

*Leland Locke Tolman—for Defendants on Challenge—
Direct*

is accurately set forth in Challenge Exhibit 102 for identification? A. I tried to make it accurate.

Q. Well, is it accurate? His Honor has just stated that if you accurately reflected in the report the content of your conversation, that that would be sufficient; and I ask you whether it is or is not an accurate report of the conversations you had with the three men I have (2666) mentioned? A. It is not a report of conversations. It is a report of my observations. I think it is accurate.

Q. Is your report based at all on conversations? A. Yes.

Q. And did you accurately express the contents of your conversations with Judge Knox? A. The report is the product of my conversations with all of the people we have mentioned.

Q. With whom? A. With all of the people we have mentioned.

Q. And only of those three people; is that right?

Mr. McGohey: Oh, I object, your Honor. The witness has stated it was his—

The Court: No. He is asking him whether it was the product of the conversations with only those three, or others in addition.

The Witness: I could not say that it was only those three. There might have been other people I spoke to about it.

Q. Such as who? A. I saw a great many people here, while I was here. I talked, for instance, with the calendar Commissioner who is in charge of the pool room. I know that.

Q. And that is reflected in your report too, is that (2667) right? A. Yes.

Q. Did you produce any other documents pursuant to the subpoena duces tecum served on you? A. I have documents here.

Q. Pursuant to the subpoena? A. Yes.

Q. Will you be good enough to produce them?

The Witness: Your Honor, before I do that, I should like to say that my superior, Mr. Chandler, has a statement I think he would like to make to the Court in regard to the other documents.

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The Court: Very well. This witness may be withdrawn and Mr. Chandler called in, and I will see what statement he desires to make before we proceed further.

(Witness temporarily withdrawn.)

(Mr. Chandler entered the courtroom and approached the witness stand.)

Mr. Sacher: Just a moment, your Honor, I am not calling Mr. Chandler as a witness at this time.

The Court: Well, Mr. Chandler has a statement to make, and I will listen to it. So if you will just administer the oath to Mr. Chandler.

(2668) HENRY P. CHANDLER, called as a witness on the challenge, being first duly sworn, testified as follows:

By the Court:

Q. You are the Director of the Administrative Office of the United States Courts? A. I am.

Q. Mr. Tolman has stated here that in reference to or perhaps by reason of certain subpoenas duces tecum, or a subpoena duces tecum that has been served, that you had a statement you desired to make to the Court? A. Yes, your Honor. I have this statement to make: I do not know what information Mr. Tolman has given as to the papers that we have brought in response to the subpoenas which were served upon us. I will say to you that we made a careful search of our office files after the subpoenas were served in order that as far as possible—and I think we were successful—all the papers that came within the terms of the subpoena were brought here, and they are produced for such use as the Court deems proper.

Now, as to the memorandum or report of Mr. Tolman to which I presume he referred, and which are the conclusions drawn by him from a brief study of the system of selecting jurors in this district, which he made in the autumn and early winter of 1940 and 1941, and which was

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sent to all of the Circuit and District Judges in (2669) the winter of 1941, that has received such a general distribution that it is offered, if the Court considers it competent.

In addition to that there are two other documents which have also received equally wide distribution, namely, a report of the Committee of the Judicial Conference of the United States, which formerly was entitled The Judicial Conference of Senior Circuit Judges, on the method of selecting jurors in all of the courts of the United States. That committee was appointed by the Chief Justice upon authorization of the Judicial Conference to which I have referred.

The purpose of the study was to determine whether some general recommendations in reference to the selection of jurors in the district courts might be made, or perhaps some legislation might be desirable.

That committee made two reports. The first one, as I recall, in the autumn of 1942; and the second one, which was a supplemental report, in the autumn of 1943, both of which were ordered, directed by the Judicial Conference to be distributed to all circuit and district judges in the United States; and there has been fairly wide distribution of those reports. Those are here for such use as the Court may deem proper.

Now, in addition, there are what may be called (2670) the working materials which came into being in connection with the study of Mr. Tolman and the conclusions from which were stated in his memorandum of 1941. Those materials consist of preliminary drafts by him of the memorandum which ultimately emerged, submission of it to certain persons who were believed to be from their office or would be familiar with the method of selecting jurors in this court in order to test the accuracy of it, certain correspondence. They were typically working materials.

Now, there were in connection with the reports of the Committee of the Judicial Conference to which I have referred during its study, which extended over a period of a number of months—there were also working materials

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in the sense of inquiries in writing, answers in writing, memoranda concerning phases of the study.

Also there are some comments of judges in the file both on the study by Mr. Tolman, and I think some comments in the form of letters on the reports of the Committee of the Judicial Conference to which I have referred.

Now, it is my judgment, as the representative, as the executive agent of the Judicial Conference of the United States, that it is inadvisable from the standpoint of the effectiveness of work of the committees of the (2671) Judicial Conference and of the Administrative Office that materials developed in the course of the study of problems in connection with the judicial administration should be made public at least unless there is some very strong consideration in reference to a particular subject matter which prevents securing the information in some other way; and I say that because if the Judicial Conference is to act intelligently, if the Administrative Office or committees of the Judicial Conference are to study problems effectively, they must be able to ask for information and to secure it under more or less of an understanding that the information given will be treated as confidential.

Now, in reference to this particular subject matter, where the method of selecting jurors in this court can be ascertained and shown by the testimony of persons to whom such inquires would go, I merely submit to your Honor that to introduce into the record of this case, or to require me to produce for inspection materials of the kind to which I have referred, which are the working papers either of the Administrative Office or of the Judicial Conference, would militate against the effectiveness of the work of the office and the Judicial Conference in the long run. But I submit all those papers, sir; I am perfectly willing that you should examine them and after (2672) stating that consideration of public policy, which to me is a very real one, I leave the matter to your discretion.

Mr. Sacher: I may say, your Honor—
The Court (To the witness): As to the report
you see no objection to—

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The Witness: None whatever.

The Court: Now for your guidance, Mr. Sacher, and so that there may not be unnecessary extended argument, I shall sustain the view expressed by Mr. Chandler as to the confidential character of the working papers, memoranda and communications of one sort or another that he has described. The reports are on a different basis, and should you desire to offer them in evidence, I will, after considering any objection that may be made, rule thereon. But I place them in a different category from the papers which Mr. Chandler objects, and I think very properly so, to have brought out publicly because of their confidential character.

Mr. Sacher: May it please the Court, so far as the Judicial Conference is concerned, we have no desire for those, so that we see eye to eye on that, whether we agree on the grounds or not; but we have not sought them in connection with this case. But if you will recall what Mr. Chandler said, your Honor, you will (2673) remember that he said that these preliminary drafts or work sheets as he described them were sent to people in this court who had reason to know whether they were accurate or not. And it is on that basis that I respectfully submit that in this instance the requests or the questions directed to those materials which were sent to others—in other words, your Honor, what I am saying is, if they were working sheets which constituted the private memoranda of the witness, then I should see some validity perhaps to the contention that they were like, for instance, our lawyers' private memoranda. But when the papers saw the light of day and were communicated to somebody else and that somebody else was a person in authority or with familiarity to inform Mr. Tolman as to whether what he had drafted accorded with the practice or not, then I submit that that becomes a document which we are entitled to see and to offer in evidence.

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The Court: Mr. Sacher, I shall not direct the witness, nor shall I direct Mr. Tolman to produce for your inspection any of the papers to which he objects. If that can be done in one criminal trial it can be done in another; and so all the details of the administration of justice would be revealed to those who perhaps would misuse them in some way.

(2674) Mr. Sacher: But if this jury system—

The Court: Mr. Chandler has said that he regards them as confidential, and so do I.

Mr. Sacher: They are not confidential. They were sent out to other people. And, moreover, I would like to point out, your Honor, that if this jury system is rotten then nothing should stand in the way of ascertaining the truth, and little insistences on little confidences certainly should not be the barrier to ascertaining the truth.

The Court: Well, you have such a curious way of expressing yourself. You always seem to have the words corruption and things of that kind—

Mr. Sacher: I didn't use that word, your Honor.

The Court: —on the tip of your tongue. And I shall not comment upon it any further. You have the reports, which, according to the arguments you and your colleagues have made here, demonstrate corruption on their face. I have thought it was a curious conclusion to draw from them. But however, that has been the position that you have taken. And however that may be, I will not direct the production of these papers.

Now as I said the other day, and I have indicated that I do not desire further argument, I will not simply wear myself out repeating it and telling people to sit (2675) down and desist. I do not believe in doing that. I try to maintain the dignity of the court here, and I shall continue to do so. So that if you should insist on going on I will do nothing further to stop you.

Mr. Sacher: I wish just to note an exception, your Honor, to your ruling.

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May I reserve the examination of Mr. Chandler until after I have examined Mr. Tolman, please?

The Court: Yes, you may.

The Witness: Am I excused for the time being?

Mr. Gladstein: Mr. Chandler maybe misunderstands. Do you understand, Mr. Chandler, you are to remain for further examination?

The Court: Oh, he is not going away.

The Witness: I told Judge Medina that I would stay.

I would like to make this statement to the Court, which does not pertain to the merits of this case. It is quite important, if in any way convenient here, that I be in Washington tomorrow. Naturally I shall be glad to conclude today if it is possible, but if I cannot conclude today I would like to ask the consideration of counsel on both sides and of the Court to be permitted to return to Washington to handle a rather important official matter. And if I am needed I will return.

(2676) The Court: I think we will finish up with you today, Mr. Chandler.

The Witness: I will remain subject to your Honor's call.

(Witness temporarily excused.)

LELAND LOCKE TOLMAN, resumed the stand.

Direct examination continued by Mr. Sacher:

Q. Now Mr. Tolman, there came a time, did there not, when Mr. Chandler in his position as director of the Administrative Office of the United States sent out copies of your report of January 2nd to all United States and district judges, isn't that so? A. To all United States circuit and district judges, yes.

Q. Yes. And did he ask you prior to the time that he sent this report out, to all United States Circuit and Dis-

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trict Judges, whether you had taken measures to guarantee the correctness and accuracy of your report? A. I don't think he ever asked me that. I—

Q. But did you take such measures? A. I—

Mr. McGohey: I object to it, your Honor. The report speaks for itself.

The Court: Sustained.

Mr. Sacher: If it please the Court—

The Court: All these preliminaries, Mr. Sacher, (2677) seem to me quite inconsequential. If there is anything in the report helpful to you I think you might get around to that without so many of these seemingly unimportant details. In any event, I shall not permit any further inquiry along that line.

Mr. Sacher: May I say that my only purpose is to do what I thought was a lawyerlike job of laying the foundation for the introduction of documents in evidence.

The Court: You see, you lay a foundation once, you lay it twice, you lay it three times.

Mr. Sacher: Does your Honor hold the foundation is laid?

The Court: It would seem to me that it is—

Mr. Sacher: All right, sir, if you say it is.

By Mr. Sacher:

Q. Did you have a conversation with Judge Knox prior to the preparation of your report in regard to Mr. McKenzie, the deputy jury clerk?

Mr. McGohey: Objection, your Honor.

The Court: Sustained.

Q. Did Judge Knox tell you anything about the use of the Social Register for the purpose of selecting jurors in this district?

Mr. McGohey: Objection.

The Court: Sustained.

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(2678) Q. Did Judge Knox tell you anything about the use of Who's Who in connection with the selection of jurors in this district?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did Mr. McKenzie tell you anything about the use of Who's Who in this district in connection with the selection of jurors?

Mr. McGohey: Objection.

The Court: Sustained. I may say, Mr. Sacher, that if you go over each phrase, each sentence, each paragraph of the report with similar questions and objection is made, I shall sustain the objection.

Mr. Sacher: I respectfully except.

I will offer the report in evidence.

Mr. Gordon: Let us see the covering letter.

Are you offering that or just the report?

Mr. Sacher: The report. That is 102.

The Court: 102.

Mr. Sacher: The letter is 103.

Mr. Gordon: That isn't your file copy, is it?

The Witness: No.

Mr. Gordon: It is an extra copy.

(Defendants' Challenge Exhibit 102 for identification received in evidence.)

(2679) The Court: In other words, you may leave that without inconvenience?

The Witness: Yes.

Mr. Sacher: I am about to enter into a line of questions and I was wondering if you would prefer, before I open, to take the recess now.

The Court: Yes, it is just about time for our ten-minute recess, so we will take it now.

(Short recess.)

Colloquy of Court and Counsel

By Mr. Sacher:

Q. Mr. Tolman, I hand you Exhibit 102 and invite your attention to the sentence beginning at the very bottom of the first page of that exhibit, which reads as follows:

"He"—referring to Judge Knox—"also arranged for the appointment as deputy clerk of an energetic young man of pleasing manner who is a good judge of character and has a thorough and practical knowledge of the social, racial and economic groups of New York City and their geographic distribution."

And I ask you what was the name of the young man to whom these words applied? A. That was—

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

The Court: Sustained.

Mr. Sacher: But, your Honor, we wish to show (2680) who it is.

The Court: Mr. Sacher, you have laid a foundation for putting the report in evidence and it is in evidence. I consider these other matters that you are going into as extrinsic and not admissible.

Mr. Sacher: Well, what is extrinsic when I ask for the name of a person described in the letter who is not named? That is what I am asking for, the name of the man.

The Court: Proceed.

Mr. Sacher: Is that extrinsic, your Honor?

The Court: I have sustained the objection. You have stated that you are going to call all the judges, and I gather that the sole purpose of Mr. Tolman's testimony is to lay the foundation for the report. The rest should seem to me to be hearsay.

Mr. Sacher: No, your Honor. If I ask him to whom he applied those words that is not hearsay. He may have applied them improperly, maybe. But I would like to know the name of the man to whom he applied this, and I would like to know whether

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they are his words or Judge Knox's words. There is nothing extrinsic about that.

The Court: There might be a lot of other things that you would like to do that would in my judgment unnecessarily prolong the proceedings. But I have sustained (2681) the objection.

Mr. Sacher: You see, your Honor speaks of hearsay, which can only impair, if it be hearsay, can only impair the weight to be given to Exhibit 102. And what I am trying to do is to establish its weight.

The Court: Mr. Sacher, I do not desire argument on such a question.

Mr. Sacher: All right.

By Mr. Sacher:

Q. Now in the second paragraph on the first page of Exhibit 102 you write as follows—this is the beginning of the second paragraph:

"The jury system in the District Court for the Southern District of New York is at present one of the outstanding features of that court. Its excellence is evidenced primarily by the very high type of citizens who now serve regularly as jurors in the trial court rooms. Its results have been praised by the resident and visiting judges who"—

The Court: I do not think you need to keep reading that report.

Mr. Sacher: Just to the end of that sentence. Just a moment, please.

The Court: No. If you are going to ask him something about from whom he got that and objection is (2682) made, I am going to sustain the objection. Now, the report, for whatever its value may be, is in evidence, and Mr. Tolman does not pretend to have any personal knowledge of these matters. And I am not going to permit you to read just one paragraph after another and then have objection, with the objection sustained. Now I can

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see what is coming; it may save a little time if I indicate to you, as I am now doing, what my ruling will be.

Mr. Sacher: Now, your Honor, I think I ought to be permitted to state to you very briefly as to what my purpose is.

The Court: Well, Mr. Sacher, you know these parts of the report that you are now reading again were read to me not once, not twice, but I don't know how many times by you and your colleagues earlier in the proceeding. Now I am going to have to decide what the value of the report is and the evidentiary weight later. But I am very clear now, from what has already gone on, that Mr. Tolman had nothing personally to do with the administration of this jury system. So I think you had better let the matter rest there.

Mr. Sacher: If your Honor please, we charge that this jury system was the result of a conspiracy, and I am placing questions to establish that conspiracy.

(2683) The Court: Yes.

Mr. Sacher: And I am being prevented from proving the conspiracy.

The Court: Well, you know, it is often that way when a lawyer asks a question and the Judge sustains an objection to it, that he would like to go on arguing. But I do not desire further argument. I understand your contentions. Goodness knows, you have told me about them often enough.

Mr. Sacher: But your Honor has said that it will rest in your hands to say what weight, if any, is to be given to this report. And I am addressing questions designed to elicit answers which will give the highest and the greatest weight to this report, and that is what I am being prevented from doing. I cannot—

The Court: You are being prevented, that is right.

Mr. Sacher: Yes. That is what I am saying.

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The Court: And that is what the Court is here for, to rule on questions.

Mr. Sacher: Does your Honor mean that if this man testifies—

The Court: I do not desire further argument, Mr. Sacher.

Mr. Sacher: I want to ask you a question.

(2684) The Court: And you were just about to raise your voice again. It gets so tiresome. Please don't do it.

Mr. Sacher: I will refrain. But I would like to ask you, your Honor, does not your Honor hold that a conversation between this witness and the Chief Judge of the Southern District of New York concerning the characteristics of the jury system in this district would constitute hearsay, when this man is directed by his chief, who is the chief or director of an agency created by the Supreme Court of the United States, to ascertain this information from the only people whose duty it is to divulge the information, namely, the senior judge and the various clerks—does your Honor say that statements made in the course of the performance of their duties constitute mere hearsay?

(2685) The Court: I am not disposed to get into a controversy with you.

Mr. Sacher: No. I thought your Honor might help me and answer as to whether you regard that as hearsay. I can't regard any statement Judge Knox made whether here or before Congressional committees as constituting hearsay. I say that they express the practice, and however—

The Court: I suppose there is no way for me to stop you from going on talking, and, as I said before, I am not inclined to waste my strength in the effort.

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By Mr. Sacher:

Q. Do you know Mr. Cornelius J. Smythe?

Mr. McGohey: I object, your Honor. What difference does it make? It is immaterial whether he knows him or not.

The Court: I overrule that objection.

A. I don't know Mr. Smythe.

Q. Did you mention Mr. Smythe in your letter? A. My memorandum?

Q. In your memorandum, I beg your pardon. A. I think I did, yes.

Q. Don't you know? A. Yes.

Q. Didn't you describe Mr. Smythe as an attorney of excellent standing at the bar who has good business and social connections and who is willing as a public (2686) service to give a large amount of time to the jury problem?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Do you really mean that you have forgotten this distinguished lawyer so quickly?

Mr. McGohey: Objection.

The Court: Sustained.

Q. You were a lawyer of only one year's standing at the bar when you first met this distinguished lawyer, weren't you?

Mr. McGohey: I object, your Honor.

The Court: Objection sustained.

Mr. McGohey: And I object to the cross-examination of Mr. Sacher's own witness.

The Court: Yes.

Mr. Sacher: He is my witness you say?

Mr. McGohey: You called him.

Mr. Sacher: I called him, yes, but he is hardly mine.

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The Court: You seem to have some feeling against him.

Mr. Sacher: Against Mr. Tolman? On the contrary, I have no feeling against him. I would like to have better feeling for him by getting his answers.

Q. Did Judge Knox tell you that he thought that Mr. (2687) Smythe and the deputy jury clerk, who was an energetic young man, etc., were particularly important in the successful operation of the jury system then in vogue in this district?

Mr. McGohey: Objection.

The Court: Sustained.

Now, there is no use going through the report, Mr. Sacher, and doing just what I told you not to do.

Mr. Sacher: I am trying to find things which your Honor's direction, as I understood it, do not apply to. So if you will indulge me I will try to sort of manage my little skiff in between—

The Court: I can imagine nothing in there that would be important repeating or would lead to a relevant question, but perhaps there may be.

Q. Did you confer with the United States Attorney for the Southern District of New York some time during the fall of 1940 in regard to the manner of selection of jurors in the Southern District in criminal cases? A. I saw the United States Attorney.

Q. What was his name? A. That was a long time ago. I don't remember his name, I am sorry.

Q. Was it Mr. Correa? A. Yes, that is right.

Mr. Sacher: The witness apparently does not have great—is not over-awed by our great men in New York.

(2688) Mr. McGohey: I move to strike that, your Honor.

The Court: Strike it.

Q. What was your conversation with Mr. Correa concerning the jury system in New York?

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Mr. McGohey: Objection.
The Court: Sustained.

Q. Did the United States Attorney or Judge Knox tell you that the number and percentage of convictions had increased since the new jury system had been introduced in the Southern District of New York?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you ascertain in the course of your investigation how the grand juries are selected in the Southern District? A. I inquired about the selection of grand juries, yes.

Q. Of whom did you inquire? A. The same sources that I had used in inquiring about the petit juries.

Q. Who are those sources? Whom are you talking about? A. I spoke with Judge Knox; I spoke with the jury clerk, Mr. McKenzie.

Q. Mr. McKenzie? A. Yes.

Q. By the way, was he that energetic young man referred to before by you? A. He was the energetic young man.

(2689) The Court: That mystery is dispelled.

Q. Did you ascertain whether or not the selection of grand jurors in the Southern District was similar to the method of selection of petit jurors in this district?

Mr. McGohey: I object, your Honor. The report speaks for itself.

The Court: Sustained.

Q. By the way, Mr. Tolman, the preparation of your report constituted, did it not, a rather important undertaking on the part of the Administrative Office of the United States Courts during the very early period of its existence; did it not?

Mr. McGohey: Objection.
The Court: Sustained.

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Q. Do you know whether or not your study came in for mention in the report of the Judicial Conference of Senior Circuit Judges held in September 1941? A. I think it was mentioned in the report of the Conference.

Q. I show you this report for the year 1941—that is, the report of the Judicial Conference of Senior Circuit Judges held at Washington, D. C., September 23 to 26, 1941,—and ask you whether the following sentence refers to the memorandum which you have testified was prepared by you and dated January 2, 1941, namely: “In addition (2690) to its regular duties detailed in the Director’s report, the Administrative Office completed two special procedural studies during the year, one of the method of selecting jurors in the Southern District of New York, and the other, a survey of pre-trial procedure in the Federal Courts.”

I ask you, does that sentence that I have read and which I now show you apply to your report of January 2, 1941?

Mr. McGohey: May I ask if the document being handed to the witness is in evidence?

Mr. Sacher: I imagine the Court will take judicial notice of the reports of the Judicial Conference, will it not?

The Court: I think I will.

Mr. McGohey: I don’t question that. I just wanted to make sure that it is that report that is being shown to the witness.

The Court: It is the 1941 report. What page was that?

Mr. Sacher: That was page 2.

A. Yes, this reference is to the report—the memorandum.

Mr. Sacher: Suppose I offer it in evidence.

The Court: Are the Senior Circuit Judges supposed to be part of this alleged conspiracy?

Mr. Sacher: No, your Honor.

(2691) May we just have it marked for identification, please?

The Court: Yes, you may have it marked.

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(Marked Defendants' Challenge Exhibit 104 for identification.)

Q. Now, your report, which is Exhibit 102, also came in for mention, did it not, in the annual report of the Director of the Administrative Office of the United States, which appears in the volume which I just showed you a moment ago and which is marked 104 for identification, is that right? A. I think that is right. Will you show me the reference?

Q. Was the following referable to your report? I read from page 22:

"Procedural Studies.

"Experience has shown the need for carrying on studies in the Administrative Office in regard to important procedures and from time to time reporting the results for the information of all the judges. This enables every judge to know how the judges generally are dealing with matters that concern them and to profit by methods found helpful. Recently a number of such studies have been made or are in progress. One, a study of the method used in recent years for selecting jurors in the (2692) Southern District of New York, which was sent to all the federal judges, elicited widespread interest and led to new appraisal by the courts in many districts of the efficiency of their way of performing this highly important function."

Was that applicable to your report of January 2, 1941?

A. Yes, it was applicable.

Q. And what I have read is contained in the Director's annual report, is that right? A. That is right.

Q. Did you receive any comments on your report from any of the judges of the Southern District of New York or from any other district?

Mr. McGohey: Objection.
The Court: Sustained.

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Q. I notice that at the top of page 8 of your report, referring to the grand jurors of the Southern District of New York, you say—this is at the bottom of page 7 and the top of page 8—“This Association has meetings and issues a publication devoted to the problems of the court in general and of the grand jury system in particular. It assists the office of the clerk in securing the names of persons who would be suitable and willing to serve as grand jurors and it constitutes a liaison between the public and the court which the judges (2693) consider to be very valuable.”

And I ask you where you obtained that information.

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: Your Honor, it is just impossible to give a performance of Hamlet without the Prince of Denmark.

The Court: Then perhaps we had better get along without the Prince of Denmark.

Q. The last paragraph—

The Court: You see, you have been talking along here about a conspiracy that had evolved in this theory that the whole administration of justice is on trial, and that the rules of evidence in conspiracy cases are applicable, whereas I see no charge. I see before me a challenge similar to other challenges that have been made in the past. So I think perhaps you might be well to recall that it is up to you to prove the allegations of your challenge, which is not conspiracy of the administration of justice, so that you may go through the whole system and prolong this trial of this preliminary question indefinitely, but address yourself to the charge, which is the wilful and deliberate discrimination against and exclusion of certain classes of persons.

Mr. Sacher: Your Honor, I am quite willing to (2694) forget for the nonce the question of the conspiracy if I could be permitted to prove this

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latter type of matter. In that connection your Honor will recall that we introduced evidence the other day to show the racial and national origin of compositions of various geographical areas in New York, and your Honor said you would be shocked to find that that sort of standard would be applied.

The Court: I said what?

Mr. Sacher: You would be shocked, you said, to find that that kind of standard would be applied.

The Court: I said if there was shown to be wilful and deliberate discrimination against Jews and Negroes I would be shocked, and I would be.

Mr. Sacher: Now, I want to prove it to you, and the first step in proving it to you—

The Court: Don't prove it to me in the way you are now endeavoring to do—

Mr. Sacher: What you are doing—

The Court: —constant repetition and coming back to the same thing, Mr. Sacher, does not help one iota. You may be right; I may be wrong; but saying it over again, repeating and repeating, you asking the question, I sustaining the objection, will do no more than had been done when the first objection and the first ruling was made.

(2695) Mr. Sacher: You see, I ask for instance—

The Court: Well, you always use anything that is said as the jumping off point for some more argument, and I tell you on this point I do not desire argument.

Mr. Sacher: Well, I don't want to argue, but I would like to ask what is the occasion for appointing a man with a practical knowledge of the social, racial and economic groups of New York and their geographical distribution unless he is put there for the purpose of using that knowledge to exclude certain economic, social, racial and geographic groups?

The Court: You see, whenever I try to stop you you raise your voice—

Mr. Sacher: I am sorry—

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The Court: —and you repeat again. Now you have said that same thing many times. I suppose you do it for some purpose other than is connected with this judicial proceeding. But as I said before, I am not disposed to go ahead and try and hold you down—

By Mr. Sacher:

Q. Did you make any notes of the conversations that you had with Judge Knox?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: I am not asking for the notes yet; (2696) I am asking when he made notes.

The Court: I know. I sustain the objection.

Q. Do you have any kind of paper or working sheets which contain any reference to any conversations with Judge Knox which were written or prepared prior to the date of your January 2, 1941 report?

Mr. McGohey: Objection.

The Court: Sustained.

Q. You brought such notes with you, didn't you, today, pursuant to the subpoena?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you look at any of the jury lists or other lists of names in the office of the jury clerk in this court while you were here? A. I looked at a few of them, not very carefully though.

Q. Did you see a safe in which cards with jurors' names were filed away? A. Yes.

Q. Did you see any cards which bore the word "Deferred" on them? A. I did not examine any of the cards.

Q. Did you see a so-called deferred list in the office of the jury clerk when you were here?

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Mr. McGohey: Objection to the characterization.
The Court: Sustained.

(2697) Q. Did you see a list with the word "Deferred" written on it?

Mr. McGohey: Objection.
The Court: Sustained.

Mr. Sacher: Might I ask Mr. McGohey what the basis of that objection was? I thought I was meeting his first objection by removing the characterization.

The Court: Well, if you had been listening to my rulings here I think you would have appreciated the fact that the question was not a proper one in view of the rulings I made.

Mr. Sacher: Can't I prove through this witness things that he knows actually from personal knowledge in regard to this system? That is what I want to do now, not on the basis of conversations or things in the report, but on the basis of his own observations. That is what I want to elicit now.

The Court: I don't want to argue with you about it, Mr. Sacher.

Mr. Sacher: All right.

Q. Did you observe whether or not jurors whose names were on the qualified list of jurors were placed in one section of the safe and whether others were put in other sections of the safe?

Mr. McGohey: Objection.

(2698) The Court: Sustained.

Mr. Sacher: I bow to the inevitable.

Mr. McGohey: I move to strike it.

The Court: I think I will let it stand.

Mr. Gladstein: Your Honor, may I ask a few questions of the witness?

The Court: You may.

Mr. Gladstein: Thank you.

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By Mr. Gladstein:

Q. Mr. Tolman, do you have with you the copy of the subpoena duces tecum that was served on you? A. I think I do.

Q. All right. Now it calls for materials other than the working materials that dealt with your memorandum; that is correct, isn't it, sir? A. Yes.

Q. Now I am not going to ask you for the working materials that the Court has ruled on. Did you bring pursuant to that subpoena reports or documents sent to your office by the clerk or the jury commissioner of this court? A. Yes.

Q. Do you have those with you? A. Yes.

Q. May I see them?

Mr. McGohey: I object, your Honor. They must in the nature be part of his working papers.

(2699) The Court: Yes. I will sustain the objection. The witness need not show them to you.

Mr. Gladstein: What did you say, your Honor?

The Court: They are part of the papers that Mr. Chandler, the Director, has made his statement about.

Is that not so, Mr. Tolman?

The Witness: I didn't hear Mr. Chandler's statement, your Honor, but I think that is correct.

Mr. Gladstein: Let me ask this question. I think your Honor may be mistaken.

Q. The reports I have asked about coming from the jury commissioner and the clerk of this court—did they come to your office before your memorandum of January 1941 or after, sir? A. They came afterwards.

Q. After. So they were not part of the working materials for your report at all, were they? A. No, not for this.

The Court: But they are confidential just the same and you are not going to see them.

Q. How many such reports did you bring, Mr. Tolman? A. I brought the material that covered that part of the

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inquiry covering the Southern District of New York. I think there were two questionnaires, one from the jury commissioner and one from the clerk.

Q. Were these questionnaires—when you say (2700) questionnaires from the jury commissioner and the clerk, are we to understand that your office sent a questionnaire to the Southern District of New York and received replies to it respectively from the jury clerk and the commissioner of this court? A. Yes.

Q. And those replies are the written report that you have reference to? A. Those were made as part of a later study. They had nothing to do with this—

Q. When you say “this” you mean with your earlier study, is that right? A. Yes.

Q. Now, that later study—by whom was that conducted? A. That was conducted by a committee appointed by the Judicial Conference of the United States to study problems in connection with the selection of jurors in the United States courts.

Q. Now, would you tell us the dates of the replies received from the jury clerk and the commissioner of this court?

Mr. McGohey: I object, your Honor.

The Court: Sustained.

Mr. Gladstein: Your Honor, I would like to at least have them identified because it may well be that these documents, as your Honor may find in the course of the development of evidence, should be received, and I would think that the record at least ought to show their (2701) identification even though your Honor won't permit at this time the contents.

The Court: It is already sufficiently evident that there are many documents of one sort or another which Mr. Chandler, the Director of the Administrative Office of the Federal Courts, has stated he regards as confidential and against the best interests of the administration of justice to have brought out, for reasons that I think should be obvious to anyone. And so I have sustained that

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view, and none of these confidential papers will be produced or marked or read by you or by any of your colleagues.

Mr. Gladstein: But, your Honor, I am seeking only now the identification by date, by year—

The Court: I know.

Mr. Gladstein: —so that there may be no mistake about the document referred to.

The Court: I know, but one thing leads to another, you know.

Mr. Gladstein: Well, the only thing that your Honor leads to on my part is to remind the Court, as the Court has said several times, the Court may be wrong, and it may turn out that we are right—

The Court: Well, I have been wrong before.

Mr. Gladstein: Yes.

(2702) The Court: I can only do my best in my effort to be right, and that is just what I shall continue to do.

Mr. Gladstein: Is your Honor ruling that I may not have any testimony from this witness to identify the jury commissioner's report and the clerk's—

The Court: To identify or mark or read or do anything else with any of the papers that Mr. Chandler, the Director, appointed by the Supreme Court of the United States, has stated that he regards as confidential and not such as to be brought out in this way. That you may take in the broadest possible manner.

By Mr. Gladstein:

Q. By the way, your own report of January 1941, the one that is in evidence, that has never been published in the Federal Register, has it? A. Not that I know of.

Q. Or anywhere else as a public document, has it?

Mr. McGohey: Oh, I object to the form of that question.

The Court: Well, do you mean to ask him—let me hear that question.

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Mr. Gladstein: I will withdraw the question.
The Court: All right.

By Mr. McCabe:

Q. Mr. Tolman, among the memoranda which you brought up with you are there any letters from Mr. McKenzie or any other (2703) person in this district connected with the selection of juries—

Mr. McGohey: Objection.

Q. —declaring a deliberate intention not to have Negroes on the juries in this Southern District of New York?

A. There are no such letters.

Q. There are no such letters? A. No.

Mr. McCabe: Your Honor permits questions along those lines?

The Court: Well, you gentlemen have developed a most extraordinary way of asking the Court questions. I take it it is just in sort of a rhetorical way, as on previous occasions. There was no objection to this question. What my ruling would have been I suppose is a mere matter of speculation. I do not intend to enter into any discussion on the subject.

Mr. McCabe: I was so shocked at the fact that Mr. McGohey's inchoate objection was not acted upon promptly, that I perhaps was moved to ask the question.

The Court: Would you like the answer stricken?

Mr. McCabe: I have no objection to the answer.

The Court: What is it you are arguing about?

Mr. McCabe: I am not arguing at all.

The Court: Go ahead.

Q. Mr. Tolman, did you have any discussion with anybody (2704) concerning the testimony which you were to give here today? A. Oh yes.

Q. With whom? A. With Mr. Chandler.

Q. Is that all? A. No, I spoke about it with Mr. Gordon this morning.

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Q. You talked with Mr. Gordon this morning? A. Yes.

Q. Concerning the testimony you were to give here?

A. Oh no, not concerning the testimony I was to give here, no.

Q. The question was whether you had talked with anyone concerning the testimony you were to give here. A. No, except Mr. Chandler as I said.

Q. Then your answer to my question is you talked with no one else except Mr. Chandler? A. Well, I have talked to Mr. Gordon and I have talked to Mr. Shapiro, but not concerning this testimony that I was to give here.

Q. Just concerning the weather which greeted—

The Court: Well, how could he know what testimony he was to give when you called him? The defense called him as a witness. Now you have asked him whether he had conversations with anyone and he said he had conversations with Mr. Chandler and Mr. Gordon and Mr. Shapiro. Now if you desire to ask him what those conversations were, and objection is made, I am going to sustain the objection, if that is what you want to find out.

(2705) Q. I will ask you what the conversations were.

Mr. McGohey: Objection.

The Court: Sustained.

Mr. McCabe: Your Honor put a question to me, how could he discuss the testimony—

The Court: You see, Mr. McCabe, it is so curious that you do not appreciate that the position of the Court is a little different from the position of attorneys pleading at the bar. When the Court desires to ask a question it is the duty of attorneys to respond—

Mr. McCabe: I am trying to respond your Honor—

The Court: —and when you reverse the procedure, however desirable it may seem to counsel, you cannot alter the difference in position of the Court on the one hand and counsel on the other.

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Mr. McCabe: Your Honor, it was with a desire not to have a question from your Honor unanswered on the record that I asked whether I might answer the question you put to me.

The Court: Well, you see, with all this discussion I have forgotten what the question was, if there was any. So I think perhaps we can drop it, and if there is anything else you want to elicit from the witness, you may do so.

Mr. McCabe: Your Honor directs me not to (2706) answer the question?

The Court: No, I don't direct you not to answer any question I asked you. I just don't remember asking the question. So much confusion gets in here sometimes that it is a little hard to remember. But if there is a question that you desire to answer, go ahead and answer it.

Mr. McCabe: I should like to have the question repeated then by the stenographer.

The Court: Well, you may give your own version of it.

Mr. McCabe: My version of it is, your Honor asked me how could he discuss the testimony he was about to give here, and your Honor went on to say that he was subpoenaed as a defense witness. I say that having been served with a subpoena requiring him to bring certain memoranda, certain documents here, there was certainly the basis for a discussion as to the testimony which he would give or which he would not give or which he would be prevented from giving here today.

By Mr. McCabe:

Q. Mr. Tolman, subsequently to your preparation of the report which is in evidence here, did you have occasion to return to the Southern District of New York?

Mr. McGohey: Objection.

(2707) The Court: Sustained.

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Q. Did you have occasion to discuss with Mr. McKenzie the administration of the system of selection of juries, as described in your report? A. After the report had been finished?

Q. Yes. A. I don't think I ever talked very much to him after that about it.

Q. Did you talk at all? A. That would be hard to say. I think I might have. I just can't recall.

Q. Well, will you try to recall for a moment?

Mr. McGohey: I object, your Honor.

The Court: Sustained.

Q. Would you say that you had no conversations with him?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you ever discuss with Mr. McGohey what constitutes a better quality of juror?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you ever tell Mr. McKenzie that his manner of administering the system of selection of jurors in the Southern District of New York was an illegal one? A. No.

Q. Did you ever tell him that the system was being (2708) administered in a manner which was bound to bring forth an investigation and repercussions? A. No.

Q. Did you ever say anything along those lines to him? A. No.

Q. Are you sure of that? A. As sure as I could be from my recollection.

Q. Well now, if you had ever told Mr. McKenzie that he was administering this system in an illegal manner, would you be likely to remember it? A. I—

Mr. McGohey: Objection.

The Court: Well, it has gone so far, I will overrule the objection and let him answer.

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A. (Continuing) I think I certainly would have remembered it.

Q. Do you say to the best of your recollection you don't recall ever making the statement that you were sitting on a keg of dynamite which might blow up at any time? A. I don't remember that.

Mr. McCabe: That is all.

The Court: Any cross examination?

Mr. McGohey: Yes, your Honor. Mr. Gordon will examine.

Cross examination by Mr. Gordon:

Q. Mr. Tolman, this report, Exhibit 102, has that been given any distribution other than transmission to the (2709) judges of the circuit and district courts? A. There was no formal distribution. A number of requests came to our office for copies of it, and ordinarily they were furnished to the person who asked for them.

Q. Can you remember to whom they were distributed, not the detailed list, but in general what distribution this report has had?

Mr. Sacher: I object to the question as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Gladstein: I would like to add another ground, your Honor, and that would be that it is calling for not the best evidence. I assume if requests came in for the report some record was kept of who the request came from and of the persons to whom they were sent. The witness is being asked apparently to testify—

The Court: You remember, Mr. Gladstein, that one of the matters on which I have reserved decision is the motion to strike the part of the challenge relating to the grand jury. In connection with that the question arose, as I recall it, about the motion previously made by the defense before Judge Hulbert, and the contention was made, among others, that this report was something new, it had

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not been found before, and that, in turn, led to the question of whether it could have been found in the (2710) exercise of due diligence; and I take it that the question now put to the witness is relevant to that subject.

Mr. Gladstein: But the point of my objection is, it is calling for not the best evidence; that if there is written evidence as to the circumstances under which any copy of the report was requested and any copy was sent in response to that request, then the witness should not be called on to speak from his recollection; and your Honor, I take it, has just established a rather fortified precedent that you will not permit the witness to testify at all concerning a written document—

The Court: Fortified precedent?

Mr. Gladstein: Yes. Many times I heard your Honor repeat your ruling that prevented Mr. Sacher from examining this witness concerning circumstances that were covered by or referred to any written document.

The Court: Well, it seems to me there is a difference. I suppose that the details here are not very relevant. It is perhaps relevant to know what sort of distribution there was, and I will allow the witness to state in general what distribution there was of copies of this report, Exhibit 102, challenge exhibit.

Mr. Sacher: Just a moment, your Honor. I would like to have a preliminary question of the witness on his knowledge of this, for if it is based on hearsay then (2710-A) I would like to interpose that objection to his testimony in this regard; so may I ask him a couple of preliminary questions as to where this information comes from?

The Court: You may not.

Mr. Sacher: Exception.

(2711) Q. Will you answer along the lines of his Honor's ruling, giving your own knowledge of the general distribution of Exhibit 102?

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Mr. Gladstein: I object to the direction, advising the witness to answer along the lines of the Court's ruling.

Mr. Gordon: Your Honor, may I examine the witness without interruption?

The Court: You know, Mr. Gladstein, you are perfectly ridiculous. Now that question is entirely proper, and I am not going to get into a lot of wrangling over such a simple matter as this. He has asked him to follow my direction, and we all remember what that was, and to speak of his own knowledge. So, now, let us hear what he says and not magnify the matter.

A. Occasionally a lawyer would write us and ask us if he could have a copy of the report, and occasionally a library would want a copy for some reason or other, probably because they saw references to it in the Judicial Conference material. I couldn't tell you how many came in altogether because I did not handle them all, and I went away shortly after this.

Q. Were they sent out? A. Yes.

Q. Over what period of time? I mean, when was the (2712) first time that such a request came in? 1942? A. I should think it must have been about then.

Mr. Sacher: Would you like to suggest the month to him, too, Mr. Gordon?

Mr. Gordon: May that be stricken, your Honor?

Mr. Sacher: Then I object—

The Court: Yes, it will be stricken out.

Mr. Sacher: —on the ground that it is leading.

Mr. Gordon: I am cross-examining Mr. Sacher's witness.

Mr. Sacher: Are we going to be funny about whether this is cross-examination?

The Court: It sounded to me like a piece of sarcasm.

Mr. Sacher: It was.

The Court: It was not important, and I think we had better drop it.

Now, what is the question?

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Q. My question was: Was it beginning in 1942? A. I think that is about right.

Q. Now in preparing this report, did you make any effort to put statistics in it so that the statistics reported, the percentages reported would reflect exact statistics or counts of jurors in the office here? A. The statistics that I gave were based on information (2713) given me by the clerk. I didn't myself compile the statistics.

Q. Did you make any effort to classify the jurors by occupation according to census definitions? A. Oh, no.

Q. Did you in your investigation or inquiry here discover any evidence of discrimination in selection of jurors in the Southern District of New York because of race, religion, sex or social or economic position?

Mr. Sacher: I object to the question on the ground that it calls for a conclusion of the witness and on the ground that there is nothing that refers to the subject in the report and nothing that the witness was interrogated on on direct to justify this on cross.

The Court: Overruled.

Mr. Sacher: Exception.

A. No.

Redirect examination by Mr. Sacher:

Q. Now will you be good enough, Mr. Tolman, to tell the Court what you did to discover evidence in regard to the discrimination of citizens in respect to jury service on the basis of race, religion, geographical status or economic status? A. I didn't go into that problem.

Q. You did not go into it at all? A. No.

Q. You weren't looking for it, is that right? (2714) A. I wasn't interested in it.

Q. You weren't interested in it at all? A. Not at that time.

Q. When you testified a moment ago that you found no evidence of discrimination all you really meant was that you didn't look and therefore didn't find, is that right? Is that what your testimony means? A. I didn't look for it.

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Q. You didn't look for it. Did you ever hear the old adage, "Look and ye shall find"? Did you?

Mr. McGohey: I move to strike that out, and I object to the question.

The Court: Well, from what you did see and from what was said to you, did you observe any evidence of discrimination as to race, religion, economic status or political affiliations or otherwise?

The Witness: No, I did not.

Q. What was it, referring now to his Honor's question—what was it that you observed or what was it that was said to you on the basis of which you did or did not see discrimination?

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

The Court: Sustained. I do not understand the question.

Mr. Sacher: May I trouble the reporter to read (2715) your Honor's question?

(Record read.)

Q. Now what was it that was said to you on the basis of which you answered the Court's question? A. I said I wasn't looking into the problem of racial discrimination.

Q. Now Mr. Tolman, you are a lawyer. The Judge asked you whether on the basis of anything you saw or on the basis of anything that was said to you, you observed certain things. And now I am asking you what was it that was said to you on the basis of which you answered his Honor's question? A. I think I answered his Honor's question on the basis of what was not said to me.

Q. Oh, on the basis of what was not said to you? A. Yes.

Q. And I suppose also on the basis of what you didn't see, is that correct? A. I suppose so.

Mr. Sacher: That is all.

The Court: Well, how else can it be, Mr. Sacher? If a person sees no evidence of discrimination when

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he is making an investigation such as the witness has described here, what is so funny about it?

Mr. Sacher: What is funny about it is, your Honor, he reminds me of those three little monkeys—
(2716) See no evil, hear no evil, speak no evil.

The Court: Well, perhaps you are prejudiced.

Mr. Sacher: I am prejudiced?

Mr. Chandler, please.

Mr. Gordon: Just a moment, your Honor.

The Court: All right.

Mr. Gordon: In connection with the testimony of the witness as to the distribution of his report, I ask your Honor to take judicial notice of and will hand to the Court the minutes of a proceeding in this court on October 6, 1942, entitled William Jacob vs. The City of New York. It involved an attack on the jury system before Judge Rifkind. And in that attack there was offered in evidence as an exhibit by the attacking party there the report that Mr. Tolman submitted. I will hand that up to the Court.

The Court: I will take judicial consideration of that. It should be marked as an exhibit.

Mr. Gordon: This is taken from the official records of the court, your Honor.

The Court: You had better give it an exhibit number just for the purpose of convenience. I would like to look at it.

This same question and this report in a prior judicial proceeding in this court, you say, Mr. Gordon?

(2717) Mr. Gordon: Yes, your Honor. On October 6, 1942, this report by the witness now on the stand which has been referred to as secret and confidential was offered in evidence by an attorney attacking the jury system in the Southern District of New York.

The Court: What was Judge Rifkind's decision?

Mr. Gordon: He denied the attack.

(Deemed marked Government's Challenge Exhibit T for identification.)

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Mr. McGohey: If your Honor please, the record will show that he also made some findings with respect to the evidence and on the basis of his own experience.

Mr. Gladstein: Is that the complete transcript of the case?

Mr. Gordon: It is.

Mr. Gladstein: May we see it?

The Court: Yes. I would like to look at it first.

(The witness left the stand.)

Mr. Sacher: Will you get Mr. Tolman back?

The Court: Are the findings in here, Mr. Gordon?

Mr. Gordon: Yes, your Honor. There is an oral opinion in there by Judge Rifkind concerning the challenge. There is a statement by him concerning the evidence and the challenge and his findings.

(2718) The Court: Yes. Well, I will look at that later, and we will go on with Mr. Chandler now as he is anxious to get away.

Mr. Sacher: I just have a question or two for Mr. Tolman, if you don't mind, just one or two more.

Will you take the stand, Mr. Tolman?

The Court: The next time, Mr. Tolman, you go right out—and quickly.

Mr. Sacher: He had better run.

The Court: They always think of some new questions if you keep hanging around.

LELAND LOCKE TOLMAN, resumed the stand.

Redirect examination continued by Mr. Sacher:

Q. Did you have anything to do with the mailing out of any of these reports? A. This memorandum of mine?

Q. Yes. A. Yes, I helped prepare it for mailing. I didn't put in envelopes.

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Q. What does that mean, you helped prepare it for mailing? Did you put it in envelopes and lick stamps? A. No.

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

Mr. Sacher: No; I want to test the witness's credibility on this question.

The Court: You see, he is your own witness.
(2719) Mr. Sacher: Your Honor, I give him to you.

The Court: Well, I accept him with pleasure.

Mr. Sacher: May we then regard him as yours from here on out?

The Court: Yes. Go ahead. You are asking what he did about the mailing. He said he prepared them for mailing, and you wanted to know if he actually licked the envelopes and put the stamps on and he said no.

Q. What do you mean—

The Court: I suppose we can use up a little more time on this kind of thing. But go ahead.

Mr. Sacher: Oh, no. Now, your Honor, I don't think that this ought to be disparaged. Your Honor said that his testimony on this subject is material as bearing on our claim that the report was not—

The Court: I know what preparing things for mailing means. We do it all the time. But go ahead and bring it out.

By Mr. Sacher:

Q. What did you do in connection with the mailing of this report other than preparing the report originally? A. We have a mail room in our office in Washington, and I instructed them what mailing list to use and told them when to put it in the mails.

Q. What mailing list do you claim that you told them (2720) to use?

Mr. McGohey: Objection.

The Court: Sustained.

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Mr. Sacher: Now, this is altogether new. They didn't bring out anything about mailing lists before. He says he got requests from—

The Court: He is not claiming anything, Mr. Sacher.

Mr. Sacher: I think he is.

The Court: Well, I should say that is an offensive expression and it makes the question inadmissible.

Mr. Sacher: All right. I will reframe the question.

The Court: The witness is answering questions, not making claims.

Q. You say you gave instructions, did you, to send out copies of your report, which is Exhibit 102 in evidence, to certain mailing lists; is that right? Is that what you said? A. Yes.

Q. Now, what mailing list did you give instructions to mail it out to? A. To all the United States circuit and district judges.

Q. And was that the only mailing list that you have reference to? A. Yes.

Q. Was there any mailing list of lawyers that you (2721) directed that the report be sent to? A. No.

Q. Can you give us the name of a single lawyer in the United States who sent in a request for a copy of your report? A. Yes. I think it was a New York lawyer.

Q. What was his name? A. I think it was a Mr. Axtell—

Q. And do you have a record of that? A. —if I recall it.

Q. What is that? A. As I recall it.

Q. You mean that you remember Mr. Axtell's name? A. Yes.

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

The Court: He is the man that pressed that challenge that came before Judge Rifkind.

Mr. Sacher: We will get to that.

The Court: I just looked at that exhibit.

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Mr. Sacher: I know. And that is just what I am coming to.

The Court: I suppose it is amazing that the witness should recall it, but to me it seems perfectly natural.

Q. Was this shown to you, referring now to Government's Challenge Exhibit T for identification; was this Government's Exhibit T shown to you this morning? A. No, sir.

(2722) Q. Are you sure now, Mr. Tolman? A. I am.

Q. Are you or are you not? A. I am sure.

Q. You are sure. Did Mr. Gordon tell you this morning that he had these minutes and that the minutes showed that a Mr. Axtell had a copy of your report in October 1942 is the date; is that it?

Mr. Gordon: That is the date, but that is not what I told him.

Mr. Sacher: Let us see. You are leading the witness again, Mr. Gordon.

Q. Did Mr. Gordon tell you anything about this report? A. No, he did not.

Q. And do you remember Mr. Axtell's first name perhaps, too? A. No.

Q. It is a rather unusual name, isn't it? A. Axtell!

Q. Yes. A. Yes.

Q. And his first name is unusual too, isn't it?

The Court: I remember it.

A. I don't recall it.

Mr. Sacher: If you wish to take the stand, your Honor,—

The Court: No.

Q. Do you remember "Silas Marner" by George Eliot, Mr. Tolman?

Mr. McGohey: I object, your Honor.

Colloquy of Court and Counsel

(2723) The Court: All right, let him play around for a little while.

Q. Is Mr. Axtell's name Silas Axtell? A. I think so.

Q. You think so. Let me ask you something. Did you find any record in the last day or so which revealed that Mr. Axtell had written to you about this report or this study of yours? A. In going through our files, yes.

Q. You have that letter here? A. Yes.

Q. May I see it? A. I think that is among the documents that are in that file of working materials.

The Court: If you object to producing it, I will sustain the objection.

The Witness: It is, your Honor, in the file of materials I think which Mr. Chandler—

The Court: Very well. I will not direct you to produce it.

Mr. Sacher: The witness has testified to it already. I don't know why we can't see it, if it is a harmless little letter.

The Court: What earthly difference can it be whether it was Mr. Sacher that wrote or Mr. Jones that wrote or Mr. Axtell or somebody else? The point, as I see it, is, was this thing commonly known or known to many people so that with the exercise of reasonable diligence you people could have found it before you made (2724) that motion before Judge Hulbert? Now it is turning out that a lot of people got it and that it was right in this report of the senior circuit judges which was certainly highly publicized and available in many places. So that it seems to me that looking into the letter of Mr. Axtell is just a diversion that consumes time without contributing anything. The point is, if Mr. Axtell got it, why wasn't it that you gentlemen didn't get it?

Mr. Sacher: Would you indulge me just a moment, your Honor? I just want to look through this testimony here a second.

Colloquy of Court and Counsel

Now, your Honor, I call your attention to pages 7 and 8. And Mr. Borman—is that you, Mr. Borman (addressing clerk)?

The Court: Certainly it is this Mr. Borman.

Mr. Sacher: Oh, it is this Mr. Borman.

The Court: Is that another mystery?

Mr. Sacher: No. I wish to call your attention to the following which does not appear from this report—

The Court: Is that in the exhibit?

Mr. Sacher: Yes, I am reading from the exhibit.

The Court: I wish you would finish up with this.

Mr. Sacher: I am through with him now.

The Court: All right. Now Mr. Tolman, this is your cue.

(2725) (Witness left the stand.)

Mr. Sacher: May I call your attention to the fact that Mr. Axtell did not obtain his memorandum, Tolman's memorandum for evidence in the case by writing to Mr. Tolman.

Examining Mr. Borman, he said to him at the top of page 8:

"Now you have also produced an interoffice memorandum of the Administrative Office of the United States Court. It is dated January 2, 1942—1941. Have you not? A. Yes, sir.

"Q. And that is one of the records of the office of the clerk of the United States District Court? A. That is right.

"Q. And the Commissioner of Jurors? A. That is right."

I am willing to gamble anything that if you get the letter from Mr. Tolman from Mr. Axtell you will find it was a letter written after he had discovered the existence of this document in the clerk's office. We will have Mr. Axtell to prove that.

The Court: I am tempted to take you up now, but I tell you it is illegal and it is immoral to bet.

Colloquy of Court and Counsel

And I will now look at a part of this exhibit that I observed that comes before Mr. Borman's testimony—

Mr. Gladstein: Can I look at it after your (2726) Honor has finished?

The Court: —which I thought indicated prior to the time that Mr. Borman took the stand that Mr. Axtell had the paper. I think that was on page 2, before Mr. Borman even testified. I had to read rather hastily here, but that attracted my attention. I think you will find there is nothing inconsistent between the statement made by Mr. Borman and the statement made by Mr. Tolman on the witness stand.

Mr. Gladstein: Your Honor, I noticed another statement here just a moment ago when Mr. Sacher showed it to me, and if you will indulge me for just a second, because I saw it very hurriedly, I want to call this to your Honor's attention.

The Court: Why don't we get Mr. Chandler on and finish up with him?

Mr. Gladstein: We will do that too. But the essence—

The Court: And then we can set aside a little time to discuss the effect of this exhibit.

Mr. Gladstein: Let me look through this for a moment.

The Court: Yes. And I think after you and your colleagues are through, you may have a number of things to suggest, and you can do it all at one time. And in (2727) meantime we will get Mr. Chandler back and conclude his testimony. You will have plenty of time to go over that proceeding before Judge Rifkind.

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HENRY P. CHANDLER, resumed the stand.

Direct examination by Mr. Sacher:

Q. Mr. Chandler, you are the Director of the Administrative Office of the United States Courts, are you not?

A. That is correct.

Q. And how long have you been director of that office?

A. Since December 1, 1939.

Q. Did you some time in the fall of 1940 request Mr. Tolman as assistant chief of the Division of Procedural Studies and Statistics to obtain information for you regarding the practice in administering the jury system in the Southern District of New York and particularly regarding the preliminary investigation of jurors in that court? A. I think that at that time Mr. Tolman was not the assistant chief of the Division. I think he came to that position later. He was an attorney. And I did ask him if he would not make a study of the method of selecting jurors in the Southern District of New York.

Q. Will you please look at Mr. Tolman's signature at the end of the report and tell me whether that refreshes your recollection as to whether he was just an attorney (2728) or whether he was in fact the assistant chief of the Division? A. Well, he certainly was assistant chief at the time that the report was rendered on January 2nd. That is plain.

Q. Was that a more important job than that of attorney?

Mr. McGohey: I object.

The Court: Mr. Sacher, the question you just asked him was when he told him. Now there is a lapse of some months in between. So don't try to twist it around so that it looks just the opposite to what the man is saying.

Mr. Sacher: Your Honor, if I were a Judge I would have to resent the implication of that observation.

The Court: Well, you are not a Judge yet.

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Q. Now Mr. Chandler, did you give Mr. Tolman any instructions as to the manner in which he was to carry out the assignment which you gave him in regard to this subject of the jury system in the Southern District of New York? A. Not as far as I can recall.

Q. And did he submit any preliminary report of progress to you from time to time? A. I do not recall. I recall that he did speak with me about his—what he had done here, and I think that he did submit a preliminary draft of his which with some changes became the memorandum with which you are familiar.

(2729) Q. Who made those changes, if you know?

Mr. McGohey: I object, your Honor.
The Court: Sustained.

Q. Were those changes made by Judge Knox?

Mr. McGohey: I object.
The Court: Sustained.

Mr. Sacher: (To Mr. McGohey) What is the matter? Are you afraid?

Mr. McGohey: No, I am not afraid. I just don't want to waste time.

Mr. Sacher: Is that all?
The Court: Now, Mr. Sacher—
Mr. Sacher: All right.

The Court: Give you an inch and you take a yard. Now, why don't you just go along? We have been getting along so nicely here this morning.

Q. Did you have any conversations with Judge Knox about the jury system in New York?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you have any conversations with any Judicial Conference of the senior circuit judges concerning Mr. Tolman's report? A. I informed the Judicial Conference at a special meeting which it was holding in January 1941

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to consider another matter, that such a study and report (2730) had been made by Mr. Tolman. I said that some interest in it had been manifested, and I asked the Conference whether it would deem it appropriate and desirable to send copies of it to the circuit judges and the district judges, and the Conference answered that question in the affirmative. Following the Conference therefore which was held, the meeting of the Conference which was held, as I recall, in January, I sent the report to the circuit judges and the district judges—copies of it.

Q. Now I show you this letter purporting to be a copy of one you sent out to the circuit judges and the district judges on February 5th, marked Challenge Exhibit 103 for identification, and ask you whether that is the letter which you sent out with Mr. Tolman's report to the circuit judges and the district judges? A. That is correct.

Mr. Sacher: I ask that it be marked in evidence.
Mr. McGohey: No objection.

(Defendants' Challenge Exhibit 103 for identification received in evidence.)

Q. Now Mr. Tolman's inquiry for the information which you asked him to obtain, was made, was it not, in the regular course of the performance of his duties in your office? A. Oh, yes.

(2731) Q. And it was an official activity on behalf of your office, was it not? A. That is right.

Q. And you so reported the study to the Judicial Conference of senior circuit judges held in September 1941 at Washington, D. C.; is that correct? A. In my annual report for 1941 I referred to work of the Administrative Office in making studies of particular problems arising in the administration of justice in the federal courts, and I cited this study of the method of selecting jurors in the Southern District of New York as one of such studies which had been made.

Q. Did you send, or did you include among those to whom you mailed copies of Mr. Tolman's report, the judges of the Second Circuit, both district judges and circuit

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judges? A. The direction was that it be sent to all circuit judges and all district judges, and naturally the judges of both classes of the Second Circuit were included. And I presume that copies in due course went to all of the circuit judges and all of the district judges of the Second Circuit. At least that was the direction and the intention.

Q. So that the little children will understand, the Second Circuit includes, among other things, the Southern District of New York; is that correct? A. It does include the Southern District of New York.

Q. Now was there ever an occasion when any judge of this (2732) court informed you or any meeting of the Judicial Conference of the senior circuit judges that the description contained in Mr. Tolman's memorandum of January 2, 1941, was no longer in existence?

Mr. McGohey: I do not understand the question, your Honor.

The Court: Do you object to it?

Mr. McGohey: I do.

The Court: Sustained.

Q. Well, then, let me put it this way: Did any judge in the Southern District of New York, that is, a judge of the federal courts in the Southern District of New York, ever advise you at any time after January 2, 1941, that the method of investigating jurors and the practice in administering the jury system in the Southern District of New York had become different from that described in Mr. Tolman's letter of January 2, 1941?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: Not on the grounds of incomprehensibility this time, I take it.

Q. Was any report ever made by your office after January 2, 1941, describing a method of investigation of jurors or the practice in administering the jury system in the Southern District of New York which described that

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(2733) method and that system as being different from that described in Mr. Tolman's report of January 2, 1941?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did any report of any kind emanate from the Administrative Office of the United States concerning the preliminary investigation of jurors in the Southern District of New York or regarding the practice in administering the jury system in the Southern District of New York, other than the one report which is Mr. Tolman's report in evidence as Challenge Exhibit 102?

Mr. McGohey: Objection.
The Court: Overruled.

A. No, I do not recall that any other report by a representative of the Administrative Office on that subject has been—any other written report has been made.

Mr. Sacher: Thank you, Mr. Chandler.
The Court: Now we will adjourn until 2.30.
Mr. Sacher: Mr. Gladstein has some questions.
Mr. Gladstein: Would you ask him to resume at 2.30?

The Court: I don't quite hear you.
Mr. Gladstein: We have some further examination of Mr. Chandler.
The Court: I know. He will return.
(2734) The Witness: I will return.
The Court: (To the witness) But you are going to get through this afternoon.

(Recess to 2.30 p. m.)

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AFTERNOON SESSION

HENRY P. CHANDLER, resumed the stand.

Mr. Gladstein: Shall I proceed, your Honor?
The Court: Yes.

Direct examination continued by Mr. Gladstein:

Q. Mr. Chandler, this morning when you made your statement to the Court regarding the materials in the files that you and Mr. Tolman had brought here pursuant to subpoena, which you thought were sufficiently confidential as to warrant their not being publicized, you referred to what you call working materials; you recall that? A. Yes.

Q. And by "working materials" what did you mean? A. I meant all correspondence, memoranda, papers on the subject matter which were developed in the course of the study and were preliminary to the report which was settled and is the memorandum of Mr. Tolman.

(2735) Q. In other words, those working materials, the contents of which ultimately were embodied in that report? A. That is right—not all of those materials were embodied. They are the materials which were developed and which were taken into account in the report which has been produced.

Q. Now, did those working materials include preliminary drafts or proposed memoranda? A. They did.

Q. Is it true that the proposed drafts of the ultimate Tolman memorandum were submitted to Judge Knox?

Mr. McGohey: I object.
The Court: Sustained.

Q. Is it true that Judge Knox passed upon the contents of the Tolman report prior to its ultimate consummation in that Judge Knox passed upon proposals for that report?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Is it true that the Tolman report, which is here in evidence, was finalized in that form and with that content

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only after Judge Knox had had an opportunity to have the content and form of that memorandum submitted to him for approval or criticism?

Mr. McGohey: Objection.
The Court: Sustained.

(2736) Q. Well, now, outside of the working materials that you have mentioned and which you or Mr. Tolman brought here pursuant to subpoena that dealt with the subject matter of the Tolman report, did you bring in response to the subpoena other matter dated subsequent to the Tolman report and not being a part of that report at all? A. I did.

Q. Now such material is not working material for the Tolman report; that is right, isn't it, sir? A. That is correct.

Q. Now, among that material dated subsequent in time to the Tolman memorandum did you bring communications that you had or your office had with attaches of this court here in the Southern District?

The Witness: Now, if the Court please, the specification in detail of the official correspondence of this office would, in part at least, defeat the purpose of the objection which I raised not in behalf of either of these parties but in behalf of the effectiveness of the work of the Judicial Conference and its committees.

The Court: Yes, I will rule out any questions of that sort, as I did this morning.

Q. Well, now, Mr. Chandler, is it true that some time in 1942 your office conducted an investigation to find out how in all the district courts they selected their (2737) juries?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Isn't it a matter of public record that your office did conduct investigations throughout the district courts of this country to ascertain how they operate?

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Mr. McGohey: Objection.

The Court: Sustained.

Mr. Gladstein: You mean, your Honor, that I can't even go into matters that are of public record as distinguished from what the Court has indicated is confidential?

The Court: I mean those matters that Mr. Chandler has stated he regards as confidential will not be inquired into and will not be brought forth in this courtroom.

Mr. Gladstein: But I am now asking him if it is not true that there were some matters, your Honor, as to which certain publicity attached, and therefore I assume the same ruling regarding confidential nature would not apply. Perhaps—

Mr. McGohey: Your Honor, I suggest—oh, I beg your pardon.

Mr. Gladstein: (Continuing) Perhaps the Court did not have that in mind as I was pursuing that question.

The Court: I think I listened quite intently (2738) this morning to Mr. Chandler's statement, and I have sustained the view that he expressed.

Q. Mr. Chandler, did you ever have occasion to make public in any form information in part obtained, whether statistically or other types of information from the attaches of this court at a date some time after the 1st of January 1942? A. I can't recall that I did, sir.

Q. Do you know? A. Well, I am giving you my best recollection and it is that I did not.

Q. Did you ever make public or cause to be made public the result of any investigation in the United States District Court dealing with a matter of selecting jurors?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Gladstein: I am now asking if he ever made it public.

The Court: That is what you asked him before and he said no.

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Mr. Gladstein: Well, I am not sure that the question—I don't think the question is the same.

The Court: Well, I do.

Mr. Gladstein: Could I ask the witness if he understood the question to be the same or if his answer would be the same?

(2739) The Court: No.

Q. Well, isn't it a fact, Mr. Chandler, that your offices solicited and obtained from the district court, the Southern District of New York, as well as from other district courts in the United States answers to particular questions that were embodied in a questionnaire that your office sent out generally to the districts?

Mr. McGohey: Objection.

The Witness: I can answer that—

Mr. Gladstein: Will the Court allow the witness to answer?

The Court: Is there any objection?

Mr. McGohey: I have objected, your Honor, on the ground of relevance.

The Court: I sustain the objection.

Mr. Gladstein: On the ground of relevancy? Is that what I understood you to say, Mr. McGohey?

Mr. McGohey: That is correct.

The Court: Go ahead.

Q. I will confine it to the Southern District of New York? Isn't it a fact, sir, that you obtained from the attaches of the court of the Southern District of New York at a date subsequent to the Tolman memorandum and report, information in writing that deals with the manner of selecting jurors in this court?

(2740) Mr. McGohey: Objection.

The Court: Sustained.

Q. Isn't it true, Mr. Chandler, that you learned after the Tolman memorandum and report had been made to you many months later that the system of selecting jurors

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in this court included, among other things, the use of so-called exclusive or select sources such as the Social Register?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Such as Who's Who in New York?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Such as Poor's Directory of Directors?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Isn't it a fact, Mr. Chandler, that in 1942 there was given to you written evidence by attaches of this court, not Mr. Tolman's report now, but written evidence, signed the clerk and commissioner of this court, stating that their method of selecting jurors included, in part, resort to exclusive sources containing the names of corporation directors?

Mr. McGohey: Objection.
The Court: Sustained.
(2741) Mr. McGohey: And I object, your Honor, to the leading character of the question.
The Court: Well, the entire line is improper.

Q. Now isn't it true that, among other things, you sought to find out from the attaches of this court what proposals they might make that could be utilized in other courts through transmission via your office for improving the system of selecting jurors?

Mr. McGohey: Objection.
The Court: Sustained.

Q. And isn't it true that in response to such an inquiry from you you received recommendations in writing—

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Mr. McGohey: Objection.

Mr. Gladstein: I haven't finished.

Mr. McGohey: I am sorry. I thought you had.

Mr. Gladstein: I know that you are going to object.

Q. You received recommendations in writing from the attaches of this court recommending as very excellent the method in use in the Southern District of New York whereby resort was had to so-called select and exclusive sources from which to draw the names of potential jurors?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Isn't it true that you learned in 1942 directly from (2742) the attaches of this court, particularly the jury clerk and the commissioner, the jury commissioner, that in selecting citizens of this district for potential jury service the clerk's office and the jury commissioner were taking names directly from a private organization?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Isn't it true—

Mr. McGohey: I desire, your Honor, to press the objection against the form of the question because counsel is now attempting to testify.

The Court: Well, I think, Mr. Gladstein, it is sufficiently obvious that the attitude of the Court is and the rulings are against this line of questioning. So I think you had better turn to something else.

Q. Did you ever learn directly from attaches of this court, sir, whether or not an association called the Federal Grand Jurors Association of this district had been and was supplying to the clerk's office lists of names of people to be qualified as and selected for jury service?

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Mr. McGohey: Objection.

The Court: Mr. Gladstein, that is the very type of question that I just told you not to ask.

Q. Did you ever have occasion to tell Judge Knox that the system of selection of jurors in this district was (2743) illegal?

Mr. McGohey: Objection.

The Court: Sustained.

Q. While Mr. Tolman was being examined and you were in the witness room a question arose concerning a letter from a lawyer. Now was it your intention to convey to the Court that the so-called working materials—you know, that you claimed are confidential and as to which the Court has sustained you, Mr. Chandler—included the letter of a lawyer, a private practitioner, requesting a copy of the Tolman report? A. My intention was to state that in my opinion the entire file in connection with the Tolman memorandum, except the report which embodied the conclusions reached in the study, should on grounds of public policy and in the interest of the effective prosecution of the duties of the Administrative Office and the Judicial Conference and its committees be regarded as confidential.

Q. That included that letter, you mean? A. It included everything.

Q. In other words, as I understand it, Mr. Chandler, your position is, in essence, this: that since, as appears by the fact that we filed copies with our challenging papers, since we had a copy of the Tolman memorandum, and your covering letter which sent it to the circuit (2744) and district judges, you weren't claiming confidence for those too? A. No, sir.

Q. And you were going to claim confidence for everything that we didn't have; is that right? A. No, sir, that is not my position.

Q. Is there any document about which you don't claim the privilege?

The Court: How does he know what you have?

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Q. Any document that you brought with you, outside of the memorandum and report as to which you don't claim that it is confidential? A. Yes, there is, and I so stated this morning. There is the report of the committee of the Judicial Conference on the—

Q. That has to do with recommendations generally from the districts? A. Yes. And it was within the scope of your subpoena in that part of it—in that it contains references to the practice in the Southern District of New York. That also I regard as having had such distribution that it was public—that it has already been made public and I do not ask any privilege for it.

Q. Did you have occasion to talk with Judge Knox in 1947 concerning the system of selecting jurors here?

Mr. McGohey: Objection.

The Court: Sustained.

(2745) Q. Did you advise Judge Knox in 1947 that he ought to take steps to try to revise and legalize his system of selecting jurors?

The Court: Mr. Gladstein, what is the theory on which you think that any witness may come and testify to what Judge Knox told him, or what the clerk told him or what somebody else told him? Is it this conspiracy charge? Is that the theory?

Mr. Gladstein: I desire to ask the witness just the question I have asked.

The Court: Whenever I ask a lawyer what his theory is, he does what you are doing now, either refuses to answer or gives me some equivocal statement that constitutes no answer. Now I thought you might perhaps make an exception this time and tell me what the theory was, because I suppose that if Mr. Chandler is a competent witness to what people around the courthouse told him or what he learned, as you put it in various questions, you could very well be calling your associates, your colleagues or anyone else and put them on and ask them what somebody told them or what they learned. You

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have been, according to your own statement, looking over hundreds of documents in the file here. Perhaps you might be put on the witness stand, and if the questions were proper you could say what you learned. But I don't think (2746) you are going to do that.

Mr. Gladstein: You don't think I am going to tell the Court what I learned—

The Court: I thought I would indicate to you that it is futile to pursue this line of inquiry. The testimony is not competent and it is excluded.

Mr. Gladstein: Very well.

By Mr. Gladstein:

Q. Mr. Chandler, what is the relationship in a general way between your office and the offices of the clerks and jury commissioners throughout the district courts?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Isn't it a fact that in certain respects your office is in charge of and administers certain functions that relate very closely to the offices of the jury clerk and the jury commissioner in each of the district courts?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Gladstein: Your Honor, is it objectionable to obtain for the record just what the relationship is between the Administrative Office of the Courts of the United States and the jury clerk and commissioner of this court?

(2747) The Court: I think that is all a matter of statutory provision.

By Mr. Gladstein:

Q. Do you have supervisory authority of any kind over the clerk or the commissioner in this district, sir?

Mr. McGohey: Objection.

The Court: Sustained.

Colloquy of Court and Counsel

Mr. Sacher: I just have one or two requests of your Honor. In the first place, this exhibit, I think it was Exhibit T—

The Court: What is that?

Mr. Sacher: Exhibit T.

The Court: Here it is.

Mr. Sacher: May it be understood that the limitation with which that was admitted was that it does not purport to state the facts but is simply something that is given to your Honor as a matter of record, because anything beyond—

The Court: Well, I was asked to take judicial notice of the contents of that Exhibit T for identification as it is a proceeding in this court, and it is commonly the practice here to take judicial notice of those matters that appear upon our own files, and I have had it marked simply so that the paper might be identified, but the process is one of judicial notice.

(2748) Mr. Sacher: I have one other request to make of the Court: We are so eager that every fact bearing upon our challenge shall be in the record that if your Honor continues to adhere to the ruling you have made in regard to those working sheets and preparatory data dealing with Mr. Tolman's report, that we would suggest that that portion and that portion only—we mean to exclude the Judicial Conference matter concerning which Mr. Chandler spoke—to be impounded and be deemed part of the record, limited, however, to the view of your Honor and to the view of any upper courts which may be called upon to pass on the matter.

I just wish briefly to observe that your Honor has taken Mr. Chandler's characterization of the documents as being confidential without looking at them yourself; and, secondly, if the material is of relevance and materiality to our inquiry, then certainly the Court at least should have the benefit of the knowledge of the contents of that material. And so we would urge upon your Honor that you peruse the material and if you conclude that it is not of

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such a character as to impair the work of the Administrative Office, that in that event you spread it upon the record. If, on the other hand, you conclude that it might effectuate the things which Mr. Chandler fears, that in that event (2749) your Honor put them into the record limited, as I have indicated, to your Honor's observation and that of any courts which may sit in review of the matter.

The Court: The application is denied. The procedure followed here is similar to the procedure followed in numerous other instances of confidential information. The heads of departments, those charged with public duties, make statements similar to the one made by Mr. Chandler, and they are commonly honored by the courts, and as I also honor them.

Mr. Sacher: If your Honor would be kind enough to permit me just one more brief observation, I would like to say this concerning the theory of such question as Mr. Gladstein latterly propounded. I think it has to be regarded that our view of this matter is that whether you call the situation a conspiracy or anything else we regard all those who played a role in the establishment of the jury system under attack, as being for the purposes of this proceeding adverse parties, and therefore any statement, whether oral or in writing, made to anybody, whether it would be to counsel in this case or to Mr. Chandler's office would constitute such an admission against interest as to justify its introduction into evidence; and that would be one of the theories on which I, for one, would urge your Honor to receive communications from the (2750) jury commissioner, the clerk of the court, the deputy jury clerk, Judge Knox and any other person connected with the administration of the jury system and made in the course of the performance of his duties.

I am not talking now about gossip; I am talking about statements, whether oral or written, which are made by an official in the course of the performance of his duties.

Colloquy of Court and Counsel

Now, that I respectfully submit, cannot be of the confidential character asserted here which would entitle the matter to be excluded either from the public record or from the view of the court.

The Court: I take it you have concluded the matter?

Mr. Gladstein: Your Honor, may I add to that as affecting, possibly, and I think it should, the Court's view, the documents concerning which I asked Mr. Chandler, particularly these three which I desire to identify in a very general way—one, a questionnaire which Mr. Chandler's office sent to various district courts of the United States, including the Southern District of New York, that questionnaire being sent both to the jury commissioner and to the clerk of the court—that is the first document.

The second document is the reply of each of those attaches of the court to the questionnaire.

(2751) Now, those three documents I have seen in the office of the clerk of this court, and I would submit to your Honor that inasmuch as they were recently made available to me for visual inspection, and that I made certain notes as to the contents thereof, it seems to me under those circumstances that your Honor should not prevent the reception of those documents in evidence, although your Honor may well feel that rather than have them introduced through Mr. Chandler, perhaps they should be introduced through the testimony of an attache of the court, I don't know. But, in any case, they are the same documents.

The Court: Mr. Gladstein, I get the innuendo which you intended in that word "prevent." I don't like it. I think it will be well for you to avoid such statements, if you can. I am not preventing anything I am ruling here as it is my duty to rule. All these matters seem to me clearly incompetent. No matter how many times you and your colleagues talk about conspirators and corruption, and how all the clerks and all the judges are fellow conspirators, and so

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on, the fact remains that we are trying out a simple challenge here. If I were to permit what you and your colleagues desire, the result might be the entire subversion of the administration of justice. The very least that would happen would be the prolongation of these proceedings for such an indefinite (2752) period that justice could not be done with reference to the indictment under which these defendants stay in charge.

Mr. Gladstein: Now, if your Honor please, nothing that I said in my statement warranted that sort of reply, and your Honor has not replied to the question that I raised, which was simply this, that as part of the proof which we desire to introduce in the record to substantiate the charges contained in our challenge—and I shall not use the word "conspiracy" if that seems to offend the Court's sensitivities—

The Court: No, all I say is that just because you and your colleagues have this curious terminology, "conspirators," "corruption," and so on, that does not make the charge one of conspiracy. I can read the challenge, and I have read it, and all I say is that by this interminable repetition by lawyers you prove nothing.

Mr. Gladstein: Your Honor is not addressing yourself—the Court is not addressing itself to the point I am making, which is that with respect to the challenge and the grounds of the challenge, as set forth in the moving papers, we desire to offer in substantiation of a portion of that challenge and of the grounds contained in that challenge, written evidence directly communicated (2753) from the office of the clerk and the jury commissioner of this court to the witness who is on the stand, the contents of which disclose material matters as to the manner in which the jury system has been administered here, particularly the sources to which the Court officials of this court resorted of a selective and exclusive character in order to bring about a jury that

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was not representative of the community. That we offer to prove. It is in writing, and, as I say, I have seen it.

Now, the question that I am raising is this: Surely your Honor's ruling regarding the protective veil that will be drawn about what Mr. Chandler calls his confidential files or paper, would not appropriately apply to documents which the clerk's office has exhibited to me. I have seen them; I am aware of their contents, I have made notes as to the contents. That occurred very recently, since this proceeding began, but they have been communicated to me.

Now, in consonance with your Honor's reasoning, surely, those documents should be permitted to be introduced, and Mr. Chandler, as I understand it, has brought such documents with him. So I urge your Honor to permit the witness to produce those three documents that I have identified and which he brought pursuant to the subpoena.

The Court: The application is denied.

(2754) Is there any cross examination?

Mr. McGohey: No, I have no questions.

The Court: Thank you, Mr. Chandler.

The Witness: I take it, then, that I am excused?

The Court: You are excused and you may return to your duties in Washington.

The Witness: Thank you very much.

(Witness excused.)

Mr. Gladstein: Mr. Wilkerson, will you resume the stand.

DODEY A. WILKERSON, resumed the stand.

Direct examination continued by Mr. Gladstein:

Q. Mr. Wilkerson, since last week did you have occasion to examine an exhibit that was introduced in evidence and ascertain the existence of an error, the cor-

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rection of which should be brought to the attention of the Court? A. I did.

Q. And what was the exhibit? A. It was an exhibit entitled Table W-2, and I think it was Challenge Exhibit No. 92.

Mr. Gladstein: Is that correct, your Honor, No. 92?

The Court: 92? Just a second.

Mr. Sacher: That is right.

(2755) The Court: That is the residences of the Westchester jurors?

Mr. Gladstein: That is correct.

By Mr. Gladstein:

Q. Now, what is the correction that you desire to direct to the attention of the Court, Mr. Wilkerson? A. There is an obvious clerical error in the number of jurors listed for Yonkers for the panel of October 16, 1944. The figure there is 19. It should be 1. The explanation is that the figure 19 was on the work sheet in a column not shown on the table, and you will observe by adding to the right that changing the figure 1, or rather, 19 to 1, and adding 19, which really represents the Westchester jurors not shown by cities, you will get the same total that now appears for Westchester County, a total of 33.

That would call also for one correction at the bottom of the Yonkers total—

Q. In other words,—

The Court: Just a second. Let me see if I can find 92. Does it bear a number in your challenge?

Mr. Gladstein: W-2.

The Court: W-2? Just a second.

Q. Was this in the original paper? A. Not in the original.

(2756) The Court: I do not think it was in those originals.

Mr. Gladstein: I have a copy for the Court (handing).

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The Court: I just like to have a paper before me when somebody is talking about it.

Mr. Gladstein: I was trying to get you three papers a moment ago, your Honor.

The Court: I know.

Mr. Gladstein: Two letters and a questionnaire, but I will remember the Court's admonition.

The Court: I see the correction. Do you desire to make it in the original exhibit?

Mr. Gladstein: Yes.

The Court: I think that is perhaps the easiest way to do it.

By Mr. Gladstein:

Q. And, of course, Mr. Wilkerson, that will require a recomputation of the totals at the bottom, and so I suggest you state fully the nature of the correction and its impact on the rest of the calculation.

The Court: From what is shown in the paper you handed me it may be done with the stroke of the pen. The 93 at the bottom of the second column from the right becomes 75, and the computation under it becomes 55.7 (2757) instead of 7.1.

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

Mr. Gladstein: And the 19 becomes 1.

The Court: That is right.

Q. And the error was in the first instance that it accorded too many jurors to Yonkers, 18 more jurors than was the fact on that panel? A. That is correct.

The Court: Now, have we found that original? I just would like the original exhibit found and we still make that change in it so we won't get confused about it.

The Witness: I think it important to observe, Mr. Gladstein—

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Mr. Gladstein: Beg pardon?

The Witness: I think it important to observe—

The Court: Now Mr. Wilkerson, that is just one of the things I spoke about. I am trying to save a little time here, and you have a way of putting things that takes about four times as much time as is necessary and I think if you wait for a question it will be better.

Now, have you got the original there?

Mr. Gladstein: Yes, I do.

Will you make the correction, Mr. Clerk?

The Court: Just make it in accordance with that paper.

(2758) Mr. Gladstein: While the clerk is doing that, may we have the statement that Mr. Wilkerson was going to make?

By Mr. Gladstein:

Q. Does it deal with this exhibit, Mr. Wilkerson? A. It does.

Q. Will you call it to the Court's attention? A. The observation is that this clerical error being corrected in no way alters the statistical conclusion drawn from that table, but was originally entered in the record.

Q. As a matter of fact, the discovery and correction of the error that had been made serves to change the picture only to the extent of fortifying and even more substantiating the conclusion, isn't that right? A. That is correct.

Q. Now, last week there were received in evidence certain tables, Mr. Wilkerson, comparing the distribution of jurors by Congressional districts with the distribution of the voting population by Congressional districts. Did you make any study to investigate the accuracy of those comparisons? A. I did.

Q. And with what result, sir? A. With the result that—

Mr. McGohey: May I—I am not quite sure that I understand the question.

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(2759) The Court: He is merely asking him if he verified the figures and he found them all right.

Mr. McGohey: I understood that that was testified to at the time the various charts and papers went in.

The Court: I thought so, too.

Mr. Gladstein: I am now asking for the accuracy of the comparison, your Honor.

Mr. McGohey: What table?

The Court: Yes, let us have the table.

Q. Do you have the number of the table? A. I don't have the exhibit numbers but the tables relevant to this discussion are P-1, P-2, P-3—

Mr. Gladstein: One of them is 98 in evidence, if my recollection serves me.

A. —and P-4.

The Court: You are seeking to have him now say over again that they are accurate—

Mr. Gladstein: No.

The Court: —or is there some observation you want him to make about it?

Mr. Gladstein: No. I will withdraw the question, if I may.

Q. Direct yourself to—

Mr. McGohey: Pardon me. Our record shows that (2760) Table P-2 was identified but not received in evidence because objected to, and that was Challenge Exhibit 97 for identification—

Mr. Sacher: That was 96.

The Court: 96.

Mr. McGohey: P-2 is 96 for identification and P-1 is 97 for identification, and they were both excluded because of objection.

The Court: That is right.

Mr. Gladstein: But the next one, one of the three the witness mentioned, was received in evidence.

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Mr. McGohey: Could we have it identified which table was received in evidence?

Mr. Gladstein: Yes. 98.

The Court: Now, it is P-3, the one that was received?

Mr. Gladstein: That is right. It was received as Exhibit 98.

The Court: That is right.

Mr. Gladstein: And it is in evidence.

The Court: Yes.

Mr. Gladstein: All right.

Q. Now, Mr. Wilkerson, address yourself to that table which has been received in evidence and state to the Court what investigation, if any, you have made that (2761) resulted in information that will be helpful to the Court in understanding that exhibit.

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

The Court: Sustained. Sustained. You might get a witness to say almost anything that way.

Q. Did you make any investigation with respect to the subject of the literacy of the voting population concerning which your exhibit No. 98 deals?

Mr. McGohey: Objection.

The Court: Sustained.

Q. What about the question of literacy requirements? Did you make a study of what the law requires on that?

Mr. McGohey: Requirements for what, please?

The Court: Voting?

Mr. Gladstein: Voting.

A. I did.

Q. Now, there is a statute governing that, is there not? A. Yes.

Q. Is that right, sir?

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The Court: You may call my attention to the statute without eliciting it from the witness.

Mr. Gladstein: Well, I don't have the exact one. I do not have the citation, but I will direct it to your Honor's attention.

(2762) Q. Did you make any study to ascertain the extent to which by virtue of the question of literacy or illiteracy the population 21 years old and over who are voters could or could not serve as jurors?

Mr. McGohey: Objection.

A. I did.

The Court: Sustained. Strike the answer out.

Mr. Gladstein: Now, your Honor, I desire to show by this witness that a study has been made the result of which demonstrates that the question of illiteracy has been studied to determine what, if any, impact prevalent illiteracy has upon the potential jurors in this district. That your Honor will recall was one of the questions raised in the Fay case, the answer to which Justice Jackson said was not there supplied. We wish to supply the answer based upon a study conducted under the supervision of the witness.

The Court: Yes, and it is my judgment that this witness is not competent to express any opinion as to the literacy of the 1,386,918 voters indicated on that table. No matter what he studied or what he did, I do not see how it can have any substantial probative force as to whether those voters or any of them were or were not proper jurors in the matter of literacy.

Mr. Gladstein: Your Honor mistakes my intention. (2763) I am not soliciting an opinion of the witness but I am about to ask him concerning a study that was undertaken under his supervision, and I want to ask him about the sources to which he went. And I may say that they include what I understand to be official sources. That is to say, I

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am not going to ask him for his opinion as to whether the one million, et cetera, voters were literate, but simply to give the Court and for the record the facts concerning certain studies that have been made elsewhere.

The Court: Well, I think you are entitled to argue certain things from the mere fact that persons were held qualified to vote. I have heard nothing from you, nor do I think it is the fact that the census statistics indicate who are the persons entitled to be jurors in the matter of literacy. There is nothing in the census figures about that, is there?

Mr. Gladstein: There is census data concerning literacy and illiteracy.

I think I am correct about that, am I not, Mr. Wilkerson?

The Court: Well, that data you have already got in evidence, have you not?

Mr. Gladstein: I don't think so, your Honor.

Q. Is there such data, Mr. Wilkerson? (2764) A. There is, but not bearing on this particular point. It bears on another aspect of the testimony that I have given here, particularly with reference to occupations.

Q. All right. A. However,—

Q. Go ahead. Have you finished?

The Court: Now that is the "however" business and then he starts talking. Now, that is what I am not going to have.

Q. Can you refer me to census data? Is there census data that deals with the question of illiteracy among the people? A. There is.

Q. Now where is that data to be found? A. There is no census report for New York City concerning illiteracy. There is a census volume, the reference I don't have immediately before me but which we mentioned the other day, that does deal with illiteracy in the United States and provides a basis for certain inferences about New York City. There is also the census volume on the Character-

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istics of the Population by Age which provides information concerning the number of years schooling of the population in New York City and in Westchester County.

Q. All right. Now utilizing such sources, did you make any tabulations?

Mr. McGohey: May we have the precise sources (2765) identified, your Honor?

The Court: Yes.

Mr. McGohey: If they are in evidence I would like to know it. If they are not, I would like to see them.

The Court: Let us have the exhibits, Mr. Gladstein.

Q. Can you refer to them specifically, Mr. Wilkerson? I don't have a list of them here. A. I can do so. I would again point out, Mr. Gladstein, if the Court permits, that such information as I am calling attention to now does not bear directly upon the immediate issue we were taking up concerning the extent of literacy among the voting population.

Q. Then we will pass it.

Mr. Gladstein: I would like to call your Honor's attention to the code section—I think it is called that, "Code"—that I referred to. It is called the Election Law of the State of New York. And in the 1948 edition your Honor will find at page 116, Section 166, dealing with proof of literacy and regulations.

The Court: Section 166?

Mr. Gladstein: 166.

The Court: Would you mind letting me have that to read for a moment so that I can follow this matter a (2766) little better?

Mr. Gladstein: Yes (handing).

The Court: Is there some correlation between literacy under the Election Law and literacy in connection with the selection of jurors? I do not want the witness's answer on matters of law. I am com-

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petent to take care of those. I am asking enlightenment from you.

Mr. Gladstein: Well, the section of the statute governing the selection of jurors has language which I can only paraphrase, but it states that one of the requirements of the qualified juror shall be that he shall be able, as I recall it, to read and write the English language understandingly. In essence, it is that he be literate.

Mr. McGohey: Pardon me. May I interrupt to hand up the provisions of the New York State Judiciary Law dealing with the qualifications of jurors, your Honor?

Mr. Sacher: Section 592, Mr. McGohey?

Mr. Gordon: 596.

Mr. McGohey: I think so. 592, I think it may be, your Honor; somewhere in there.

The Court: I think it is 596.

Mr. Gladstein: When your Honor has completed reading I may point out the parallel.

The Court: It seems to me that the matters are different. Section 166 of the Election law which is (2767) headed "Proof of literacy and regulations" in subdivision 1 provides: "The Board of Regents of the State of New York shall make provisions for the giving of literacy tests. A certificate of literacy issued to a voter under the rules and regulations of the Board of Regents of the State of New York to the effect that the voter to whom it is issued is able to read and write English, or is able to read and write English, save for physical disability only, and to the extent of such physical disability which shall be stated in the certificate, shall be received by election inspectors and collateral and veteran's absentee registration boards as conclusive of such fact, except as hereinafter provided."

Now in the section 596 of the New York Judiciary law as to qualifications of jurors, subdivision 6 contains, all in the one subdivision, the following, prefaced by the words, "The person must," and then comes subdivision 6: "be intelligent; of sound

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mind and good character; well informed; able to read and write the English language understandingly."

Now it seems to me that census statistics can be of little value in determining or in assisting the court to determine when a person as a prospective juror met that qualification. And I should hesitate to suppose that he did or that she did merely because they (2768) got a certificate of literacy which entitled him to vote in the election.

Mr. Gladstein: Well, I would be very happy to point out that what your Honor has failed to see is this: that we are taking the points one by one as they are set forth in the New York statute, and the four criteria that your Honor has just read—of those four only one deals with the question of literacy, because a person may be literate in the sense that he can read and write the English language understandingly and yet not be regarded by your Honor as intelligent. I may not be regarded by your Honor as very intelligent, but I can certify that I read and write the English language.

The Court: You have a pretty good I.Q. in my judgment. I would give you a good mark in intelligence.

Mr. Gladstein: All right. Now I want to proceed to the other two. For example, I may not be regarded as being very well informed, but I am quite certain that I pass that portion of the statutory requirement that says that I must be able to read and write the English language understandingly. And similarly, I suppose the question of whether my character is good or not is also something that is quite separate from literacy.

So what I desire to point out is that your Honor has called attention to four criteria, three of which (2769) do not deal with the subject of literacy, only one does. And as to that one the language is almost identical in the two statutes. And I simply desire to bring out from this witness the fact, whatever the fact may be, as to the existence of literacy tests under which for approximately 25 years or

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more the voting population of the Southern District of New York has been required as a condition of voting to pass literacy tests. And therefore substantiate our basic proposition that the voters of this district who are good enough to elect Senators and Congressmen and voted for President are good enough on the subject of literacy and anything else to participate in the jury system. Now, with that—

The Court: I will permit the witness to state without the usual peroration and exclamatory matter what the statistics show as to the literacy in connection with the voting and also what the census statistics show.

Mr. Gladstein: Before I ask the witness—

By Mr. Gladstein:

Q. By the way, Mr. Wilkerson, did you get at my request some sample literacy tests that have been used here in New York to qualify people before they can vote? A. I did.

Q. Do you have them with you? A. Yes.

Mr. Gladstein: May I show you one, your Honor?

(2770) The Court: The minute I get one thing disposed of you go to something else. I said I will let you bring out from him what this statistical data was that had to do with the voting.

Mr. Gladstein: Very well.

The Court: And what the statistical data was that had to do with literacy and the census. Now, just have him give the data.

Q. Will you do that, Mr. Wilkerson? A. Yes. In the first place it is a requirement of law that people under 48 years of age must have passed literacy tests.

Q. Why is that? A. By virtue of a State law requiring that after January 1st, I believe it was 1922, any person qualifying to vote must receive either a passing mark on a literacy test prescribed by the Board of Regents or

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present and have proof or recognized a certificate of graduation from a public school—from a school.

Q. That is for New York State? A. That is right. It is relevant to the consideration we have here that in 1940, according to the 16th Census, 67 per cent of all the people in the Southern District were of such an age that they had to prove literacy in one of these two ways in order to vote.

Mr. McGohey: May I ask what the exhibit is from (2771) which that conclusion is drawn, please, that is, what the census book is?

The Witness: That is the Characteristics by Age. I think it is the fourth series.

The Court: Let me get a look at that as we go along here.

Mr. McGohey: I just want to have it identified. Oh, you want it now.

The Court: I would like to have the book before me right now.

By Mr. Gladstein:

Q. You don't happen to have a reference to the number of the exhibit? A. I do not.

The Clerk: I believe it is Exhibit 8, your Honor.

Mr. Gladstein: Did you say 8?

The Court: This is it. No. It is 19. Maybe I have the other one here, too. No.

Q. (Handing to witness.)

The Court: Just find the page, if you will, Mr. Wilkerson.

The Witness: It is on several pages, your Honor.

The Court: Find one that indicates it, or if there is a preliminary statement that leads to it find that and just hand it over so that I can look at it.

(2772) The Witness: All right. To illustrate on one of the pages, you will find on page 8, Table 2, the number of persons living in the Bronx Borough

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by age. You will find similar information for Manhattan. You will find it for Westchester County. And by adding the number of people 48 years and younger and dividing it by the number of people 21 years and older you will find that in 1940 67 per cent of the population of voting age in these three counties were of such age that they would have had to prove their literacy in order to vote by one of the two methods prescribed by the Legislature.

By Mr. Gladstein:

Q. In other words, that is because of the fact that the literacy tests or requirements before you could vote had been in effect for a sufficient period of time to affect all of the population within a certain age group; isn't that right? A. That is correct.

Q. Now do you have some samples with you?

Mr. McGohey: May I ask where the figures for Westchester County can be found in that exhibit, please?

The Witness (To the Court): May I have it?

The Court: Now this page 8 is the Bronx, isn't it?

The Witness: That is right. Do you want me (2773) to find Manhattan?

The Court: No. Westchester.

The Witness: Well, let me have—I don't find it in this particular census volume. I wouldn't say at this moment that it is not here, but I think I can find it more readily for you in another one. Let me check and see which one it is. I wonder if you would bring, Mr. Gladstein—

Mr. Gladstein: I beg your pardon?

The Witness: Would you bring to me the whole series?

The Court: Well, it is time for our recess now and you can perhaps straighten that out during the recess.

(Short recess.)

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Mr. Sacher: Your Honor, may I interrupt a moment to observe that Mr. Winston is absent this afternoon and he waives the right to be present, and all defendants do, similarly.

The Court: Very well.

Mr. McGohey: No objection.

The Court: No objection.

By Mr. Gladstein:

Q. Mr. Wilkerson, did you find the source reference that the Court asked about or that Mr. McGohey asked about? (2774) A. I did.

Q. Where is it to be found? A. Volume 2 of the 16th Census population, characteristics for New York, table 21, gives among many other things the population of male and female persons age 21 and over for each county in New York State.

Q. What exhibit number is on the face?

The Witness (To the Court): This (indicating) is a more ready reference for that, than all of that (indicating).

The Court: That is the whole State, is it?

The Witness: Here is the Bronx, here is New York, here is Westchester; age, 21 and over, male; age, 21 and over, female.

The Court: Now Mr. Wilkerson, let me have that again, about how you figured out that 67 per cent. It is probably just that I am a little slow or stupid about it, as I was once before. But I do not quite see how you calculate that 67 per cent.

The Witness: Well, let us look at it. The people of voting age in New York are people 21 years of age and over. Now those of them who are 48 years or younger would have been required to establish their literacy in order to vote. The census enables us to find them. First, the number of people 21 years of age (2775) and over, and also the first column, you look on table 2, the number of those persons who in 1940 were 48 years of age and less. Divide the latter number by the former and you will get

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the percentage of these people 21 years of age and over who, by virtue of their age and other considerations—the other considerations being if they did not live or moved in they would have been required by the statute to establish their literacy anyhow—persons who—

The Court: In other words, in 1940 the members of the population, not the voting population, but the whole population between 21 and 48 were 67 per cent of the entire population in those areas?

The Witness: Of the entire population 21 and over.

The Court: Yes. Of the entire population 21 and over. It seems to me there is a little hiatus there. But I will take it for what it is worth and let you go on with the other figures.

Mr. Gladstein: Will you indicate what the hiatus is? And the witness will be happy to answer it.

The Court: Well, as these figures are not the voting population but all the population, there is a gap. That is what I call the hiatus.

Mr. Gladstein: The figures are for those (2776) who were 21 years of age and over who are residents of the counties in the State that the census took data concerning, and who fall within two outside ranges of age 21 up to the years 48, I think Mr. Wilkerson said, who must have during the period since the passage of the literacy test law in this State submitted proof of their literacy before they are entitled to vote.

The Court: Well, it still seems to me there is a gap there. But you go ahead. I understand how he reaches the figure of 67 per cent now, which is what I did not understand before.

Q. Now I asked if you had obtained several samples for me of the literacy— A. I am not through.

Q. Excuse me. You haven't completed your answer? A. That is on the question, Mr. Gladstein, of age and literacy.

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Q. Yes. Would you do that? A. I would like to. And I would like to address myself if I may to the matter that seems to be disturbing the Judge. I think it might be helpful.

Q. I hope so. A. It is the fact that the ratio I give you is one of the population 21 and over, whether they vote or not. And you were suggesting that out of that population a smaller number actually voted. Which is a reasonable inference.

(2777) The Court: Yes. There may be a lot who were aliens and there may be a lot who were in jail and in the insane asylums, and there may be all kinds of—

The Witness: Or some just lazy. Now, the impact of what you were saying is still further to strengthen the point I am making, because it would suggest that if at the outside limits 61-67 per cent of the people old enough to vote had to prove their literacy, then the smaller proportion who actually did vote and hence actually did prove their literacy would be greater than 67 per cent.

By Mr. Gladstein:

Q. That is, that the numbers who voted, actually voted, would be more than 67 per cent of the potential vote? A. That is right. Further, the 67 per cent, the 1940 figure you remember, has been still further reduced for 1947.

Q. Would you indicate why that is? A. Yes.

Mr. Sacher: Don't you mean increased by 67 per cent? Increased? More people have taken literacy tests since 1940?

The Witness: No. I mean reduced. I will explain why. There has been—well, we have an interim census report.

Q. What date, please? A. April 1947. The title of (2778) which is "Population Characteristics of New York, Northeastern New Jersey, Metropolitan District." It is a current population report of the Bureau of Census, Series P-21, No. 25.

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Mr. McGohey: Has that been marked?
The Witness: It has not.

Q. You used this source for information you are about to testify to? A. That is right.

Mr. Gladstein: Then I will mark it and offer it in evidence.

(Marked Defendants' Challenge Exhibit 105 for identification.)

Mr. Gladstein: May it be received, your Honor?
The Court: Yes.

Mr. Gladstein: Because the witness has already said he used it in connection with his testimony.

(Defendants' Challenge Exhibit 105 for identification received in evidence.)

Mr. McGohey: If your Honor please, I should like to ascertain whether or not we are not talking about people who were qualified as literate in the year 1948 or in the year 1940.

The Witness: The voting population data which we are concerned with here are 1948 data.

Mr. McGohey: As I understand it, the census (2779) data is 1940?

The Witness: The first citation is 1940.

Mr. McGohey: Well, from 1940—

The Witness: The collateral information I am about to mention is 1947.

Mr. McGohey: But I should like to know from what data is it determined that there are a certain number of people 48 years of age and over.

Mr. Gladstein: And younger.

Mr. McGohey: 48 years of age and younger.

The Witness: 1940 data.

Mr. McGohey: 1940 data.

The Witness: And also—

Mr. McGohey: I suggest that the Election Law requirement for taking literacy tests went into effect in 1922, and there would be only 18 years between

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1922 and 1940, and then if you add to that 18 the age 21 years, you would get an age limit of 39 rather than 48.

The Court: Well, isn't that so, Mr. Wilkerson?

The Witness: Just a minute. People who were 21 years of age in 1922 when this law went into effect would now be—that is, in 1948, would have been 48 years of age. Is that—

Mr. McGohey: Yes. But I thought you were talking about 1940.

(2780) The Witness: What I am interested in doing is establishing the fact that the overwhelming majority we know for certainty of the people who voted in the 1948 elections had to establish their literacy by tests prescribed by law. Now we are using 1940 data as one point of departure in the process which I have not completed yet.

By Mr. Gladstein:

Q. And 1947 data for another? A. That is right.

Q. And you were about to address yourself to that?

Mr. McGohey: Now Mr. Wilkerson, do you have any data with respect to the voting population in Westchester County?

The Witness: Age 21 and—you are thinking about people of voting age or people who actually voted?

Mr. McGohey: Anybody who voted in 1948.

The Witness: Yes. We presented such data here before. Possibly P-4, I think, if I remember the number correctly, which is an exhibit—

Mr. McGohey: Well, would you tell me from what source you secured the data upon which you rely which shows the number of people in Westchester County 48 years of age and over—or younger, 48 and younger?

The Witness: In 1940?

Mr. McGohey: In any time.

(2781) The Witness: I have just called the Judge's attention—

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Mr. McGohey: Well, that covers, what you pointed out to the Court was your census data as of 1940.

The Witness: That is right.

Mr. McGohey: Now would you tell us what data you used to ascertain information with respect to the number of people in Westchester County 48 years of age and younger in the year 1948?

The Witness: I did not. I have no such information.

Mr. McGohey: I understood you to testify with respect to New York, Bronx and Westchester County concerning the number of people who would have been required to demonstrate literacy pursuant to the provisions of the Election Law.

The Witness: It would—are you through? Pardon me.

Mr. McGohey: I am, yes.

The Witness: It would be very convenient, of course, if the census provided us each year with an enumerator. It does not. It does provide us once every ten years with an enumerator and also with successive interim sampling reports which do not give the precise (2782) information that the 1940 census and the 1950 census will, but which provide a basis upon which judgment can be drawn which would be acceptable to any reasonable person looking at the facts. What I am saying in other words is that there is no way that anybody can tell you how many people in 1948 in Westchester County were of a certain age. Such data do not exist. There do exist, however, data which provide a basis for inferences which are the best that can be made in terms of available data. This is true not only on this aspect of the inquiry but on any aspect of the inquiry where we are using census data.

Mr. McGohey: When you say inferences, you mean the making of mathematical calculations?

The Witness: Mathematical inferences, yes.

Mr. McGohey: Thank you. That satisfies me.

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By Mr. Gladstein:

Q. Now will you continue with your answer dealing with the 1947 census data? A. By a process of interpolation it can be ascertained from the special census report to which we have just called attention that in the New York district of this metropolitan area for which that report deals approximately 62 per cent of the population rather than 67 per cent, as earlier, in 1940, was of such age that it had to prove literacy.

(2783) Now, that is due to several factors. One, I think I must say, Mr. Gladstein, that in analyzing this and all other factors we made use of many sources, such as statistical abstracts that I am about to point to now, such as the report of Immigration officials but from which I did not copy down the page numbers and figures but which anybody referring to them can find the kind of information that I am talking about—and I would hope that I would not have to look up every such figure at this moment; but there has been considerable—well, first there has been an aging of the population, of course, which largely accounts for the reduced percentage of 62 per cent as compared with 67 per cent mentioned earlier. Also during this period of time there has been substantial migration into the State of New York of persons who would have to prove their literacy. There has been substantial naturalization of persons who would have to prove their literacy.

A rough calculation would be that something between 70 and 75 per cent at least of the persons 21 years of age and over on these bases would have had to prove their literacy to vote in 1948. That leaves approximately one-fourth of the population above 21 unaccounted for. And there are data which are relevant there. It is clear to anyone at all acquainted with (2784) this realm of information, that the overwhelming majority of such people are literate. It is here for example that some census data on literacy that we plan to use in another connection might well be introduced here.

Q. What exhibit are you referring to? A. You don't have it in your folder.

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Q. Well, let me have the exhibit and we will have that marked. A. Let me see, which one shall I give you. (Handing to Mr. Gladstein.)

Q. Well, I will take one at a time. Do you want this one first? A. Let me see. What is that?

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

(Marked Defendants' Challenge Exhibit 106 for identification.)

Q. I will show you No. 106 for identification, Mr. Wilkerson; did you prepare that or have it prepared under your supervision? A. I did.

The Court: Have you got a copy of that for me?

Mr. Gladstein: I do not, your Honor. I do not even have one for myself.

Oh, the witness has one. That is fine.

The Witness: I may have another one, Mr. Gladstein.

Mr. Gladstein: I don't want to interrupt your examination. If you don't have one, forget it.

(Witness hands to Mr. Gladstein.)

(2785) Mr. Gladstein: All right.

By Mr. Gladstein:

Q. Does this exhibit correctly show all of the sources to which you went for the information you obtained in connection with it? A. It does not. I can tell you the source, however.

Q. Would you do so? A. The 16th Census of the United States, 1940, volume 4, Characteristics by age, I think table 19. I am not sure of that. But you will find it in the index if it is not table 19.

Q. Now, to what does the content of that exhibit refer? A. It is the estimated illiteracy by race and nativity, Manhattan, Bronx, 1940.

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Q. What did you do with the information that you secured from the sources you have indicated? A. Well, the source I have indicated does not provide illiteracy statistics for Manhattan and Bronx. The 1940 census just gave no such statistics for New York City. It does, however, provide information concerning the number of people with no years of schooling and with one to four years of schooling.

Now there is another census report on illiteracy which has been introduced here as Exhibit 85, Illiteracy in the United States, October 1947, which (2786) provides a way of estimating illiteracy in 1940 on the basis of census data concerning the number of school years completed in the population. And utilizing the methods specified and used in this report by the Census—

Q. Which is that? A. This is Exhibit 85, Illiteracy in the United States, October 1947.

Q. Yes. A. (Continuing) Employing precisely the same methods which are described in detail here and utilizing the census data 1940 on the number of people aged—or rather, the number of people 25 years and over who had no years of schooling and who have had one to four years of schooling, I can estimate the rate of illiteracy in New York—in Manhattan and Bronx in 1940. Table 11-C provides such an estimate.

(2787) Q. What does that show on that subject?

Mr. McGohey: May we have a look at it?

Mr. Gladstein: You can have it.

The Court: I do not see how you get the Manhattan and Bronx when the Manhattan and Bronx figures do not appear in the Census. You have figured them.

The Witness: Manhattan and Bronx figures do not appear in the Census?

The Court: On this 106 for identification, as I was listening to you you seemed to say that while the Census figures did not cover Manhattan and Bronx, still the Census figures gave all the people in the United States, and by some process of calculation you derived what probably were the proper figures for Manhattan and Bronx.

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The Witness: Let me restate what I have been saying, your Honor: It is that the census report to which I have called attention, Volume 4, Characteristics by Age, New York, provides for Manhattan and for Bronx the number of persons 25 years of age and over who had no years schooling in 1940, and the number of persons 25 years and over who have had from one to four years of schooling in 1940. That is reported by the census.

Mr. Gladstein: For Manhattan and Bronx?

(2788) The Witness: For Manhattan and Bronx. Now utilizing percentage ratios and a procedure outline in this interim census report, Exhibit 85, and applying them to the population with given years of schooling in 1940, we are able to calculate precisely as the Census Bureau calculates the rate of illiteracy in Manhattan and Bronx in 1940, and it is those calculations which are reported in Table XI-C.

The Court: You did say that there was something that the census did not show for Manhattan and the Bronx. What was that?

The Witness: I said the census does not report illiteracy for any of New York, 1940, but it provides the base and the method for calculating it in terms of other data which are reported by the census.

By Mr. Gladstein:

Q. The ones you have named concerning the number of years of schooling, and so on? A. That is right.

Q. All right. What does this exhibit show, sir? A. This exhibit shows that over-all in Manhattan and Bronx only 6.5 per cent of the people 25 years of age and over were illiterate. It shows further—

Q. What is the figure? A. 6.5 per cent.

Q. Oh, that is different. 6.5? A. Yes.

Q. It sounded like you said 65. (2789) A. It shows that the native white rate of illiteracy is 1.1 per cent; for foreign born white, 12.6 per cent; Negroes, 3.9 per cent—

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the Negro rate of illiteracy, incidentally, is about one-half of that for the white for the city as a whole—for these two boroughs; and others, 24.3 per cent.

The importance of this fact in the argument we began a little bit ago is to show that the rate of illiteracy is low, quite low in New York City, which is a bit of collateral evidence in justification of the assertion that I made that among these people of voting population of such age, that they would not have to prove their literacy in order to vote—

Q. That is, those over 48 years of age? A. That is right, the rate of illiteracy is low, and hence the overwhelming majority of such people, though they did not have to prove it by legal requirement, are indeed literate.

Q. In other words, those between 21 to 48 have proved that they are literate, and those over 48, the overwhelming majority in these figures are also literate, is that right?
A. Yes.

Q. Now, is there any particular portion of that exhibit which you desire to call the Court's special attention to?
A. I think this is adequate.

(2790) Q. Now, are the tabulations and the data shown on that exhibit true and correct? A. They are.

Q. Are there any other official references you would care to mention that would assist the Court in understanding that? A. I think no further comments are necessary.

Mr. Gladstein: I offer it in evidence.

The Witness: A conclusion one draws from this—

The Court: Now, that is the sort of thing, Mr. Wilkerson, you will please not do. You see, out of a clear sky you just start talking.

The Witness: Forgive me, your Honor. I thought I was—

The Court: You are forgiven.

The Witness: I will hear how to proceed in court before I am through, sir.

Q. It is apparent that you have some testimony to give about this exhibit that I have not asked you about. I will

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ask this question: Do you have additional testimony to direct to the Court's attention concerning this last exhibit? A. Concerning that last exhibit in relationship to the other bits of testimony we presented.

Q. Will you do that? A. The statistical conclusion one will draw is that only a very small percentage of the people who qualify to vote in New York in 1948 (2791) in New York could possibly have been illiterate.

Q. When you say "very small," what do you mean by that? A. Something—well, I won't give an estimate here. We have demonstrated that it would be—well, if I were to give an estimate—this is an opinion I have not calculated—

The Court: I think you had better omit that.
Mr. McGohey: I object to that.

(Defendants' Challenge Exhibit 106 for identification received in evidence.)

Mr. McGohey: May I ask one question on it:

Mr. Wilkerson, when you talk about people being literate, am I correct in understanding that you are talking about literacy as provided in the Election Law?

The Witness: We have used the term in two senses in our discussion: with reference to people who must prove their literacy, which amounts to approximately three-quarters of the voters in 1948, yes. With reference—

The Court: Weren't you referring to some papers which showed what the literacy test was for voters?

The Witness: I was.

The Court: And isn't it a fact that these figures that you have been giving have been based upon literacy for voting?

The Witness: That does not answer Mr. McGohey's (2792) question.

The Court: I asked you the question but you did not seem to answer it. I thought all the time you have been talking about voting literacy.

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The Witness: May I answer his question now?
The Court: Yes.

The Witness: I used the term literacy in two senses. When we were talking about people who had to prove their literacy by a certificate of schooling or by—

Mr. McGohey: Passing a test?

The Witness: —passing a test, we were talking about approximately three-quarters of the voting population that fell within that category. Now there is approximately another fourth of the population that did not have to prove its literacy, and when I speak of literacy in that section of the population I am talking about literacy not established by test but, rather, established by such methods as the census utilizes in defining literacy. That is a minority of the voting population. The majority of those who voted had to establish literacy by test.

Mr. McGohey: And in that minority that you talked about the literacy is determined, is it, by the number of years that those persons are estimated to (2793) have attended school.

The Witness: The number reported by the census that they attended school.

Mr. McGohey: I see. Thank you.

The Witness: You are welcome.

Mr. Gladstein: Now will you let me see the samples that you brought of literacy tests?

(Witness hands papers to Mr. Gladstein.)

Mr. Gladstein: Do you want to mark these, sir? I suppose one or two of these could be adequate, your Honor. I have about six. We could mark them all as part of one exhibit, though, if the Court desires.

The Court: Well, you may do it whichever way you like.

Mr. Gladstein: All right. You might just as well do this, if you will, Mr. Clerk. I think these

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can go in as 107-A, B, C, D, E and F, if that is all right.

(Marked Defendants' Challenge Exhibits 107-A, 107-B, 107-C, 107-D, 107-E and 107-F for identification.)

By Mr. Gladstein:

Q. Now I will call your attention to 107-A for identification. Where did that come from? A. From the State Department of Education in (2794) Albany.

Q. And when did you obtain it? A. We obtained it by writing to the State Department.

Q. When? Recently? A. Yes.

Q. You asked for a sample test and got it, is that right?
A. Yes.

Q. This plus the others? A. Yes.

Mr. Gladstein: Your Honor, I can summarize this briefly. The others are something like it. And then I will offer it in evidence.

It appears that the candidate for the test must answer certain questions. A statement is made for testing his ability to read and understand, and then questions are put to him concerning the subject matter contained in the paragraph and constitutes a test. For example, the one I am looking at reads as follows. It says "Read this and then write the answers to the questions. The Constitution of the United States"—

Mr. McGohey: If your Honor please, I assume if these are going in as exhibits they speak for themselves.

The Court: Yes.

Mr. Gladstone: I just want to indicate what it says, and I won't read the others, as an indication to the Court rather than having the witness go through these.

(2795) Mr. McGohey: I assume the Court can read it.

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The Court: I can look at it. It won't take a second. I take it it is rather simple.

Mr. Gladstein: Well, your Honor can look at this. They are all the same. That is, not the same questions; they are the same character.

Simple, but more than simple—this one, for example, reads:

“The Constitution”—

Mr. McGohey: Now—

The Court: Now Mr. Gladstein—

Mr. Gladstein: May I not read this in the record?

The Court: I see nothing particular to be gained, and it is just slowing down things, that is all.

Mr. Gladstein: This is exactly seven or eight lines, but I think—

The Court: Well, I think we will let you read seven or eight lines.

Mr. Gladstein: Very well. I just thought your Honor would be interested in it:

“The Constitution of the United States is the supreme law of the land. It is a written document, which was adopted on September 17, 1787, (2796) and went into effect in 1789. From time to time amendments have been made. These amendments either change the Constitution or add something to it. An amendment must be passed by a two-thirds vote of both houses of Congress and must be ratified, that is, accepted by three-fourths of all the states. Twenty-one such amendments have been made up to the present. The first ten are called the Bill of Rights and are very important. Freedom of religion, freedom of speech and freedom of the press are some of the fundamental rights they guarantee to both citizens and noncitizens.”

Thereafter follows a series of questions based on that statement by which there is tested the ability

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of the applicant to understand what he has read and to write answers concerning that statement.

I think those should be received in evidence and I will offer them, your Honor.

(Defendants' Challenge Exhibits 107-A to 107-F for identification, inclusive, received in evidence.)

Mr. Gladstein: Your Honor said that these tests are simple. I think when you check them you will find they are not so simple, but if your Honor is interested, (2797) on November 19, 1948—

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

Mr. Gladstein: —it was reported—

The Court: The only thing is, it just adds to the record. I can look at them, you know, and I will look at them just as soon as the clerk has marked them.

(Exhibits handed to the Court.)

The Court: You may go right ahead.

Mr. Gladstein: Will you mark this for identification.

(Marked Defendants' Challenge Exhibit 108 for identification.)

Q. I show you Exhibit marked 108 for identification. Please state whether it was prepared under your supervision? A. It was.

The Court: By the way, what mark did they have to get in order to pass?

The Witness: Information in that regard I don't have. I do know, however—maybe you don't want to know—

Mr. Gladstein: Perhaps you had better tell the Judge.

The Court: Well, if you don't know what a person had to get to pass, I think speculation on the (2798) subject—

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The Witness: That information is not made public, but there is made public information about a proportionate number who do fail.

The Court: I wanted to know what they had to get to pass. I notice at the bottom it says "Number of answers correct." They look awfully simple to me; I don't see how anybody could get any of them wrong, but I suppose you could, and I wondered as to what the passing grade is, but we don't know that.

By Mr. Gladstein:

Q. Now, I want to ask you about the last exhibit, Mr. Wilkerson. Was it prepared under your supervision?

A. It was.

Q. And to what does the exhibit refer, the content of it? A. This exhibit indicates the party enrollment of voters in 1946, in relationship to the party enrollment of jurors in 1946 for two jury panels, the panel of January 17, 1949, and of January 4, 1949, with reference to three political parties: the Republican, Democratic and American Labor Party.

Q. Is the source of your information shown on the exhibit? A. The source is shown on the exhibit.

Q. Are all of the sources, the complete enumeration of sources, there indicated? A. Yes, they are complete.

(2799) Q. What does that exhibit show?

Mr. Gladstein: Do you want the copy, Mr. McGohey?

Mr. McGohey: I should like to.

The Court: Isn't that what we ruled out the other day?

The Witness: This has never been offered.

The Court: This is different?

The Witness: That has never been offered.

The Court: I remember something the other day about these party affiliations, and it seemed to me then that without some proof that the clerk knew something about those things, it was just sort of

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speculative; but perhaps it was a different subject, so you may go ahead if there is no objection.

Mr. Gladstein: There is a question pending, Mr. Wilkerson. What does that exhibit show?

I will look for a copy for you, Mr. McGohey.

Mr. McGohey: I should like to have it before the witness starts to testify about something that is not in evidence.

Mr. Gladstein: You know, I could mention that earlier in these proceedings—not that I want to deprive Mr. McGohey of any copy I have at any time he wants it—but earlier in these proceedings when he was examining (2800) on cross-examination I think some jurors, and he showed him a questionnaire or a qualification blank, or a letter, he would have it marked for identification and he would question the witness; and once I recall one of us saying “May we see it, Mr. McGohey?” and he said the usual custom here is that we ask the questions laying the basis first, and then as we are about to offer the document in evidence we then give it to counsel.

Now, I am perfectly willing, however, not only to abide by that, if that is the rule, but even to accord every courtesy to Mr. McGohey and give him a copy if we have it before I offer it in evidence. I was just asking one of my associates to look for such a copy, that is all.

Mr. McGohey: If your Honor please, I don't remember this discourse or this colloquy that Mr. Gladstein has just related, but I raise no questions about laying a foundation for getting it in, but when the witness starts to describe what is in it I think I ought to be allowed to look at it.

The Court: That is right. I think that is clear enough, and you have got the paper now, so we can go right ahead.

Mr. Gladstein: Will you answer the question, (2801) Mr. Wilkerson?

Mr. McGohey: May I have the question read, please?

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The Court: Yes.

(Question read as follows: "Q. What does that exhibit show?")

Mr. McGohey: If your Honor please, I call the Court's attention to Defendants' Challenge Exhibit 96 for identification and 97 for identification which were not received after objection was made, and I object now to any testimony by this witness from this exhibit—I don't know its number,—

The Clerk: 108 for identification.

Mr. McGohey: —Defendants' Challenge Exhibit No. 108 for identification, which is designated Table P-5, because it appears to be the same kind of data appearing in Exhibits 96 for identification and 97 for identification which, as I say, were not admitted.

Mr. Gladstein: It is different. It is obvious on its face that it is different.

By Mr. Gladstein:

Q. Would you explain the difference between the two without testifying as to the contents of the exhibit, Mr. Wilkerson? A. The exhibits here referred to were—

Mr. McGohey: 96 and 97 for identification. I think they are denominated Tables P-1 and P-2.

(2802) The Court: That is right.

The Witness: All right. No. 1, Exhibit 97, has nothing whatever to do with registrations or votes by particular political parties; but the Exhibit 108 here offered does give analysis of distribution of jurors according to political enrollment and distribution of the voting population—registered population according to political parties.

With reference to Exhibit 96, that exhibit indicates for the several Congressional Districts of Manhattan and Bronx the ratio of the number of voters—that is, it gives the number of jurors per 10,000 voters on six panels, first in relation—yes, the number of voters on six panels per 10,000 votes

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cast in the CD, and it also gives such ratios in relationship to the vote cast for the Republican Party and the vote cast for the American Labor Party. But the table under consideration here, Challenge Exhibit 108, has no information concerning the vote cast for any party, and differs still further from Exhibit 97, which was rejected, in that it has no reference to political parties, though this one does.

Mr. McGohey: Has your Honor seen the exhibit?

The Court: Yes. Do you object to it?

Mr. McGohey: I object to it and I object to (2803) any testimony with respect to it.

The Court: Sustained. It seems to me that it proves nothing of any consequence.

Mr. Gladstein: May I have the copy to examine for a couple of other questions?

(Copy handed to Mr. Gladstein.)

Q. Well, with respect to Exhibit 108 for identification, Mr. Wilkerson, I will ask you to state whether the sources reported thereon are correctly reported? A. They are.

Q. I will ask you to state whether the data utilized in preparation of that exhibit was obtained from those official sources indicated on that exhibit? A. They were.

Q. I will ask you whether the tabulations you made mathematically that are shown on the exhibit are true and correct? A. They are.

Q. I will ask you whether the data and conclusions shown on that exhibit are honest and correct? A. They are.

Mr. Gladstein: I renew my offer.

Mr. McGohey: Objected to.

The Court: Sustained. I consider that to be a reaffirmation of the ruling I made last week.

Mr. Gladstein: May I make an offer to prove? (2804) I offer to prove that if this witness were permitted to answer questions—

Mr. McGohey: I object, your Honor—

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The Court: Mr. Gladstein, can it be doubtful that what you have offered here in this exhibit is what you are offering? You want to make an offer of proof, but it seems to me, as it seemed to me in so many other instances, that what you are offering to prove is self-evident.

Mr. Gladstein: All right, if it is clear to the Court, and it is a matter of record that if I were permitted to question the witness and he were permitted to answer he would testify to the facts, figures and data contained in and shown in Exhibit 108 for identification.

The Court: That is right.

Mr. Gladstein: Is that understood, your Honor?

The Court: Yes.

Q. Now will you take a table that is marked P-6—

Mr. Gladstein: Will you mark this for identification, sir.

The Witness: I think P-6 and P-7 should be together.

Mr. Gladstein: Well, we will do it one at a time.

(2805) (Marked Defendants' Challenge Exhibit 109 for identification.)

The Court: Is P-6 another new one?

The Witness: It is.

Mr. Gladstein: Do you have an extra copy for the Court?

The Witness: I don't have—wait a minute, I may have.

Mr. Gladstein: Here is one for your Honor. Will you give this to the Judge, Mr. Clerk.

(Handed to Court.)

The Court: Thank you. What is the number given to this P-6?

The Clerk: 109 for identification.

Q. Did you prepare that Exhibit 109? A. I did.

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Q. To what does the content of that exhibit refer?
A. That exhibit lists by assembly districts as of 1940
the number of jurors on the panel of February 6, 1940, and
on the panel of April 14, 1941.

Q. Is the source of information shown on the exhibit
indicated on the exhibit? A. The sources are fully indicated.

Q. What was done with the information obtained from
those sources? A. We analyzed the incidence of jurors
(2806) on these two panels for the Assembly Districts
1940 in relation to the percentage of the population of
voting age that actually registered to vote by Assembly
Districts of the same date, 1940.

Q. And that is— A. That information is set forth in
what we have here as Table P-7.

Q. What does that exhibit show? A. You are thinking
of P-6?

Q. Yes. A. The exhibit shows that in certain Con-
gressional Districts, namely—I mean certain Assembly
Districts as of 1940, namely, No. 4, there were no jurors
on the list of February 6, 1940, and none on the list of
April 14, 1941.

Assembly District 5 had five on the first list, February
6, 1940, and none in the April 14, 1941. I won't read all
of these, but I would call attention to eight Assembly Dis-
tricts that have been marked by special symbols on the
table. The fourth and the sixth Assembly Districts in
Manhattan were entirely without jurors for the two panels
analyzed.

Mr. McGohey: Now, if the Court, please, I ob-
ject to any further testimony with respect to this
exhibit and I move to strike the testimony already
given on the ground that it is all immaterial. The
witness has testified, and apparently the table pur-
ports to (2807) show that two jury panels did not
have residents of certain Assembly Districts. I say
that that is immaterial and proves nothing. I ob-
ject to the testimony and I object to the table.

Mr. Gladstein: Well, we can only go with this
question part of the time, your Honor. We have not
had the time and could not possibly have the—

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

The Court: You have got those geographical things showing where every single juror came from, and I have great difficulty in seeing the legal significance of this correlation to Assembly Districts, and things of that kind.

Mr. Gladstein: We are going to do that by having a map offered, your Honor, which will show where these Assembly Districts are located.

Q. You have such a map, do you not, Mr. Wilkerson?
A. I may have.

The Court: It seems to me that it already sufficiently appears in those charts with the pins on where every single one of these jurors resides—that is, every single one of the jurors in the panels to which the charts relate; so I will sustain the objection and grant the motion.

Mr. Gladstein: Well, I will ask the witness this (2808) question regarding this exhibit, 109 for identification:

Q. Are the figures and data shown on it true and correct? A. They are.

Q. Did they come from the official sources indicated on the exhibit? A. They did.

Q. Did you make tabulation or calculations from those official statistical data in order to tabulate the information shown on the exhibit? A. I did.

Q. Were the tabulations correct? A. They were.

Q. Were they checked for accuracy? A. They were.

Q. And your testimony is that everything set forth on Exhibit 109 for identification is true, accurate and correct, is that right? A. That is right.

Mr. Gladstein: I offer it.

Mr. McGohey: Objection.

The Court: Sustained.

We will now adjourn until tomorrow morning at 10.30.

(Adjourned to February 8, 1949, at 10.30 a.m.)

Colloquy of Court and Counsel

(2809)

New York, February 8, 1949;
10.30 a. m.

* * *

The Court: Very well. Now, I noticed that all day yesterday, as I remember it, Mr. McCabe and Mr. Isserman and Mr. Crockett were absent, and today Mr. Sacher is also absent. Now I did say the other day, and I repeat now, that it is perfectly agreeable to the Court to have counsel absent himself for a time, which I meant going out of the room for this or that because Mr. Isserman requested permission two or three times; but if we reach a point (2810) where some of the defendants begin objecting to going ahead because counsel is not here then I perhaps shall have to have some other way of doing it.

Now I am assuming when counsel are absent, as they are today and were yesterday, that that is just for a time and that it is agreeable to all the defendants that they be absent and not to have some of them suddenly get up as they did the other day and protest our going ahead in the absence of their particular counsel.

Now do you think I am warranted in making that assumption, Mr. Gladstein?

Mr. Gladstein: I was not present when the occurrence that your Honor refers to took place. That was not at all comparable to the present situation. I may say that the absence of Mr. Isserman yesterday and Mr. Crockett, and for part of the day Mr. McCabe, was by consent of all.

The Court: I do not criticize it at all.

Mr. Gladstein: I understand.

The Court: All I want to do is to be a little beforehand about these things so that suddenly we do not meet another situation such as we had before. And all I am saying is, that when counsel are not here and nothing has been said to me about permission for them to be absent I am assuming that their absence is very temporary and (2811) that all of the defendants are perfectly agreeable to going ahead without them.

Colloquy of Court and Counsel

Mr. Gladstein: That assumption is based upon the fact, which I want to state, that when an attorney, as yesterday, is absent from the courtroom for the day it is because he is engaged in matters connected with the case; whereas the occasion the Court referred to when the defendants or several of them refused to go ahead without their attorneys, on that occasion their attorneys were not engaged in matters connected with the case but were outside of New York on other matters. One of them was a matter that I had permission of the Court to absent myself on.

The Court: That is right, you did. Well, there seems to be no difference between us at all on it. I have felt probably we were not going to have any more difficulty of that kind, and I am very glad to extend the courtesy to counsel to be away from time to time, as they are now, working on the case and doing whatever their duties call upon them to do.

Mr. Gladstein: Very good.

The Court: And I think we can leave it right where it is.

Mr. Gladstein: Very well.

(2812) DOXEY A. WILKERSON, resumed the stand.

Mr. Gladstein: Yesterday, if the Court please, there was offered in evidence and I think received a table, the number of which I do not have. It has a designation 11-C at the top.

The Clerk: That would be 106.

Mr. Gladstein: I would like to substitute a copy for that. All the tabulations are the same, but the new copy I propose to substitute contains a notation indicating the source from which the basic data shown in the table was taken.

Have you any objection to that, Mr. McGohey?

The Court: Let me just get my exhibits together here. I think here is one. That may be handed back.

Colloquy of Court and Counsel

I have felt a little concerned about a ruling I made on that exhibit that had to do with the Assembly districts. I wonder if you could get that out and let me take a look at that again. My concern is that I do not quite understand the matter and I thought perhaps in fairness it would be better for me to give it a little consideration here this morning after I understood it better.

The Witness: I have another copy here, Mr. Gladstein.

Mr. Gladstein: Let me see the copy, if you (2813) will.

The Court: I think probably I did not keep a copy here because it was merely marked for identification and I ruled it out.

What is the number of this for identification?

The Witness: 109.

Mr. Gladstein: I am told 109.

The Court: 109?

Mr. Gladstein: Yes.

The Court: Now Mr. Gladstein, I wish you would explain to me why, having covered the matter so exhaustively in connection with Congressional districts, you feel that there is some special significance in these Assembly districts.

Mr. Gladstein: Yes. That tabulation, if the Court will notice, represents the years 1940, 1941. That was a period prior to the Congressional reapportionment in Manhattan and Bronx. The Assembly districts or the areas with which we are concerned for the purposes of this proceeding are important because they remained static in so far as those neighborhood areas that we are talking about, that we are concerned about; and your Honor will recall that we used the Congressional boundaries on all maps primarily as a frame of reference.

We now desire to show data concerning those Assembly (2814) districts, and by reference to other exhibits in evidence, it may be shown that the Assembly districts covered by the tabulation the Court is looking at remained the same regardless of Congressional boundaries, regardless of the change in 1944.