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Recalled—Cross*

Q. And is it correct to say that that is all that you used for classification? A. That is correct. This—I think that question must be qualified.

Q. Well, did you or didn't you use— A. That classification, yes.

Q. That classification. That is all I am talking about. A. All right.

Mr. McGohey: May I have this paper marked, please?

(Government's Challenge Exhibit V marked for identification.)

Q. In view of the answers you have just given, it is correct to say, is it not, Mr. Wilkerson, that you did not use for classification the supplement to the alphabetical index of occupations in industries, published by the U. S. Department of Commerce, Bureau of Census, dated June 9, 1941, did you? A. To my knowledge, no. I make that statement, however, with this reservation. As I testified yesterday, the classifications were made—

Mr. McGohey: I object to this, your Honor. (3122) I am asking the witness what he used.

The Court: Yes.

The Witness: I did not make most of the classifications, you know.

Q. I show you this exhibit marked Government's Challenge Exhibit V for identification and ask you to look at it.

The Court: B for identification?

Mr. McGohey: V for identification.

A. All right.

Q. Did you use that? A. I did not.

Mr. McGohey: I offer this in evidence, your Honor.

Mr. Gladstein: May we see it?

(Mr. McGohey hands to Mr. Gladstein.)

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Mr. McGohey: Is there any objection?

Mr. Gladstein: No.

The Witness: May I see that, Mr. McGohey?

Mr. McGohey: Will you just wait until it is marked, please?

Government's Challenge Exhibit V for identification is offered in evidence, and I understand there is no objection.

(Government's Challenge Exhibit V for identification received in evidence.)

(3123) The Court: I would like to look at it for just a moment.

Before you proceed, I should like to see that exhibit which constitutes the main document.

Mr. McGohey: The witness has them here, I think, your Honor. There are two.

(Witness hands to the Court.)

Mr. McGohey: Those are Defendants' Challenge Exhibits 16 and 17.

I should like to read, your Honor, the text that appears at the beginning of Government's Challenge Exhibit V in evidence.

"U. S. Department of Commerce, Bureau of Census, Washington, D. C., June 9, 1941. Supplement to the Alphabetical Index of Occupations in Industries." Then in the next line, in parenthesis, "(This supersedes previous supplements.) Items preceded by an asterisk supplement or limit items in the alphabetical index by prescribing special codes for certain returns because of differences of such factors as industry, class of worker or sex. Returns that correspond, as to occupation, industry, class of worker, etc., to all those items in this supplement which are preceded by an asterisk should be coded according to the supplement rather than according to the original index. The sixth digit which is shown for some items (3124) represent the class of worker; this appears wherever the data listed are sufficient to determine the class of worker."

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By Mr. McGohey:

Q. Now, Mr. Wilkerson, I hand you the exhibit just put in evidence, Government's Challenge Exhibit V in evidence. Now I ask you to take Defendants' Challenge Exhibit 16. A. Go right ahead, I have it.

Q. Will you turn there to the occupation "Butcher." "Butcher, meat market." Look on page 88; I think you will find that. A. I see it.

Q. Do you have that? A. I have. It also says, "Dealer." Is that the one you are referring to, "A butcher, a dealer"?

Q. I am asking you for the occupation "Butcher, meat market." Is there any other than one characterization of a butcher in a meat market except the one that also has the word "Dealer" with it? A. I see only one. It is, "Butcher, Dealer, meat market."

Q. Well, the word "Dealer" is in parenthesis alongside the ditto mark representing the word "Butcher"; is that correct? A. It is vital to the classification.

Q. That is right, and then the industry is "Meat market"? A. Right.

(3125) Q. And that, according to the Census, that occupation is classified how? A. As Proprietor, manager and official.

Q. Will you look, please, Mr. Witness, at Exhibit 16 concerning which I am questioning you? A. I have seen what you have asked me there and I am waiting for your next question.

Q. Butcher in a meat market, according to Challenge Exhibit 16, the alphabetical index, is classified in the Proprietor, manager and official class; is that correct? A. That is correct.

Q. And that is the class that you call an executive for the purposes of the tables and analysis that you made here? A. That does not follow.

Q. Didn't you tell us— A. Oh, the class, yes.

Q. The class, yes. A. But that does not follow—

Q. Just a minute, please.

The Court: Now let me see if I understand that. I have been going all along here on the as-

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sumption that when you got up that table showing executives, that you were following the Census classifications of proprietors, managers and officials; am I wrong about that?

The Witness: You are not wrong about that. There is one thing that—

Mr. McGohey: Pardon me, just a minute, please.

(3126) Mr. Sacher: Excuse me. I think the witness would like to say something to your Honor. Would you mind?

The Court: Is there something you desire to say?

The Witness: Yes. I may do so?

The Court: Well, I think perhaps you had better have Mr. McGohey follow these questions, and then when he gets through with this subject if there is something you want to explain to me, I will let you do it.

By Mr. McGohey:

Q. Now will you turn to page 2 of the supplement, which is Challenge Exhibit V in evidence, and tell me how a butcher in a meat market is classified there; the supplement I am asking for. A. Yes. If he is an employer—

Q. Are you looking at the supplement, Mr. Wilkerson? A. I am looking at the supplement.

Q. Are you looking also at something else besides the supplement? A. I am looking at a guide to the symbols which are on the supplement.

Q. I am asking you now to look at the supplement. A. Very well.

Q. Will you please look at the supplement and not at anything else. And will you tell me how Butcher in a meat market is classified on page 2 of that supplement? (3127) A. If he be an employer or employed on his own account, or a private worker—PW—I forget the exact description of that.

Q. Isn't that private wages? A. I think that is it.

Q. Private wages as distinguished from government wages? A. If those things be true according to the sup-

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plement he would be classified in our category as a manual worker.

Q. Yes.

The Court: Let me just see what it says in there.

Mr. McGohey: If I could ask a couple of questions—

The Court: From his answer I cannot make out what this supplement shows.

Mr. McGohey: That is what I wanted to bring out.

The Court: Will you show me the place, Mr. McGohey, please, and I will read it into the record.

Mr. Sacher: That needs translation, I am afraid, your Honor.

The Court: He wants to make the explanation first and have what Mr. McGohey wants brought out come in afterwards, but I think we will get it in a way—

Mr. McGohey: It is this line (indicating to the Court).

(3128) The Court: The supplement, Exhibit V, states “Butcher, meat market, (E,OA) or (PW) 45261.”

(Mr. Sacher approaches the witness stand.)

The Court: What do you want, Mr. Sacher? Do you want to take that book?

Mr. Sacher: Just for a moment I wanted to look at something.

The Court: All right.

By Mr. McGohey:

Q. Now referring to the supplement which you have before you, Mr. Wilkerson, you have said that the supplement refers to a butcher in a meat market who might be in any one of three different classes, namely, an employer or working on his own account, or working for private wages; is that so, according to the supplement? A. Yes.

Q. Now, would a butcher working as an employer also be a proprietor? A. According to the supplement?

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Q. Wouldn't he, in fact? A. Wouldn't he, in fact, what?

Q. Wouldn't the man who was working as a butcher and as an employer at the same time be the proprietor of some business? A. Are you asking me about his classification?

Q. I am asking you about a fact, a butcher who employed other people who worked for him. Wouldn't he, in fact, (3129) be an employer and a proprietor of some business in which he had employees? A. In normal parlance, I would say yes.

Q. But he is classified here, according to the supplement, in the laboring class or the manual worker class; isn't he? A. There are many such instances, yes, not only butchers.

Q. Isn't it a fact that in that supplement all butchers are classified as craftsmen; all butchers in meat markets are classified as craftsmen? A. It is not.

Q. Well, are they classified as laborers, manual workers? A. Not all of them.

Q. All of them in that "Butchers in meat markets"? A. Oh, in meat markets?

Q. Yes, that is what I asked. A. I thought you said all butchers.

Q. No, I think I said all butchers in meat markets.

The Court: Yes, you did.

A. Pardon me.

Q. That is correct, isn't it? A. Yes.

Q. They are classified as manual workers? A. Yes.

Q. Now, isn't it a fact that on the alphabetical index which you say you used, Defendants' Challenge Exhibit 16, all butchers employed in meat markets are listed in the class which you call executives? A. That is correct.

(3130) The Court: Now, what is that explanation you want to make?

The Witness: First, my answer to the question, did I use that supplement, which was a negative answer, does not imply that that supplement was not used in the classification of occupations for this study, the reason for that being, as I testified earlier, these occupational classifications were done by a

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professional person who we engaged. I checked several lists of them— May I ask, was that submitted by the defendants as an exhibit?

By Mr. McGohey:

Q. Which? A. This supplement?

Q. No, it was not. I just put it in evidence. A. What I am saying is that the fact that I did not use that in the checks I made on several of the lists does not mean that the professional, trained economist who did these occupational classifications did not use it.

Q. Mr. Wilkerson—

The Court: You know, Mr. Wilkerson, you said when they introduced these various charts, you said in effect here is a chart and here is the material that was used in getting it up, and there was a careful checking each time as to just what the source materials were, and you said nothing about this paper that Mr. McGohey has (3131) now produced, did you?

The Witness: I did not; which again, your Honor, does not mean that the highly trained technician who did this work did not use it.

Mr. McGohey: If your Honor please, I take it that is for argument.

The Court: I don't know how highly trained the technician was.

The Witness: I can tell you if you like. This one I can tell you about and you will agree she is a highly trained economic analyst.

Mr. McGohey: I move to strike that.

The Court: Strike it out.

Mr. Gladstein: Your Honor, it might be more to the point to first ascertain if on the 28 panels subjected to this study we had any butchers in meat markets at all who required classification. I don't know. There may have been none whatsoever. It would be very unusual for the clerk to ever pick a butcher in a meat market.

Mr. McGohey: I move to strike that.

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The Court: I didn't hear what he said.

Mr. McGohey: The observation of Mr. Gladstein was that it would be very unusual for the clerk to call a butcher. Now there is no evidence to support any such statement as that.

(3132) The Court: Yes, strike it out. And I think, Mr. Gladstein, you have probably forgotten that there is such a thing as redirect examination—

Mr. Gladstein: I had not forgotten.

The Court: —the function of which is to bring out any explanatory matter that counsel feels should be brought out. If we interrupted the cross-examination at every point that some evidence were brought out to have the other side go into all the explanations he thought ought to be made, why, there would be no continuity to the cross-examination at all, and all would result in confusion.

Mr. McGohey: If your Honor please, of course, it must be apparent that the purpose of the line of questions I am now offering is to test the qualifications of this witness for the testimony and the charts that he has exhibited.

By Mr. McGohey:

Q. Now Mr. Wilkerson, will you take Challenge Exhibit 16 again, the alphabetical index, and turn to page 312, and take the occupation "Manager of a shoe repair shop." Have you found it on page 312? A. I have.

Q. And will you tell me how it is classified there? A. It is a 100 number, that would be classified as an executive in our categories.

(3133) Q. Now I show you again Government's Challenge Exhibit V in evidence, and call your attention to page 8, and ask you how a manager of a shoe shop is classified in the supplement? A. If he is the manager of a shoe shop working on his own account he is classified in what would be our group 4, manual workers; but only if he is a manager of a shoe shop working on his own account. If he is working for somebody else he would be classified as an executive—

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The Court: Now just a second.

Q. Is that what you mean really? You mean the other way, don't you? A. All right, read it. What does it say?

Q. You say if he is working for somebody else he is an executive, and if he is working for himself he is a worker? A. You will find, Mr. McGohey, that if you analyze these classifications you will find many technical things which do not accord with what commonsense would seem to suggest to you.

Q. Oh, I think I have discovered a great deal of that in the last few days. A. And there are very good reasons, I am sure, the Census has. But what this means, judging from my knowledge of the Census, a man who has a little shoe shop and it is his own, he would be called a craftsman, or he would be in the manual worker class. But if he is (3134) managing a shop for some corporation you will find he would be classified as an executive. And that is true with many other categories.

Q. Will you look at Challenge Exhibit 16 which you say you used and tell me, is there any other classification for a manager of a shoe repair shop? Is that in any way limited in Defendants' Challenge Exhibit 16? A. It is not limited in 16 but it is limited in the exhibit you have in your hand.

Q. Well, according to Challenge Exhibit 16 is it not a fact that that embraces every manager of a shoe shop whether he is on his own account or whether he is working for somebody else? A. In the light of the supplement which you are holding—

Q. No, please.

Mr. Sacher: Now, I object to the question on the ground that the question assumes that the supplement is more than a supplement, but that it repeals what is in the alphabetical index.

Mr. McGohey: That is what it does.

Mr. Sacher: No, it does not. It refers only to the superseding prior supplement and not the index itself.

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The Court: Let me have it just a second, Mr. McGohey. I remember something being read that I put in (3135) my notes which indicated where the asterisks were used—

Mr. McGohey: That is it.

The Court: —it should be classified according to the supplement and not according to the original index. I heard something like that. Let me see if I can find it here.

Mr. McGohey: That is right on the top of the page, your Honor, the top of the first page. That part that defines what the asterisk is used for.

The Court: Yes. I think Mr. Sacher had his attention diverted to the parenthetical phrase “This supersedes previous supplements,” and he forgot the other part which reads, “Those items in this supplement which are preceded by an asterisk should be coded according to the supplement rather than according to the original index.”

Mr. McGohey: Yes, your Honor. And I ask your Honor to notice that the occupation about which the witness has just been testifying, namely, a manger of a shoe repair shop, is marked with an asterisk in Government’s Challenge Exhibit V in evidence.

The Court: Yes.

The Witness: Only if he is working on his own account. That is what the supplement says.

Mr. McGohey: That is true.

(3136) *By Mr. McGohey:*

Q. But does the classification in 16 which you used, the original alphabetical classification, make any distinction whatever between a person working on his own account or a person working for somebody else? A. It does not, but the supplement takes—

Q. Now, will you please answer that question?

Mr. Sacher: I object. If the witness says he can’t answer yes or no and needs a fuller answer, I suggest he be permitted to do that.

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The Court: But he started by answering directly, and there is nothing about this that makes it hard to answer yes or no.

Mr. Sacher: If he can answer it.

The Witness: It just happens to be misleading, that is all.

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

The Court: Strike it out.

I think that is the whole trouble, Mr. Wilkerson, that you probably have had little experience in court, and you think when you are being cross-examined that if a direct and truthful answer may be misleading or may not bring out what you conceive to be the whole story, you have the impression that you can lean back and go on (3137) and talk and explain and all that; and I am telling you now, as I have already told you several times already, that it is for the lawyer who calls you on redirect examination to bring out the explanation. You are just to answer questions. That is true of all trials; it is not anything different here from any other case.

Mr. Gladstein: Now, your Honor, the other day you made a ruling when another witness was on the stand—it was a Government witness—it was someone we had subpoenaed and we were asking for a direct answer—

Mr. McGohey: If your Honor please, I move to strike that. There was no Government witness on the stand. I have not called any witness yet.

The Court: I think that is right.

Mr. Gladstein: It was a witness who was an official of the Administrative Office of the United States Courts.

The Court: That you called.

Mr. Gladstein: That we called; and when we asked for direct answers your Honor permitted the witness and, in fact, told the witness to give a very

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complete reply to any question. Now, it seems to me that in order to prevent a distortion of the continuity of the testimony it is important and appropriate that the Court should tell the witness that in replying to a (3138) question from the United States Attorney he can make that answer full and complete so long as it is direct in response to the question. That is the customary and usual method of permitting the witness to testify.

The Court: I say it is not customary and it is not usual, and I am not going to permit it as to this witness.

Mr. Gladstein: I object to your Honor's ruling that prevents the witness from giving a full and direct answer to any question that Mr. McGohey asks.

The Court: I think your objection has been duly noted.

By Mr. McGohey:

Q. Now Mr. Wilkerson, I call your attention to page 390 of Defendants' Challenge Exhibit 16, the alphabetical index, and I ask you to tell me how the proprietor of a bakery is classified in that exhibit. A. If he be an employer he is classified as an executive.

Q. He is classified as an executive? A. If he is an employer.

Q. Now I direct your attention to page 9 of Government's Challenge Exhibit V in evidence, and ask you to tell me how the owner of a bakery and a proprietor is classified there. A. He is classified in the 300 category.

(3139) Q. That would be what, Mr. Wilkerson? A. Craftsman, I think.

Q. Craftsman? A. That is right. Foreman or kindred worker.

Mr. McGohey: That is all on that. May I have that, please?

(Exhibit handed to Mr. McGohey.)

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Mr. McGohey: Now I desire to point out to the Court—and this is something that is subject to check—I have counted the number of occupations listed in this supplement, Government's Challenge Exhibit V in evidence, and I find that it lists 500 occupational titles in addition to those which appear in the alphabetical index, which is Defendants' Challenge Exhibit 16 in evidence. And I find that there are 50 occupations carrying the asterisk alongside of them, which means that as to those 50 there have been changes in the occupational classification.

Now, may I have Defendants' Challenge Exhibits 83 and 84?

(Exhibits handed to Mr. McGohey.)

Mr. McGohey: Will your Honor give me just a minute?

The Court: Certainly.

(3140) *By Mr. McGohey:*

Q. Now Mr. Wilkerson, I show you Defendants' Challenge Exhibit 83 in evidence, which is called Occupational Distribution of Employed Persons in New York City, March 1940 and November 1946. I understand from your testimony that that was in part based on the information contained in Defendants' Challenge Exhibit 84 in evidence, which is a report on the labor force of New York in November 1946.

That is correct, is it not? A. All right.

Q. Now I understand your testimony with respect to these two exhibits to be substantially this, that the war which occurred between 1940 and 1946 caused no substantial shift in the occupational distribution in that period? A. I made a very important qualification to that statement, as I recall—

Q. May I interrupt you. I think you said that there were shifts within the groupings; that is, that there would be shifts within the manual workers and there might have

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been shifts within the clericals or the professionals or the executives, but there was no substantial shift from executive to any of the other categories, or vice versa? A. That was my testimony.

Q. Did you mean by that to say that it was not possible (3141) that in this wartime period there might not have been large shifts between the categories? A. You are thinking of individuals or are you thinking of the pattern?

Mr. McGohey: Would you read the question? May I have the question read to the witness?

The Court: Yes.

(Question read.)

A. What I mean by that is that during this wartime period there were no large shifts in the numbers and proportions of people gainfully employed in the several categories.

Q. Do you mean to say that in that period from 1940 to 1946 when hundreds of thousands of men and women in this city and in this area which you have covered by these tables, Challenge Exhibit 67 and Challenge Exhibit 67-A in evidence, that the calling into service of hundreds of thousands of men and women had no effect on the categories of the distribution of people within the categories?

A. I didn't say that at all.

Q. Is that your testimony? A. What I testified to is evident on the face of the exhibit you handed me—

Mr. McGohey: Now if your Honor please—

Mr. Gladstein: Let the witness finish.

Mr. McGohey: If he says that is not what he (3142) testified to I want to ask another question.

Mr. Gladstein: He ought to be able to finish his answer first to this question before Mr. McGohey asks him another question.

Mr. McGohey: He says he did not testify to that.

The Court: I think I will have to make a ruling as to the objections on cross-examination. I like to allow a little leeway in those things, and I have

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noticed, looking up the authorities, that there have been instances where it was necessary for a Court during cross-examination to require that counsel merely state that he objects and have a ruling without any argument. I don't want to do that. I am not going to do it yet. But I shall do it if I have to.

Now, as to this particular objection, I overrule it.

Now you may read the question. I thought he gave a direct answer.

(Question read.)

The Court: He didn't answer it.

Do you understand the question?

The Witness: I don't understand the question.
May I ask for a clarification?

The Court: I think Mr. McGohey can reframe it.

Mr. McGohey: I will be glad to reframe it.

(3143) The Witness: Can I tell you what I don't understand? I want to understand what you mean by your terms.

Mr. McGohey: Perhaps you better let me ask the question and if we get to the point that I can't ask it, well, maybe all of us together can form one that you can understand.

By Mr. McGohey:

Q. Is it your testimony that there was no effect in the distribution of persons among categories even though in that period hundreds of thousands of men and women of all walks of life were called into the military and naval and other service of the Government? A. And by distributions of persons you mean in the numbers and proportions in the categories—

Q. No— A.—or do you mean individuals?

Q. I mean shifts of individuals between categories. A. That is not my testimony.

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(3144) Q. Well, then, it is possible, is it not, that the calling into service of hundreds of thousands of people might have had an effect on the distribution among the categories? A. Of individuals?

Q. Yes. A. Yes.

Q. Of individuals. A. But not in the proportions they represent of the total.

Mr. McGohey: I move to strike that out, your Honor. It is not responsive.

The Court: Strike it out.

Q. Now you admit that there might have been a change in the distribution of persons among the categories? A. Individuals may have shifted, yes.

Q. And do you say that that shifting of persons within the categories would have no effect upon the jury panels called during those years? A. What I say is—

Q. Would you please answer that question? A. On the basis of Census reports the answer is yes.

Mr. McGohey: Now I move that the witness be directed to answer the question.

Mr. Sacher: I object on the ground that the question is duplicitous, because the word "effect" may have some other—

Mr. McGohey: If your Honor please, we are getting into the very thing your Honor talked about yesterday.

(3145) The Court: Mr. Sacher—

Mr. Sacher: I will desist.

The Court (Continuing): You must from your wide experience realize the disturbing effect of objections on cross-examination that go into long discussions and this and that.

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

The Court: You may not want to do it but somehow or another you don't seem to have quite the will power to refrain. Now, please try to do that, because it is most disturbing and open to misconstruction.

Mr. Sacher: I will, your Honor.

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The Court: You know, oftentimes lawyers do that to give the witness a chance to think, to suggest answers to him, and to do all that sort of thing. And it is so much better if you have an experienced judge who understands and can follow the thing as I think I can, even though I haven't been on the bench very long—you can just say you object or that you would like to have the question read, if that is not done too often, and I have sense enough to follow what it is about and see whether the question is proper.

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

The Court: I think if we do that we will have a more orderly cross-examination and we will all get along (3146) in a calm and dignified atmosphere which is suitable for the occasion.

So let us get back—well, here is the time for our recess, so let us take a recess.

(Short recess.)

Mr. McGohey: May I have Defendants' Challenge Exhibit 137, please?

The Witness (Referring to papers): I may need those, Mr. McGohey.

Mr. McGohey: I don't think you will need them for any questions that I am going to ask.

By Mr. McGohey:

Q. Mr. Wilkerson, Challenge Exhibit 137 purports to be a list of the names of jurors whose names appeared on more than one panel in the group of either 29 or 30 or 31 panels that you examined. A. 28 panels.

Q. 28 panels. And you testified yesterday, I believe, that this Exhibit 137 fully and accurately reflects the facts shown by the panels which you used; is that correct?

The Court: He says yes.

Mr. McGohey: May I have Defendants' Challenge Exhibit 28 which I think was reserved and Challenge Exhibit 30 for identification. Challenge

Colloquy of Court and Counsel

Exhibit 28 which was reserved is the jury list for April 14, 1941— (3147) the panel, rather.

The Court: That number was reserved for that.

Mr. McGohey: That is right, your Honor.

And Exhibit 30 for identification which is the jury panel for June 17, 1942.

Mr. Gladstein: No. 30, the one Mr. McGohey has just asked for, is one that was copied in the clerk's office and on which, you will recall, a question arose concerning such panels, yesterday I think. So I have made arrangements for some clerical people to go up to the clerk's office—I called the clerk last night about it—and to take the Challenge exhibits for identification and compare them against the file copies in the office of the clerk. And that accounts for the fact that No. 30 which you asked for now we don't have.

The Court: You haven't 30 now?

Mr. Gladstein: It is being compared.

The Court: It is upstairs?

Mr. McGohey: Your Honor, I should like to have it because I understand from the witness's testimony that the copy that was offered for identification here is the precise copy which was used in making up Exhibit 137.

The Court: That is what I understood.

Mr. McGohey: I want that exact copy.

(3148) Mr. Gladstein: That is the one that is being compared against the original in the clerk's office to ascertain whatever—

The Court: Well, it is right upstairs.

Mr. McGohey: I should like to have it sent for because I want it in the form it is, or the form that it was at the time it was used and not the form that it may be after it is compared.

Mr. Sacher: There will be no different form.

Mr. Gladstein: I was just going to say there will be no changes made in any exhibit that has been introduced here at all.

The Court: Oh, my; oh, my!

Mr. Gladstein: We have sent somebody for it while we have been talking.

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The Court: You get so excited.

Mr. Gladstein: While we have been talking, Judge, we have sent somebody to get the copy.

The Court: I noticed that. Well, we will just wait until he gets back.

Mr. McGohey: Well, can I have the panel for September 7, 1948, which is Defendants' Challenge Exhibit 45 for identification?

Mr. Gladstein: It so happens we have this one here.

(3149) Mr. McGohey: Thank you.

By Mr. McGohey:

Q. Now will you refer, please, to the Exhibit 137 which you have before you, Mr. Wilkerson? Would you look on page 6 of that exhibit, and I direct your attention to the first name on that page, Braun, Raymond J., president Park Central Hotel, and then to the right is a column bearing three dates. That is correct? A. That is correct.

Q. And the three dates shown are 7-6-43, 8-9-43, and 9-7-48. That is correct? A. That is correct.

Q. And do I understand that those three dates are placed there to indicate that the juror Raymond J. Braun appeared on the panels bearing those dates? A. That is the purpose of those dates.

Q. Now I show you Defendants' Challenge Exhibit 45 for identification which appears to be the certified copy of the panel for September 8, 1948, and ask you to find me the name of Raymond—

Mr. Gordon: What is the date?

Mr. McGohey: No. It is September 7th.

Mr. Gladstein: Even Mr. McGohey can make a mistake in the date, apparently.

The Court: Yes, I can make them myself.

Mr. Sacher: Oh, he can make many of them.

(3150) Mr. Gordon: Will your Honor strike the remark of Mr. Sacher?

The Court: The question is whether these charts are accurate. Of course, if they are not that is one thing, and if they are it is something different. And we are now getting the facts as I suppose—

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Mr. Gladstein: We have been getting facts all through Mr. Wilkerson's testimony.

The Court: I know, but these little comments don't do any good. A few of them once in a while don't do any great harm, and as long as they are in good temper and pleasant they don't bother me at all. It is just when you start things that you know about. So let us just keep them to a minimum.

Now, what is that date?

Mr. McGohey: September 7, 1948. That is the date of the panel.

The Court: All right.

Mr. McGohey: And that is the date that appears on Challenge Exhibit 137 in evidence as being the date of the panel on which the name Raymond J. Braun appeared as a juror.

The Court: That is right. And he is going to find it.

Mr. McGohey: I don't think so.

(3151) A. I don't see the name on this list. If I may add—

Q. Have you looked through the list, Challenge Exhibit 45? A. I have looked through it hastily, yes.

Q. Will you look through it carefully and go through each name there and tell me if any place on that list you find the name Raymond J. Braun? A. I don't see the name.

Q. Would you say then that Challenge Exhibit 137 which you testified fully and accurately reflected the facts shown by the panels is inaccurate to the extent that it lists Raymond J. Braun as being on the panel for September 7, 1948? A. On the basis of evidence before me—

Mr. McGohey: May I have an answer to that question, your Honor?

The Court: Yes, you may.

A. I would say that—

Q. Well, is it or isn't it? Is 137 accurate or is it inaccurate with respect to the listing of Braun for the panel of September 7, 1948?

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Recalled—Cross*

Mr. Sacher: I will concede that to that extent it is not.

A. It appears to be—

Mr. McGohey: Your Honor, I desire to get the (3152) answer from the witness, not from counsel.

The Court: You are entitled to get it and you are going to get it.

A. It appears to be inaccurate in so far as this list is a correct list of that panel.

Q. But that is the list you used, is it not? A. Not necessarily. It might have been—I don't know whether this was copied in our office or not.

The Court: No.

Q. Isn't that the list that was used in making up Exhibit 137? A. It is very likely that it is.

Q. Well, was it? A. Very likely it is; I couldn't swear to that.

Q. Do you know? A. We have—

Q. Do you know or do you not know whether Exhibit 45 is the list that was used in making up Challenge Exhibit 137? A. Whether this particular copy—

Q. No, please. Do you or don't you?

The Court: Put down the answer that he doesn't know. It is obvious to me now that he doesn't know whether that is the one that—

Mr. Isserman: I object to your Honor's putting the words into the mouth of the witness.

The Court: When he says it is likely and maybe it isn't, and maybe, it appears to me that he doesn't know.

(3153) Mr. Isserman: He wants to make an explanation and he is not being allowed to do so.

The Court: This is one explanation he is not going to make.

Mr. Isserman: I object to your Honor's refusal to allow him to make it.

The Court: All right. Go on with the next one.

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Mr. McGohey: Now have the panels for April 14, 1941, and June 17, 1942, arrived yet?

Mr. Gladstein: I gave you two, if I remember. One is not here and we sent for it. That has not yet arrived. Don't you have, Mr. McGohey, one of the two lists referred to?

Mr. McGohey: Yes, I do, Mr. Gladstein. I want the other one to use at the same time.

While we are waiting for that I will pass to another matter, another subject dealing with the Exhibit 137.

The Court: What you are waiting for is the list that the man has gone upstairs to get.

Mr. McGohey: Yes, your Honor. And that is the list of jurors called for April 14, 1941.

The Court: Yes, you may go on to your different subject.

(3154) Q. Mr. Wilkerson, am I correct in interpreting Exhibit 137, which you have before you, as showing that executives are called as jurors more often than members of other categories? A. We made no interpretation of this exhibit; we merely listed the names and the categories of their occupations, and told you how many there were.

Q. Will you tell me now, from looking at it, whether or not it purports to show more executives than others?

Mr. Sacher: I object to that on the ground that the exhibit is the best evidence of what it shows.

A. I would be very glad to answer it.

The Court: It is cross-examination. I will allow it.

A. If you want an analysis I will be glad to make one, but I would not make it offhand, as you are requesting.

Q. The answer is, then, you don't know; is that correct? A. The answer is no to the question you ask, that I will not tell you now.

Q. Let me ask you this question: Do you know whether that exhibit shows more jurors in the category of executives than any other categories? A. I don't know. I would have to refer to my notes or else check the exhibits.

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Q. Now in preparing your analysis of the the 28 panels (3155) that you used, did you make any effort to ascertain whether or not the persons whose names appeared on these lists were at the time they were called on those lists available for jury service? A. By available for jury service, what do you mean?

Q. Did you undertake to determine, for instance, whether any of those persons whose names appeared on that list were actually alive at the time they were supposed to report? A. We did not.

Q. Did you make any attempt to ascertain whether they were—

Mr. Sacher: Just a moment. You mean on the lists gotten out by the clerk?

Mr. McGohey: Yes; at the time that they were called to appear. I think it is already in evidence that the lists are made out two or three weeks before the date that the people are supposed to report.

A. This, Mr. McGohey, is labeled the list of names beginning with letters A and B that appear on more than one of the panels as listed by the clerk, that is all; that the names as appeared on the clerk's lists that he gets—

Q. No. I am talking about all the 28 panels that you analyzed, Mr. Wilkerson, not necessarily some that you analyzed on Exhibit 137. A. And you want to know whether (3156) we checked to see whether the people were still alive. We did not.

Q. Did you make any check to ascertain whether they still resided in the Southern District of New York? A. We did not.

Q. Did you make any attempt to ascertain whether in fact they responded to the summonses which were sent out in accordance with the list? A. We did not.

Q. Did you make any check to ascertain whether they came down pursuant to the summons? A. Our analysis was based completely on the list provided by the jury clerk.

Q. May I have an answer to the question, please? A. The answer is the same, no.

Q. All right. Did you make any effort to ascertain, if they came down, whether or not they were excused from

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any service during the period for which they were called?
A. We did not.

Mr. McGohey: May I have Exhibit 102, please?
Mr. Gladstein: I just gave you the other one.
Mr. McGohey: 102.

Q. I show you Defendants' Challenge Exhibit 102 in evidence which is the report of Mr. Tolman that was introduced the other day. In preparing your analysis, Mr. Wilkerson, did you—withdraw that.

(3157) Q. Have you read the Tolman report? A. I read it several months ago. I gave no testimony here on it.

The Court: Now, you see, that is just an illustration. All you had to do was say yes.

The Witness: I am afraid, your Honor—

The Court: I know.

The Witness (Continuing): As much as I would like, that my habits of lifetime, even in court, I can't get out of. I apologize if they run contrary to your—

The Court: You may realize that the impression that is made by these digressions, these quite unnecessary circumlocutions of yours has not made a very favorable impression on the Court. I have tried on I don't know how many occasions to get you to stop it, but you seem to think that it is all right, but I think it would be better if you could say just plain yes once in a while, particularly to such simple questions as that last one.

Q. I understand your answer to be, Mr. Wilkerson, that you did read the report some months ago? A. That is correct.

Q. Will you tell us about when? A. I don't remember.

Q. Well, I think you testified yesterday that you began your work in preparation of these charts some time around (3158) the middle of November; is that correct? A. Yes.

Q. Was it prior to that date that you read the Tolman report? A. I know it was not.

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Q. Was it about that date? A. That I don't remember. It might very easily have been a month or six weeks later. This I had no special concern for and—

Mr. McGohey: If your Honor please, I move that that part be stricken.

The Court: Strike it out.

Q. But you did read it? A. It was some time.

Q. Some time, and some months before you came in here to testify? A. I wouldn't say—well, probably—I came in here when? January?

Q. It seems like December. A. At least a month before I came in here I would say.

Q. You did read it. Now I call your attention to page 4 of that report. A. Page 4?

Q. Page 4, please. I ask if you will read the first two full paragraphs on page 4 beginning with "The names of people who have qualified" and so forth. A. "The names of persons who have qualified are then immediately placed on separate file cards (Exhibit 8) in drawers"—

Q. Would you stop for a minute there and refer to Exhibit 8? A. My statement that I read this does not (3159) apply to the exhibits; I have never seen them before.

Q. Will you look at that now? A. I am going to. All right.

Q. That purports to be one of the separate file cards that appears in the text of the report, does it not? A. "Immediately placed on separate file cards (Exhibit 8)"—I take that to be the reference.

Q. Yes. Now will you proceed, please, and then later on when you come to Exhibit 9 would you also turn and look at Exhibit 9 when you come to that in the text? Page 4 is the page from which you have been reading. A. (Continuing) "in drawers in a special office safe used for that purpose. These cards serve as combined index and personal record cards for all jurors. At the same time a separate wheel card is made out for each qualified juror. The card for male jurors (Exhibit 9)"—I am looking at it. What do you want me to do about it?

Q. I just want you to look at it and then go back and read. A. All right. (Continuing) "contains the name,

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residence, and occupation of the juror, and the card for women jurors (Exhibit 10) shows in addition to her former occupation and her husband's occupation—shows in addition to her former occupation and her husband's occupation"—oh; "in addition her former (3160) occupation and her husband's occupation. All wheel cards including those for jurors who have already served, arranged chronologically according to the date of service, and those for jurors whose names had previously been placed in the wheel for drawing but which were not drawn and which were therefore removed from the wheel at the last drawing of the month, arranged in chronological order according to the date of removal, are also kept in the office safe in separate file drawers. The names of new jurors are arranged in chronological order according to time of qualification. The wheel cards of all jurors contain entries showing the history of service."

Q. Now will you turn to Exhibits 8 and 9? A. You don't want me to read the second paragraph?

Q. Oh, yes, I do, but before you do that I should like to direct your attention to Exhibits 8 and 9 attached to that Exhibit 102 in evidence from which you are reading. A. Do you want me to read Exhibit 8?

(3161) Q. I direct your attention to the fact that there appears on Exhibit 8 this legend on the lower half: The letter E, September 3, 1940; the letter S, December 3, 1940, on Exhibit 8 in the report. That is correct, is it not? A. That is correct.

Q. And then in the Exhibit 9, which is the wheel card, on the part which indicates the back of the wheel card you have the same legend: E, September 3, 1940, and S, December 3, 1940? A. That is right.

Q. That is correct? A. Yes.

Q. Now, will you proceed to read the second paragraph. A. "At the beginning of each term a formal order is entered for the drawing of the needed jurors (Exhibit 11)"—shall we pause to look at Exhibit 11?

Q. I don't think it is necessary, Mr. Wilkerson.

Mr. Sacher: Is it necessary to read this at all, since it is in evidence, your Honor?

The Court: Please desist from that, Mr. Sacher.

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Mr. Sacher: May I object then, your Honor?

The Court: You may object to it. The objection is overruled. I don't know what he is getting at, but I assume he is getting at something, and we will just wait and find out.

The Witness: Continuing—or beginning the sentence over: "At the beginning of each term a formal (3162) order is entered for the drawing of the needed jurors (Exhibit 11) and at this time the wheel cards necessary for a drawing are placed in the jury wheel. New jurors' names are placed in the wheel either for the month which they have indicated will be most suitable for them for jury service or, if no time was indicated, they are placed in the wheel as needed. The wheel cards for jurors who have previously served are placed in the wheel in chronological order, those who served most recently being added first; and a similar practice is followed in placing in the wheel the cards of jurors whose names were previously placed there but not drawn"—

Q. "Place therein" is it not, Mr. Wilkerson? A. Right. (Continuing) —"Wheel cards for jurors who have been drawn but excused are placed in the wheel for drawing during the month which they have indicated, at the time when their excuses"—it obviously means "were" but it says "was granted."

Q. Yes, it does say "was". A. (Continuing) —"will be most convenient for them. The cards of jurors whose names have been used before generally reach the wheel in rotation about once in two years."

Q. Very well. Now, you learned from those two paragraphs which you have just read—that is, when you (3163) read this report originally you learned from those two paragraphs that you have just read that jurors whose names appeared on a panel might not necessarily serve as jurors for the period for which that panel was called, did you not? A. No. Indeed, I do not even remember reading those paragraphs because my reading of the Tolman Report some time ago was a cursory reading which

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had no impact or no use for the purposes that I was seeking.

Q. And you don't remember now? A. And I don't remember reacting to that at all.

Q. Well, you know now from reading it that jurors whose names appear on a panel do not necessarily serve as jurors during the period for which that panel is called, do you not?

Mr. Sacher: Just a moment. I object to the question on the ground that this witness, who did not write the report, is being asked questions in regard to the contents of the report, while when I examined the author of the report your Honor sustained objections to any inquiry concerning any part of the exhibit. On the same grounds, I object to this question.

The Court: Mr. Sacher, let us suppose that the witness, as he states, read the report and saw from that report that by the common experience in the jury commissioner's office, jurors might be called and be (3164) excused, and when they were excused they were put on for the next month. Don't you think that if he did that, if he read that, that it would be a curious circumstance that he should produce a list which purported to indicate that certain jurors were brought on again and again, when an indication of an excuse and coming back the next month would sort of reduce the effect of any such list? Perhaps if he knew those facts but got up the list, nevertheless, it might be a circumstance affecting his veracity, might it not?

Mr. Sacher: A short answer would be no.

The Court: Very well. Then I will overrule the objection.

Mr. Crockett: If the Court please, I would like to state an objection: My objection is that the witness is being cross-examined about matters that were not brought out in his direct examination; unless the United States Attorney desires to make the witness his witness, then I submit that this is improper cross-examination. I wish also to object to

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the Court's statement to the effect that the witness got up a list. I think the testimony indicates from the witness's own words that he was provided with lists by defense counsel.

The Court: I meant Exhibit 37. That is the one I am talking about. That is the list, that is (3165) the exhibit which he attested to the accuracy of, and that is what was being inquired into. I will overrule it. But I see we are getting back to the old system, so each one of you may proceed *seriatim et singulatim*.

Mr. Crockett: I object to the Court's characterization of my objection as getting back to "the old system."

The Court: Mr. Crockett, do you think that any reasonable person could suppose that there was anything improper in questioning this witness on the subject that he is being questioned about? Do you seriously think there is anything in the point?

Mr. Crockett: I do. I would not press the objection if I was not serious about it.

The Court: Well, the objection, as you stated it, seemed to me to be almost frivolous.

Mr. Crockett: But, your Honor, I sat throughout this entire proceeding and at no time has this witness been questioned about the Tolman letter.

The Court: No.

Mr. Crockett: The United States Attorney asked him had he read the Tolman letter, and his testimony is to the effect that he had given it a cursory reading; and now he proceeds to cross-examine him on the Tolman letter, which was not brought out on his direct (3166) examination.

Mr. Gladstein: If your Honor please, I desire to record an objection to the question asked by the United States Attorney and to this line of inquiry upon the ground that it is incompetent, irrelevant and immaterial, for these reasons: the testimony of this witness and the exhibits that were received in evidence in support of that testimony go to the proposition of establishing that in the first instance there is discrimination in the selection of jurors. It

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is wholly immaterial that thereafter, after the selections are made and the discrimination has been practiced and brought about, one or another or several of the jurors so called may for personal reasons seek to be excused from one particular panel. And the fact that upon being so excused those jurors are later utilized on some later panel, be it the following month or the following six months period or the following year, is by no means any basis for contending that there could be any weakness in the testimony given by this witness.

I therefore submit that the line of inquiry is immaterial.

Mr. Isserman: If the Court please, I rise singulatim and not seriatim—

Mr. McGohey: Now before Mr. Isserman proceeds—

The Court: I think it is both seriatim and (3167) singulatim.

Mr. Isserman: And rise for the sole purpose of objecting to your Honor's characterization of the conduct of counsel.

The Court: Well, the objection is duly noted.

Have you no argument to make on the point at issue?

Mr. Isserman: As a matter of fact, your Honor, I do have, and my objection would be on another ground, but your Honor has inhibited me, and I won't make it, and that is the precise reason for my objection to your Honor's comment.

The Court: If you are inhibited, Mr. Isserman—

Mr. Isserman: I am.

The Court: —it is a condition which has suddenly crept up on you.

Mr. McGohey: Now, if your Honor please, before the objections were made I had asked the witness a question, and I am not sure that he answered it. My recollection is that the question is: "Well, you know now that not all jurors whose names appeared on the panels actually served in the period for which the panels were called?"

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The Witness: Yes. I knew that before I read the Tolman Report.

Mr. Gladstein: I think for the sake of the record—I don't recall your ruling on the objection (3168) made by me. I can make an assumption as to what the ruling may be, but I think the record ought to be clear that you have ruled.

The Court: I think your assumption is well founded, and the objection is overruled.

Mr. McGohey: Could I have the witness's answer read? I think he did answer it.

The Court: Let us have the question and the answer. I have forgotten what it was.

(Question referred to read as follows:

"Q. Well, you know now from reading it that jurors whose names appear on a panel do not necessarily serve as jurors during the period for which that panel is called, do you not?"

Mr. McGohey: I thought the witness answered it just now. If the witness has not answered it, or the reporter does not have it, may I have the witness answer that question now?

The Witness: The answer I gave now is that I do know and I knew that before I read the Tolman Report.

Q. Before you read the Tolman Report? A. Yes.

Q. You do know that names that appear on those panels, those persons whose names appear on the panels might not necessarily serve during that period for which the panel was called? A. Yes.

(3169) Mr. McGohey: Now, if the Court please, I ask the Court to take judicial notice of the fact that in the light of the text of the Tolman Report and the exhibits attached to it—I am referring particularly to Exhibit 8 and Exhibit 9—that the letter E where it appears on those cards must of necessity mean "Excused"; and that the letter "S" must of

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necessity mean “Served” in the light of the text of the report.

Mr. Crockett: I want to object to that. If the United States Attorney wants to testify I suggest he take the stand. I would be glad to examine him on just—

The Court: If you gentlemen are going to get rambunctious again I suppose we will have some more trouble. Now why don’t you try to confine your remarks to something of some importance?

Now, Mr. McGohey, I don’t think that I can find it just the way you have stated it, because the symbols do not, as I see it, of necessity mean what you say to those familiar with the jury system. It is a most reasonable thing to consider that they mean that, and doubtless in the use of the cards here in this court they mean that, if you say so. I did not know it myself. I would have supposed perhaps that they meant that, but I do not think they necessarily mean (3170) that.

Mr. McGohey: Well, the point I make, your Honor, is that in the light of the text of the Tolman Report, which is in evidence, it seems to me that they can’t mean anything else. If your Honor will read those—

The Court: Let me look and see those, because the copy of the report I have been using is the one annexed to the challenge, and I have not looked at this exhibit—

Mr. McGohey: I refer your Honor to the paragraphs on page 4 which the witness has just read.

The Court: Yes?

Mr. McGohey: And then—

The Court: Where is the part? Oh, I am looking at the wrong exhibit here.

Mr. McGohey: 8 and 9.

The Court: Where is the part?

(Mr. McGohey indicates to Court.)

The Court: Oh. I thought it was just an E and an S with a date that would indicate the date of the printing of the exhibit perhaps.

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Mr. McGohey: Oh no, your Honor. That is an entry that appears on that card.

The Court: Yes. Show this to defense counsel.

Mr. McGohey: May I perhaps better show him the original exhibits?

(3171) The Court: I must say that I can see no other reasonable way of interpreting those entries.

Mr. Sacher: And I wish to say that I do not regard the issue as very momentous.

The Court: No, I do not think it is either.

Mr. McGohey: Well then, if that is so may we have a concession or a stipulation that that is what it means?

Mr. Sacher: No. We don't have to fall backwards because it is not momentous.

The Court: I think you will have to give Mr. Sacher a little score on that.

Your testimony, Mr. Wilkerson, is, as far as you can recall, you did not even notice those things on these exhibits?

The Witness: I was not concerned with it. They were irrelevant to my problem.

The Court: I did not ask you whether you were concerned with it. I asked you whether, now that you have looked at it, your testimony is that you have no recollection of seeing those symbols on there?

The Witness: Might—

The Court: Either you do recall it or you don't. If you can't do it without a long story we will forget it.

The Witness: I testified I had never seen those exhibits, your Honor.

(3172) *By Mr. McGohey:*

Q. Now, Mr. Wilkerson, will you refer to Exhibit 137. That is the list. A. Yes?

Q. Will you tell me whether the name Louis Alpren appears on that list? I think you will find it, as a matter of fact, as the third name from the top of page 2 of the

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exhibit. President, textiles, 320 Central Park West. A. The name is there.

Q. The name is there? A. Yes.

Q. How many panels does the exhibit show that he was called on? A. Four.

Mr. McGohey: Now, if your Honor please, I have asked the clerk of the court to send up here some of the wheel cards which are official records of this office, and I ask Mr. Borman if he has them here.

The Court: Now let me get the dates down of these four times that Alpren was supposed to have been in.

Mr. McGohey: Well, I will read it to the Court. Do you wish to check me, Mr. Wilkerson?

5/5/42; 4/14/47; 8/3/48; 12/20/48.

The Court: Yes.

Mr. McGohey: Now, if your Honor please, I ask the Court to take judicial notice of this card, which is an official record of the court and is a card similar to Exhibit 8 which appears in the Tolman Report.

(3173) The Court: I do take judicial notice of it.

Mr. Isserman: I have an objection on two grounds: First, the card has not been identified; and secondly the use of this card is not proper cross-examination. The witness has not testified about cards; he has testified about an exhibit; he has answered questions on cross on the exhibit. If the Government cares to go further on the issue of this new matter, that is something for the Government's direct case, just as the matter which we sought to elicit from Mr. Wilkerson at this point is matter for redirect. This is going very far afield in cross-examination, and an effort by the Government to use cross-examination to put in its own case.

The Court: Mr. Isserman, are you cognizant of the fact that I made a finding the other day that you and your colleagues had participated in a wilful, deliberate and concerted effort to delay the proceedings in this case?

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Mr. Isserman: I am, and I made the objection to your Honor's finding, your Honor will recall.

The Court: Yes. Now you are doing it again.

Mr. Isserman: I object to your Honor's characterization of my objection.

The Court: I just want you to know that I (3174) find that you are doing it again.

Mr. Isserman: I take objection to your Honor's comment.

The Court: And if these repeated objections on such grounds as have been stated here are continued I shall be literally forced to rule that on cross-examination objections shall be restricted merely to saying "I object." Now, I don't want to do that. But these objections we have been having here this morning are absolutely trifling. The questions are of such a character that there is no occasion to have any objections at all, and I wish you lawyers would desist from doing that.

Now, I am asked to take judicial notice of this card, which I do. If something is going to be done later on as to the use of it I can see now what it will probably be, and I would suppose it was entirely relevant and proper; but that is all I have been asked to do that you have been making all these objections to, and I notice the smirking of Mr. Crockett and Mr. Sacher which, as I have observed before, a number of things of that kind—

Mr. Sacher: That is unrelated, your Honor, to anything that your Honor has said or done. I was talking to my client. I can't control my facial (3175) expressions when I hear a humorous remark from a client.

The Court: I have observed, Mr. Sacher,—

Mr. Sacher: And on the record, I can't control the facial expressions arising in the course of a conversation with one of my clients. Now, I can't live in a straitjacket here and control my face so that it will be pleasing to your Honor.

The Court: If you ever get so that you can control your face I am afraid you will be in a bad way. But however that may be—

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Mr. Sacher: I don't think that is a nice remark to make either, even if it is only to a lawyer.

The Court: You talk and talk and talk. No amount of warning will suffice. No amount of finding that you do it with the deliberate effort for delay has any effect upon you. You keep on talking probably because you are so used to doing it and not being reprimanded for it. But I think we will reach a time in these proceedings when you will cease.

Now, I go on with what I started to say. The finding I made the other day was based not only upon occurrences that appear in the minutes but upon what I have observed in the conduct of counsel before me here, sneering, snickering, obvious indications of one to another "Get up, it is your turn now, go at it next, keep this thing (3176) going," and so on. So that I think perhaps before very long you gentlemen will appreciate that you should not do these things.

Now I have taken judicial notice of the paper, and we will proceed.

Mr. Crockett: If your Honor please, I was not in court at the time your Honor made this finding of dilatory tactics on my part. I desire to object for the record at this time. I desire first to deny your Honor's characterization of my conduct as smirking and sneering—

The Court: Well, that is what it was.

Mr. Crockett (Continuing): And I feel restrained by the code of ethics and refrain from making my own characterizations of some of your Honor's conduct into the record at this time.

The Court: Well, if you have been restrained in characterizing my conduct it is a queer kind of restraint. You and your colleagues have called me about everything that a Judge can be called, and have charged me with corruption and bias and prejudice and many other things, and if you consider that you have been restrained in doing that, not once, not twice, not a dozen times—then I am afraid the record will not bear you out.

Colloquy of Court and Counsel

Mr. Isserman: If the Court please, I rise to (3177) object to your Honor's characterization of my conduct at any time in this proceeding as either sneering or smirking. I also object to your Honor's characterization of any conduct on my part as suggesting "go at him next, keep this thing going." I have never done that. I have never engaged in any action which indicated that that was my intention. I have never had that intention. I have made objections, and when I make them I make them because I believe I should make them for my client.

As far as any charge or characterization of your Honor is concerned, if I have done it it has been done solely in a manner which the law provides in connection with protecting the rights of my client.

The Court: That is what you say.

Mr. Sacher: If you please, I wish to deny on the record so far as I am concerned each and every of the statements made by your Honor concerning me, if the remarks were designed or intended to cover my conduct—

The Court: They were.

Mr. Sacher (Continuing): If they were, then I wish to interpose a denial very briefly to those charges, and I wish to state it to be my belief that the sole purpose of the statement is to prejudice us in the eyes of the people and of any higher courts who may come to review (3178) this record.

Mr. Gladstein: Your Honor, I wish to object to your Honor's characterization and statements in so far as they apply to me, and I deny the validity of those statements or that any basis for such statements exists.

The Court: Now I hope there will be a little less profuseness in the objections during cross-examination.

Mr. McGohey: I understand that your Honor has taken judicial notice of this card?

The Court: I have.

Mr. McGohey: And may I ask to substitute in its place for identification or introduction in evidence a photostatic copy?

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Mr. Gladstein: May I see the original?
Mr. Gordon: We will give him a copy.

By Mr. McGohey:

Q. By the way, while the clerk is marking that, Mr. Wilkerson, referring to Exhibit 137, and Louis Alpren, whose name appears thereon, he would be classified in the executive class, would he not? A. I would not make an offhand statement there, Mr. McGohey, because this list does not provide all the information that is sometimes on other lists. The probabilities are yes—

Q. Would you read what the occupation is as shown on (3179) the Exhibit 137? A. It says here, president of textiles, and the probabilities are that if we were to look it up we would classify him as an executive.

Q. Yes? A. But I won't assert that this is true.

The Court: What do you mean you would look it up carefully? You mean you would go up to his place of business and find out?

The Witness: I won't. I mean, we might, depending on what is on the jury list, might find it necessary to call his office. We have done that with many of them to make sure that the information listed for occupation fits a given category in the Census classification.

The Court: I thought you testified earlier that you took the descriptive matter on the jury cards and that was the sole source of information as to these tables.

The Witness: No.

Mr. McGohey: I think your Honor means the jury panels.

The Court: That is what I do mean.

Mr. McGohey: Not the jury cards.

The Court: The descriptive matter on the jury panels.

The Witness: May I correct your Honor?

The Court: Well, you say now that you did more (3180) than that?

The Witness: I said that before, too.

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Recalled—Cross*

(Marked Government's Challenge Exhibit W in evidence.)

By Mr. McGohey:

Q. I show you Government's Challenge Exhibit W, which appears to be the history card relating to the juror Louis Algren. His name appears on Challenge Exhibit 137. I ask you to look at that card for the date 5/5/42, and tell me what symbol appears alongside that date on his card.

Mr. Isserman: If the Court please, I object to this question on the ground that it is not proper cross-examination.

The Court: The objection is overruled.

A. To the left of 5/5/42 is the symbol S.

Q. Now, do you have a pencil with you, Mr. Wilkerson, or would you like me to furnish you with a pencil?

The Witness: No, thank you. I have one.

Q. You have a pencil? Fine.

Mr. Sacher: May I object to this line of testimony.

The Court: Yes?

Mr. Sacher: On the ground that it is designed to show that only certain people appearing on panels (3181) were excused. It does not contravene the correctness of the name appearing on the panel itself.

The Court: Overruled.

Mr. McGohey: Will you make a table—you can do it to suit yourself, Mr. Wilkerson—

Mr. Isserman: If the Court please, I object to the instruction of the District Attorney to the witness to make a table relating to the card which is before him.

The Court: Overruled.

Q. Will you make a table from which you will be able to calculate the number of times this juror and other

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jurors were called, other jurors about whom I shall question you, were called, and the number of times they served out of the number of times that they were called? A. That is, you want me merely to make a form in which I can record these you ask me about?

Q. Yes, I propose to ask you about a certain number of jurors appearing on these panels, and then I propose to ask you what these cards show with respect to those people. And it will be easier for you if you make some kind of a record on a pad. A. I will keep a record. A record of the questions you ask me—is that the point?—on these individual jurors you have picked out to ask me about?

(3182) Q. Yes. This entry on Challenge Exhibit W which you have just read shows that Mr. Alpren served once, does it not? A. I don't know. All I know is it says S 5/5/42.

Mr. McGohey: Your Honor, I ask that you take judicial notice that that indicates that he served at that time.

The Court: I do. And you may proceed accordingly, Mr. Wilkerson. You may assume for the purpose of that tabulation that you are going to make that that means that Mr. Alpren served.

Q. Now I direct your attention to the entry 4/14/47—

Mr. Isserman: I object to that question—I am sorry, I will wait for the question.

Q. (Continuing) And ask you what symbol appears alongside that date on the card?

Mr. Isserman: I object to that question on the ground that it is not proper cross-examination.

The Court: Overruled.

A. The symbol E appears to the left of 8/14/44.

Q. I am talking about 4/14/47, which is the date shown on Exhibit 137. A. The symbol E appears to the left of that one also. And also a notation "DEC," the implication of which I don't know.

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Q. Will you look at the entry on that card, 8/3/48, and tell me what symbol is alongside of that?

(3183) Mr. Isserman: I object to that question on the ground that it is not proper cross-examination.

The Court: Overruled.

A. I notice the symbol E to the left.

Q. That is all I have asked you about. Now I ask you to look at the entry 12/20/48 and tell me what symbol appears there to the left of that date.

Mr. Isserman: I object to that question on the ground that it is not proper cross-examination.

The Court: Overruled.

A. The symbol E is there.

Q. Now, does that indicate that Mr. Alpren was called on four panels?

Mr. Isserman: I object to that question on the ground that it is not proper cross-examination.

The Court: Overruled.

A. There are several that you skipped.

Q. I am referring to Exhibit 137. That exhibit shows that he was called on four panels, does it not? A. This exhibit shows that his name appeared on four jury lists submitted for those dates.

Q. That is right. We have been calling them jury panels, haven't we? Do you prefer me to call them jury lists? A. Yes.

Q. Very well, I shall. Exhibit 137 shows that Louis (3184) Alpren, president, textiles, of 320 Central Park West, had his name appear on panels called for the dates which appear on the extreme righthand column of Exhibit 137 on page 2 thereof, that is correct? A. Using panels in the sense of lists, as we did it here.

Q. Jury lists, and I am sorry I said panels, except that the word "Panel" appears on the exhibit which was introduced in evidence through you. A. In the sense of lists, yes.

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Q. Now, from your examination of Government's Challenge Exhibit W, the card relating to Mr. Alpren, is it not a fact that out of the four times that he was called he served once and was excused three times?

Mr. Crockett: I wish to object, your Honor, to this entire line of questioning for the reason that while this Court may take judicial notice of the existence of that record, there is no evidence here as to the accuracy of the notations that have been made by somebody in the clerk's office on that card which is serving now as the basis for Mr. McGohey's examination.

The Court: Overruled.

Mr. Isserman: And I object because it is not proper cross-examination.

The Court: Overruled.

(3185) Mr. McGohey: Now may I have the question answered?

The Witness: May I have the question read?

(Question read.)

A. It is a fact that the symbol E appears to the left of his name three of the four times we have indicated it on Exhibit 137 and S appears once.

Q. Now I call your attention to the next page of Exhibit 137, namely, page 3, and direct your attention to the second name which appears thereon, to wit, Avedon, Harvey, president, 159 East 33rd Street, and in the column which bears the heading "Dates of Panels," I ask you if it is not correct that there appear these three dates: 11/7/45; 3/4/47; 11/3/48? A. That is correct.

Mr. McGohey: If your Honor please, I ask your Honor to take judicial notice of a record of this court for the juror whose name I have just read from Exhibit 137 in evidence.

The Court: I do so.

Mr. McGohey: And I ask leave to substitute for the original the photostat which I have here.

The Court: Yes.

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(Marked Government's Challenge Exhibit X in evidence.)

(3186) Q. Now I call your attention to Government's Challenge Exhibit X in evidence and ask you to look at that and see if there is an entry 11/7/45.

Mr. Isserman: I object to the question on the ground that it is not proper cross-examination.

The Court: Overruled.

Q. Will you tell us if there is a symbol to the left of that entry and what that symbol is?

Mr. Isserman: I object to that question on the ground that it is not proper cross-examination.

The Court: Overruled.

A. The date you are asking for—

Q. 11/7/45, Mr. Wilkerson. A. There is a symbol E to the left.

Q. Now, will you look to see if there is an entry 3/4/47?

Mr. Isserman: I object to that question on the ground that it is not proper cross-examination.

The Court: Overruled.

Mr. Sacher: I object on the ground that the card is the best evidence, particularly since your Honor has taken judicial notice of it.

The Court: Overruled.

Q. Do you find that entry 3/4/47? A. I do.

Q. And do you find a symbol to the left of it, and, (3187) if so, what is the symbol? A. I find a symbol E to the left of it.

Q. Now, will you look and see if there is an entry 11/3/48?

Mr. Isserman: I object to that question on the ground that it is not proper cross-examination.

The Court: Overruled.

A. I do.

Q. And do you find a symbol to the left of that, and, if so, what is the symbol?

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Mr. Iserman: I object on the ground that it is not proper cross-examination.

The Court: Overruled.

A. The symbol E.

Q. By the way, Mr. Avedon appears on Exhibit 132 to have the occupation "President." I take it that he would be classified by you in the category of executives? A. We would not attempt to classify him on that basis alone.

Q. You have used the name in your list. A. The lists provided more information concerning him. Very likely they do for most people. And we would consider all of the factors; the classification of a single person sometimes takes a matter of a half hour to look into all of the sources and check.

(3188) Mr. McGohey: Do we have in court any of the panels of jurors for November 7, 1946, March 4, 1947, or November 3, 1948?

Mr. Gladstein: Will you give me the numbers of those exhibits so I can find them?

Mr. McGohey: Exhibit 35 is November 7, 1946; March 4, 1947, is Exhibit 36; and November 3, 1948, is Exhibit 47.

Q. Now I show you Defendants' Challenge Exhibit 47—

Mr. McGohey: Is this the exhibit that was marked in evidence or marked for identification? It does not appear to have any stamp of the clerk on it.

Mr. Gladstein: It is a photostat, isn't it? What do you mean, stamp?

Mr. McGohey: By the clerk, no exhibit stamp.

Mr. Gladstein: You mean by the clerk here?

Mr. McGohey: Yes.

Mr. Gladstein: Oh, it has not been received.

Mr. McGohey: Well, is it understood that this is the list that was used in the preparation?

Mr. Gladstein: Yes.

Mr. McGohey: I will accept that.

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(3189) Q. Will you look at the name of Avedon, Harvey, as it appears on the jury list which was used by you in compiling your data with respect to jurors and tell me if it does not appear thereon that Mr. Avedon's business is given as the Avedon Manufacturing Company? A. It does. That is one of the reasons I would not classify it without that information.

Q. Now that you have the list from which the name was taken from which it appears that his occupation is president and that he is connected with the Avedon Manufacturing Company, would you not say that he would be in the executive category as you have used it in your testimony? A. I will check it for you in just a moment. President of a factory would be classified as an executive.

Q. Very well. Thank you. A. You are welcome.

Q. Now, from the notations that you have made does it not appear that Harvey Avedon appeared on three jury panels and that from the card you have looked at it appears that he was excused three times?

Mr. Isserman: I object to that question on the ground that it is not proper cross-examination.

The Court: Overruled.

Mr. Gladstein: I further object, your Honor, to that question and to any questions based upon the (3190) Government Exhibit X for the reason that any answer given to a question of this character would tend neither to prove nor disprove any issue involved in the challenge, which has to do with the question of the jury clerk's selection of jurors and not with the question of when jurors get excused. So that even if Government Exhibit X shows the president of this corporation was excused every time that he was asked to serve the fact is that he was called year after year, a total of eight times, beginning in 1943 and ending some time in 1948, with a notation that he was to come back and serve February 1949.

The Court: Overruled.

Mr. McGohey: May the record also show, since Mr. Gladstein has read some data from it, that Gov-

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ernment's Exhibit X in evidence shows that while this juror was called eight times he has yet to serve on a jury.

Mr. Sacher: You are putting up a hard fight for him.

Mr. McGohey: Did I get an answer to that question that I asked the witness?

May the question be read then?

(Question read.)

A. The symbol S is to the left of his name on the three panels—

(3191) Q. The symbol S? A. The symbol E. Pardon me.

Q. Appears opposite each panel? A. Each of the three you have called attention to.

Q. Now I call your attention to the name Arthur N. Bachrach which appears also on page 3 of Challenge Exhibit 137.

Mr. Gladstein: What is the name, Mr. McGohey?

Mr. McGohey: Bachrach, B-a-c-h-r-a-c-h, Arthur N.

Q. Have you found that? A. Yes, I have it.

Q. And that exhibit shows that his name appeared on the jury lists or panels for July 6, 1943, March 4, 1947, and August 3, 1948, is that correct? A. It is Arthur Bachrach that you are inquiring about?

Q. Arthur, yes. A. That is correct.

Mr. McGohey: Now I ask the Court to take judicial notice of the history card or record of this court for that juror Arthur Bachrach. I offer it in evidence and ask leave to substitute a photostatic copy for the original.

The Court: Very well.

(Marked Government's Challenge Exhibit Y.)

Q. Now I show you Government's Challenge Exhibit Y and ask you to look thereon and see if you find on that

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(3192) exhibit an entry for Arthur N. Bachrach for July 6, 1943?

Mr. Isserman: I object on the ground that the question is not proper cross-examination.

The Court: Overruled.

A. I do.

Q. And do you find a symbol to the left of it, and, if so, what is the symbol?

Mr. Isserman: I object on the same grounds, your Honor.

The Court: Overruled.

A. I find a symbol and it is E.

Q. Would you keep your voice up a little, please? A. It is E.

Q. Do you find an entry for March 4, 1947?

Mr. Isserman: I object on the same ground.

The Court: Overruled.

A. I do.

Q. Do you find a symbol to the left of it and, if so, what is the symbol?

Mr. Isserman: I object on the same ground.

The Court: Overruled.

A. E.

Q. Do you find an entry for August 3, 1948? A. I do.

Mr. Isserman: I object on the same ground.

(3193) The Court: Overruled.

Q. Do you find a symbol and if so what is the symbol?

Mr. Isserman: I object on the same ground.

The Court: Overruled.

A. O-f-f.

Q. Anything else? A. Something else I can't read to the right of it; to the left of it is o-f-f.

Mr. McGohey: I think that refers to an ailment of the juror which need not be published, and I think counsel will agree with that.

The Court: Yes. And he went off the jury lists?

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Mr. McGohey: That is right.

Mr. Gladstein: But the original contains a date apparently of service in 1948 that seems to have been blotted out in ink after having been made and in the photostatic process you can't tell that. Is that right, Mr. McGohey?

Mr. McGohey: I think the exhibit speaks for itself, your Honor, and it seems to me that—

Mr. Gladstein: I suppose the clerk who made those notations would be able to supply the answer.

Mr. McGohey: I think when you look at the other entries that are in there with it you can see the entry of service cannot be accurate.

Mr. Sacher: Are we to take judicial notice now (3194) of inaccuracy?

Mr. Gladstein: By the clerk.

Mr. McGohey: Furthermore, your Honor, I call your attention to the fact that the entry that is discussed by Mr. Gladstein has no relation at all to the entries which appear on the Defendants' Challenge Exhibit 137.

The Court: That is right.

Mr. Gladstein: I suppose I can take it up on redirect examination, since the exhibit is in evidence.

The Court: I think so.

Mr. Gladstein: Yes.

The Court: If there is something that you particularly want to direct my attention to now, I have no objection.

Mr. Gladstein: That is quite all right, your Honor, as long as I can reserve it for redirect.

Q. Now, it does appear, does it not, that although his name appears on three panels as listed in your exhibit 137, that the wheel card shows that he was excused on each one of those occasions?

Mr. Isserman: I object on the ground that it is not proper cross-examination.

The Court: Overruled.

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A. It shows the symbol E to the left of two and o-f-f to the left of one.

(3195) (To Mr. Gladstein.) I have two copies here. I don't know whose they are.

The Court: What was the name of that last man?

Mr. McGohey: Arthur N. Bachrach.

The Court: Oh yes, I have that. I thought you had gone to another.

Q. Do you have a copy of the exhibits? A. Yes. I have been looking at it.

Q. Now would not Mr. Bachrach be classified in the executive class? A. I don't know.

Q. Will you look at Challenge Exhibit Y and see what his occupation is? A. Is this Challenge Exhibit Y?

Q. Yes, it is. It appears from that that he is a manufacturer, and then in parenthesis appeared the words "Own Co period" apparently meaning "Own Company."

The Court: He has to look up in the alphabetical index to see whether he would classify him as an executive.

A. He would be classified as an executive.

Q. I beg your pardon? A. He would be classified as an executive.

The Court: Did you really have to look that up in the book?

The Witness: You can make a million mistakes if you don't, your Honor.

The Court: When it says "Manufacturer" and "his own (3196) company" you still would doubt without checking it up?

The Witness: You would be surprised, I am sure, at some of the things which appear in the classifications, that you assume to be so but are not.

The Court: Well, that is what puzzles me here. I thought earlier that you just took the descriptions of occupations from these panels and made up your

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statistics by doing the best you could to correlate those with the occupational classifications in the Census. But this morning you have indicated to me that you did a lot of telephoning around and that various people in your organization tried to get information.

The Witness: The record will show I indicated that when I first testified, but—

The Court: But I say, I probably did not notice it then. But if you do, or, rather, if you did what you now say, namely, took the occupations as stated by the jurors and as appearing in the lists and also have miscellaneous individuals telephoning around and drawing conclusions—

The Witness: That is not my testimony.

The Court: —how can it be other than a perfect chaos of descriptive occupations when it is the result of all that?

The Witness: You are not describing my procedure.

(3197) Mr. Crockett: Your Honor, I want to object to the Court's statement that the witness has testified that quote miscellaneous people end quote were telephoning around.

The Court: Yes, your objection is noted.

The Witness: I will be glad to illustrate to the Court if he wants to know.

The Court: What is that?

The Witness: I will be glad to illustrate to the Court if he wants to know what I did.

The Court: I haven't any doubt about that.

Now we will have a recess and come back at 2.30.

(Recess to 2.30 p. m.)

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(3198)

AFTERNOON SESSION

DOXEY A. WILKERSON, resumed the stand.

* * *

Mr. McGohey: Your Honor, this morning I called for Exhibits 28 and 30, being the panels for April 14, 1941, and June 17, 1942.

Mr. Gladstein: 28 and 30?

Mr. McGohey: Please.

(Exhibits handed to Mr. McGohey.)

Cross examination continued by Mr. McGohey:

Q. Mr. Wilkerson, do you have Exhibit 137 which we were referring to this morning? A. I do.

Q. Now I show you Defendants' Challenge Exhibit 28 and Defendants' Challenge Exhibit 30. Challenge Exhibit 28 is the jury list or panel for April 14, 1941. Challenge Exhibit 30 is the jury list or panel for June 17, 1942.

Will you please look at those lists and tell me if the name of John H. Alexander appears on either or both of those jury lists? (3199) A. It appears on both lists.

Q. It appears on both lists? A. Yes.

Q. Challenge Exhibit 137 reads: "Complete listing of names beginning with the letters A and B that appear on more than one of the 28 jury panels for the Southern District of New York. These 28 panels extend over the years 1938-1949."

Now, those two panels before you marked Challenge Exhibit 28 and Challenge Exhibit 30 are two of the panels which were used in compiling Exhibit 137, are they not?

A. I will have to check that. I can do it quickly.

Q. Will you refer to Challenge Exhibit 136, please?

Mr. McGohey: May we have that Exhibit?

(Exhibit handed to Mr. McGohey.)

Mr. McGohey: Thank you.

Q. I hand you Challenge Exhibit 136 and ask you if that does not purport to indicate the panels which were

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used in compiling the data which appears on Challenge Exhibit 137? A. That is correct.

Q. Now having looked at Challenge Exhibit 136, will you tell me whether the two panels designated Challenge Exhibit 28 and Challenge Exhibit 30 are panels which were used in compiling the figures and data which appear on Exhibit 137? A. They are.

(3200) Q. Now will you tell me if you find the name John H. Alexander on Challenge Exhibit 137? A. I do not.

Q. Challenge Exhibit 137, then, is inaccurate then, is it not? A. There seems to be an error.

Mr. McGohey: Now let me take these exhibits out of your way because I can't be questioning you about them now.

Q. Will you please hold Challenge Exhibit 137. Now will you look at page 4 of Challenge Exhibit 137 and I call your attention to the name Albert F. Berenger, about the ninth name from the top of the page. A. I see it.

Q. The exhibit reads "Berenger, Albert F., president, Mamaroneck," and then in the column to the right it appears that his name appears on panels for the following dates: July 6, 1943; August 9, 1943; July 19, 1948; is that correct? A. That is correct.

Mr. McGohey: Your Honor, I ask you to take judicial notice of this record in this court, being the history card for the juror Albert Berenger.

The Court: I do.

Mr. McGohey: I offer it in evidence. And I offer the photostatic copy in lieu of the original.

Mr. Crockett: If the Court please, I would like to renew the objections previously made to the (3201) introduction in evidence of these panel cards through a witness on cross-examination.

The Court: You realize, I suppose, Mr. Crockett, that a Court has very broad discretionary powers in connection with the cross-examination of witnesses?

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Mr. Crockett: I understand that, your Honor. I merely want the record to show that I object to this present use of the witness on cross examination.

The Court: Objection overruled.

(Marked Defendants' Challenge Exhibit Z in evidence.)

Mr. McGohey: Would the record show that I am handing counsel for the defendants the original and a photostatic copy of Government's Challenge Exhibit Z just received in evidence (handing).

By Mr. McGohey:

Q. Mr. Wilkerson, I ask you to look at Government's Challenge Exhibit Z in evidence. Do you find listed on that card the date July 6, 1943? A. I do.

Q. And do you find alongside of it to the left a symbol? A. Yes.

Q. What is the symbol? A. E.

Q. Do you find a date, August 9, 1943? A. I do.

Q. And do you find a symbol alongside of it, and what is the symbol? A. E.

(3202) Q. Do you find the date July 19, 1948? A. I do.

Q. And do you find a symbol alongside of it, and what is the symbol? A. A. E.

Q. And does it not appear from that card that that juror was excused on each of the dates against which the letter E appears? A. I recognize the letter E to the left of each date.

Mr. McGohey: Thank you.

Q. Now will you look at Government's Exhibit Z and tell me what the occupation thereon is for that juror? A. President.

Q. Does it indicate the company? A. Of P. W. Brooks & Company, Incorporated.

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Q. And you would classify him in the executive group, would you not? A. That would depend. Very likely.

Q. Well, will you tell us how you did classify him? A. Do you happen to have before you the jury list itself? It may indicate the nature of the P. W. Brooks Company.

Q. No, I do not. A. The probabilities are, then, that he was classified as an executive. However, if there were any question about that on the list, we would use whatever collateral evidence is necessary to make a proper classification.

(3203) Q. Well, will you tell me what, if any, collateral evidence you had with respect to this juror— A. I don't remember.

Q. —whose name appears on the Challenge Exhibit offered by the defendants? A. I don't remember this particular case out of 7500.

Mr. Sacher: Will your Honor be good enough to advise the witness that if he wishes to make use of a list that he has used, he may do so?

The Court: I think he may.

Q. Have you any lists from which you can tell us how you classified this juror?

Mr. Gladstein: He wouldn't remember the number.

A. What panel is this?

The Court: If he has such a list he may refer to it.

Mr. McGohey: It appears from Challenge Exhibit 136 that the panels on which Mr. Berenger is listed are Exhibits 31, 32 and 33. If they are here maybe the witness could refer to those.

The Witness: Any one of them will suffice.

Mr. McGohey: 31, 32 and 33.

Q. I show you Defendants' Challenge Exhibit 31. Do you find the name of Albert Berenger? A. I do.

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Q. Is that one of the lists you used in classifying (3204) this juror? A. It is.

Q. And how did you classify him? A. As an executive.

Q. As an executive. Thank you.

The Court: May I see that exhibit for a moment, Mr. McGohey?

(Mr. McGohey hands exhibit to court.)

Q. While his Honor is looking at that, is there anything which you have just learned from looking at that list, Challenge Exhibit—

Mr. McGohey: What is the number, your Honor?
Mr. Sacher: 31.

Q. —31, which is different from the information which appears on the history card, Government's Challenge Exhibit Z? A. There isn't.

Q. Now will you turn to page 6 of Challenge Exhibit 137. I direct your attention to the first name on that list, Raymond J. Braun.

The Court: How do you spell that last name?

Mr. McGohey: Braun, B-r-a-u-n.

The Court: Thank you.

Mr. McGohey: There was some testimony concerning this juror this morning.

Q. Have you found that, Mr. Wilkerson? A. I have.

Q. In the panel—

The Court: Oh, yes.

(3205) Mr. McGohey: Was your Honor about to say something?

The Court: No. I just saw on my notes where it was referred to this morning.

Q. Now, in the column to the right of the page, page 6 of Exhibit No. 137, you find three dates listed, do you not? A. I do.

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Q. Those dates are July 6, 1943? A. That is one of them.

Q. And August 9, 1943? A. Yes.

Q. And September 9, 1948? A. Right.

The Court: Did you say September 9, 1948?

Mr. McGohey: Yes. I think we found out, your Honor, this morning that he did not appear on that list.

The Witness: September 7th, is it not?

The Court: Yes. I have it September 7th.

Mr. McGohey: September 7, 1948.

The Court: That is what made me think it was the 7th.

Mr. McGohey: Now I ask your Honor to take judicial notice of this history card from the files of this court for the juror Raymond J. Braun.

The Court: I do.

Mr. McGohey: I offer it in evidence and ask (3206) leave to substitute a photostatic copy for marking, and I have a photostatic copy which I shall now hand, together with the original card, to counsel for the defense.

(Marked Government's Challenge Exhibit AA.)

Q. Mr. Wilkerson, will you look at Government's Challenge Exhibit AA (handing). Will you tell me, do you find on that Exhibit the date July 6, 1943? A. I do.

Q. Is there a symbol to the left of it and, if so, what is the symbol? A. It is E.

Q. Do you find the date August 9, 1943? A. I do.

Q. And to the left of that is there a symbol and, if so, what is it? A. It is S.

Q. That would indicate, would it not, that the juror served once and was excused once? A. I see the symbols E and S beside those two names.

Mr. Gladstein: What is the identification number of this last exhibit?

Mr. McGohey: Challenge Exhibit AA. It is for the juror Raymond J. Braun.

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Q. Now would you look at this card and tell me from the information that appears thereon how you would classify that man as to his occupational category? A. May I see the panel on which he is listed?

Mr. Sacher: He is on 31 also.

(3207) Mr. Gordon: Exhibit 31.

The Witness: May I use it, your Honor?

The Court: I haven't got it here.

Q. Here it is (handing). A. He would be classified as an executive.

Q. It appears on both the jury list which you have just examined and the card, Challenge Exhibit AA, that is a president of Specific Pharmaceuticals, Inc., is that correct? A. That is right.

Q. And the same information appears on both the Challenge Exhibit 31 for identification and Challenge Exhibit AA? A. Yes.

Q. Now you have been making some tabulations, have you not, as I asked you to, this morning, as we went along? A. I have.

Q. Does it appear from that tabulation that the juror Alpren—do you have that name? A. I do.

Q. Does it appear from those calculations how many times he appeared on jury panels? A. No; what I have is the list of times he was indicated as having appeared on 137, but the card you showed me I think listed more times.

Q. I will accept the correction. Will you tell me how many times he appears on Challenge Exhibit 137? A. Louis Alpren appears four times.

(3208) Q. Will you tell me how many times the witness Avedon appears? A. Three.

Q. Juror Avedon. A. You mean on Exhibit 137.

Q. Exhibit 137. A. Three.

Q. Will you tell me how many times the juror Bachrach appears? A. Three.

Q. Will you tell me how many times the juror Berenger appears? A. Three.

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Q. Will you tell me how many times the juror Braun appears? A. Two.

The Court: No, you have got him on three.

Q. On your list how many times does Braun appear?

Mr. Sacher: I will concede it is three.

A. Three. I believe you asked me for only two dates with reference to the card; is that right?

Q. That is right. But we are talking about Exhibit 137? A. That is right.

Q. And his name appears three times there. Now, that is a total of how many appearances for those five men? A. 16.

Q. 16. Now I draw your attention to Defendants' Challenge Exhibit 67. I understand that this column (indicating) marked "Executives" represents the percentage that the number of executives bears to the total population. Is that correct? A. Gainfully employed.

(3209) Q. Gainfully employed. A. Age 14 and over.

Q. Now is it a fact that this column is a graphic representation of the count of executives in the population gainfully employed as reported on here and for the period reported? A. Yes.

Q. Is it a fact then that these five jurors, each of whom you have classified as an executive, appears once in that column? A. Once in this column?

Q. In the column marked "Executives" on Challenge Exhibit 67. A. I couldn't guarantee that any of them appear there.

Q. Well, they were counted in the population, were they not? A. I don't know whether they were executives when the census was taken.

Q. Were they people? A. Presumably.

Q. Could they be counted any other way than as executives? A. If they weren't executives at the time of the census they could.

Q. But haven't you assumed that they were executives? A. I have assumed nothing about these individuals as regards the census report.

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Q. Well, if they were executives in 1940 they would be counted as five individuals, would they not? A. They would.

Q. Now, you have counted them, have you not, as 16 (3210) executives in computing your table that appears to designate the percentage of executives in Defendants' Challenge Exhibit 67-A; is that correct? A. That is correct; 67-A reflects the listings for—it reflects the composition of the panels as a whole and indicates how many listings of executives there are there.

Q. That is right. So that if the same man appeared, as Mr. Algren does, four times on those panels, and if his classification is an executive, he is counted four times in this column, is that so? A. That is right. It would mean that there are that many executives on the panels we are considering.

Q. Isn't it a fact, then, that you have overloaded this column of executives as it appears for jurors in Challenge Exhibit 67 300 per cent against the count of executives in the population? A. It is not. It is a fact that whoever chose those persons overloaded it with executives.

Mr. McGohey: I move to strike out the answer, your Honor.

Mr. Sacher: I move that it stand.

The Court: Strike it out.

Q. Who prepared the table? A. I prepared the table.

Q. And you have five people counted 16 times in this column, is that correct? A. That is correct.

(3211) Q. And you have them counted five times in this column? A. I don't know whether they are in the column at all.

Q. Well, they might be overloaded more than 300 per cent, then, might they not? A. Depending on whether they were put in that list that often. They are not overloaded at all from my point of view. But obviously the list was overloaded with executives.

Q. Does the Census count a person more than once? A. It counts a person once; but it isn't true with reference to the jury lists.

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Mr. McGohey: I move to strike that out, your Honor.

The Court: Strike it out.

Q. Now will you look at your calculations again and tell me how many times the symbol S appears for these five jurors that we have been talking about? A. It appears twice.

Q. And does the symbol E appear for the other 14 times that their names appear? A. Twelve times, I think. Is it?

Q. Well, how many times? Your calculations I will take. A. Twelve E's. Now, remember that for Raymond J. Braun you had me list only two listings, not all three that are on the list, and hence the calculations you (3212) asked me to keep a record of—

Q. Yes. A. —have fewer than the number you are talking about.

Q. You recall the reason I did that was because he appeared on Challenge Exhibit 137 three times, whereas as a matter of fact he only appeared on two panels?

Mr. Sacher: As a matter of fact, he appears by the record to have appeared on four panels. That is what your exhibit shows.

The Court: Why do you do that?

Mr. Sacher: No; that is what the exhibit shows.

Mr. McGohey: Well, your Honor, the record—

The Court: It seems to me there is no indication for any comment here. The calculation is very simple. He left one of them out.

Mr. Sacher: That is right.

The Court: There were two that served and there were 13 who were excused. And that makes 16.

Mr. Sacher: So far as fact is concerned, the Government's Exhibit AA shows that Mr. Braun was on four panels; that he served twice, and was excused twice. That is Exhibit AA.

The Court: Well, it seems to me that is what is being inquired into here is the accuracy of these—

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Mr. Sacher: His calculations? Oh, I beg (3213) your pardon.

The Court: Not the calculations when he said 12 instead of 13. I knew it was 13 all the time because I have been listening to this myself.

Mr. Sacher: I misunderstood that.

By Mr. McGohey:

Q. Now Mr. Wilkerson, it is a fact, is it not, that the four categories you have used are a composite of some 450 or 451 occupational classifications that appear in the alphabetical index used by the Census? A. They were based upon those, yes.

Q. Can you tell me how many of these 451 occupational categories established by the Census, and as they appear in—I think it is Challenge Exhibit 16, which you referred to this morning—are not represented in the panels which you have examined? A. No.—if I understand your question you want to know how many of the hundreds of occupations listed by the Census are not represented in the panels?

Q. That is my question. A. I made no such count.

Q. I am talking about the 451 categories of occupations which I understood you to say was established in Challenge Exhibit 16, being the alphabetical index. A. The only way your question could be answered, Mr. McGohey, is to check—

Mr. McGohey: Now, if your Honor please, I want (3214) to know if the witness can tell us how many of those 451 categories of occupations are not represented on the panels.

Q. Can you tell me or can't you? A. I gave you my answer.

Q. You cannot? A. I cannot, not without checking.

Mr. McGohey: That is all I desire. Thank you. May I have Exhibit 9, please?

Q. And while that is being gotten, Mr. Wilkerson, I ask you—

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Mr. Sacher: Excuse me, which Exhibit was that?
The Court: 9.

Mr. McGohey: 9.

Q. (Continuing) It is a fact, is it not, that you have described the managers, proprietors and officials as executives; that is correct, is it not? A. Some of them—oh, in our classification? Yes.

Q. In your classification, yes. A. That is right.

Q. And you indicate by that that this group forms the rich, the propertied and the well to do, as those phrases are used in the papers in support of the challenge; is that not correct? A. I made no testimony to that effect.

Q. Well, I ask you now. You are familiar with the papers that were filed in court by defense counsel in (3215) support of the challenge to the jury system, are you not? A. I am.

Q. And isn't it a fact that in those papers they say that the jury system is loaded in favor of the rich, the propertied and the well to do? A. That is what I have read in the challenge papers.

Q. And you have testified that according to your analysis that the largest category are the executives, is that correct? A. That is correct.

Q. Now, doesn't that mean that the executives are the rich, the propertied and the well to do referred to in the moving papers? A. That means that there are five times more—

Mr. Sacher: Just a minute. I object to the question as to what the draftsman of the papers meant and asking this witness—

The Witness: Let me answer his question.

Mr. Sacher (Continuing): —for the meaning of those terms as employed in the challenge itself.

The Court: Perhaps the question can be rephrased.

Q. The challenge paper states that "The said array, panel, venire, and jury lists, and the grand jury which returned the indictments herein, were and are, and each of

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them was and is, improperly and illegally selected and drawn in that the same have been and are systematically, (3216) purposefully and intentionally selected and drawn in such manner as to be the organ of an economic class or group consisting of the rich, the propertied, the well to do, including the economically powerful executives, proprietors and salaried officers, directors, and supervisory agents of corporations."

Now, did you not intend in setting up this category of executives, that that category should conform to the language used that I have just read to you from the moving papers? A. I intended in setting up that category to include people who held proprietary, managerial and official connection for the most part with corporations as defined by the census, and my testimony is simply to the effect that there are five times as many such people, or they are represented five times as often on the jury lists as there are among people in the population.

Q. Now, do you now say that the executives which you have listed as such constitute the rich, propertied and well to do? A. Some of them do; some of them don't. Many of them do.

Q. Now I hand you Defendants' Challenge Exhibit 9 in evidence, being "Population, Third Series, the labor force, occupation, industry, employment, and income, New York." taken from the 16th Census. That is one of the books that you used in compiling the data and charts to which (3217) you have testified here, is it not? A. (Witness nods.)

Mr. McGohey: Did we get the answer to that?
The Witness: This is one of the books, yes.

Q. Now I direct your attention to page 107. That is Table 16. Do you have that? A. I do.

Q. And I direct your attention to that part of the page showing the totals for proprietors, managers and officials. Do you have page 107, Mr. Wilkerson, the page on the right? A. I will have to get the category on 106. Proprietors, managers and officials. Now what do you want to know, Mr. McGohey?

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Q. I want to know if it is not a fact—wait. This table on page 107 shows "Force (except persons on emergency work in 1940)"—no. The table is: "Wage or salary income received in 1939 by all experienced persons in the labor force (except persons on emergency work) in 1940, and by those who worked twelve months in 1939, and number of wage or salary workers, by occupation and sex, for the State and for cities of 250,000 or more."

That is correct, isn't it? A. Yes.

Q. Now, this table that appears on page 107 relates only to wages, does it not? A. That is right. That is, for New York as a whole.

Q. Now, isn't it a fact that of the proprietors, managers and officials who worked for a full year, that (3218) about one-third of them earn \$30 a week or less? A. It is quite possible because included—

The Court: No, is it so?

The Witness: I will figure it out if you want me to. Earned less than how much a week, did you say?

The Court: Thirty.

Q. Doesn't it show on the exhibit itself without any figuring? A. No. I don't see it.

Q. You are familiar with the use of these tables, are you not, Mr. Wilkerson? A. I am. I did not use this particular one.

Q. I thought you testified that you did? A. No, I did not. I used this volume but not this table. I tried to put in data of this sort, however, from other sources and was not allowed to do so.

Mr. McGohey: I move to strike that out.

The Court: Strike that out.

Mr. Gladstein: Would it be all right for him to answer on redirect what sources he would like to have mentioned, your Honor?

The Court: I can't hear you, Mr. Gladstein.

Mr. Gladstein: All right, I withdraw it.

Mr. Sacher: I wanted to compliment you on your unison.

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Mr. Gladstein: What exhibit is that, Mr. McGohey?

(3219) Mr. McGohey: Exhibit 9. And the tables appear on pages 106 and 107.

By Mr. McGohey:

Q. I assume in making that calculation, Mr. Wilkerson, that you will leave out those who are shown on the table to have made less than a hundred dollars a year? A. I was going to ask you if you wanted me to do that, because it makes a big difference, and I would leave out also those not reported.

Q. Beg pardon? A. I would also leave out where I am making the calculation those not reported.

Q. Yes. A. 26.5 per cent of them made less than \$1400 a year.

Q. Now will you turn to that part of the table before you that deals with the craftsmen, in the same table. Do you have that part of the table? A. Yes.

Q. Now, isn't it a fact that a substantial proportion of those listed as craftsmen whom you include in the manual worker class earn more than \$30 a week?

Mr. Sacher: I should hope so.

A. Many do.

Mr. McGohey: Thank you. That is enough. That is all I want.

The Witness: Is that all?

The Court: What percentage of them earn more (3220) than \$30 a week?

Mr. McGohey: He did not give a percentage, your Honor. He just said many of them do.

Q. Mr. Wilkerson, do you know the defendant Eugene Dennis? A. I do.

Q. You know, do you not, that he is the general secretary of the Communist Party of the United States? Do you not?

A. I do.

Q. How would you classify Mr. Dennis? A. Occupationally, you mean?

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Mr. Sacher: I would like to know the basis on which the witness does it.

The Court: He has got it in his mind. He reached for the book.

The Witness: Do you have Exhibit 17?

Mr. Gladstein: He has to be given a juror's list which contains an occupational description which gives a man's work or his address, or something of that sort, the way this was done.

The Court: Now Mr. Gladstein—

Mr. Gladstein: Well, that is right.

Q. Mr. Wilkerson, do you have Exhibit 16 before you?
A. Just a minute. I do have.

Mr. Gladstein: If Mr. Dennis was ever called to serve as a juror here, I hope that his name is on the (3221) list, because, if so, the list ought to show what the man's occupation is.

The Witness: On the assumption that Mr. Dennis's occupation is that of president of a political organization, he would be classified as an executive.

Q. Do you know the defendant John Williamson? A. I do.

Q. Do you know that he is the National Labor Secretary of the Communist Party of the United States of America? A. I don't know that, but I think that is correct.

Q. How would you classify him? Would he not also, like Mr. Dennis, being an official of a large society or union — A. Very likely.

Q. And would that make him an executive, according to the Census tabulation? I think you will find that on page 344 of Exhibit 16. A. Yes.

Q. Now, do you know the defendant Jacob Stachel? A. I do.

Q. Do you know that he is the chairman of the Department of Agitation, publication and education of the Communist Party of the United States of America? A. I don't know that.

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Q. Do you know that he is a member of the National Board of the Communist Party of the United States of America? A. I do.

(3222) Q. How then would you classify him?

Mr. Crockett: Your Honor, I wish to object to the question on the ground that it assumes a state of facts which does not exist. I represent Mr. Stachel, and there is no such thing as a National Board of the Communist Party.

Mr. McGohey: I understood the witness to say that he knew that he was.

The Court: I thought he said that, but maybe he has not.

The Witness: Well, I might be in error there.

Q. Do you know that he is a member of the National Committee of the Communist Party? A. I understood that he was.

Q. On the assumption that he is a member of the National Committee of the Communist Party, will you tell me how you classify him?

Mr. Sacher: I object to the question on the ground that the question is incomplete. The first question is, is that an occupation or not?

The Court: Overruled.

Mr. Sacher: Exception.

Mr. McGohey: If your Honor please, with respect to the question of whether or not the defendant Stachel is a member of the National Board, I call the (3223) Court's attention to an affidavit that is in evidence here—no, it is from the files of this court; it is not an exhibit here; it was an exhibit in another proceeding, but it is from the files of this court—it is an affidavit by Abraham Unger, verified August 9, 1948, who states that he is a member of the firm of Unger, Freedman & Fleischer, attorneys for the defendants herein, including all the defendants, and he says that the above-named twelve defendants—which includes the defendant Jacob Stachel—constitute the National Board of the Communist Party of the United States.

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The Court: Well, let us go on the assumption that that is so. Put the question to him, assuming that is so—

Mr. Crockett: If the Court please, I am prepared to stipulate that at the time that affidavit was made there was a National Board of which my client was a member. My point is that the question that Mr. McGohey asked relates to the present condition. There is no National Board. There is a National Committee:

The Court: Mr. Crockett, the question is going to be, assuming that he was a member of such a Board, how would the witness classify him? So that will eliminate the necessity of our going into the question deeply as to what the fact is now or was when he got up the tables, (3224) and so on.

By Mr. McGohey:

Q. Well, will you tell us now how you classify the defendant Stachel? A. That would depend on the nature of his employment. The fact of his membership on a National Board would not be decisive in determining what his occupational classification is.

Mr. McGohey: I desire again to refer to the affidavit of Mr. Unger in which he states that the defendant Jacob Stachel is National Educational Secretary and his duties require him to act and meet with educational committees throughout the country.

Q. On the basis of his being the National Educational Secretary of the Communist party, would you tell me how you would classify him? A. If his gainful employment is as the national education secretary, he would be classified as an executive.

Q. Do you know the defendant Robert G. Thompson? A. I do.

Q. Do you know that he is chairman of the New York State Communist Party? A. I do.

Q. How would you classify him?

Colloquy of Court and Counsel

Mr. Gladstein: Just a moment, before you answer. I object to that. Now, Mr. Thompson happens to be a client of mine. Whether he was elected to an office (3225) in a political party or not is not the question here. He holds political office in the Communist Party. That is an elected position. What his occupation is, what his job has been, what he has trained to be, and what he is in fact is something Mr. McGohey is not asking. Now, a man may be gainfully employed, may have a trade, may be a teamster or something else, and if he is elected to a union position or to office in a political party, the facts ought to be given if you are to get a factual reply. There is no basis for making any kind of comparison such as Mr. McGohey is here seeking between the analysis of the jury lists and the sort of thing that is now being asked. I object to this form of question because it is misleading, because it does not state the facts, and it assumes a state of facts not in evidence.

Mr. Sacher: May I be heard—

The Court: Don't you see, Mr. Gladstein, how such an objection might be construed? It may seem as though you were practically telling the witness how to answer the question.

Mr. Gladstein: Your Honor, I made the objection in the sincere belief—

The Court: I know, but you see, when you make an objection and then you go on and give an explanation for the objection that is so close to the question put to (3226) the witness that it may seem to indicate to him a course of thought or a possible answer to make, the objection may be misconstrued. Now I scarcely think it necessary to make objections that way when we are dealing with cross examination. You see, cross examination is supposed, among other things, to test the veracity and the credibility of a witness; and if the lawyer is jumping up and practically telling him what to answer, it doesn't help at all.

Mr. Gladstein: Your Honor, that was not my intention—

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The Court: I do not say it was. I say it is open to that construction. I do not think that particular objection was made for that purpose at all.

Mr. Gladstein: The reason for my explanation, I want to say, is that I had hoped to direct your Honor's mind to a course of thought that would reach the viewpoint that I was correct and you would sustain the objection that I made.

The Court: Well, I am really interested to see how he is going to answer questions like these: For instance, I thought he was going to say, perhaps, that just seeing such a description as that, that he would have to get some assistance to call somebody up and get some collateral information, and that then (3227) with that collateral information and what he had, and so on, he would finally make up his mind as to how to classify him. But I don't know how he is going to answer it, and I think it is a perfectly proper question.

Mr. Sacher: May I address myself very briefly to this?

In cases arising under challenges in federal courts the question of whether or not the defendant in a given case is or is not a member of the excluded class—that is, excluded from jury representation—is not a material consideration or even a relevant one. Your Honor will recall that in the Thiel case the Supreme Court put it squarely on the basis of the administration of justice and that Mr. Justice Murphy expressly wrote that membership in the excluded class was of no consequence and significance, that it is a matter of consequence and significance in State cases.

Now in these circumstances it seems to me that the inquiry is utterly needless or it might seem to me, with all due deference to Mr. McGohey, a little bit frivolous, because I can't imagine that Mr. McGohey's thesis can be that the so-called executives of the Communist Party will receive sympathetic consideration at the hands of the kind of executives who have been selected for these panels we are talking about.

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(3228) The Court: Now you are doing just the kind of thing that can't possibly be legal argument addressed to this cross-examination—

Mr. Sacher: Oh, no.

The Court: And I do wish, if you want to object, that you just say you object to it, and then we can see what the ruling will be.

Mr. Sacher: But, your Honor, I—

The Court: Inquiring of this man as to how he would classify this person, that person or the other person when he had such and such a designation is a perfectly proper thing to ask him. And I am very much interested to see what he is going to answer. So I overrule the objection. Whether he picks people from the Communist Party or people who have a title in this or that, I regard it as perfectly proper.

Now, don't let us start this wrangling.

Mr. Sacher: Oh, I really have tried, your Honor.

The Court: I know. But let us not do it.

Mr. Sacher: Won't you agree I have tried very hard to avoid it this afternoon?

The Court: Well, it seems as though you have.

Mr. McGohey: Your Honor, reading again from the affidavit of Mr. Unger, it appears that the defendant Robert G. Thompson is chairman of the Communist Party (3229) of the State of New York and is required to confer with officers and members of the organization under his jurisdiction as well as with similar officials in various states.

By Mr. McGohey:

Q. Now may I have the answer to the question as to how you would classify Mr. Thompson? A. With the same reservation I made before, namely, that the presidency of an organization as such is not decisive in determining one's occupational classification. If you were assuming that his gainful employment is as president of a political organization he would be classified as an executive.

Q. When you say the president of an organization, you mean listed as he is listed as chairman of the New York State Communist Party? A. That does not follow. I have

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been president of organizations but my gainful employment was otherwise.

Q. I am asking you how you would classify the chairman of the New York State Communist Party? A. And I am telling you that if his gainful employment is as president I would classify him—

Q. As chairman, I am talking about.

The Court: Suppose you had a list of jurors and he was down there and all that was there was this (3230) descriptive matter that Mr. McGohey is stating. How would you classify him?

The Witness: If—

The Court: You haven't got another thing to go by.

The Witness: If the column on the jury list for occupation listed him as president of the organization we would classify him as an executive.

Q. Now, do you know Mr. Davis, Benjamin J. Davis, Jr.? A. I do.

Q. You know, do you not, that he is chairman of the Legislative Committee of the Communist Party of the United States of America? Do you not? A. I don't know that.

Q. You know that he was a member of the National Committee of the Communist Party? A. I think he has been, and on this subject I am not competent to give a final answer.

Q. You know Mr. Davis, do you not? A. I know Mr. Davis.

Q. You know that he holds office in the Communist Party, do you not? A. I know that he is a high official of the Communist Party and I think he is a member of the National Committee.

Q. You know also that he is a member of the New York (3231) City Council A. I do.

Q. And that he has been such since 1943; and you know also, do you not, that he is a member of the bar of the State of New York? A. I am not sure of that.

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Mr. McGohey: Well, I think that is something that the Court might also take judicial notice of. I don't think it will be denied by the defendants that he is.

Mr. Sacher: I object to this. Every time Mr. McGohey does not have the proof he asks your Honor to take judicial notice. Now, that is an accommodation, I realize; but after all, he ought to do the thing which every lawyer has to do.

The Court: Oh, don't let us go on with this sort of thing.

Mr. Sacher: All right.

Q. With that information about Mr. Davis, how would you classify him occupationally? A. I would classify Mr. Davis occupationally as a City official, a Councilman, which so far as my information is concerned, is the basis for his gainful employment and that would be as an executive.

Q. You know Henry Winston, do you not, the defendant? A. I do.

Q. And do you know that he is the organizational secretary (3232) of the Communist Party of the United States of America? A. I know he has some post. I would not be sure that this is the precise title of that post.

Q. Well, assume that he appeared on a jury list and that his occupation was given as organizational secretary of the Communist Party of the United States of America, how would you classify him occupationally? A. On the basis of those assumptions, as an executive.

Q. Now you know the defendant John Gates, do you not? A. I do.

Q. You know that he is a member of the National Board of the Communist Party, do you not? A. I am not competent to testify on that subject.

Q. Well, do you or don't you know? A. I don't know.

Q. But you do know that he is the editor of the Daily Worker, do you not? A. I know that he was and probably still is.

Q. And as editor of the Daily Worker and member of the National Board of the Communist Party, how would you classify him? A. If his gainful employment is that of

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an editor of a newspaper his classification would be that of a professional. Let me check it.

Q. Now you know the defendant Irving? A. Let me check it, will you? That is a tentative (3233) answer.

Q. Oh, I thought you were through. A. It would be as a professional, on the assumption that that is his gainful employment.

Q. Now do you know the defendant Irving Potash? A. I do.

Q. Do you know that he is a member of the National Board of the Communist Party? A. I cannot testify on that subject.

Q. You know that he is an official of the Communist Party, do you not? A. I know that he is a prominent leader of the Communist Party, but precisely his post I would not care to say because I am not sure.

Q. Do you know also that he is the manager of the Furriers Joint Council of the CIO? A. I know that he is a leader in the fur union; whether that is his precise title, I do not know.

Q. Having that information before you, how would you classify him? A. Which assumption do you want to make?

Q. Both? A. You have made none yet concerning his gainful employment, and I will have to make one before I can classify him.

Q. Well, you have a list on which his occupation appears as manager of the Furriers Joint Council of the CIO. A. On the assumption then that that is his (3234) gainful employment, he would be classified as an executive.

Q. Now do you know the defendant Gilbert Green? A. I do.

Q. Do you know that he is district chairman of the Communist Party of the United States of America at Chicago? A. I would not care to testify on that because I am not certain.

Q. Well, if you had a list on which his occupation was thus given, how would you classify him? A. If his occupation were given as that of—what did you say?

Q. District chairman of the Communist Party, United States of America, at Chicago. A. He would be classified as an official, an executive.

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Q. Do you know the defendant Carl Winter? A. I do.

Q. Do you know that he is chairman of the Michigan State Committee? A. I don't.

Q. If you had his occupation listed as that, how would you classify him? A. If his occupation were listed as that, he would be classified as an official, which is in the category that we are calling executives.

Q. Do you know the defendant Gus Hall? A. I do.

(3235) Q. And do you know that he is chairman of the Communist Party in the State of Ohio? A. I don't.

Q. If you had his occupation listed as chairman of the Communist Party in Ohio, how would you classify him?

Mr. Gladstein: Just a moment. I object to that, your Honor. I do not believe there is any basis for comparing the holding of office in the Communist Party with the holding of a vice-presidency in a corporation or anything of that sort. One is a business organization, the other is a political party. And I do not believe there is any basis upon which to ask this question.

I therefore object to the question upon the ground that it calls for conjecture and speculation on a matter that is not comparable.

The Court: Overruled.

Q. May I have an answer to the question? A. On this, as in all of the others, on the basis of the assumptions you are making, he would be classified as an executive.

Q. Thank you.

Mr. McGohey: Is it about time for the recess now?

The Court: Yes. Ten-minute recess.

(Short recess.)

(3236) *By Mr. McGohey:*

Q. Mr. Wilkerson, you have testified that you teach at the Jefferson School of Social Science here in New York, have you not? A. That is right.

Q. And you have testified also, as I understood it, that you perform the duties that would normally be performed

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by a dean in the Jefferson School of Social Science; is that correct? A. In describing the title, director of faculty and curriculum, which is my exact title there.

Q. And that is substantially—at least part of the functions that a dean of a college or of a school would perform; is that correct? A. That is right.

Q. I don't know whether you told us what subjects you teach at the Jefferson School. Would you tell us that? A. I don't do much teaching, and what I teach varies from time to time.

Q. Well, will you tell us what you teach at any one time? A. At the present time, as soon as I get out of the witness stand I will begin to teach classes I am supposed to be teaching, which are entitled Science of Society, an introductory course, a class of Marxism and the Negro Question which deals with the question of Negro oppression in our country, oppression of the Negro people, and a course in political economy, elementary course in (3237) political economy.

Q. At any time since you have been at the Jefferson School did you teach Marxist-Leninist theory?

Mr. Sacher: I object to that as incompetent, irrelevant and immaterial.

The Court: Yes. What has that got to do with the matter?

Mr. McGohey: I am trying to find out what he teaches, because he testified that in 1943 I think he became educational director of the Communist Party in the Maryland district, Columbia district, teaching Marxist-Leninist theory there.

The Court: Well, I don't want to have this preliminary proceeding mixed up with the merits of the main case at all.

Mr. McGohey: Oh, no, your Honor. This is to lead up to find out whether or not—I want to establish if I can that this defendant has an interest in this proceeding. The witness, rather.

The Court: Very well.

Mr. Gladstein: That is the third time in the course of this proceeding Mr. McGohey has made the witness a defendant, your Honor.

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The Court: Well, if he has—

Mr. McGohey: I withdraw it. I apologize to (3228) Mr. Wilkerson.

The Court (Continuing): An interest I don't know just what kind of an interest it may be, but if he has an interest, of course, it is proper to disclose what that interest may be.

But I merely want to indicate that I don't want anything brought out now that may have some bearing on the main issue that we are not now, of course, trying.

Mr. McGohey: Since your Honor has some doubt about it I shall withdraw the question.

The Court: I think perhaps I would feel easier if you did not press that subject.

Q. Are you paid for your services at the Jefferson School as teacher and— A. I am.

Q. —dean? A. Yes, director of faculty and curriculum.

Q. Director of faculty and curriculum. A. That is right.

Q. By whom are you paid? A. By the Jefferson School of Social Sciences.

Q. Have you been drawing your salary during the time that you have given testimony here in court?

Mr. Gladstein: I object to that as immaterial, your Honor. It does not bear on the question of interest or anything else.

(3239) Mr. McGohey: I think it will bear, your Honor.

The Court: Yes; well, on the assurance—

Mr. McGohey: I will withdraw that for the time being. I will withdraw that for the time being.

Q. Have you been associated prior to this trial with any of the defense counsel? A. What do you mean when you use the term "associated"?

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Mr. Isserman: I would like to object to that question, if your Honor please. I don't see how the association of the witness with defense counsel on any other occasion has any bearing on this case.

The Court: I can't tell what it may lead to. You know, in cross-examination if you stop a man at the threshold of some inquiry that may bring some fact out that that is relevant to the interest of the witness or some other circumstance, you unduly curtail him. I am going to allow the question. I have no idea what Mr. McGohey is working up to, but I see no reason to curtail him now.

A. If you define "associated" I will answer the question.

Q. Pardon me? A. If you tell me what you mean by "associated" I may answer the—

Q. Have you been associated with any of defense counsel in any way prior to the time that you came in to testify as a witness in this trial?

(3240) Mr. Gladstein: That is hardly explaining the meaning of the word "associated," to say to the witness by "associated" I mean "associated."

The Court: I can't see where the ambiguity comes. He has certainly been associated with you during this trial.

Mr. Gladstein: That is so. He is a witness in this case.

The Court: I think it is a perfectly fair question and I see nothing ambiguous about it.

What is the answer?

The Witness: I don't know what he means. I have known certain of them before; I have been associated in this defense. If that is what you mean, the answer is yes.

The Court: The question is whether prior to your association with them in connection with this trial, in this proceeding.

The Witness: Prior to my association with this proceeding I have known certain of defense counsel. Now, what the District Attorney means, have I been

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associated with them before, I don't know, and I can't answer the question until he tells me what he means.

Q. I will ask you this. Have you ever served on any Board or committee with any of the defense counsel (3241) prior to the time that you came in here to testify?

Mr. Isserman: I object to that as being immaterial.

The Court: Overruled.

A. Probably so. I know in one instance at least that I have.

Q. Will you tell us the instance? A. Attorney Sacher is a member of the board of trustees of the Jefferson School and so am I.

Q. Do you know each of the defendants in this case? A. I am acquainted with them all, yes.

Q. How long have you known them? A. For various periods of time.

Q. Will you tell us the longest period that you know any of them?

Mr. Crockett: I would like to object to this line of questions. I don't think it makes any difference so far as an expert witness is concerned whether or not he knows the defendants. If Mr. McGohey is interested in whether or not this witness has any interest in the case I am prepared to stipulate that as a Negro he has an interest in any case that charges discrimination against Negroes in the selection of jurors. So there is the predicate for his interest, if that is what the United States Attorney is trying to bring out.

(3242) The Court: Overruled.

Mr. McGohey: May I have the question read?

(Question read.)

A. I can't tell you that, Mr. McGohey, I just don't know.

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Recalled—Cross*

Q. How long do you know the defendant Dennis? A. I think I have known Dennis four or five years.

Q. Is there any other defendant whom you know for a longer period than that?

Mr. Sacher: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Sacher: Exception.

A. I have met Councilman Davis quite some time before that; I don't know how long it was.

Q. How long do you know the defendant Williamson? A. That I don't know. I should think maybe three or four or five years.

Q. How long do you know the defendant Stachel? A. Approximately three to five years.

Q. How long do you know the defendant Thompson? A. A brief period of time. I don't know just how long.

Q. One year? A. Maybe two or three years.

Q. Two or three years. How long have you known the defendant Henry Winston? A. I think I have known him, too, only some four or five years.

Q. How long have you known the defendant John Gates? A. A brief period of time; probably two or three years.

Q. How long have you known the defendant Irving Potash? A. That I don't know. I think I have known Mr. Potash probably a shorter period of time than most of the others that you have mentioned; maybe a couple of years, two or three years. That I am not specific on.

(3243) Q. How long have you known the defendant Gilbert Green? A. For three or four years.

Q. How long have you known the defendant Carl Winters? A. I suspect maybe one or two years.

Q. How long have you known the defendant Gus Hall? A. Probably one or two years. I really don't know the answers precisely to this question, Mr. McGohey, but my guess would be that I have known Mr. Hall one or two years, maybe two or three years; I don't know.

Q. Now you have testified that in 1943 you became educational director of the Communist Party for the Mary-

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land-Washington, District of Columbia District, have you not? A. That is correct.

Q. During the time that you held that position have you received any directions or instructions from any of the defendants?

Mr. Crockett: I object. That has absolutely no materiality whatever as far as the issues in this case are concerned or as far as the testimony that the witness gave on direct examination.

The Court: Overruled.

A. I don't remember having received any instructions from any of them during the period that I was educational director of the Communist Party in Maryland and D. C.

Q. Did you receive during that time instructions from (3244) anybody? A. I didn't. Well, maybe I should explain.

Mr. Isserman: I object to that question as being too vague.

The Witness: When you say "anybody"—

Q. I shall limit it. During the time that you held that position as educational director for the Maryland District and Columbia District did you receive instructions from any official of the Communist Party? A. I was one of the officials of the Communist Party at that time and participated in making decisions and policies. And to talk about my receiving instructions from them is just alien to the nature of the organization and the way it operates.

Q. Did you receive any instructions from the National Board of the Communist Party?

The Court: I would like to have an answer to that question. I do not regard that answer as responsive.

Mr. McGohey: Well, I don't either, your Honor, but in order to save time I was going to address—

The Court: Did you receive any instructions from any official of the Communist Party?

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The Witness: I have received instructions from the State Committee of the Communist Party of which I was a part.

Q. You mean the State Committee of Maryland? (3245) A. That is right.

Q. The Maryland-District of Columbia District. Did you receive any instructions from any of the National officers of the Communist Party? A. I did not.

Q. Did you receive any instructions from the National Educational Secretary of the Communist Party? A. Did I? I did not. Certainly I don't recall any.

Q. Do you know whether any instructions were given by the Educational Secretary of the Communist Party to the Chairman of the—

Mr. Isserman: I object to that.

Mr. McGohey: May I finish?

Mr. Isserman: I am sorry. You may finish the question.

Q. Did you receive any instructions from the National Secretary, Educational Secretary of the Communist Party through the State Chairman of the Maryland District-Columbia District?

Mr. Isserman: I object to that as being immaterial, your Honor.

The Court: Overruled.

A. Let me be sure that I have your question, Mr. McGohey.

Mr. McGohey: I will ask the reporter to read that.

Q. (Read) A. To the best of my knowledge, no. The organization didn't work that way, I tell you.

(3246) Q. Are you a member of the Communist Party?

Mr. Gladstein: I object to that.

Mr. Crockett: I object, your Honor.

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The Court: Well, this time it was not *seriatim et singulatim*, but I take it you all object to the question. And did you desire to press some point about it, Mr. Crockett?

Mr. Crockett: I should like to very much.

The question is intended to get from the witness his present, if any, political affiliations. I believe the law of the case has already been settled on that question by your Honor. If you will refer to page 1402 of the record you will find that at the time Mr. Gladstein was examining a witness whose name was Allen he asked him a question, and I quote:

“Q. What is your public political party registration? What was it this last time?”

Then here was quite a bit of discussion and Mr. McGohey objected: “unless the witness wants to answer that” question. After several pages of argument, on page 1407 of the record the Court said:

“I sustain the objection,” indicating that it was an improper inquiry to the witness to ask of his political affiliation.

The Court: This is cross-examination.

(3246-A) Mr. Crockett: The second reason why I object to the answer is that it violates the witness's right to the secrecy of his own ballot, a right which I respectfully submit one does not surrender merely by becoming a witness in any lawsuit.

Mr. Sacher: If it please the Court, I should like to be heard on that question unless your Honor sees the answer as clearly as I think you do and that is that the matter of the witness's political affiliation or belief is of no relevancy on cross-examination. If it is argued that the question of interest is involved, why, I think that the evidence discloses that the witness has not betrayed any such interest of any kind as should have affected his credibility or the veracity of his testimony.

On the other hand, the impropriety of seeking the political belief or affiliation of a witness who

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testifies to things utterly unrelated to political questions, seems to me so apparent that it ought not in all decency and propriety be pressed.

The Court: Well, frankly, I am puzzled by the difficulty here when he said he had this title in connection with the Communist Party in Maryland; I thought of course he was a member of the Communist Party. I had no idea there was any question about it. (3247) And now that it is put in this way and objected to it makes me think that perhaps there is something here affecting his interest that I ought to know. I had no reason to suppose there was anything difficult or embarrassing about it after what he said here.

Mr. Sacher: Oh, ye gods, all you have to do is to take a look at what has happened to the defendants for being members of the Communist Party, and perhaps there is some—

The Court: Well, I did not understand that they were charged here in the indictment merely with being members of the Communist Party. I have had an entirely different conception of the indictment all the time. You know, I have said several times that it seemed to me that they were indicted as individuals and that it was my charge here to protect their rights as well as the rights of the Government as individuals here charged with conspiring to do certain things. I don't understand that they are indicted here just for being members of the Communist Party.

Mr. Sacher: Well, one of the indictments against them is precisely that and nothing more. Each of the individual indictments is an indictment predicated on nothing more nor less than membership in the Communist Party. Those are the individual indictments.

(3248) Mr. McGohey: If your Honor please—
The Court: That is the kind of—

Mr. McGohey: If your Honor please, the individual indictments charge that each defendant named in each indictment became a member of the

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Communist Party knowing it to be, is the language of the indictment, knowing it to be a party which teaches and advocates the overthrow of the Government of the United States by force and violence.

The Court: That is right.

Mr. McGohey: So that it is not accurate to say that they have been charged with a crime merely by membership.

The Court: Well, that is what I understood.

Mr. McGohey: And now the purpose of this line of questions, your Honor, is to further explore the interest.

The Court: You know, it was way back there last summer when I was sitting in the criminal term and the matter first came up and there was that argument with Mr. Unger and this same sort of thing was there, and I reached for the indictment and found these various things that it seemed to me Mr. Unger was leaving out of consideration. And I cannot feel that it is accurate to say that they are indicted just for being Communists. (3249) I don't think that is the charge at all. And I will overrule the objection here.

Mr. Sacher: Just a second, your Honor.

The Court: Unless there is something more to this than meets the eye.

Mr. Sacher: There is nothing to it. If what you are concerned with is the question of the membership then let me say that so far as the defendants are concerned, at least those I represent, we have no objection to stipulating or conceding for the purposes of this record and for no other purpose that Mr. Wilkerson is a member of the Communist Party.

Now, if that is all that is desired, if it be true that all that the prosecution wants is that kind of a formulation in regard to possible membership in the Communist Party so far as the same may affect his interest or credibility, et cetera, speaking for my clients I am quite willing to stipulate for the purpose of this case and this case only, he may be deemed to be a member of the Communist Party.

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The Court: And may be deemed to have testified to that effect. Is that satisfactory, Mr. McGohey?

Mr. Sacher: Except as to the "deemed to have testified" I can't speak for Mr. Wilkerson in that respect, and you don't need that because I am not intending to (3250) limit the stipulation for the purpose for which it might be properly used in this inquiry, namely—

The Court: I will overrule the objection.

Mr. Gladstein: May I be heard, your Honor? I have not said anything on this question.

I am taking Mr. McGohey at his word when he says that his purpose in asking this question is to disclose interest on the part of the witness, if any there be. I also am for the sake of the argument I am about to make accepting the premise which the Court has announced in its interpretation of the indictments involved in this case. Whether I agree with that premise or not is here immaterial. The Court has said that it does not regard the indictments as presenting a charge of Communist Party membership, as I understand it.

Now, these things being so on the record I submit that even the possibility that a witness might be a member of the Communist Party would in no way show interest in these proceedings under these circumstances and on the issue involved. In the face of these indictments and on the basis of Mr. McGohey's own statement that what he seeks here is to disclose the possibility of existing interest, by reason I take it of assumed or possible membership in the (3251) Communist Party, then it is perfectly obvious that that question is immaterial, and I submit that it becomes even more clearly immaterial, if the Court please, when you consider the nature of the testimony that has been given by Mr. Wilkerson.

Mr. Wilkerson has come here to testify concerning facts, data, statistical tabulations dealing with the jury system. All of those things of course are subject to cross-examination. Now Mr. McGohey is going far, far afield when he seeks to ask this wit-

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ness what his own political affiliation might be. That is obviously outside the scope of appropriate cross-examination because it would not tend—the answer to the question would not tend to prove or disprove a single thing that Mr. Wilkerson has said on the witness stand.

And therefore I submit, your Honor, that this question should not be asked and that the Court should sustain the objection that I am making.

The Court: It is my understanding of the authorities that an expert witness or person called to testify, as Mr. Wilkerson has, is subject to all the usual rules of cross-examination as to his interest, as to his credibility and veracity and so on. And I must say—it is just repeating, but I had understood (3252) from what he said before that he was a member of the Communist Party when he was talking about being down in Maryland there and in that organization. And if there is some doubt about that, I am going to allow the question.

Mr. Crockett: Your Honor, the question was not whether he was a member of the Communist Party. The question was, Are you now a member of the Communist Party.

The Court: That is right.

Mr. Crockett: There is a world of difference between the two.

The Court: Well, whatever interest is material is the interest he has now when he is testifying. And I am going to allow it. What did you wish to say?

Mr. Isserman: If the Court please, I want to say that while we recognize the latitude on cross-examination, when that latitude cuts across the rights of individuals guaranteed by the Constitution, which is the right to maintain religious and political beliefs, that at that point another standard comes in by which to judge the question of whether the particular question put by the prosecution should be allowed. I think there is involved here a matter of deep public policy, whether a person who

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comes to testify is to be questioned about his political beliefs in connection with a matter on (3253) which his political beliefs have not been—

The Court: I think I will reserve decision on that and give you gentlemen a chance to give me a memorandum that I can look at before I rule tomorrow morning on it. There has been a whole lot of discussion as to this sort of thing that I confess I haven't understood very well, and there may be something about it that I do not understand. And I will withhold ruling on this question until I have been able to see such cases as you draw to my attention. You may be right about it. I do not feel sure enough of it to rule now.

So, Mr. McGohey, just reserve that, and if you will pursue such other subjects as you have—it is now toward the latter part of the afternoon, and the witness will doubtless be on tomorrow morning anyway—then after a little more mature consideration I will give a ruling on it.

Mr. McGohey: Now, if your Honor please, the line of questions that I had to ask from now on I am sure would be objected to on the same grounds. And I desire to press that now before I go to anything else. So if your Honor desires to reserve decision I suggest, then, that we might adjourn now.

The Court: Very well. And I wish that you (3254) would give me a short memorandum too on this.

Mr. McGohey: Yes.

The Court: So that you will understand what is troubling me, there has been a good deal of this sort of thing before Congressional committees and other places where somebody is asked whether he is a Communist, and sometimes they have refused to answer because the answer might tend to incriminate them, which is not the case here, because this witness has not raised any such question at all; and there may be other points of one kind or another that I simply do not feel myself oriented upon; and

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the fact that everybody has been so urgent in their objections has made me feel that I ought to look into it a little further before I rule; so that I will welcome memoranda from each side. Get them to my chambers at ten o'clock, and I will study them before we come back here at 10.30.

Mr. McGohey: Yes, your Honor.

(Adjourned to February 11, 1949, at 10.30 a. m.)

(3255)

New York, February 11, 1949;
10.30 a. m.

The Court: Now, gentlemen, I have given this question of the objection made yesterday afternoon considerable thought and study and I have examined the briefs submitted to me this morning. I had notions about it yesterday but I felt, in view of the earnestness with which the objections were pressed and the constitutional feature involved, it would be better for me to think it over a little bit; but I have done so and I feel quite clear now that as affecting the interest of the witness the question is proper. So I overrule the objection.

Mr. McCabe: If your Honor please, before your Honor proceeds, I had the misfortune to be absent yesterday and I understand there was some expression of views. And for that reason I should ask your Honor's indulgence to put into the record a statement which I have prepared of a little over two pages. I should like to read it, outlining my views on that.

The Court: If you will let me see it first. I am not desirous of hearing oral argument on this.
(3256) Let me see the statement.

Mr. McCabe: It is not argument; it is more in the nature of a statement.

The Court: I know, and I think perhaps the best way would be to mark it as an exhibit so that you will have the benefit of any legal questions that you raise, and if I think after looking at it that

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there is some occasion for an oral statement of views, I will permit you to do that.

Mr. Crockett: I may state, your Honor, that the statement has the support of all members of defense counsel and it is supported by all the defendants.

The Court: You know, Mr. Crockett, I have tried in numerous ways here to make it clear that in view of the relatively same position of different defendants here that whatever ruling is made that may be adverse to one, the others may all get the benefit of it. And the same is true of any law points that are raised. I have thought from the beginning that that was only fair, and I made that statement, too, so that we might not have the hue of each lawyer in reference to each point because it seems so unnecessary. I do not want to say that it is in every instance not the right thing to do. For example, I felt with that question that came up late yesterday afternoon that it was one on which everybody (3257) might desire to express some views. But so many of the things have been utterly trivial.

And so I hope that what I have said and what I now repeat about rulings that may adversely affect anyone, all of the defendants have the benefit of it. It will not be necessary to say that you join in the views; it will be assumed that any adverse ruling is one which any one of the defendants may take the benefit of before any Appellate Court; the exceptions will be deemed to have been taken by all, and the benefit of any legal argument made by one counsel will be deemed to inure to the advantage of each and every one of the defendants.

Now I will just glance over this statement of Mr. McCabe's.

Mr. McGohey: If the Court please, since your Honor is now passing on a question which was discussed by each counsel present yesterday afternoon, I think the record ought to show that two of the defendants, Green and Hall, are absent, and I should like to have some statement from counsel with respect to that.

Colloquy of Court and Counsel

The Court: Yes.

Mr. Gladstein: For Mr. Hall, and I am sure for Mr. Green, although his attorney can speak for him, the usual understanding may be made for the record.

(3258) The Court: Very well.

Mr. McGohey: That is accepted. I take it that that means a waiver by everybody?

The Court: That is right.

Now Mr. McCabe, this may be marked as an exhibit for identification and treated with the same force and effect as though you had orally stated those objections on the record.

(Marked Defendants' Challenge Exhibit 150 for identification.)

The Court: Mr. Wilkerson, you will resume the stand.

DOXEY A. WILKERSON, resumed the stand.

Mr. Crockett: May I request, your Honor, that since the witness is not represented by counsel here, that the Court at this time advise him of his constitutional rights with reference to the line of inquiry that Mr. McGohey is about to begin.

The Court: Yes, I will do that.

With reference to any question which may be put to you, if it is your view that the answer may tend to incriminate you, you may refuse to answer on that ground.

Mr. McGohey: Now, may I have the question read if this reporter has that question, the question that (3259) was read and objected to yesterday afternoon, which your Honor has just overruled the objection to?

The Reporter: It is in the typewritten record, Mr. McGohey.

The Court: Well, repeat it.

Mr. McGohey: I have the question.

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Cross examination continued by Mr. McGohey:

Q. The question is, Mr. Wilkerson, are you a member of the Communist Party of the United States? A. My experiences as a Negro American—

Mr. McGohey: Now, your Honor, I ask that the witness be directed to answer the question.

The Court: That is right.

Mr. Gladstein: Your Honor, he has started to give an answer, and I ask the Court to permit the witness—

The Court: I don't consider the answer as he started to give it responsive. It seems to me there are only three possible answers: Yes, No, or that he pleads his privilege against self-incrimination.

Mr. Gladstein: May I respectfully suggest, your Honor, that recently that same question or a similar question was before Federal Judge Yankwich in Los Angeles in the federal court. It was his statement that nobody is required to give a yes or no answer to any question. He must answer responsively, that is true, (3260) but it need not be the simple word "Yes" or "No," and if the answer that Mr. Wilkerson is going to give your Honor constitutes an answer either in the affirmative or in the negative, or the third alternative, but in his own words, then it is responsive and direct, and I think your Honor should permit this witness, just as you have allowed other witnesses, to give an answer that does not necessarily consist of simply the word "Yes" or the word "No," or the third alternative which your Honor mentioned.

The Court: I might have viewed that suggestion with favor except for the fact that this witness has so persistently digressed and gone off the point and gone into long explanations that seemed to me quite unresponsive, and I think he is now right to the point where he is going to say that he is a member of the Communist Party of the United States or that he is not, or that he pleads his privilege

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against self-incrimination. If some other judge has ruled otherwise under different circumstances I can only say that the ruling I am now making is the one which I think is the proper one here and under the circumstances of this case.

Mr. Gladstein: May the record record my objection to that ruling, and also my suggestion that the witness be permitted to answer, and if it is found when he has concluded his answer that it is not responsive, the (3261) Court has the right, which it has exercised a number of times, to strike it out.

The Court: I think it is better with him to put a stop to it from the beginning.

Mr. Sacher: May I make a brief observation in that connection: In view of the third alternative referred to by your Honor, namely, the possibility that the witness might claim his constitutional privilege, I respectfully suggest that the disposition made by the witness of that choice is entitled to expression in the courtroom. In other words, whether he chooses or not to rely on the constitutional protection and the reasons why he chooses the one course or the other might afford a justification for a fuller explanation of his answer or a mere statement of his bare reliance on the constitutional amendment.

The Court: My view on that subject is this: When a witness pleads his privilege against self-incrimination there is presented to the Court the question of whether the privilege is pleaded in good faith; whether the circumstances are such to make it a proper plea of privilege or not; and so after he has pleaded his constitutional privilege, should he determine to do so, there will then be presented to me the question of whether I desire further enlightenment from him (3262) before I sustain or overrule the privilege.

Mr. Sacher: Well, your Honor I think has stated the law correctly in regard to the rights of the witness—

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The Court: I think I know the law on these things, and anyway, he is now going to say either that he is a member of the Communist Party or that he is not, or that he pleads his privilege against self-incrimination. Now I think we have got to the point where no further argument can be helpful.

Now, which of the three answers do you give, Mr. Wilkerson?

The Witness: Your Honor, in view of many circumstances involved here—

The Court: Now, I am not going to hear any talk about various circumstances or any other digressions. You are either going to say "Yes" or you are going to say "No" or you are going to plead your constitutional privilege. Which is it?

The Witness: I have sought advice of counsel, your Honor, in the light of which I have been advised of my constitutional privileges, and also given advice concerning my rights to answer this question in a way which makes very clear—

The Court: Well, just a second now. You are (3263) just trying to do what you have done so many times before. Now you have been advised by your counsel of your rights. I have advised you of your rights. I have ruled here that you are going to say either that you are a member of the Communist Party of the United States or that you are not or that you plead your constitutional privilege. Now you may take your choice of those three answers, but please do it without starting any further explanation.

Mr. Sacher: May I urge the Court to extend to this witness the same consideration that was extended to Mr. Chandler so as to permit him on this most important constitutional question to express himself briefly. I do not think it will do any injury to the cause if he is permitted to do that.

The Court: Well, it is not a question of what injury it will do. I have presented to me a question of law for ruling, and I have ruled.

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Mr. Sacher: May I not ask your Honor to exercise its discretion in this one instance in behalf of the witness?

The Court: No, I will not exercise discretion in favor otherwise than I have done by the ruling I have already made.

Now what is the answer?

The Witness: May I have the privilege of (3264) consulting counsel before I give the answer to that question?

The Court: Is your counsel here?

The Witness: If not, I can reach him by telephone and it will take just a few minutes.

Mr. Crockett: If the Court please, I should like to volunteer my assistance, as counsel for the witness with the Court's permission.

The Court: Well, he has stated that he has already conferred with his counsel, and if he desires to confer with his counsel further I shall take a five-minute adjournment to give him an opportunity to do that. I think this business of having somebody else act as his counsel is not proper here. He has a lawyer, as he stated; he has consulted with him, and he desires to consult with him further, and I will now take a brief recess of five minutes so that he may do so.

(Brief recess.)

(3265) The Court: Well, Mr. Wilkerson, what is the answer?

The Witness: The answer, your Honor, is Yes, and I should like to have the privilege of explaining why I give that answer.

Mr. McGohey: I object to any explanation, your Honor.

The Court: Objection sustained.

Mr. Gladstein: I suppose he may make that in redirect examination, your Honor, just as the ruling covers the others.

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The Court: Well, you can bring it up then and I will rule on it. I am very clear that at this stage it is not proper; perhaps it may be later. I will wait and see.

By Mr. McGohey:

Q. Mr. Wilkerson, when did you join the Communist Party?

Mr. Sacher: I object to that as incompetent, irrelevant and immaterial, and I would like to be heard briefly on that question, your Honor. If it be said that the purpose of this inquiry is for the purpose of demonstrating interest, then I submit that your Honor's ruling yesterday—I don't recall the exact page—made in response to Mr. Crockett's observation as to the timing (3266) of the question, your Honor said the material question is present interest. And since the witness has answered the question Yes, I respectfully submit that any further inquiry into this subject is not for the purpose of demonstrating interest but for the purpose of pursuing an indecent persecutor's inquiry. It has no further relevance, no further materiality or weight. For purposes of interest, this witness has answered all that has to be answered and more.

I respectfully submit that his constitutional rights were invaded when he was asked the question, and the fact that this witness chose not to rely on those constitutional rights does not constitute a license to the prosecutor to become ever more unconstitutional.

The Court: I think your choice of language is not only reprehensible but unwise. There has been nothing here by Mr. McGohey that could by any stretch of the imagination be regarded as indecent. And I strike the comment.

Mr. Isserman: If the Court please—

The Court: And so I will overrule the objection.

Mr. Isserman: If the Court please, I wanted to be heard before your Honor ruled on the objection.

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The Court: Yes.

Mr. Isserman: At the close of the session (3267) yesterday afternoon in my objection to the first question I made the point that there is involved here a weighing of equities, a balance as between the right to test credibility and the balance under the constitutional provisions of the First and Fifth Amendments for a person to be inviolate in his beliefs and opinions, and that necessarily there was involved a broad consideration of public policy. The Court in compelling the answer to the direct question of membership undoubtedly acted on the basis, I believe, as the Court stated, that it was a matter of disclosing interest of the defendant. The defendant has now disclosed his interest, one which, as the Court had pointed out, was apparent from his prior testimony, and that at no time did he make any effort to conceal his interest in the subject matter of the controversy from the standpoint of his interest in a jury system, and also that he did not conceal any fact from which the Court might properly or improperly draw the inference of interest.

In view of these circumstances we are now getting into an area, and because we are getting into an area which is more and more remote from the subject matter of inquiry before the Court, and interest having been disclosed, we ask now that the Court weigh the constitutional right and privilege on the one hand and (3268) give due weight to them, and on the other hand consider that further inquiries into this matter are unnecessary to establish the alleged source of interest which the prosecution believes exists.

The Court: I think I will limit the question to whether or not he became a member of the Communist Party to a time just prior to the time he started to do the work of preparing data which has been reflected in the charts here. I do not think that an inquiry into the remote past and whether he was or was not a member of the Communist Party years ago is of any moment. I do think, however,

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that it is relevant to bring out whether or not he was a member of the Communist Party of the United States at the time he started to do his work upon the accumulation of data and preparation of the charts.

So, if Mr. McGohey will reframe the question along those lines, I shall permit it.

Mr. Gladstein: Your Honor, would it be adequate if I were to offer for the purpose of this record a stipulation that it may be deemed that Mr. Wilkerson was a member of the Communist Party on the day when he began to work in connection with this?

The Court: I think Mr. McGohey is entitled to testimony on that subject from the witness. You (3269) know, we went over that yesterday; and Mr. Sacher was willing to stipulate as to the fact but not willing to stipulate that the witness would so testify.

I think we will follow the orderly procedure here, and I shall permit the question in the form indicated.

Will you kindly reframe the question, Mr. McGohey?

Mr. McGohey: May I be heard on that for a moment, your Honor?

The Court: Yes.

Mr. McGohey: My purpose, so that there shall be no doubt about it, in asking the question in the form I did is twofold. First I desire by ascertaining the length of time that the witness has been a member of the Party to show a long association with the defendants in this case that would have some bearing on the question of his interest and bias in their behalf. Furthermore, if I am permitted to ascertain precisely the date which he joined, it may or may not transpire that at some other time the witness has testified falsely or answered falsely under oath with respect to that very same question.

Mr. Sacher: I move to strike the improper remark out, your Honor.

The Court: No, Mr. Sacher. Why should I (3270) strike it?

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Mr. Sacher: I think it is improper to make the remark, because the purpose of cross-examination here is not to lay the basis for another prosecution, assuming there even were any grounds for it, and I assert as strongly as I can there are absolutely none. But even if there were, this inquiry would be improper for that purpose. The purpose of cross-examination is to elicit the truth and not to lay a basis for persecution of a witness.

Mr. McGohey: If your Honor please, I move to strike that last remark.

The Court: I don't see—

Mr. Sacher: Let us see whether I get equal treatment with Mr. McGohey.

The Court: I do not see that there is much use in my striking things that are already said and on the record. I think I will just content myself with ruling after I have heard the balance of your argument.

Mr. McGohey: I submit that it is always appropriate on cross-examination to show that a witness has made a contradictory statement about the matter being examined at some prior time, and if he has made that statement—a statement different from what he (3271) says now under oath at a previous time, I think that is proper to be done to test his credibility and the weight that is to be given to his evidence.

The Court: I think that would be so as to the subject matter of his direct examination; if there were something that he testified to on his direct examination that he had made prior inconsistent statements under oath or otherwise, I think that would be clearly proper. But to go back on this question, to find some statement that he made on the subject before he started work here for the purpose of proving a contradiction I shall not allow at this stage of the case.

Mr. McGohey: Very well, your Honor.

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By Mr. McGohey:

Q. You have testified that you became the educational director, I think that was the title you gave, for the Maryland District-Columbia District, was it? A. That is correct.

Q. The educational director of the Communist Party for the Maryland District-Columbia District, some time in 1943; wasn't that your testimony? A. That is correct.

Q. Now, did you join the Party—had you been a member of the party at that time?

Mr. Isserman: I object to that question, your (3272) Honor. That is simply another way of trying to get the answer which your Honor has previously ruled out.

The Court: Well, how could he have that position without being a member of the Communist Party then? That is the part that has puzzled me all along here.

Mr. Sacher: What difference does it make, your Honor?

The Court: It makes me think there is something tricky about it—

Mr. Sacher: No, nothing at all.

The Court: —that ought to be brought to the light. I will overrule the objection.

Mr. Sacher: Your Honor, may I just point out one thing, that yesterday the witness testified how long he has known each of the defendants in the case. Now, what more is necessary?

The Court: He testified on that subject, as I recall it, very equivocally.

Mr. Sacher: No, he didn't.

The Court: He did not seem to say that he met any of them at any particular time, but he had known one or another two or three or four years, and it did seem to me a very curious circumstance that he knows them all and has known them all, but he didn't seem to be able to (3273) say how long he had known any of them. And I will say what