won't make much difference who started it.

Mr. Isserman: I wasn't making a serious point of it, your Honor.

The Court: I know you were not. Now, we are doing so nicely, let us keep going before something gets started again and then we have to let it subside. Now everything has subsided and calm, and we are doing all right.

So the next one we have is Charles Mason.

The Witness: Charles Mason. Charles Mason lives at 315 East 68th Street. I have described that building in describing one of the apartments in which one of the jurors of the February panel—

The Court: Yes, that is a 16-story elevator apartment with a canopy.

The Witness: That is right.

The Court: And \$35 plus per room.

The Witness: Correct. His occupation, marine (2592) towing.

Q. What is that? A. I have marine towing here.

Mr. McGohey: That is what the list shows, marine towing.

The Court: Now, the next one is John Philip Mayer.

The Witness: That is 409 East 118th Street. That is up in the 23rd Election District of the 16th Assembly District. It is a private brownstone building. It is one of the older brownstone buildings.

The Court: It might be a rooming house or a private house?

The Witness: It might be either a private house or a rooming house, it is hard to tell.

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The Court: What is his occupation?

The Witness: Paymaster, New York Times, 229 West 43rd Street.

The Court: The next one is Jack Wishny, I think.

The Witness: Jack Wishny, new apartment house—

The Court: 330 East 79th Street.

The Witness: Yes, 330 East 79th Street, Fifth Election District of the Tenth Assembly District—

Mr. McGohey: Would you wait just a minute, please? As I am trying to locate it.

(2593) The Court: Yes.

Mr. McGohey: What was the address?

The Court: 330 East 79th.

Mr. McGohey: That appears on the list as Wishny.

The Court: All right.

The Witness: Correct.

Q. Which panel is that, Mr. Marcantonio? A. That is the January 17th panel, drawn January 7th.

The Court: Jack Wishny. Now you say that 330 East 79th is a new building?

The Witness: A new building, ten story, elevator; it is one of the nicest buildings in that block. The rentals there range from \$28—average \$28 to \$40 per room.

The Court: And his occupation?

The Witness: His occupation, assistant sales manager, Calvert Distilleries, 405 Lexington Avenue.

Mr. Isserman: He switched to Calvert.

The Court: He probably was there all the time.

Now that brings us to Mrs. Alice Yohalem of 308 East 79th Street.

The Witness: She lives at 308 East 79th Street; that is the Fifth Election District of the Tenth Assembly District. This is a 16-story elevator apartment, (2594) canopy, and rentals here are \$28 to \$40 a month average per room. Occupation, housewife.

The Court: That brings us to Emanuel Salmon, 230 East 71st Street.

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The Witness: Yes. This is an elevator, six-story apartment, canopy; that is right next to Marymount College—

Mr. Isserman: May we just pause for a moment until we locate the name on the list?

Mr. McGohey: What is the name, sir?

The Witness: Salmon.

The Court: Emanuel Salmon is what I have.

The Witness: I better check it. S-a-l-m-a—

The Court: Just a minute.

The Witness: The name is Salma, S-a-l-m-a; it is on your panel of January 7th—January 7th panel drawn on November 17th.

The Court: The witness is saying that it is the 7th of January drawing.

The Witness: No, drawn November 17th.

The Court: All right.

The Witness: The name is Emanuel Salma.

The Court: Does everybody say that, too?

Mr. McGohey: That is what the list shows too, your Honor.

(2595) The Court: S-a-l-m-a. I will make this change in my notes.

The Witness: He lives at 230 East 71st Street, 46th Election District of the Eighth Assembly District, six-story—

The Court: Yes, you have given us that.

The Witness: —elevator apartment, canopy, right next to Marymount College.

The Court: Yes, you told us that.

The Witness: The rooms here are \$30 and up.

The Court: Thirty and up, all right.

The Witness: Occupation, teacher, New York University, University Heights.

The Court: The next one is Eliot Butler Willauer.

The Witness: 425 East 86th Street, 16-story apartment, canopy, elevator; it is one of these buildings with tenements around, one of these buildings that juts out, swanky apartment house.

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Q. What do you mean by the expression “juts out”?

The Court: Well, it is all surrounded by tenements.

A. Yes, this building comes up. I said it was a 16-story. Occupation is architectural draftsman, Eggers & Higgins.

The Court: Now the next one—I suppose you (2596) have no rental figures for that?

The Witness: When I don't give the rental figures it means I don't have them.

The Court: Yes, that is what I thought. Now the next man—

The Witness: I beg your pardon, I do have it.

Mr. Isserman: Your Honor, the witness says he has it.

The Witness: No, I am in error. The rental figure is for 525 instead of 425 East 86th. I don't have it.

The Court: Now, the next man is George Fiel Pearson who lives in the same building, so you need not repeat the description of the building, and just give his occupation.

The Witness: He is an insurance broker, own business, 103 Park Avenue.

The Court: Now the next one is Lewis M. Russell at 315 East 68th, which is the building which you have previously described.

The Witness: Yes, I have described that. That makes three jurors in the same building.

The Court: I think it is four, isn't it?

The Witness: Four?

The Court: Yes, it is four. That is the (2597) fourth one in the same building.

His occupation?

The Witness: Advertising representative, Macfadden Publications.

The Court: Now the last one is Clarence Stuart at 430 East 86th.

The Witness: That is right. I have described that building, I believe—no, I have described 435.

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16-story, canopy, elevator; also with tenements surrounding it; this big swanky building juts out there. Textiles—I can't make it out, I think it is Best & Company.

Mr. McGohey: Beir, it seems to be on the list.

The Witness: Beir & Company.

Now, may I say on this list that was given to me there are two other names which are not in my Congressional District, so that there is no margin of error here. There is one, 322 East 59th Street. I take the odd-numbered street on 59th Street. The even-numbered street is in the 17th Congressional District.

By Mr. Isserman:

Q. In other words, 59th Street is one of the boundary streets? A. Correct. And then there is another one here on West 72nd Street, which is all the way over in Sol Bloom's district. That completes the number of jurors in my district.

(2598) Mr. Isserman: If the Court please, before going on to another panel it might be well to take our noon recess at this point.

The Court: Well, do you propose to do this through all the panels?

Mr. Isserman: You see, we are faced, of course, with the problem of sufficient sampling in the absence of any rulings, but I would say it is not our intention to go into detail through all the panels, your Honor.

The Court: Any other testimony that you desire to elicit from this witness besides such as he has already given?

Mr. Isserman: Yes, I had intended to—I had put three panels on here. I had intended to take him through three panels and then go to other testimony.

The Witness: May I suggest we complete this other panel? There are only about six or seven names.

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The Court: I will give consideration to that, and we will take a recess now until 2.30.

Mr. McGohey what is your position on this matter of this long-drawn-out affair of all these panels? I am disposed to curtail the proof wherever I can, but I don't want to make any ruling that might prejudice the defendants in any way.

Mr. McGohey: Your Honor, I don't see the (2599) materiality of it at all.

The Court: I think possibly I will listen to the proof as to one more panel, and then we will see what we do then.

You say, Mr. Marcantonio, that there are only six or seven names in the next one?

The Witness: I will count them to be accurate.

The Court: Well, if it is eight, it won't make any difference.

The Witness: 13.

The Court: Well, I think I will after lunch hear the proof as to this next panel, and then I will listen briefly to what may be said about going any further. My disposition, I think, will be not to permit that course to be pursued indefinitely, but I will at least go that far. So we will now adjourn until 2.30.

Mr. Isserman: If the Court please, just as a matter of personal indulgence, can we come back at 2.45 instead of 2.30? There is some little matter that would occupy me.

The Court: You know, if there were some way of starting earlier and then finishing a little earlier in the afternoon, that would be better for me. (2600) You see, these daily hearings and all the work I am doing on all these exhibits and testimony is becoming very fatiguing to me, and I had planned to start off this afternoon not too late to some place where I can get a little rest.

Now, if we start later that means that our idea of doing that will scarcely materialize. Why don't we—

Mr. Isserman: Well, it is not important, your Honor. I think I could waive it.

Colloquy of Court and Counsel

The Court: My inclination would be to start at 2.30 and finish at four. That is the schedule, unless somebody objects to that. So that is what we will do.

(Recess to 2.30 p.m.)

(2601)

AFTERNOON SESSION

VITO MARCANTONIO, resumed the stand.

* * *

Mr. Gladstein: If your Honor please, I have just spoken to Mr. McGohey about this matter that I would like to ask the Court about. There are some records that have been subpoenaed that are in the office of the jury clerk. These are documents that I have seen and where they are covered by subpoena duces tecum. However, to accommodate all of us, it would be advisable I think if some of them were photostated in order to allow us to work on them over the weekend.

And in talking with Mr. Connell and his deputy I was advised that if the Court permitted that to be (2602) done or directed that we might have photostats made, it would be entirely satisfactory with them. They have a photostat man who would be available this afternoon. So I would ask—I have spoken to Mr. McGohey about this; these are going to be matters that would be brought into court, they are under subpoena, and it would save time if we could photostat them in advance.

The Court: Are they voluminous?

Mr. Gladstein: Well, they won't be so voluminous that the photostat man can't handle them. But they would be if they were brought into court.

The Court: What do you say, Mr. McGohey?

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Mr. McGohey: I have no objection to that, your Honor.

The Court: Very well. That may be done.

Mr. Gladstein: Yes. These I may identify as 76 lists on which there are names of people who went into the petit jury panels and some went into the grand jury panels.

The Court: Very well.

Mr. McGohey: No objection at all, your Honor.

The Court: Very well.

Direct examination continued by Mr. Isserman:

Q. We will suspend the analysis of the next panel, Mr. Congressman, and go into another matter for the time (2603) being.

Now from your work, political and community work in your district and your residence there ever since you were born, and in connection with your work, have you had occasion to study the racial composition and the national origin of the people in your district? A. I have.

Q. Can you tell us briefly if you will, summarize that composition if you can by relation to geographic parts of your district? A. That section known as Yorkville which is south of 96th Street, the racial composition there is I should say about 60 per cent Americans of Irish descent. The balance is divided between Americans of German descent—among Americans of German descent, Czechoslovakian descent, Italian descent, Hungarian, and a very small group of Jewish descent.

North of 96th Street, the area immediately north of 96th, 96, 97, 98, is of Irish descent. 98, 99, 100 is American Negro descent. The East River Housing Projects, that is between 102nd and 105th, that is a mixture of all races, predominantly of Italian descent, Porto Rican descent and Negro, and Jewish.

Then the rest of the area from 105th Street up all the way to the bridge east of Third Avenue— (2604) east of Lexington Avenue, is predominantly of Italian descent. Then between Fifth Avenue to Lexington Avenue, with the exception of three election districts, 118, 119, 117 and

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'15 and '16, part of 114th Street is Negro and the balance is Porto Rican.

Q. Just to clarify your statement, the few election districts you mentioned by name are predominantly Negro districts, is that correct? A. Correct.

Q. Now are there any Negroes or Porto Ricans living in your district below the 99th Street line? A. There are very few.

Mr. McCabe: May I ask what the Congressman means by "the bridge"?

The Witness: I am sorry.

The Court: That is the Triboro I think.

The Witness: No, no. 129th Street, the bridge separates the Bronx from Manhattan. There are three bridges there, Third Avenue, Second Avenue and First Avenue Bridge.

Q. Is that on the northerly line of your district? A. That is right. That is the northern boundary of my district.

(2605) The Court: Oh yes. I was off on the wrong track. I am glad you brought that out, Mr. McCabe. I see now what you mean. It is the most northerly of those three bridges that you were speaking of.

The Witness: That is right.

Mr. Isserman: It is this one right here, I believe (indicating on map).

The Witness: The Harlem River.

The Court: Yes.

By Mr. Isserman:

Q. In the two panels that you have examined thus far did you find any jurors north of the 99th Street line? A. I think we found three. Harrington, Forrester—

Q. Forster. A. Forster or Forrester, I don't recall which one, and—I don't remember the name of the third one. I think that was the paymaster—

The Court: Mayer.

The Witness: Mayer, the paymaster of the New York Times.

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Q. Now in your work in your district and the knowledge of that district have you become acquainted with numerous persons living in that district? A. Definitely.

Q. Have you any estimate about how many you confer with in the course of any week? (2606) A. Well, when Congress is in session and I am in New York only on Saturday and Sunday I see at my Yorkville office over 200 people a week, and I see at my East Harlem office on Sunday afternoon over 300 people a week.

When Congress is not in session and I am at my Congressional office all week long I can safely say that I see a good seven hundred, eight hundred people a week.

Q. And in addition to this number you have a great many occasions where you meet other people in your district, is that correct? A. Definitely.

Q. Now just one more question on that: and that habit of yours of meeting people, as you have described, in your district goes back how many years? A. Since I have been a member of Congress, 1935.

Q. Now, in the course of your meeting these people and your study of your district, have you become acquainted with the general occupational characteristics of the people whom you represent? A. Yes, I have.

Q. Now using the 99th Street line as a boundary, will you tell us the occupational characteristics of the people in your district living north of that line? A. Well, I don't have to use that line.

Q. Well, then, you do it the way you can, the way (2607) you know best. A. I can say that in the main—

Mr. McGohey: I object, your Honor, to any such generalization as this.

The Court: Sustained.

Mr. Isserman: Your Honor, I could do it block for block and election district by election district. Mr. Marcantonio does know the facts. I thought we could generalize to some degree. I am willing to qualify him further on specific knowledge of specific blocks in his district, in his area.

The Court: I will permit a brief general statement and then we will see what it amounts to.

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A. (Continuing) In the main the people of my district are wage earners; by that I mean specifically they work in factories; they work in the construction field, bricklayers, plasterers, carpenters, cement helpers. Then we have also needleworkers and some white collar workers.

The Court: Some what?

The Witness: White collar workers.

Q. Would you amplify that just a little bit? A. Yes. Clerks, stenographers, people who do clerical work in the various industries in the city, but I can definitely state that 95 per cent of the people in my district receive wages for a living. Then we have (2608) unemployed also.

The Court: What is the percentage of unemployed, do you suppose?

The Witness: It is going up, Judge. It is going up every day. The percentage is hard to fix at this time, but—

The Court: There is no reason to guess if you don't want to.

The Witness: I don't want to guess. I would rather not guess, except to state the number of unemployed is growing daily.

By Mr. Isserman:

Q. But at this point is it a relatively small percentage of the working class community in your district? A. I would not say small.

Q. Well, could you give us some estimate? A. I would rather not venture a guess. I would definitely say, however, that out of every hundred people there must be about ten unemployed, especially during the month of January the lay-offs have been tremendous.

Q. You mean January 1949? A. 1949. People working in the hotel industry—

The Court: Well, I don't think you need to amplify it in more detail. I think that will suffice.

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Q. Now, a moment ago in your reference to wage (2609) earners, can you tell us in what way you used that term as distinguished from any other term denoting income, such as salary? A. Well, let me put it this way: I would say that the average income is about \$2,500 a year per family.

Q. And did the term "wage earner" connote the method of payment in your mind when you gave us that term? A. It connotes the method of earning a living. In other words, they are employed by somebody and they are working at trades; they are not professional people as doctors, lawyers or executives.

The Court: You mean they are paid by the hour or by the day?

The Witness: Either by the hour or by the day.

Mr. Isserman: I just didn't want to lead the witness, your Honor.

The Court: That is all right.

Q. Now can you give us any estimate of the number of residence buildings in your area excluding the 25 or 30 apartments that you made reference to? By "area" I mean in your Congressional District, a rough estimate. A. I have never made a count. However, the average block—I don't believe I am overstating the case—the average square block has about 30 buildings. Of course, you get some square blocks that may be smaller—

(2610) The Court: How many did he say? 30?

The Witness: 30.

The Court: These are these tenements you are talking about?

The Witness: Yes. There may be a little more or less. But I don't think I am actually overstating that.

The Court: That is, rooming houses, these brownstone places, tenements, and things like that?

The Witness: Exactly. Sometimes you may have a block where it is all tenements, a square block. On the other hand you may have a block where you have a series of brownstone rooming houses, which make more buildings in that particular block.

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Q. Now, have you any rough figure in mind as to the minimum aggregate number of residential buildings other than those apartments? A. Other than the apartments?

Q. Yes, a rough minimum figure of the total aggregate. A. Roughly, 5,000 or 6,000. I say roughly. I have not made a count.

The Court: Yes. I should think that would be pretty rough. I don't see much value in a man's guess as to how many buildings there are in such an area as this. I don't think it is necessary for you.

Mr. Isserman: Well, he has answered the (2611) question, I believe, as best as he can.

The Court: Yes.

Mr. Gladstein: Your Honor, may I interrupt the questioning for a moment?

The Court: Yes.

Mr. Gladstein: I am advised that the clerk with respect to the documents that I spoke to the Court about desires to have something in the nature of a written statement from the Court inasmuch as these, he says, are not files copies, and therefore—is there some way of communicating to Mr. McKenzie that these documents, though they are not file copies—whatever that term means—are the ones to be photostated? Could that be done?

The Court: Yes, I think that will be done.

Mr. McGohey: Your Honor, I wonder if the clerk, Mr. Connell, is raising a question as to whether or not these are documents that he would produce pursuant to a subpoena, or are they documents which he would ask the Court to direct him on because of some idea that they might be confidential?

Mr. Gladstein: No, I have seen them. They are not confidential.

Mr. McGohey: Well, that seems to answer that problem.

(2612) The Court: I think they are all right.

Mr. McGohey: Perhaps your Honor could direct Mr. Borman, the clerk, to convey your Honor's direction.

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The Court: Yes. Will you do that, Mr. Borman, please?

The Clerk: Yes.

By Mr. Isserman:

Q. Now you used the term "rooming house" in your description of some of the houses in the area. Are those rooming houses predominant in the area? A. No, I would not say they are predominant, no. I would say they are scattered, except in one or two blocks you may have them.

Q. And from your own observation and knowledge of the people in your district, have you any opinion as to the stability of residence? A. I would say that the people in my district have been living there for many, many years. In fact, there are some families that have been there for about two generations or more. The exodus has been very small. I venture to say that it is smaller than from any other Congressional district.

Q. Now, you mentioned the presence of—

The Court: Now, of course, you realize, Mr. Isserman, that proof of that kind is highly speculative. I think it better if you keep that to a limit—

(2613) Mr. Isserman: But, your Honor—

The Court (Continuing): But if my mentioning it makes you feel like going into it more, you may do so.

Q. Are you familiar with the various election districts in your district, Congressman Marcantonio? A. Certainly.

Q. And about how many voters are there per Election district? A. The average is 800.

Q. And are you familiar with, personally familiar with about how many voters in your Congressional district? A. Well, I think that north of 99th Street there are very few voters I don't know, and south of 99th Street I should know about a good 40, 50 per cent of the district.

Q. And have you in the course of your work in the community visited them at their homes? A. I have canvassed, yes.

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Q. And have you done that on a great many occasions?

A. In every single election.

Q. And you meet these people from week to week? A. I do.

Q. Now, in the course of your work in the community as an individual and as a Congressman, have you had any occasion to consider and investigate the number of Porto Ricans in your district or people of Porto Rican descent? A. I made a special study of the Porto Rican migration, (2614) and it is a safe estimate to state that within the boundary lines, district boundary lines of my Congressional district there are at least 25,000 people who have either come from Porto Rico or who are the children of Porto Rican parents.

Q. And are you familiar with a great many of these people from Porto Rico? A. I am.

Q. And are many of them to your knowledge enrolled voters in your district? A. They are.

Q. Are many of those who are now enrolled voters persons whom you know? A. I do know them.

Q. Do many of them know how to read and write? A. They do.

Q. And speak English? A. They certainly do.

Q. Now, has there been any increase in the number of Porto Ricans in your district since 1940, if you can state? A. There has been some.

Q. And approximately what is that increase? A. I should say that the Spanish speaking population from Porto Rico in my district has increased from about 20 to 25 thousand.

The Court: How do you mean? From 20,000 when to 25,000 when?

The Witness: From 1940, I think there has been an increase of at least 5,000.

The Court: Since 1940?

(2615) The Witness: Since 1940.

The Court: I see.

Mr. McGohey: Is that 25,000 or 5,000?

The Witness: 5,000.

The Court: The increase was twenty to twenty-five since 1940?

The Witness: That is right.

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Q. Now do you know from your own experience and knowledge of your district approximately the number of Negroes in your district? A. I am figuring on the basis of districts that we consider to be Negro inhabitant Election districts. Say we have about five or six thousand Negro people in our district. Some reside in the James Weldon Johnson project and some reside in the East River houses.

Q. And to your own personal knowledge—

The Court: Some reside in these housing developments, these low cost housing developments?

The Witness: That is correct.

Q. And are many of those enrolled voters to your personal knowledge? A. They are.

Mr. Isserman: May I have a minute, your Honor?

The Court: Yes, you may.

I suppose some of these families have several wage earners in each family.

The Witness: They have.

(2616) Q. Now I believe you gave us a figure before as to the approximate population in your district. Can you tell us briefly what it was, again? A. According to the census of 1940 upon which the district was reapportioned, the figure is 297,000 as it appears in the Congressional Directory.

Q. And the number of voters were approximately somewhat over a hundred thousand in the last election, is that right? A. The 1948 elections, 104 plus something registered; about a hundred thousand plus voted.

The Court: Yes. We got that this morning.

Mr. Isserman: Yes.

Q. Now, in respect to the people in your district, in the sense that you know and have observed, are there many between the ages of 21 and 70? A. Very many.

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Q. And did you have occasion to make any observation as to literacy particularly amongst the adults in your district? A. Yes.

Q. What is your knowledge on that situation?

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

The Court: Sustained.

Q. You have a large—

The Court: Just a second. Mr. Borman has told me that if there is any difference as between defense counsel and the clerk in this photostating it is because (2617) he may not understand exactly what is desired. And I think perhaps if you will make a very brief statement here, Mr. Gladstein—

Mr. Gladstein: Why don't I just go up there? I will make the statement and then go up.

The Court: You have already made it before, I take it.

Mr. Gladstein: Yes.

The Court: And you know just what it is. Well, why don't you go up there?

Mr. Gladstein: With the Court's permission.

The Court: And perhaps take one of the Government counsel up with you.

Mr. McGohey: Mr. Shapiro.

The Court: And I take it no point is going to be made by any of the defendants that you are out of the room for a time. So, if you will just go up there and straighten that out it will be all right. And Mr. Isserman will continue on in your absence.

Mr. McGohey: Mr. Shapiro will accompany him.

The Court: That is all right.

(Mr. Gladstein and Mr. Shapiro left the courtroom.)

By Mr. Isserman:

Q. Now Mr. Congressman, of the many persons you know (2618) in your district have you found them to be of average intelligence?

Colloquy of Court and Counsel

Mr. McGohey: I object, your Honor.

A. Well, they must be. They voted for me seven times.

The Court: Sustained. I strike the answer out.

Mr. Isserman: Will your Honor hear me?

The Court: I will hear you.

Mr. Isserman: My purpose is to indicate that the residents of Mr. Marcantonio's district, without regard to their economic status, are fully able and capable of carrying out the duties of citizenship which they bear, including the duty of serving on juries in this court.

The Court: Well, I don't think a general omnibus statement of a Congressman covering hundreds of thousands of people in a district as to their intelligence or literacy is of value to the court.

Mr. Isserman: You see, your Honor, I was obliged to approach the question in this fashion. Certainly we could call the individual persons who reside in the area, which we would do without hesitancy if it were a small community—

The Court: Well, I think you would do it without hesitancy, all right, if I let you.

Mr. Isserman: I said if it were—

The Court: But that is just one of those (2619) things you are not going to do.

Mr. Isserman: Your Honor, I did not say at this point that I would do it, but I am—

The Court: All right. Now just a second. There is one thing that I don't think has been apparent to defense counsel. We have a vast area in the City of New York, a cosmopolitan area, one of the most congested probably there is anywhere in the world, and the problem of selecting jurors from such a vast aggregation of people is something that I am becoming increasingly convinced cannot be demonstrated by such proofs as you have been offering.

Naturally the law gives a vast discretion to the people who select the juries, necessarily so. To attempt to select so many manual workers, so many clerical workers, so many of this and so many of that, and so many of this race and that race and the other

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race—why, it is just perfectly impossible. Nor was it ever intended to have any such thing.

And the special problem of this huge city here is one that differs from the jury selection problem elsewhere. And I cannot see that it can be determined by this indirect form of proof. It might do for some little village or some small town, but for the aggregation of human beings in the City of New York I think it is an utter futility.

(2620) Mr. Isserman: If the Court please, I would like to respectfully object to your Honor's remarks in characterizing the effort we are making here and in indicating that the general proof will not be accepted while at the same time the specific proof which is available is also not received. I was beginning to point out to the Court—

The Court: Well, I thought, Mr. Isserman, that when you came to have the Congressman testify to the general complexion of his district that that was all right. Now when you come down to his study of literacy or the intelligence of such a large number of people, I regard it as of no value.

Mr. Isserman: But he knows those people, your Honor.

The Court: That is what you say.

Mr. Isserman: That is what he says.

The Court: That is what he says.

Mr. Isserman: And that is the fact.

The Court: And I must draw conclusions when a man says that he knows—what is it? —104,000 voters and 297,000 people in there; I must draw my own conclusions. And from my own rationalization of it I have excluded his statement, or the questions that are seeking to elicit his statements about his knowledge of the intelligence (2621) and of the literacy of such a large number of people.

Now you take your exception and you are protected. If I am wrong, why, that is something that—

Mr. Isserman: I was in the middle—

The Court: —that you can have corrected.

Mr. Isserman: I was in the middle of my objection when your Honor interrupted to misconstrue

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a statement that I made. I said, conditionally—

The Court: I wish you would not say that I do that, to misconstrue.

Mr. Isserman: It seems to me to have been misconstrued.

The Court: That seems an impertinent thing.

Mr. Isserman, that seems an impertinent thing. You are an experienced lawyer and you know better than to do that.

Now, you lawyers have been at that here for three weeks, perhaps to provoke me—I don't know what the reason may be. But I do know that if you keep it up some day, perhaps now, perhaps hereafter there will be a time of reckoning. Now, please don't do that.

Mr. Isserman: And I would like now to object to your Honor's characterization of my comment.

Now, the statement that I was making—

The Court: Well, when you charge me with deliberately misconstruing something I regard that as (2622) impertinence.

Mr. Isserman: I did not say it was deliberate, your Honor. But I said it seemed to me to be that. But, in any event, what I was saying was this: I said if this were a small community the method of proof, as indicated by the cases, would be to call the persons directly involved. Your Honor has thus far conditionally ruled that your Honor would not allow the calling of those persons who would give the direct evidence on their status.

The Court: There is no condition about it. I have said positively that I won't let you do it.

Mr. Isserman: Then your Honor has in effect ruled that this would not be allowed.

The Court: I have ruled that this idea of calling every member of the population or every member from Mr. Marcantonio's district or every voter or every inhabitant from any other district I will not permit, and I won't. And if it can be stated any clearer than that so that you may have your exception in the most positive and unequivocal manner,

Colloquy of Court and Counsel

I can try to restate it but I think that is pretty clear.

Mr. Isserman: Now I said, if it were a small community that would be the way of proceeding. Now, when the Court rules out the direct evidence then there (2623) necessarily must be a falling back upon secondary evidence; and secondary evidence invariably, by its nature, is evidence which has not the sharp, direct, probative value of direct evidence.

The Court: Now, Mr. Isserman—

Mr. Isserman: Now, the reason why—

The Court: Let me say something to you. In every judicial proceeding that I am familiar with, and I have had a pretty large experience at the bar, when the Court indicated that it didn't want any more argument on a point the lawyer quietly desisted. If he chose to except he noted his exception and went on to something else. Here, perhaps in an endeavor to wear me out, which it is gradually doing, you keep that up, and you make the argument or arguments just are you are doing now. And I say, as I have said before, that that in my judgment is not the proper conduct of an attorney. It is extremely wearing on the Court in a trial of this kind. I suppose it will wind up by bringing me down. I hope it won't. I may have the strength to go on, and I hope I shall. But I tell you—stop it.

Mr. Isserman: I would like to take exception to your Honor's remark as an improper characterization of my conduct.

(2624) I would like to state my—complete my objection for the record if I may.

The Court: You insist on going ahead again, and all I can do, as I do not intend to make a rumpus about it, is to advise you again—please desist; and then, if you insist upon going on, why, you must take the consequences, whatever they may be.

Mr. Isserman: May I state my objection for the record?

The Court: You may not.

Colloquy of Court and Counsel

Mr. McCabe: May I respectfully suggest, your Honor—

The Court: Now it is your turn to go after me, is it?

Mr. McCabe: No, not at all, not at all. I am making a suggestion which I think is normal when the credibility or value of a witness's testimony is under scrutiny; that the Congressman's ability to testify as to the qualification for service on a jury of the hundred thousand persons in his district might well be subjected to the ordinary test of cross-examination rather than to arbitrary exclusion by your Honor. I should not have used "arbitrary," and I withdraw that. But exclusion without any test. I don't think your Honor should assume at the beginning that the Congressman (2625) is unable to testify.

The Court: You know, Mr. McCabe, what we are talking about now is my excluding the question to the Congressman of whether he can tell us about the intelligence of these 297,000 people and their literacy. That is what you are arguing about.

Mr. McCabe: Wasn't that the point to which I addressed myself?

The Court: I say it does not need any argument. Now, some day somebody will read this record and they will see just how many times this same sort of thing has been going on, and somebody may be brought to judgment.

I am not going to attempt to use up my physical resources in telling you any more. So if you want to go ahead, after what I have said, I am not going to try to stop you. It is just too wearing.

Mr. Sacher: I have an observation to make, your Honor. I think it would be a misunderstanding of our purpose if the Court were to believe that we have any aim at any time to harass the Court or to do anything of impropriety. I think that while your Honor's health is of grave concern or great concern to yourself and those who are near to you, we lawyers have the responsibility of defending the freedom and liberty of twelve men and also to de-

Colloquy of Court and Counsel

fend the right of their political party to (2626) exist, to say nothing of their wives and children.

The Court: You may wear me down.

Mr. Sacher: No, it isn't a question of wearing you down.

The Court: But my own personal opinion is that you won't.

Mr. Sacher: Well, I don't intend to, I don't want to. And that is not a purpose that I have set myself.

The Court: The best way to avoid it is to sit down and let the matter rest with my ruling excluding the two questions.

Mr. Sacher: I just want to make this observation, if I may. Your Honor did not limit himself to a statement of ruling. Your Honor made an observation concerning the state of our proof, and you said because of the nature of Manhattan Island or of the Southern District it was impossible to do things in a certain way. And I respectfully submit that that evidences a misconception on the Court's part of the tendency of our proof. If New York is all that your Honor says it is, how come that this jury clerk always manages to find his jurors from the 17th Congressional District? And how come that this jury clerk never hits any one of the hundred thousand people from—

(2627) The Court: Now Mr. Sacher, just lower your voice a little bit.

Mr. Sacher: All right, your Honor, I am sorry if I am carried away.

The Court: That is the same sort of thing that you have repeated again, again and again, and that is the sort of repetition that I do not desire.

Mr. Crockett: If the Court please—

The Court: Ah, Mr. Crockett.

Mr. Crockett: I should like to address the Court.

The Court: Well, we are going to have every one of you take a crack at me, eh? Well, go ahead.

Mr. Sacher: I wish to note an exception.

Mr. Isserman: I take an exception to your Honor's remark.

Colloquy of Court and Counsel

The Court: Yes. Go ahead, go ahead. Take a couple of exceptions.

Mr. Crockett: As a matter of fact, I have been unusually quiet, because this morning when your Honor was inviting comment—

The Court: Yes, but now you see a chance to follow up a little harassment and you can't resist it?

Mr. Crockett: No, it isn't that.

The Court: Yes, go ahead.

(2628) Mr. Crockett: I sort of feel badly over the fact that this morning when you invited comment you did not ask me to speak on the matter, and I thought that maybe at this time you would care to hear what I did think about it.

Well, I have only two observations to make. A day or two ago the Court pointed out that at the conclusion of the taking of testimony in this case no time would be allowed for the submission of briefs, and that if counsel had any authorities to which the Court's attention should be directed that should be done in the course of the presentation of testimony.

The Court: No; what I said was that when the evidence was closed there would be no additional time for briefs but that I would be glad to receive whatever briefs might be submitted during the continuance of the proceeding. And I mentioned specifically the fact that you might busy yourselves over this week end in getting something up for me. I did not ask for more talk during the taking of the testimony.

Mr. Crockett: Well, I do not regard what I am saying as just more talk, and I am certain your Honor did not intend to characterize it as that.

The Court: When you read the record you will see that what you said was that I had indicated that I wanted some (2629) enlightenment orally during the proceeding, and I consider that not what I said at all, and as I like to have the record straight I made the statement I just made.

Colloquy of Court and Counsel

Now, go ahead, without bringing in those other matters. If you have something to say about these two questions that I ruled out that have been addressed to Mr. Marcantonio, go ahead and do it.

Mr. Crockett: I seem to recall distinctly the Court's statement that "If you gentlemen have any authorities to which you care to direct my attention I suggest that you do it as we go along."

The Court: That is right. Not orally. Hand me up a memorandum with them. I can read.

Mr. Crockett: I appreciate that fact, your Honor, and I am very much aware of it.

However, what I want to point is that the method of proof we have been pursuing here by calling an outstanding member of the community to testify concerning the approximate number of people in the district, about their knowledge, the basis of qualification for jury service, is precisely the type of proof that has been offered and accepted in the overwhelming majority of cases coming up from the South, where it was necessary (2630) to prove Negro exclusion.

In those cases counsel did not rely on the clerk and the court officials perhaps because he was aware of the characterization which Mr. Gladstein mentioned yesterday as having been made by your Honor. What normally happens is that they call in some outstanding person in the community to establish the fact that there are qualified Negroes in the county who had not served as members of the jury over a long period of years, and that proof has always been received, has always been considered by the Supreme Court.

In effect what we are doing here is calling the most outstanding person in the 18th Congressional District, who already has demonstrated his knowledge of the area and of the people in the area, and asking him to do precisely what has already been approved by the courts in similar cases challenging grand jurors in the South, which cases eventually went to the Supreme Court.

That is the first observation I wanted to make.

Colloquy of Court and Counsel

The second one I wanted to make is this, and that is that it seems to me that this proceeding is in the nature—

The Court: Have you some case, Mr. Crockett, to cite to me where the Supreme Court held that it was all right to ask a politician or Congressman a blanket question (2631) about the literacy of all the people in his district or the intelligence of all the people in his district? Have you such a case?

Mr. Crockett: I want first of all to object to the Court's characterization of Congressman Marcantonio as a politician.

The Court: Yes, and you will just answer as you did the last time.

Mr. Crockett: I wish also to object to your statement with reference to my own conduct. I think the record will show that on each occasion I have given the Court an answer when I was asked to give an answer.

The Court: I think not.

Mr. Crockett: Now in this case your Honor is requesting that I refer you to some cases.

The Court: That is right.

Mr. Crockett: That is what I want to do.

The Court: Go ahead and do it.

Mr. Crockett: The case of Patton vs. Mississippi is one.

The Court: Wait a minute. Penn vs. Mississippi?

Mr. Crockett: Patton vs. Mississippi.

The Court: What is the citation? And for once give me the official citation.

Mr. Crockett: If your Honor prefers, I will (2632) prepare a list of these cases and give it to you in the morning.

The Court: No. I will check this one right now and we will see if there is anything in there on the subject.

Mr. Crockett: Patton vs. Mississippi is 332 U. S. 463.

The Court: Now, if you will just sit down and let me get a look at this book. (Reading.)

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Well, I find absolutely nothing in that opinion which even remotely touches the subject under discussion.

So we will proceed now without any further argument, please.

Mr. Crockett: I should like merely to request permission to give the Court a memorandum, your Honor.

The Court: Well, if you are going on, Mr. Crockett, you are doing it in defiance of my request of you.

Mr. Crockett: I am not arguing; I am merely trying to get permission to submit a memorandum—

The Court: You are talking. Go on, keep it up.

By Mr. Isserman:

Q. Congressman Marcantonio, without regard to all the people in your Congressional district, and confining the question to the people whom you personally know amongst (2633) the voters in the district, amongst the Negro and Porto Rican population and the population of Italian origin, are the people that you know capable of carrying out all their duties of citizenship?

Mr. McGohey: I object to that.

The Court: Sustained.

Q. Are the people that you know of the group I have just described people of average intelligence?

Mr. McGohey: I object.

The Court: Sustained.

A. They had to pass a literacy test in order to vote.

The Court: The answer is stricken out.

Q. And referring to the same groups, Congressman Marcantonio, I ask you whether or not you know that the people that you personally know amongst the voters in the groups I have described are persons who can read and write? A. Definitely.

Colloquy of Court and Counsel

The Court: In striking out the answer, it is not intended to rule that inferences legitimately to be drawn from the election and voting records may not be drawn and asserted by way of argument.

Mr. Sacher: I am sorry, I missed that. Will you be good enough to read that, Mr. Reporter?

The Court: I am merely saying in substance that if it is to be argued, as you may well do, that from the (2634) voting lists of so many voters, it may be assumed that they passed whatever literacy test was necessary in order to vote, that I do not mean to eliminate any such thing as that; I have merely sustained the objection to the question and struck out the answer as addressed to this witness. I think you are entitled to draw such inferences as may be drawn from the other documents in evidence.

Mr. Isserman: But the question was limited to the witness's personal knowledge.

The Court: What is that?

Mr. Isserman: The question was limited, however, to the witness's personal knowledge.

The Court: That is the part I rule out.

Mr. Isserman: Now I would like to call attention to the panel of December—

The Court: Now we are back to that one that you were going to take up in the beginning? Very well.

Mr. Isserman: The panel of December 20th. I have the wrong one on the easel, and I will replace it with the right one.

The Court: What is the exhibit number of this?

Mr. Isserman: I am checking it now.

The Court: All right.

Mr. McCabe: While we are waiting, your Honor, (2635) might I ask what a literacy test is? The Congressman spoke of a literacy test for a voter. I do not think it is in the record yet.

The Court: I think you had better just let that drop for the time being, and we can come back to it after we get this panel done. You know, he wants to finish up this afternoon, and you can easily prove that matter by anybody or by stipulation. I am

Colloquy of Court and Counsel

anxious to have him finish up about this other panel if he can.

Mr. Isserman: If the Court please, I think we can do without the panel. I can't seem to locate it at the moment.

The Court: What is the date of it, Mr. Congressman?

The Witness: It is the December 20, 1948, panel.

The Court: December 20, 1948.

Mr. Isserman: I think the exhibit would be 50.

The Court: Well, I was looking for the chart—

Mr. McGohey: I think I can help your Honor. There is no chart for that panel.

The Court: Oh, no wonder I couldn't find it.

Mr. Isserman: That seemed to be my trouble. I was trying to check it on my list.

Mr. McGohey: But I want to ask now, is that one of the panels that was marked for identification—

(2636) The Witness: It is.

Mr. McGohey: —and identified by the witness Wilkerson as something that he worked on?

Mr. Isserman: It was, and we will offer it in evidence, your Honor, at the first opportunity.

The Court: Yes. That is 50 for identification?

Mr. Isserman: That is right.

Mr. Gladstein: Could I interrupt a moment, your Honor, to ask that the clerk and the deputy be brought in so we can identify the documents and ask your Honor's disposition of a problem that has arisen with regard to the photostating?

The Court: Yes.

Mr. Isserman: May we proceed with the witness in the meantime?

The Court: Well, you can just relax for a second or two.

Mr. Isserman: I thought we might dispose of the Congressman and let him get away.

The Court: Well, I am willing to do that, but Mr. Gladstein is a little concerned about that, and he wants to get it off his mind.

Mr. Gladstein: That is exactly right, your Honor.

Colloquy of Court and Counsel

The Court: All right.

Mr. Gladstein: Now, your Honor, these are the (2637) lists called—well, they are called not file lists but they are lists in the office of Mr. Connell or Mr. Connell's assistant, Mr. McKenzie. These are lists of names of residents of the Southern District of New York, and over the course of years, for example, the very first one I look at, is dated May 27, 1940; these contain names and addresses of people who were asked to come in and qualify for jury service, and who did, and whose names even went into the jury active lists, sometimes grand jury, sometimes petit jury, and I wanted to have photostats made. For example, the one I hold has stamped on the righthand corner, "Federal Grand Jury Association, 101 Park Avenue," and the first name on it is Carl W. Ackerman, and the last name—

Mr. McGohey: If your Honor please, I do not think it is necessary to solve this problem to read the paper.

Mr. Gladstein: No, I just want to identify the document.

The Court: Now that is all right. Without making it too long and pulling in about the Grand Jurors Association you show Mr. McGohey a few of those, and if he says all right— Are all that batch all right, Mr. McGohey? Do you see any reason for not having those photostated?

(2638) Mr. Gladstein: That is the first one. The next list has on it the words "Colored list"—

The Court: You don't need to go over those all, because you just show that top batch to Mr. McGohey, and if he says all right, I am going to direct that that top batch be handled with the photostating machine, and then we will leave that big bunch on the bottom for next week.

Is that all right, Mr. McGohey?

Mr. McGohey: If your Honor please, I have no objection to the defense getting any paper that is available that the defense thinks it needs. As I understand it, the problem here is an administrative problem, and the physical problem of getting photostats of this pile of papers.

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The Court: That is what I say. Let us take just the top batch which Mr. Gladstein seems to have in his hand now, which would seem to keep them busy for two or three days, and then we will come to the others later.

Now, Mr. Connell, these papers that Mr. Gladstein has in his hands, you will kindly have photostated if you can conveniently do so.

Mr. Connell: I will do that.

The Court: Is that a sufficiently clear direction?

(2639) Mr. Connell: It is, Judge.

Mr. Gladstein: May I identify them for the record, your Honor?

The Court: I don't think you need to do that. You know here we are—

Mr. Gladstein: Can I make a note of that?

The Court: You may go outside with Mr. Connell and may make a note there—

Mr. Gladstein: Very well.

The Court (Continuing): Because I want to finish up with the Congressman this afternoon.

Mr. Gladstein: Very well.

The Court: Now, that other big batch there can wait until next week.

Mr. Gladstein: All right, your Honor.

The Court: Well, now, Mr. Isserman, we are gradually getting along in good shape, so you may go ahead now with this panel of December 20, and I think I shall desist from taking the notes of the names and of all the details, and I will just relax a little bit and listen now while you go over these, because I suppose your contention is that they will show about the same as the others.

Mr. Gladstein: I would think so.

The Court: Very well, I will just listen (2640) and not take notes for a while.

By Mr. Isserman:

Q. Congressman, would you give us the name of the juror on the panel in each case? A. Yes.

Colloquy of Court and Counsel

Q. And give us the same information concerning that juror that you did about the others before the recess?

A. Edwin Erlich—

Mr. McGohey: Just a minute. Do I understand that the original exhibit, the panel, is not here?

The Court: Well, they must have it here, because that is what we were looking for this morning. It is Exhibit 50 for identification. Isn't that here yet?

Mr. Sacher: I will take a glance. (Searching.)

I am afraid it is not here. It is an ignominious confession to make, but I am afraid it is not here.

The Court: I think that is very curious in view of the colloquy this morning, and my request is that all original exhibits be here in court. After that colloquy the least I would expect was that it would be here.

Mr. Isserman: We have sent word that they all be sent down, your Honor.

The Court: What is that?

Mr. Isserman: We have sent word that they all be brought here, and they may be in that room, and we will (2641) check it in a moment.

The Court: All right, and I will take a five minute recess.

(Short recess.)

Mr. Isserman: If the Court please, we have not found the list amongst our papers here. We made another check at the office to see if they could locate it. I would suggest that being there are only seven names involved, that we proceed with those names and allow them to come in subject to any correction or check that may be made.

The Court: What do you say to that, Mr. McGohey?

Mr. McGohey: I am agreeable to that. It would only hold up the witness to wait while we are getting it from the clerk.

The Court: Yes. And let us have it understood that from now on all the original exhibits are going

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to be here in court every day. Now it should not be necessary to give such instructions as that because that is a commonly accepted way of doing in every kind of a trial.

So let us go ahead.

Mr. Isserman: It is our intention to have them here, and they will be here, your Honor.

The Court: Yes.

(2642) *By Mr. Isserman:*

Q. Now Congressman, referring to the names furnished you as on the December 20, 1948, panel, give us the name of the person, his classification and address, and then give us the facts concerning his address. A. Bedford, Jr., F. H.; director; address, 10 Gracie Square. This is a 15-story building facing—

Q. You have already described that building, have you not? A. Yes, that is the one I described as super-swanky—

The Court: No. The other two in Gracie Square were 10 Gracie Square and One Gracie Square.

The Witness: This is 10 Gracie Square.

The Court: Oh, yes, that is right. He has described that building, that is right.

The Witness: He is a director of the Standard Oil Company of New Jersey.

The next one on that list is—the last name is Epting, Alexander L.; textiles; lives at 513 East 86th Street.

Now, this is not an elevator apartment; it is one of these expensive renovated brownstone apartments. The rentals there range from \$32 to \$45 per room. His business address is 40 Worth Street; connected with J. W. Valentine Company, Incorporated.

(2643) Q. Would you give us his classification? A. It simply says textiles.

The next one is Erlich, Edwin; president, lace and trimming jobber; Gem Lace Importing Company, 1261 Broadway. He lives at 151 East 80th Street. And it is

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on the corner of Lexington Avenue, 11-story elevator apartment house with a canopy, and the rentals there are \$35 to \$40 per room.

The next is Mugridge, Clayton F., consultant; with the company of Dodge & Mugridge, 1270 Avenue of the Americas; he lives at 520 East 86th Street, a 15-story elevator apartment, very swanky; rentals \$35 and up.

Q. Per room? A. Per room. You won't find an apartment for \$35 in there. This is \$35 per room.

The Court: There would be a lot of people running up to get them.

The Witness: Sure would. A lot of my people would like to get in for \$35 an apartment.

The next one is Storm, Carl C.; occupation, exporter; Melchior, Armstrong & Dessau, Ridgefield, New Jersey; resides at 151 East 83rd Street; elevator apartment, canopy, doorman; rentals, \$30 to \$35 a room.

The next one is Tramel, Joseph; mortgage negotiator; Manufacturers Trust Company, 55 Broad Street; lives at 1663 York Avenue. It is a renovated house, no (2644) elevator.

The last one is Winters, John H.; occupation, writer.

The Court: Writer?

The Witness: Correct.

Geyer, Newell & Ganger, Incorporated, 745 Fifth Avenue. He lives at 520 East 86th Street; 16-story apartment—

Q. That is the one you just told us about? A. That is right, that is the one with the canopy.

The Court: That is the one Mugridge was in?

The Witness: That is right, sir. Two in the same building.

Q. Does that complete the seven names on the list as furnished to you? A. That is right.

(2645) Mr. Isserman: If the Court please, until the check is made with the list itself I think it might be well to take Challenge Exhibit 100-B for

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identification, which contains the names from this panel, and offer it in evidence.

The Court: Show it to Mr. McGohey.

Mr. McGohey: No objection.

The Court: All right.

(Defendants' Challenge Exhibit 100-B for identification received in evidence.)

Mr. Isserman: Now, if the Court please, I had further questions of this witness along the same line but will suspend those in the hope that he can be cross examined this afternoon because he does have to be in Congress on Monday.

Am I correct about that?

The Witness: Correct.

The Court: When you say "suspend," that seems to me that possibly you are considering him back again.

Mr. Isserman: No, I will not for this—

The Court: All right, that is fine, very good.

Have you any cross examination, Mr. McGohey?

Mr. McGohey: I have no cross examination, your Honor.

(2646) The Court: Then I think we had better all run out as fast as we can and call it a day, unless you have another witness you want to start with.

Mr. Isserman: No. I think this would be a good time.

The Court: And, Congressman, you get right away before they think of something.

The Witness: I notice you are awfully anxious to get rid of me. But it is quite all right.

The Court: No. But I should think you would be glad to get through because you told me you wanted to get back—

The Witness: Yes.

The Court: And if you stay around somebody may think up something now.

Mr. Isserman: As a matter of fact, I already have, but I won't ask him.

The Court: Good. I congratulate you then.

Colloquy of Court and Counsel

Now, what is the other witness that you had? We have about ten minutes.

Mr. Isserman: Well, we have no other witness that is readily available at this moment.

The Court: Then we will adjourn now until Monday morning at 10.30.

(Adjourned to February 7, 1949, at 10.30 a. m.)

(2647) New York, February 7, 1949;
10.30 a. m.

* * *

(2648) Mr. Cammer: If your Honor please, there is pending an application for intervention as amicus curiae in this case which was set over until this morning.

The Court: That is right.

Mr. Cammer: Do you want to wait until Mr. McGohey arrives or do you want to dispose of it now?

The Court: Well, I see no reason not to dispose of it now. Do you, Mr. Gordon?

Mr. Gordon: No, your Honor.

The Court: It is not a matter on which argument is generally permitted, and I am not going to permit any now. So if there is no objection I will decide it at once:

The motion is granted in so far as leave to file (2649) a brief is concerned. The motion is denied in so far as it is requested that oral argument be permitted. In deciding it that way I have decided it in accordance with the precedents in such matters, and I have only this to add: You had better get the brief in just as promptly as you can, because I will not agree to hold up the matter of the decision for any particular time pending the receipt of your brief. I will suggest that you try to have it to me by Wednesday of this week.

Colloquy of Court and Counsel

Mr. Cammer: Your Honor, I obviously can't get a brief in until the record has been completed in the matter before you.

The Court: Well, that is just the thing that I am not going to agree to. Nothing that will delay this proceeding will be permitted. If you make your motion only upon condition that you put in the brief some period after the close of the testimony I will deny the motion. You must make your choice now.

Mr. Cammer: I would like to put it in at the close of the testimony, your Honor, rather than any artificial date like Wednesday.

The Court: You see, I have indicated to counsel here that I am going to do with this case, if possible, what I have commonly done with other cases since I have been on the bench here; that is to say, I follow the (2650) evidence with the greatest care; I study the authorities as the case goes along; and I announce my decision immediately upon the close of the evidence. Consequently if you desire to have that before me it will have to follow the same course that is applicable to briefs of counsel who are participating in the trial. So I ask you, is your motion upon condition that you be allowed to put the brief in after the close of the evidence, or will it suffice if I do as I have already indicated, namely, allow you to file the brief, let you take your chances as to the time you get it in whether it reaches me in time to be given consideration before I render my decision?

Mr. Cammer: I would prefer the latter, your Honor.

The Court: Very well, upon that understanding I grant the motion to the extent indicated.

Mr. Sacher: Mr. Tolman, please.

*Leland Locke Tolman—for Defendants on Challenge—
Direct*

LELAND LOCKE TOLMAN, called as a witness by the defendants on the challenge, being first duly sworn, testified as follows:

Direct examination by Mr. Sacher:

Q. Mr. Tolman, are you an attorney and counselor at law? A. I am, sir.

(2651) Q. When were you first admitted to the bar? A. In 1935.

Q. In what court were you admitted? A. In the Court of Appeals of New York.

Q. And have you been admitted to practice in any other court in the United States? A. I have not.

Q. What is that? A. I have not.

Q. Are you employed in the Administrative Office of the United States Courts? A. I am.

Q. How long have you been employed there? A. I was first employed there in 1940.

Q. In what capacity did you enter the employ of that office? A. As an attorney, in the Division of Procedural Studies and Statistics.

Q. And what was the title of your position? A. I think when I first went in I was an attorney; my title was attorney.

Q. Did your title change at any time there? A. Yes. Later I became assistant chief of the Division of Procedural Studies and Statistics.

Q. And can you tell us in what year you became assistant chief of the Division? A. I think it was 1941 but I couldn't be sure about it; I don't recall exactly.

Q. That was a promotion, was it? A. In title only.

(2652) Q. Who is the chief of the Division of Procedural Studies and Statistics? A. Mr. Will Shafroth.

Q. Is he still the chief of that division? A. No, sir.

Q. Are you second in command, so to speak, of the division? A. I am the assistant chief, yes.

Q. How many employees all told are there in the Division of Procedural Studies and Statistics? A. I should say, altogether, approximately 25. It varies from time to time.

*Leland Locke Tolman—for Defendants on Challenge—
Direct*

Q. Who is the director of the Administrative Office?
A. Mr. Henry P. Chandler is the Director.

Q. Has he been the Director since the adoption or establishment of the Administrative office of the United States Courts in 1939? A. Well, the office was initially established and Mr. Elmore Whitehurst was appointed first as assistant director and he acted as Director until Mr. Chandler's appointment by the Court a couple of months later. But he has been the only Director of the Administrative Office.

Q. Were you employed in any capacity by the Government of the United States prior to your appointment as attorney in the Administrative Office? A. Yes. I was an attorney in the Department of Justice.

Q. In which branch of the Department of Justice? (2653) A. Initially I was in the Administrative Division and I was assigned by the Attorney General to assist the Supreme Court in the formulation of the Federal Rules of Civil Procedure.

Q. When did you receive your first appointment to the Department of Justice? A. It was in 1936, I think. I am not perfectly sure of the year.

Q. That was approximately a year after your admission to the bar here in New York. And does that constitute all your federal service, that is, in the Department of Justice and in the Administrative Office? A. Yes, it does, except for a period in the United States Navy.

Q. During the late war. A. During the war.

Q. What were your duties as attorney in the Division? I am speaking now of the Division of the Administrative Office. A. Primarily I was to inspect the dockets of the courts to find out how much congestion there was in the dockets, where help might be needed, and things of that sort. In the course of that work I talked to Judges, clerks, lawyers.

Q. Would you be good enough to keep your voice up, Mr. Tolman? A. And all of the many general problems that they have I would make notes of and take back to Washington if it seemed to be necessary.

*Leland Locke Tolman—for Defendants on Challenge—
Direct*

(2654) Q. Does that mean that you visited the various district courts and circuit courts of appeal throughout the country? A. It does. It did.

Q. And did your duties change in any respect when you were appointed assistant chief of the Division of Procedural Studies and Statistics? A. No, not materially.

Q. Did you continue after you became assistant chief to visit the various district and circuit courts of appeal in connection with the performance of your duties? A. I did.

Q. Do you say that your function was primarily to obtain data from these various courts concerning the calendars and the movement of cases from time of commencement to time of trial and disposition? A. That is correct.

Q. That was the main burden of your work, is that right? A. That is correct.

Q. And did you compile the information and the statistics that you gathered in connection with these visits and make reports from time to time to your superior? A. Yes; I didn't make statistical counts because that is done by reports from the clerks by mail to our office. But I found out—supplemented statistical material by information as to why certain types of cases were difficult to dispose of, and that sort of thing. Not—

Q. Would it be correct to say that the quantitative (2655) information came from the clerks and that what you did was make a qualitative analysis, so to speak, of what was contained in their report?

Mr. Gordon: That is objected to.

Mr. Sacher: I am asking for what he did.

The Court: Well, I think his description of it already given is sufficient.

Q. When you received—

The Court: You said something, Mr. Tolman, about the appointment of the Director and the chief of the division and your own appointment. What court was that that made those appointments?

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The Witness: The director and the assistant director are appointed by the Supreme Court of the United States. I was appointed by the director and approved by the Supreme Court of the United States.

Q. Is your position in the classified service? A. Yes, it is.

Q. You had to pass a Civil Service examination, did you? A. No, I did not.

Q. Now did there come a time some time in the year 1940 when the director of the Administrative Office requested you to obtain information concerning the investigation of jurors and the administration of the jury system in the Southern District of New York? (2656) A. When I was working—

Q. I would like a yes or no answer to that.

The Court: You are not entitled to it, Mr. Sacher.

(To the witness.) You go right ahead in your own way.

Mr. Sacher: I respectfully except.

A. When I was working here in the Southern District of New York on the dockets in 1940 Mr. Chandler received a letter from Judge St. Sure.

Q. From whom? A. Judge St. Sure, who was then the senior district judge in the Northern District of California, asking for information as to methods of jury selection generally, if we had it.

Mr. Chandler wrote me and asked me if I could get him some information about the system in the Southern District of New York while I was here.

Q. Do you have that letter or a copy of it with you? A. No, I do not. I have tried to find that letter but I can't find it.

Q. A subpoena duces tecum was served on you, was it not, Mr. Tolman? A. Yes, sir.

Q. And you say you have made a search for this letter from Mr. Chandler. Where did you search? A. Through

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our files in the Administrative Office of the United States (2657) Courts.

Q. Do you recall whether that was a typewritten letter or handwritten letter? A. I think it was a handwritten letter. It may be that he told me orally. I looked for the letter and I couldn't find it. He may have told me orally to make that study.

Q. And if he told you orally where did he tell it to you? Was it— A. In Washington, I suppose.

Q. In your office in Washington? A. I suppose it must have been, yes.

Q. And did he tell you that he wanted you to make this investigation in connection with the jury system as part of the work of the Administrative Office?

Mr. Gordon: I do not know of any testimony that he was told to make an investigation. I suggest, your Honor, that since Mr. Sacher has called Mr. Tolman as his witness he not lead him quite as much. I object to the leading questions.

The Court: Well, it is just a question of a phrase here.

Mr. Sacher: I can reframe the question.

The Court: Perhaps without getting into a controversy on phraseology the question may be re-framed. I think Mr. Sacher is merely trying to bring the mind of the witness back to what it was that he was told to do (2658) or asked to do by Mr. Chandler and what he proceeded to do. So, without a characterization you may reframe your question.

Q. Is it not a fact, Mr. Tolman, that what Mr. Chandler asked you to do was to obtain information regarding the practice in administering the jury system in the Southern District of New York and particularly regarding the preliminary investigation of jurors in that court? A. I should say that is a very fair description.

Q. As a matter of fact, do you recall the report that you submitted to Mr. Chandler? A. I do.

Q. And isn't it the fact that the description which I have just read is contained in the first paragraph of the report

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which you submitted to him; isn't that so? A. It sounds familiar.

Q. You have had occasion, I take it, in the last few days to read that report over, have you? A. Yes.

Q. When did you last read that, Mr. Tolman? A. Oh, I glanced over it coming up here on the train.

Q. You came up on the train yesterday, did you? A. Yes.

Q. And I take it you had a three and a half to four-hour train ride during which to read the memorandum; is that right?

Mr. Gordon: Now, your Honor, this—

(2659) The Court: If you object to that, I sustain the objection.

Mr. Gordon: I object to it.

Q. Do you recall the date on which you submitted your report in response to Mr. Chandler's request for the information you have described? A. Of course, I do not remember the exact date. I think the memorandum is dated early in January.

Q. Isn't it a fact that the memorandum is dated January 2, 1941? A. I think that is correct.

Q. You don't have any doubt about it, do you? A. Well, I—

Q. Do you wish to refresh your recollection by looking at it? A. Well, I would not want to say positively otherwise.

Q. All right.

The Court: Has that report not been referred to previously here? I think perhaps it was a part of your challenge papers.

Mr. Sacher: It is, your Honor.

The Court: What is the exhibit number?

Mr. Gladstein: It has not been introduced as an exhibit.

Mr. Sacher: It is not in evidence.

Mr. Gladstein: It is part of the moving papers. (2660) It is not in evidence as an exhibit.

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The Court: I remember some rather extended argument about it, and I had it before me at one time, but I take it that that was just by way of argument, and it is not one of the exhibits attached to the challenge.

Mr. Gladstein: Yes, it is.

Mr. Sacher: It is Exhibit C annexed to the challenge.

The Court: That is what I want to find. If you will just pause for a second.

Mr. Sacher: Certainly.

The Court: I have it.

By Mr. Sacher:

Q. Now having looked at the report, Mr. Tolman, can you tell us on what date you submitted it to Mr. Chandler?
A. It is dated January 2, 1941.

Q. Now, can you tell us how long before January 2, 1941, you embarked on your efforts to obtain the requested information? A. No, I am sorry, I can't tell you that; I can't recall. It must have been some time in the fall of 1940, but the exact date I can't remember.

Q. You would say, then, some time between September 15th and the 1st of the year? A. I should think so.

Q. Now, in your efforts to obtain the requested (2661) information did you have any conversations with the then senior judge, John C. Knox? A. Yes.

Q. And can you tell us about how many conversations you had with Judge Knox on the subject of your inquiry? A. Oh, that would be very difficult.

Q. It was a number of conversations in any event, is that right? A. Yes, I should say so.

Q. And did you also have occasion to speak to Mr. Joseph McKenzie, the deputy jury clerk in the Southern District Court in connection with your inquiry? A. Yes.

Q. And would it be true to say that with him likewise you had a number of conversations concerning the subject of the jury system? A. I had one or two conversations with him.

Q. With whom? A. With Mr. McKenzie.

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Q. Did you have any conversations with Mr. George Follmer? A. Yes.

Q. Will you tell us who Mr. Follmer was at the time? A. Mr. Follmer was then Clerk of the United States District Court for the Southern District of New York.

Q. And did you have a number of conversations with him concerning the subject of the jury system? A. I spoke with him one or two times on it.

Q. Is it correct to say that the most numerous conversations you had on the subject were with Judge Knox?

(2662) Mr. McGohey: I object to the characterization, your Honor.

Mr. Sacher: I will reframe it.

The Court: Sustained. What difference does it make how many conversations there were, Mr. Sacher?

Mr. Sacher: Well, I am aiming to establish the weight to be given to the report, your Honor. I am establishing and I am seeking to establish, in other words, that the witness was familiar with the subject on which he reported to the Director of the Administrative Office.

Am I needlessly?

The Court: I asked a question and you answered it.

Mr. Sacher: Oh, I am sorry.

The Court: I see no occasion for argument.

Mr. Sacher: No. There is an objection. I understand, to the question. I have not heard a ruling.

The Court: Is there an unanswered question, Mr. Reporter?

(Record read.)

Mr. Sacher: You did rule. I had forgotten the ruling.

By Mr. Sacher:

Q. Did you have more conversations with Judge Knox than you had with Mr. McKenzie or Mr. Follmer? A. That is a difficult question to answer.

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(2663) Mr. Sacher: All right, if it is difficult, you just tell me and I will move on to something else.

Q. Did you have any conversation with Judge Knox concerning the qualifications of the man who acted as deputy jury clerk at that time? A. I think I did, yes.

Q. And that man was Joseph McKenzie, is that right? A. Yes.

Q. Will you be kind enough to produce, Mr. Tolman, the report of January 2, 1941, which you submitted to Mr. Chandler? A. Yes.

Q. May I have it? A. Yes (handing).

Mr. Sacher: Will your Honor give me a moment to glance at this?

The Court: Yes.

Q. I notice on the outside folder which you have handed me a legend which reads, "Folder No. 1—Memorandum to Mr. Henry P. Chandler by Leland L. Tolman," dated February 2, 1941. A. That must be an error.

Q. Is that an error? A. That must be an error, yes.

Q. That is intended to be January 2, 1941? A. Yes.

Mr. Sacher: I request that this report with a letter by Mr. Chandler annexed thereto, dated February 5, 1941, be marked for identification, your Honor. And may I ask that they be marked separately; that is, Mr. Chandler's (2664) letter and the report?

The Court: They may be marked separately.

(Marked Defendants' Challenge Exhibits 102 and 103 for identification.)

The Court: Which is which, Mr. Clerk?

The Clerk: 103 will be the letter.

The Court: 103 is the letter and 102 is the report?

The Clerk: Yes.

The Court: Very good.

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By Mr. Sacher:

Q. Is it correct to say, Mr. Tolman, that Challenge Exhibit 102 for identification was the final draft of one or more reports in connection with this subject which you prepared prior to January 2, 1941?

Mr. McGohey: I object, your Honor.

The Court: Sustained.

Mr. Sacher: Well, your Honor, I wish to lay a foundation for something here. Won't you be good enough to take it in and then if it is not relevant it can always be stricken?

The Court: I see nothing of consequence in how many drafts there were.

Mr. Sacher: All right.

By Mr. Sacher:

Q. Mr. Tolman, did you at any time send any draft of (2665) your report on this matter to anyone connected with the Southern District of New York, whether that be a Judge, a clerk, or an attache of this court?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you ever send a copy of your report prior to delivery thereof to Mr. Chandler, to Judge Knox?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: I would like to be heard on that, your Honor. If this has the imprimatur of Judge Knox or those who gave the information to the witness, I respectfully submit that that is proper to be developed.

The Court: Well, if he says he got information from various sources and if he says what is in the report is accurate, I think that should suffice.

Q. Is it correct to say that the information which you obtained from Judge Knox, Mr. Follmer and Mr. McKenzie,