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A Tale of Two Typewriters*

HERBERT L. PACKER†

“The trial . . . is not an investigative, but a demonstrative proceeding.”¹ It is up to the parties to supply the information on which a verdict rests. What comes out depends on what goes in.

The truth of this view of the Anglo-American judicial process is nowhere more clearly exemplified than in what a British observer has called “the strange case” of Alger Hiss.² After two trials, a jury convicted Hiss of perjuring himself when he swore to a grand jury that he had never passed government documents to Whitaker Chambers. Stripped of its baroque ornamentation, the evidence which the jury must have believed came down to two things: Chambers’ assertion that Hiss had passed documents to him, and the existence of papers concededly prepared for espionage purposes and concededly typed on a typewriter owned by Hiss. Everything else in the case—the prothonotary warbler which Hiss may or may not have told Chambers he saw, the bedroom at 30th Street where Chambers may or may not have slept, the \$400 bank withdrawal that may or may not have been given to Chambers by Hiss, the performance of “She Stoops to Conquer” that the Hisses and the Chamberses may or may not have attended together, the red rug that may or may not have been a gift to Hiss from his grateful friends in Russia—all the myriad details which made for such fascinated speculation at the time and which have not, even now, lost their power to prod the imagination, all of them were, finally, peripheral, if not irrelevant. The business of counting inconsistencies—so many for Hiss, so many for Chambers—became, even at the time of the trials, little more than a sideshow in the shadow of the central question: how could documents which were surely intended to be used for espionage have been typed on the typewriter of an innocent man? One might disbelieve Chambers, but

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1. MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 71-72 (1956).

2. JOWITT, *THE STRANGE CASE OF ALGER HISS* (1953).

how could one disbelieve Chambers plus the typewritten documents?

It was the defense's failure to advance an explanation that sent Alger Hiss to the penitentiary. It was, in the end, a failure of proof. The jury was not given a plausible explanation for the existence of the incriminating documents, which might have enabled them to crystallize the doubts they must surely have felt about Chambers' largely uncorroborated, often confused and self-contradictory story. From the universe of relevant facts, known and knowable, the defense had not succeeded in extracting and placing before the jury the basis for a reasonable doubt about the central charge of espionage.³ And so it is not surprising that the defense, having failed to convince higher courts that errors of law vitiated Hiss's conviction, was led to reject the fatal concession and to assert for the first time that the incriminating documents had not been typed on the machine owned by Hiss but had instead been deliberately forged so that all would think they had come from Hiss.

The effort to demonstrate that forgery by typewriter could have taken place and had in fact been committed was, legally, a failure. The motion for new trial in which it was put forward was denied.⁴ That was almost six years ago. Ancient history, one might think, and obscure ancient history at that; for by the time the motion for new trial came on to be argued Hiss had spent almost eighteen months in prison, the public excitement over the case had lapsed, and one may surmise that most of the few people who bothered to learn from their daily papers that Alger Hiss had been denied a new trial had no notion of why the new trial had been sought and what merit, if any, there was in the plea.⁵ So it might have re-

3. As a matter of strict technical accuracy the charge against Hiss was perjury. He was indicted on two counts for having falsely sworn that he had not passed government documents to Whittaker Chambers and that he had not seen Chambers after January 1, 1937. As a practical matter, the trials were mainly devoted to proving the first count; indeed, much of the evidence tending to support it also supported the second. The dates of the documents passed were such that if the jury believed they went from Hiss to Chambers they necessarily also believed that Hiss saw Chambers after January 1, 1937. The essential charge, then, was that Hiss lied when he said he had not committed espionage (*i.e.*, passed government documents to a person not authorized to receive them). As a matter of substance, the charge being tried was a charge of espionage, in the familiar form of a perjury prosecution to obviate what would otherwise be the bar of the statute of limitations.

4. The chronology is set forth, note 5 *infra*. It is interesting, although hardly profitable, to speculate on what might have happened if the new defense theory of forgery by typewriter had been put before the jury at the first or second trial. See note 26 *infra*.

5. Hiss was found guilty on two counts of perjury on January 21, 1950, and sentenced to five years' imprisonment on January 25. The judgment of conviction was affirmed on December 7, 1950, *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), and the Supreme Court denied certiorari on January 27, 1951. 340 U.S. 948 (1951). The motion for new trial was filed on January 24, 1952, and argued on June 4. On July 22,

mained, a dusty footnote to a famous old case, of interest only to fanatical partisans of one or the other protagonist, had Alger Hiss not chosen to carry his plea to the only forum now open to him.

Lawyer to the last, Hiss has titled his book as a brief would be captioned. But we are no longer in the United States District Court for the Southern District of New York. What we must take to be Alger Hiss's final brief has been filed in the court of public opinion.⁶ What does it add to the stacks of pages that have piled up since Chambers made his first public accusation in August, 1948?

What the book is not appears more readily on a first reading than what it is. It is not, to begin with the most obvious point, an "inside story." There is little in the book that could not be derived from a close (if biased) reading of the public record and of contemporaneous newspaper accounts of the congressional hearings and the trials. Very little of Hiss the man comes through, except a kind of stereotype or folk-image of the "smart lawyer"—austere, precise, a little picayune. We get no glimpse of the charm of manner or the distinction of mind which won and kept for him so many distinguished friends. Nor is his book the vehicle for sensational new revelations about the facts. Hiss has not, as everyone must now know, either confessed that Chambers told the truth or suggested why Chambers lied. The book is no more sensational in tone than it is in content. This has disappointed many, and has convinced some that Hiss must be guilty, because (so they say) a truly innocent man would be more vociferously indignant.⁷ I cannot agree that guilt or innocence are to be measured in decibels; and I find the tone of the book—quiet, reasonable, almost good-tempered—a welcome antidote to much of the sensationalism produced by the case. But *In the Court of Public Opinion* has the defects of its virtues. Its lack of drama and color cause the attention to flag, and this can be fatal to a book whose impact must depend on making the reader pay close and continuous attention to a very complicated narrative.

But we can agree that its quality as literature is not what a commentator on Mr. Hiss's book is expected to celebrate or de-

1952, Judge Goddard, who had also presided at the second trial, denied the motion for new trial. 107 F. Supp. 128 (S.D.N.Y. 1952).

6. HISS, *IN THE COURT OF PUBLIC OPINION* (1957) (hereinafter cited as Hiss).

7. See, e.g., Editorial, *Hiss in Public Opinion*, The Washington Post and Times-Herald, May 10, 1957, p. A22.

plore. What we want to know is whether the book sheds any new light on the case. "New light" cannot, after two trials, after conviction, after appeal, mean a rearrangement of subordinate corroborating or impeaching facts. It can only mean something that will clarify for us the ultimate question of guilt or innocence.

"Guilt" or "innocence," in turn, cannot be limited to the precise charges laid in the indictment, because Hiss's defense was not merely that he had not passed state department papers to Chambers but, more sweepingly, that he had never taken part in underground Communist activities of any kind. It is conceivable that he was not guilty of the precise charges for which he was convicted, and if that turns out to be so, a miscarriage of justice certainly occurred. But, in view of the position of absolute innocence that Hiss maintained throughout, not many tears will be shed for him if it should appear that he was up to his neck in other Communist activities. The Hiss book is devoted to showing how and why he was wrongly convicted, not to establishing his total innocence. Consequently, any assessment of the book's comparative success or failure has to be limited to what Hiss has to say about the manner in which, by his account, he was "framed" by Whittaker Chambers. What he has to say on this score comes down to a restatement of his motion for a new trial, which is thus now for the first time put before a general audience. The essence of his motion for a new trial is the "tale of two typewriters," which is an attempt to demonstrate, as Hiss said just before he was sentenced, "how Whittaker Chambers was able to carry out forgery by typewriter."⁸ In the rest of the Article I will attempt first to analyze that tale and second to explore the assertion of total innocence and the adequacy of the present record on that issue.⁹

8. Other grounds relied on in the motion for new trial included impeachment of the credibility of Edith Murray, a government rebuttal witness who had identified the Hisses as visitors at the Chambers residence in Baltimore; evidence tending to show that Chambers left the Communist party several weeks before the date of the last state department document which he claimed Hiss had given him as a Communist agent; and the assertion that Lee Pressman's testimony, *infra* p. 432, showed that Hiss had not been in a Communist group to which Chambers claimed he belonged. Hiss 385-95. Of these several grounds, perhaps the most troubling is the suggestion that Chambers had withdrawn from the underground Communist movement before he could have received certain documents from Hiss. The matter is not treated adequately in Judge Goddard's opinion denying the motion for new trial. However, the newly proffered evidence was not inconsistent with the possibility that Chambers was readying his retreat to respectability at the same time that he was winding up his work for the Communists. This possibility makes Chambers look a bit less highminded than he makes himself out to be; but that does not help Hiss.

9. In so limiting this consideration of the questions raised by Mr. Hiss's book, I do not mean to suggest that it contains nothing else of value or of interest. The book raises

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The "forged typewriter" theory is a complicated one and cannot be intelligently evaluated without a detailed and, I fear, a tedious recital of what the defense did, what questions it asked its experts (as well as what questions it did not ask), and what answers its experts gave (as well as what answers they did not give).

In February of 1950, after Hiss's conviction at the second trial, Mr. Chester Lane entered the case as counsel of record for Hiss in connection with his appeal, which was briefed by Mr. Lane together with Mr. Robert Benjamin and argued by Mr. Benjamin. That appeal ended in the affirmance of Hiss's conviction by the Court of Appeals for the Second Circuit and the denial of certiorari by the Supreme Court. At the same time, Mr. Lane began to speculate on the possibility that the defense at the trial was wrong in conceding that the typewritten state department documents alleged to have been prepared on the Hiss typewriter and handed to Chambers (the "Baltimore Documents")¹⁰ had in fact been typed on the same machine as certain letters of Mrs. Hiss, which had been typed on a Woodstock typewriter owned at one time by the Hisses (the "Hiss Standards").¹¹

The defense concession was based on the unchallenged evidence of an FBI expert on questioned documents, Ramos C. Feehan, that the Baltimore Documents and the Hiss Standards had been typed on the same machine.¹² Feehan's testimony related the occurrence

interesting and troubling questions about the interaction of congressional investigation with criminal prosecution, about the creation of an atmosphere in which fair trial becomes measurably more difficult, and about other aspects of the administration of criminal justice which are not invulnerable to criticism. That these questions are important I would be the last to deny; but they are not unique to the Hiss case and the Hiss case is not unique because of them.

10. So called because they were proffered by Chambers during a pretrial deposition held in Baltimore in connection with a libel action by Hiss against Chambers.

11. The story of how the theory evolved and was tested is set forth in Hiss, c. XI, which consists of extracts from the motion for new trial, interspersed with connecting comments by Hiss. The complete text of the motion with supporting affidavits is contained in Appendix to Appellant's Brief on Appeal From Order Denying Motion for New Trial on Ground of Newly Discovered Evidence pp. 4a-169a, United States v. Hiss, 201 F.2d 372 (2d Cir. 1953) (hereinafter cited as Motion Papers). Interested readers will want to consult these documents in their entirety, particularly the affidavits of Mr. Chester Lane, from which I have drawn the account that follows.

12. At no time in his cross-examination was Feehan challenged as to his conclusions about the similarities between the Hiss Standards and the Baltimore Documents. Mr. Claude Cross, Hiss's attorney at the second trial, conceded in his summation that the Baltimore Documents had been typed on the Hiss typewriter, and no question was ever raised as to whether the typewriter in evidence, 230099, was the Hiss typewriter. As Mr. Cross put it: "it is not the question of what typewriter was used but who the typist was." Transcript of Record, p. 3162, United States v. Hiss, 185 F.2d 822 (2d Cir. 1950) (hereinafter cited as Transcript of Record).

in the two sets of documents of similar deviations from the norm in ten characters. Mr. Lane speculated that it might be possible to construct a typewriter that would duplicate some or all of the characteristics of another typewriter and that if it were possible to do so, doubt would be cast on Feehan's conclusion that the presence of similar identifying characteristics in the Baltimore Documents and the Hiss Standards meant that they had been typed on the same machine.

In short, the first part of Mr. Lane's theory was that forgery by typewriter could be committed. It would still remain, of course, to show a probability that forgery by typewriter had been committed.

Mr. Lane asked a typewriter engineer named Martin Tytell whether it would be possible, without having a particular machine in his possession, but working only from samples prepared on that machine, to make another machine that would produce work containing sufficient similarities to the original samples that the tests applied by Feehan would result in the conclusion that the samples and the "forgeries" were produced on the same machine. If Tytell had said "No," that would presumably have been the end of the matter, and the case would not have taken its new and interesting turn. But Tytell did not discourage Mr. Lane. On the contrary, he went beyond Mr. Lane's question and said that he could not only produce a typewriter that would duplicate *some* of the characteristics of an original sample but that he could produce a machine that would do work so similar in *all* respects that no expert, even one forewarned about the possibility of forgery by typewriter, could distinguish the work produced on the fake machine from the original sample. (It should be said at this point that Tytell did not entirely succeed in making good his claim.) Encouraged by Tytell's optimism, Mr. Lane commissioned him to build a typewriter that would effectively "forge" samples produced on the typewriter introduced into evidence at the trial as the Hiss machine. (Since there is a question whether that typewriter was in fact the Hiss machine, I will not refer to it as such but instead will designate it by the serial number it bears, "230099.")

Number 230099, as all who followed the Hiss case will recall, was a Woodstock typewriter which, it appeared, had originally been owned by Mrs. Hiss's father, Thomas Fansler. It had been used by Mr. Fansler in his business, had been given by him to the

Hisses, had been used by them, had been given to Perry Catlett, the son of one of their maids, during or after one of their moves, probably in the winter or spring of 1938, had then passed through various hands and had, finally, on the eve of the first trial, been located and purchased by the defense. It was introduced into evidence at both trials and had been considered by all concerned to be the machine on which both the Hiss Standards and the Baltimore Documents were typed. (Indeed, the primary defense effort was to show that the machine had been given to Perry Catlett before the earliest dates on which the Baltimore Documents could have been typed.) After the second trial, 230099, together with other defense exhibits, came into Mr. Lane's custody where it has remained ever since.

Mr. Lane supplied Tytell with specimens of typing done on 230099.¹³ Tytell never saw the machine itself. Working entirely from the specimens, Tytell set about to construct a machine that would produce work indistinguishable from the specimens. Meanwhile, Mr. Lane attempted to get the services of an examiner of questioned documents who would inspect the results as the work progressed and give suggestions for improvements. He encountered great reluctance, apparently motivated either by disbelief that the experiment could succeed or by fear that it might. (The stock-in-trade of examiners of questioned typescripts is that typewriters are unique, and a conclusion that their supposedly unique characteristics can be reproduced would have as shattering an effect on the art of document examination as a discovery that fingerprints can be artificially forged would have on the present police system of identification.)¹⁴ But at length Mr. Lane found a professional, Miss Elizabeth McCarthy, who was willing to break ranks. She aided in the work, compared the product of Tytell's machine with the samples of 230099, and pointed out where the similarities had been fixed and where further refinement was necessary. Finally, after some eighteen months of work, impeded by the difficulty in getting expert advice, Tytell produced a machine whose work, so Miss McCarthy swears, is so similar to the 230099

13. There had been testimony at the trial that the Hiss typewriter was unworkable when it was given to Perry Catlett and had remained so subsequently. The defense did not have 230099 repaired after they obtained it. It was typed on without apparent difficulty at the trial, Transcript of Record, p. 3019, and Mr. Lane had no difficulty in using it to prepare specimens for Tytell. Hiss 374.

14. For a description of the technique of examining questioned typescripts, see OSBORN, *QUESTIONED DOCUMENTS*, c. 32 (2d ed. 1929).

samples that, although she herself can still detect differences, "an expert in the field, however highly qualified, would find it difficult if not impossible to distinguish between samples from the two machines."¹⁵

Another expert, Mrs. Evelyn Ehrlich, was called upon to give an opinion whether the product of 230099 was distinguishable from that of the Tytell machine. For some reason that Mr. Lane does not explain, Mrs. Ehrlich was forewarned about the possibility of forgery, and her opinion reiterates in substance the conclusion reached by Miss McCarthy: that she could detect the differences, but only because she had been forewarned, and that an expert who was not forewarned could not have detected differences.¹⁶ Two obvious comments on this opinion of Mrs. Ehrlich's: First, Tytell's claim was not substantiated—an expert who *was* forewarned *could* tell the difference; second, and more important, the opinion lacks the authority it might have had if Mrs. Ehrlich had not been told in advance that forgery was involved but had simply been asked to say whether a certain group of documents had all been typed on the same machine. If that procedure had been followed, then we might have the opinion of an expert (not forewarned about forgery) that the documents were all typed on the same machine. Such an opinion would be far more convincing proof of the possibility of successful forgery than is the opinion we have from Mrs. Ehrlich: that she can tell the difference but that she doesn't think anyone else, unforewarned and applying the conventional tests, could do so. Of course, there is another possibility. Mrs. Ehrlich, unforewarned, might still have succeeded in separating the products of the two typewriters; and if that had happened, Mr. Lane wouldn't have had much to show for the Tytell experiment. As it is, we have only an opinion that it would be possible to forge a typewriter that would fool an expert; we do not have proof in the form of an expert who has been fooled.

However, this cavil goes only to the investigative technique followed by Mr. Lane. In fairness to him, it should be pointed out that his experiment was cut short by the necessity of filing the motion for new trial within two years after the final judgment against Hiss.¹⁷ The Tytell machine could have been improved further, so

15. Hiss 370. See also Motion Papers 58a.

16. Motion Papers 62a, 156a.

17. FED. R. CRIM. P. 33.

Tytell says, and possibly an expert could have been fooled by the similarity between its product and that of 230099. Indeed, the defense submitted samples from the two machines and challenged the Government to have its experts state which documents were typed on which machine, a challenge which the Government ignored (as it was entitled to do on a motion for new trial).

The construction of the Tytell machine certainly suggests at the very least that forgery by typewriter can be committed. But had it been? Let us consider for a moment what would be convincing proof that a forged typewriter had been used to type the Baltimore Documents. We have three pieces of evidence: (a) the Hiss Standards, (b) the Baltimore Documents, and (c) the samples typed on the typewriter in evidence, 230099. We have, let us say, an (unforewarned) examiner of questioned documents whose competence and impartiality are beyond reproach. He examines and compares the documents. What is the range of possible conclusions? He may, of course, conclude that all three categories were typed on the same typewriter. That, in effect, was the conclusion reached at the trial, although it was in part based on mere surmise because there was no comparison of the Hiss Standards and the Baltimore Documents, on the one hand, with samples of typing from 230099, on the other. Or, our expert might conclude that each of the three categories was typed on a different machine. Such a conclusion would possibly prove too much, for it is almost inconceivable that the Hiss Standards and the Baltimore Documents were typed on different machines and that *neither* was typed on 230099. A tale of *three* typewriters would lead us to think that our expert is being over-refined in his analysis and is spotting differences that are not significant.

Our expert might, then, conclude that the Hiss Standards and the Baltimore Documents were typed on the same machine, but that machine was not 230099. That conclusion would mean that 230099 was not the Hiss typewriter, but the essence of the case against Hiss was not that 230099 was the Hiss typewriter but that the Hiss Standards and the Baltimore Documents came from the same typewriter, whatever that typewriter was.

The only evidence, then, that at this point in our analysis would seem to substantiate a charge of forgery is evidence that the Hiss Standards and the Baltimore Documents were typed on different machines, and that one of the machines was 230099. Does it matter

which set was typed on 230099? I think that it does. If our expert were to tell us that the Hiss Standards but not the Baltimore Documents were typed on 230099, there would be no difficulty in fixing the provenance of 230099. It would be just what it appears to be: the typewriter which the Hisses owned and used until 1937 or 1938, when they gave it to Perry Catlett, and which then passed through various hands until it was discovered by the defense investigators in the spring of 1949. There would be no question of anyone's having tampered with *that* typewriter in some unexplained way. The forgery would have been committed, as Tytell's work leads us to think it might have been, by someone's constructing a machine from samples of the type work of 230099 and using that machine to type the Baltimore Documents.

But if our expert were to tell us that the Hiss Standards did not come from 230099 but the Baltimore Documents did, a number of troublesome questions arise that would not have arisen in the case just mentioned. What these questions come down to is this: If 230099 is not the Hiss typewriter, how did it come to be found where the Hiss typewriter should have been? And how did Chambers (if there was forgery and he was the forger) know where the Hiss typewriter should have been expected to be found? And if, somehow, he knew that, why did he not use the Hiss typewriter itself instead of laboriously constructing a forgery and then planting it in place of the purloined Hiss machine? We shall have to return to these questions at greater length because, as we shall now see, the theory adopted by the defense requires them to be answered.

After making a comparison of the originals of the Hiss Standards, the Baltimore Documents, and samples from 230099, for the first time, Mrs. Ehrlich reached the firm conclusion that the Hiss Standards had not been typed on 230099.¹⁸ However, she was not able to say definitely whether the Baltimore Documents were typed on 230099, because the grade of paper and the quality of the ribbon used in typing the Baltimore Documents made them unsuitable for comparison. Similarly, she was not able to say definitely that the Baltimore Documents and the Hiss Standards were typed on different machines, and she limited herself to the conclusion that "the observable peculiarities in the type of the Baltimore Documents in my opinion more nearly resemble the peculi-

18. Hiss 413. See also Motion Papers 155a-61a.

arities in the typing from #N230099 than they do the peculiarities in the Hiss Standards which I used for comparison."¹⁹

Miss McCarthy also examined the originals of the three sets of documents. Her conclusion (not referred to in Hiss's book) is worth quoting *in extenso*:

Without considering the possibility of forgery, I should have concluded, by all standard tests ordinarily applied by questioned document examiners, that all three sets of documents were typed on the same machine. I should not have based this conclusion merely upon an inconsequential number of relatively identical peculiarities, but upon the more convincing fact that I find no substantial consistent deviations in type impressions as among the three sets of documents. However, my own experience has shown me that it is possible, by careful work on a machine, to eliminate almost completely the deviations which would normally have developed between its typing and that of another machine, and therefore, while I cannot say definitely that all three sets of documents were not typed on the same machine, I believe it just as possible, in the light of the observable facts, that the Baltimore Documents were typed on a machine which was not the original Hiss machine used for the standards, but another machine made to type like the original Hiss machine. Since the typing of the Baltimore Documents so closely resembles the typing of the specimens from the so-called Hiss machine, and since Dr. Norman has furnished evidence that that machine is a deliberately fabricated one, I can only conclude that, as between the two possibilities, the forgery of the Baltimore Documents is the more likely. If the Baltimore Documents are forged, the forgery is a good one, but it is no better than I know would be possible with careful workmanship.²⁰

This is pretty indecisive evidence. Miss McCarthy admits that if she were not alerted to the possibility of forgery she would have concluded that all three sets of documents came from the same machine. But, as she herself says, she was alerted to that possibility, and further, she was apprised of the existence of certain other indications (which we shall come to presently) that forgery might have been committed. In this state of hyper-consciousness, is it entirely unreasonable to suppose that Miss McCarthy may have looked so hard for signs of divergence that she found what she was looking for—and that what she was looking for was, in fact, not there? The examination of questioned documents is, after all, not an exact science; it is the exercise of judgment—highly informed, technically competent, but still, in the end, judgment. It is this

19. Motion Papers 159a.

20. Motion Papers 149a-50a.

consideration that makes it especially unfortunate that Mr. Lane did not obtain a completely "blind" expert opinion on the samples from 230099 and the Tytell machine. If we had that, we would have some kind of benchmark for assessing what weight, if any, to assign to the fact that the examination of the crucial papers—the Baltimore Documents and the Hiss Standards—was *ex necessitate* carried on by experts who were alive to the possibility of forgery, and whose judgment must have been affected by their knowledge. As it is, we can only surmise, and if there were no other evidence tending to support a conclusion of forgery, my surmise would be that Mr. Lane's experts (acting, be it said, in perfect good faith) had been influenced by their consciousness that forgery might have been committed into concluding that it had been when in fact it had not.

We would be justified, I think, in dismissing the defense theory if it rested on no more than what I have just described. But comparison of the documents did not exhaust the basis for concluding that forgery had been committed. Mr. Lane's investigation led him to conclude, and to offer evidence in support of his conclusions, that 230099 itself, its history and its present condition considered, was—irrespective of what one might be able to prove about document comparison—a machine deliberately fabricated to appear to be what it was not. He asserted (1) that its probable date of manufacture made it in the highest degree unlikely that 230099 could have been the typewriter which Mr. Fansler owned and later gave to the Hisses, and (2) that the type and type bars of 230099 showed unmistakable signs of having been altered in ways inconsistent with the normal processes of manufacture and repair.

Mr. Lane's second point, that the machine showed signs of having been tampered with, rests on expert opinion: in this instance, that of Daniel P. Norman, president of a firm engaged in the physical and chemical analysis of metals, papers, and other substances.²¹ It is, like the opinion of Miss McCarthy and of Mrs. Ehrlich, and like all expert opinion, a matter of judgment, of the assessment of probabilities, and not of airtight certainty. It is sharply contested by the opinion of experts mustered by the Government.²² The most that can be said of it is that, if believed, Norman's opinion lends some support to the conclusion that 230099

21. Hiss 403-4. See also Motion Papers 123a-33a.

22. Motion Papers 192a-94a, 226a-31a.

was deliberately altered for the purpose of committing forgery, but only when taken together with other evidence of forgery, if that evidence is believed.

In quite a different category, however, is Mr. Lane's contention that 230099 was manufactured by Woodstock too late to be the Hiss machine. Leaving aside for the moment the question of what Mr. Lane was actually able to produce in support of this contention, we can agree that if it could be shown, say, that Mr. Fansler, Mrs. Hiss's father, owned the "Hiss typewriter" in July of 1929 but that 230099 was not manufactured until August of 1929, then 230099 is not the Hiss typewriter. This is not a matter of probabilities but of plain historical fact. However, at the risk of wearisome repetition, I must point out that even if this is established, as a matter of historical fact, Hiss is not home free. All that has been proved is that 230099 is not the machine which the Hisses once owned. That fact is significant only if the Hiss Standards (which we know were typed by Mrs. Hiss on a machine then in the Hisses' possession) and the Baltimore Documents were not typed on the same machine. If they were, the provenance of 230099 is utterly irrelevant. So we are thrown back on Mrs. Ehrlich's opinion, and that opinion, as we have seen, did not take a firm position on the crucial question, but only on the question whether the Hiss Standards were typed on 230099.

This puts the matter in the light most unfavorable to Hiss's contention. On the other side, it should be pointed out that the three items of "forgery" evidence—the dissimilarity of the Hiss Standards to 230099, the abnormal alteration of 230099, and the date of manufacture of 230099—are mutually consistent. They all have a tendency to support the same conclusion: that the Hisses never owned 230099 and that it is the typewriter by means of which forgery was committed. This seems painfully obvious, but consider for a moment its significance. As I pointed out before, the forgery theory can take one of two equally plausible (or implausible) forms: (a) the forgery was committed on an unknown machine and the typewriter which turned up (230099) is the Hiss typewriter; or (b) the forgery was committed on 230099 and that machine is not the Hiss typewriter. The former theory, *a priori*, is by far the more likely of the two, because from all the evidence introduced at the trial it seems that 230099 *should* be the Hiss machine. Yet the three pieces of evidence which may in some degree conduce

to a conclusion that forgery was committed *all* point to the more difficult of the two theories. Each of these pieces of evidence tends to bolster the reliability of each of the other two.

Since two of the three items are matters of expert opinion evidence, with all the limitations that fact implies, the third item—the history of 230099—assumes critical importance. It does not flout the laws of probability that two experts, each approached in a highly tendentious way, could reach mutually consistent conclusions about two separate but complementary propositions and yet be wrong. But by how much is the probability that they are wrong reduced if their conclusions agree with a third connected proposition which is not a matter of opinion at all but of demonstrable fact?

If Mr. Lane had succeeded in establishing that 230099 was not the Hiss typewriter, then an impartial observer could not lightly dismiss the opinion evidence that the Hiss Standards were not typed on 230099 and that 230099 had been deliberately altered. And if these three propositions were accepted as true, even in the absence of a clear-cut opinion that the Hiss Standards and the Baltimore Documents were not typed on the same machine or that the Baltimore Documents were typed on 230099, or both, then it would be a disingenuous observer indeed who could resist the conclusion that there had been dirty work at the crossroads. Typewriter *A* does not turn up in a location and under circumstances suggesting that it is Typewriter *B* by mere happenstance. (However, as I shall presently show, such a conclusion does not necessarily exonerate Hiss, even of the precise charge against him, let alone of Communist complicity in general.)

The trouble is that Mr. Lane, through no fault of his own—indeed, after performing near-miracles of intelligent investigation—was not able to nail the point down. His argument is: (1) The serial numbers and production records of the Woodstock company for the year 1929 indicate that 230099 was not manufactured before July 3 at the very earliest and probably not manufactured until August or September of that year. (2) Expert examination of letters typed in Mr. Fansler's office indicates that he acquired the typewriter which later went to the Hisses sometime between June 29 and July 8, 1929. (3) It is therefore virtually impossible for 230099 to be the Hiss machine. The implied conclusion, of course, is that 230099 was acquired as a reasonable facsimile of the Hiss machine by the forger or forgers, who altered it to conform either

to the original Hiss machine or to samples of typing from that machine, used it to produce the Baltimore Documents, and then left it where it would eventually be discovered and mistakenly identified, as it was, as the Hiss typewriter.

Mr. Lane's account of his efforts to establish the impossibility of 230099's having been the Hiss machine reads like one of those melodramas in which the hero is forever just on the verge of making the great discovery that will clear everything up when he is checkmated by some implacable and invisible force, whose identity we never learn until the last page. The only difference here is that there is no last page. Mr. Lane, like the hero of a penny dreadful, was frustrated in what must have been a heartbreaking way at every turn, but the frustrations were never resolved.²³

Defense investigators obtained monthly production figures and the approximate serial numbers put on machines made in January, 1929, March, 1929, and January, 1930. Comparison of the figures showed a discrepancy; the difference between the two January serial numbers suggested that 42,000 machines were made in 1929, but the monthly production records showed that only 28,548 were made. It seemed, therefore, that 13,452 serial numbers were skipped during the year. Typewriter 220000 was made some time in March. Assuming that all numbers skipped were skipped before 230099 was manufactured (the assumption most unfavorable to his theory), Mr. Lane reasoned from the production figures that the highest serial number produced in June was 229866, that 230099 would have been produced on July 3 at the earliest, and that it was highly unlikely that Mr. Fansler could have used in Philadelphia on July 8 a typewriter made in Woodstock, Illinois, on July 3, especially since the intervening days included both the Fourth of July and a weekend. Unfortunately, Mr. Lane was working from incomplete figures supplied to his representative by the Woodstock people. Mr. Lane's representative was not given direct access to the figures, the Woodstock people declined to sign an affidavit prepared by his representative, and his representative declined to make an affidavit that he had prepared the affidavit that the Woodstock people wouldn't sign—all apparently for fear of getting mixed up in the Hiss case! As if this weren't bad enough, one of Mr. Lane's associates managed to track down the typewriter

23. The story of Mr. Lane's quest is summarized in Hiss 376-82. See also Motion Papers, *passim*.

salesman who had sold Mr. Fansler his Woodstock, only to discover that he had apparently burned all his sales records (which would have contained the most conclusive evidence of when Mr. Fansler bought his Woodstock) after an earlier visit from the FBI. Lurking in the background was the interesting suggestion that the FBI had, in the earlier stages of investigation, been looking for a Woodstock with a lower serial number than 230099. But this was hearsay, as Mr. Lane never managed to get an affidavit out of any of those directly involved; and, at any rate, the FBI denied it.

Of the three items of "forgery" evidence, the one relating to the date of manufacture of 230099, although far from conclusive, is the most strongly suggestive. It is also, considered apart from the other two items, the most credible. It is so, it seems to me, because it is not based on the judgment of experts but on data which all are equally competent to assess. The difficulty I have with the Ehrlich and the Norman evidence, aside from their intrinsic ambiguity, is that in point of time they were developed *after* there was reason to suppose that 230099 was not the Hiss typewriter and, presumably, with knowledge thereof. If an expert knows what he is looking for, the chance that he will find it is increased; to say so is not to impugn the integrity of experts, but only to assert that they are not unlike the rest of us. A conspicuous example of what I mean is to be found in the affidavit of Miss McCarthy quoted earlier.²⁴ She was inclined to think that the Baltimore Documents had been typed on 230099 *because* of Mr. Norman's conclusion that 230099 was a deliberately fabricated machine. To what extent did Mrs. Ehrlich and Mr. Norman reach the conclusions they did *because* Mr. Lane had rather convincingly demonstrated that 230099 was probably not the Hiss typewriter?

What all of this seems to come down to is that Mr. Lane raised interesting and troublesome questions but that he did not demonstrate the probability of forgery by typewriter to the point where a judge could say, as he must under the federal standard, that "on a new trial, the newly discovered evidence would probably produce an acquittal."²⁵ At best, Mr. Lane uncovered leads which, if it had been possible to pursue them, might have resulted in the production of evidence that would exonerate Hiss of the specific charge

24. See p. 419 *supra*.

25. *United States v. Hiss*, 107 F. Supp. 128, 136 (S.D.N.Y. 1952), citing *Johnson v. United States*, 32 F.2d 127, 130 (8th Cir. 1929).

brought against him. Which is to say only that I think the motion for a new trial was, as a matter of law, rightly denied.²⁶

But the federal rule on new trials is not the rule that prevails in the court of public opinion. So let us speculate a little further. Let us assume that Mr. Lane has succeeded in convincing us that the Hiss Standards were not typed on 230099, and that 230099 was a deliberate fabrication used to type the Baltimore Documents with the design of incriminating Alger Hiss. How and when was this done? Bear in mind that we have now eliminated, by hypothesis, the possibility that the Baltimore Documents were typed on the Hiss typewriter and that as a result we now have two typewriters to account for.

Mr. Lane theorizes that the forgery probably took place in 1948, after Hiss had filed his libel action against Chambers. Until that time, he points out, Chambers had never asserted that Hiss had committed espionage and, indeed, had denied that espionage was involved. We are invited to infer that in the face of a ruinous suit against him, to which he had no adequate defense, Chambers forged the Baltimore Documents (perhaps from microfilm or other copies of the underlying papers in his possession) so that they would furnish incontrovertible proof that Hiss had committed espionage and, therefore, that Chambers' allegations about Hiss's Communist connections were true.²⁷

This aspect of Mr. Lane's theory readily lends itself to criticism.²⁸ First, there is the time element. Chambers' initial accusations against Hiss were made in August, 1948. The libel suit was filed in September, after Chambers had repeated his accusations in a nonprivileged form. Chambers produced the incriminating papers in November, during pre-trial examination in the libel suit. Two months is not a very long time in which to fabricate a typewriter (how long would it take just to find a Woodstock of the right vintage?), forge the documents, treat them so that they

26. It does not by any means follow, however, that Hiss's chances of acquittal would not have been greater if the "forged typewriter" theory had been used by the defense at the trial. It is probably easier to create a reasonable doubt in a jury's mind in the first instance, and thereby to secure an acquittal, than it is to persuade a judge after conviction that a given piece of evidence would probably have created such a reasonable doubt, and thereby to secure a new trial. The effect of McCarthy, Ehrlich, Tytell, Norman *et al.* might well have turned the tide before a jury. But it is still some distance from that possibility, however strong, to the probability that a judge determining a motion for new trial must find.

27. Hiss 373-74.

28. Which it has received. See, especially, the careful review by Sidney Hook, *New York Times*, May 12, 1957, § 7, p. 1.

would not appear to be brand-new, and plant the fake typewriter where it might be discovered.²⁹ Second, it is unlikely that such a forgery is a one-man job. It suggests the existence of an efficient and experienced organization. This Chambers did not have in 1948, ten years after breaking with Communism. Third, there is the troubling question of why a fake typewriter was used. Either Chambers knew where the real Hiss typewriter was or he did not. It seems almost incredible that he could have known, unless he was in contact with Hiss in 1937 or 1938 when the typewriter was given to Perry Catlett, which Hiss denies, and which is precisely the charge contained in the second count of the indictment. I would go so far as to assert that if Chambers knew in August or September of 1948 where to lay his hands on the Hisses' Woodstock typewriter, much of what Hiss said about the extent of his acquaintance with Chambers, and, by easy inference, his denial of any kind of Communist activity, is untrue. Furthermore, if Chambers could lay his hands on the old Hiss Woodstock, why not use it to type the incriminating documents? It is hardly an answer to say that the machine may have been unworkable. No matter how bad its condition, it would surely have been easier to repair the machine than to construct a new one.

On Mr. Lane's hypothesis, it seems far likelier that Chambers did not know where to find the Hiss typewriter—not only likelier but also more compatible with the truth of Hiss's own story. Let us imagine, then, a forger equipped with samples of typing from the Hiss machine (hoarded, one must suppose, for well over ten years!) and armed with expert skill in duplicating a typewriter's characteristics from samples of its work. He puts his knowledge to work, alters a Woodstock machine of about the same vintage as the Hiss machine (which he either knows from earlier inspection of that machine or deduces from the samples), and produces the Baltimore Documents. What does he do next?

He gets rid of the fake typewriter. He does not plant it anywhere. The risks are too great. If he does not know where the original Hiss machine is, he does not dare to plant the fake anywhere, for there is always the risk that the original may turn up. Nor will it do to say that the forger knows that the Hiss machine cannot turn up. He could only know that if he were satisfied that the machine had been destroyed (and the evidence of several wit-

29. A possible modification of Mr. Lane's theory would be that Chambers anticipated the necessity for producing the documents well before Hiss filed his libel action in September, possibly even before the public hearings in August.

nesses shows that it had not been) or if he had it himself, a possibility which is excluded by the fact that he has constructed a duplicate machine. Furthermore, there is nothing to be gained by planting the fabricated machine. The forger knows that documents are normally identified as coming from the same typewriter by comparison of the documents with each other, not by comparison of the documents with the typewriter. It is enough that the Baltimore Documents are put forward and compared with specimens that necessarily came from the Hiss typewriter (the Hiss Standards). Our forger may be confident that the Standards will turn up (as they did) once the question of comparison becomes important. Not only is it enough to have the two sets of documents without the typewriter, but the physical presence of the fake typewriter is vulnerable to just the sort of attack that the defense (belatedly, it is true) has leveled against it. You can't date a typewriter whose serial number you can't observe. You can't examine the type bars of a machine that you don't have. It is, in short, in the highest degree unlikely that if the Baltimore Documents had been forged, the typewriter which we know as 230099 would ever have been unearthed. It would have served its purpose and been destroyed. Its very existence goes far to negate the possibility that a forgery took place in 1948.

Suppose, however, that there was forgery and that it took place at some earlier time. Would the same objections still hold? One that would of course be eliminated is the time issue. If not confined to two or three months in the fall of 1948, it is far more probable that the forger would have been able to produce a successful duplication. Also, it is likely that if forgery was committed, it was done at a time when Chambers still had at his beck and call the services of underground Communist operatives, skilled in all the black arts. Finally, if the typewriter was forged at some time during Chambers' days in the Communist movement, it could have been planted *before* the Hisses disposed of it, and the *original* Hiss machine could have been taken away and used to type the Baltimore Documents. There would then be no problem of two typewriters turning up, for one would be in the hands of the conspirators. However, that one would not be, as has been generally assumed, 230099, but would be the Hiss machine. It would presumably be destroyed after it had served its purpose. And the forged typewriter, 230099, would be left to go through the vicissitudes that were described at the trial. The problem—so damning

to the defense's argument—of how and when the fake was planted evaporates. And the disparity between the Hiss Standards and the samples produced on 230099 becomes perfectly understandable. It seems to me that this theory, which the defense did not adopt, fits the forgery hypothesis far more neatly than does the 1948 theory which the defense advanced in support of the motion for new trial.

If the machine was fabricated during the mid-1930's, when Chambers was still a member of the Communist party, the Baltimore Documents must have been typed much later, at a time when Chambers was either in the process of withdrawing from the Communist movement or had already done so. This suggests a possibility not hitherto raised—that the typewriter might originally have been fabricated for a different purpose than that for which Chambers ultimately used it. Perhaps it was originally constructed for the purpose of producing forgeries which could be used to blackmail Hiss into joining the Communist movement or, what may be more likely, into continuing with the movement and graduating from study groups to espionage. We know from Chambers' own account the doubts that assail even the most devoted of Party members when he is first detailed to go into underground work. Chambers promised his wife he wouldn't do it, but then changed his mind.³⁰ Perhaps Hiss's scruples were harder to overcome. Perhaps he was then confronted with copies of highly incriminating documents which looked for all the world as if they had come from his own typewriter. Perhaps he was warned that, if he refused to cooperate, these might fall into the hands of American counterespionage agents, with the obvious result that his career would be ended. Perhaps, confronted with this evidence of the Party's implacability, he yielded and moved to a less innocent level of activity than was involved in the "study group" in which he was placed by the testimony of Chambers and of Nathaniel Weyl. And perhaps, when Chambers finally broke with Communism, he tried to use the same means to blackmail Hiss out of the Communist underground as he had used to blackmail him in. And, the ultimate irony, perhaps everything Chambers has said about Hiss's involvement with Communism was true except for the one act of alleged espionage for which, in effect, Hiss was convicted.

The reader who has stayed with me to this point will doubtless

30. CHAMBERS, WITNESS 279-82 (1952) (hereinafter cited as CHAMBERS).

be asking whether I really believe any such wild tale as the one I have just sketched. Of course I have no basis for believing it. But the point is that this story, or any one of a dozen variations on it, will fit the defense hypothesis of forgery by typewriter as well as, or better than, the exculpatory argument they make. In short, there is no reason why the theory of forgery by typewriter is inconsistent with Hiss's guilt, if by "guilt" we mean involvement in clandestine Communist activities. We must not lose sight of the other incriminating evidence in the case. Granted, as the defense argues, that Chambers was just as likely to commit perjury in 1949-50 as he was during his Communist career, it is hard to conclude that his association with Hiss was as casual or as short-lived as Hiss made it out to be, especially when the testimony of two other witnesses, Hede Massing at the second trial,³¹ and Nathaniel Weyl subsequently, before a congressional committee,³² tends to support the conclusion that Hiss was to some extent involved in Communist activities. True, this is not what Hiss is charged with. He is charged with having lied when he denied passing government documents to Chambers or knowing Chambers after January 1, 1937. But, in the light of his consistent assertion of total innocence, it would hardly constitute "vindication" for Hiss to prove that he was wrongly convicted on those two counts by showing that his Communist activities were not of the kind, and did not take place at the time, that Chambers testified to.

It is undeniable that the zealous efforts of Mr. Lane and his associates in constructing and supporting their theory of forgery by typewriter raise doubts about the Hiss case. It is far from clear, as I have tried to demonstrate, that those doubts, if they turn out to be well-founded, will necessarily lead to exoneration of Hiss in any but the narrowest and most technical sense.

II

The Hiss case is still a mystery and, in its narrowest aspect, may well remain one. By its narrowest aspect, I mean the question of the documents: Were they the subject of espionage by Alger Hiss? This question necessarily occupied the center of the stage

31. Hiss 307-11. For the text of Mrs. Massing's testimony, see Transcript of Record, pp. 1261-1301.

32. Hiss 308 n.6. For the text of Weyl's testimony, see *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 82d Cong., 2d Sess., pt. 8, at 2795-2823 (1952).

at the trials, for the charge against Hiss, though cast in the form of perjury, was essentially a charge of espionage. If the jury had not been satisfied that Hiss committed espionage, they would have been obliged to acquit, regardless of what they believed about his other involvements with Communism. The paradox is that those other involvements, peripheral and indeed irrelevant as they were to the charge which Hiss had to meet in the United States District Court for the Southern District of New York, are central to the exoneration that Hiss now seeks in what he calls the court of public opinion.

The public importance of the Hiss case, its symbolic role in the political life of this decade, does not relate to whether he was justly convicted of the specific charges of perjury brought against him. It relates to the much broader issue whether he was or was not involved in Communist activity during his years of government service. If he was, he has told and is still telling lies of a significant magnitude. Indeed, their magnitude is enhanced with every retelling. If on the other hand he was free from Communist involvement, then he has been the victim of a miscarriage of justice in a sense that laymen as well as lawyers can comprehend.

We get little light on this larger aspect of the problem in Mr. Hiss's book. He is concerned, as we have seen, with establishing that he was wrongly convicted of the specific charges for which he was indicted. But he deals only in the most summary and unsatisfactory form with the evidence, apart from that concerned with espionage and with the extent and character of his association with Chambers, tending to implicate him in Communist activity. One can, of course, say that Communist activity as such is not a crime. But the point that Mr. Hiss seems to have missed in his book is that, even though it isn't a crime, Communist activity is the essence of the real case against him for the precise reason that he has so hotly denied that there was any such activity. It is for this reason that his book is basically so unsatisfactory. Even if one accepts a great deal of the very cogent case he makes out against Chambers' veracity, the root question of Hiss's complicity still remains.

On this view of the case I believe that there may be better prospect for eventual clarification of the facts. If we lay to one side the question of espionage, accepting *arguendo* the tale of two typewriters or some variation on it, and if we then examine the rest

of the evidence, it becomes apparent that there are a number of loose ends in the case. I hasten to say that these loose ends can't be simply picked up and tied together on the basis of what the present record shows. What I do suggest is that it may be possible to obtain answers to questions which the trials left up in the air. It would take another book about the Hiss case to canvass these loose ends exhaustively; and there probably have been too many books already. But in the next few pages I will briefly recapitulate several key points about which additional evidence might be obtained, and will suggest the means at hand to assemble that evidence.

1. *The Ware Cell*.—On a number of different occasions Chambers has stated that Hiss was a member of a Communist cell headed by Harold Ware which flourished in Washington during the early days of the Roosevelt administration. Chambers first made this charge in an interview with Adolf Berle, then Assistant Secretary of State, in 1939. He repeated it to a State Department security officer in 1945 and in 1946. And he asserted it publicly before the House Un-American Activities Committee in 1948. The question received very little attention at the Hiss trials, because it related to a period and to activities fairly remote from the charges in the indictment and because, at the time of the trials, it was purely a matter of Chambers' word against Hiss's, for reasons presently to be considered.

The composition of the Ware cell, its relation to other Communist groups in Washington, and the nature of the activities it carried on are all matters which are far from clear. Chambers' statements varied from time to time, and even the very full account which he gives in *Witness*³³ leaves some questions unresolved. In its main outlines, however, Chambers' story is this: In 1933 Harold Ware, member of a devotedly Communist family, organized a group of bright young government workers in Washington into an underground Communist apparatus. The group's functions included recruiting other government employees into the Communist underground, placing Communists in government posts, and influencing the policies of the Government. The group was headed by a "leading committee," some or all of whose members served as heads of cells. The leading committee included Nathan Witt, Lee Pressman, John Abt, Charles Kramer, Henry H. Col-

33. CHAMBERS 331-47.

lins, Jr., Victor Perlo, and, until he was detached for other work, Alger Hiss. This group was in frequent contact with J. Peters, the head of the underground section of the American Communist party; and Peters' emissary to the group was Whittaker Chambers.

Since the end of the second Hiss trial, the existence of the Ware group has been corroborated by two witnesses. In August, 1950, following his break with the American Labor party, Lee Pressman testified that he was recruited into the Communist party by Harold Ware about 1934, and that he was a member of a Communist group in Washington until he left government service and returned to New York "about the latter part of 1935."³⁴ He testified that the group was limited to people working at the time in the Agricultural Adjustment Administration and included only four (all of whom had been named by Chambers as being part of the larger group which he described): Abt, Kramer, Witt, and Pressman. According to Pressman, the group met once or twice a month to read and discuss Marxist literature which was brought to them by Harold Ware. Occasionally, according to his recollection, J. Peters sat in with the group. He denied having met Whittaker Chambers. He had no firsthand knowledge of Alger Hiss as a Communist, or of any persons other than his colleagues in the AAA whom he named. His account is obviously at variance with Chambers' in important respects.

The second witness who has corroborated the existence of the Ware group is Nathaniel Weyl, who testified in February, 1952, during the Senate Internal Security Subcommittee's hearings on the Institute of Pacific Relations.³⁵ Weyl's story is that Harold Ware recruited him into a Communist group in Washington about the beginning of 1934. At the time he was working as an economist for the AAA. He named Hiss, Pressman, Kramer, Collins, Abt, Witt, and Perlo as members. His period of affiliation was about six months. During his affiliation Chambers was not a member. Weyl was not asked why he discontinued participation in the group. Nor was he asked whether he saw Pressman and Hiss on the same occasions, a question which might have helped resolve the apparent inconsistency between the testimony of Pressman and of Chambers.

34. Quoted in Hiss 394-95. For Pressman's full testimony, see *Hearings Regarding Communism in the United States Government Before the House Committee on Un-American Activities*, 81st Cong., 2d Sess., pt. 2, at 2843-2901 (1950).

35. *Hearings, supra* note 32, at 2795-2823.

On the vital issue of Hiss's complicity the testimony of Pressman and that of Chambers and of Weyl stand in apparent but not in necessary conflict. Chambers says that Hiss was detached from the Ware group when he transferred from the AAA to the Nye Committee, in the spring of 1934. Pressman states that he was a member of the group starting in early 1934. It is conceivable that by the time Pressman joined the group Hiss had already been detached, although it seems unlikely that Pressman would not have known all the other group members in the AAA. Closer questioning of both Pressman and Weyl might resolve the discrepancy or, on the other hand, might make it clear that it cannot be resolved. The present state of the record on this important phase of the problem is far from satisfactory, and certainly cannot be done justice merely by saying that Pressman said Hiss wasn't in, but Weyl said he was.

The others named as members of the Ware group have consistently invoked the fifth amendment when questioned about Communist affiliations.³⁶ If their testimony can be compelled, we will be in a fair way to knowing the truth about Chambers' charges that Hiss was a Communist in the early 1930's.³⁷

One word more about the Ware group. On two occasions in *Witness*, Chambers hints broadly that there is still another person—not one of those named as a member of the leading committee—who knows about the Ware group and who knows "the pertinent facts in the Hiss Case."³⁸ In a striking passage, Chambers says that he isn't going to name the man, but pleads with him to tell the truth—for "the nation, his honor, my children."³⁹ It seems a little late in the day for Chambers to be overcome with scruples about naming names. Who is this man; has he ever been called on to testify; what has he said?

2. *The Summer at Smithtown.*—Chambers testified that in the summer of 1935 he and his wife rented a cottage at Smithtown,

36. See *Hearings Regarding Communist Espionage in the United States Government Before the House Committee on Un-American Activities*, 80th Cong., 2d Sess. (1948), for the testimony of Perlo (pp. 677-701), Collins (pp. 801-10), Kramer (pp. 818-35), Abt (pp. 1015-22), Pressman (pp. 1022-28), and Witt (pp. 1028-33).

37. Hiss obliquely recognizes the fact of the Ware group's existence, but relies on the post-trial testimony of Pressman to establish that he was not a member. Indeed, that testimony was one of the grounds relied on in his motion for new trial. See note 8 *supra*. The motion was filed just before Weyl testified. Hiss concedes that Weyl's testimony "supplied an offset" to that of Pressman, but implies that Weyl's motive was publicity. Hiss 308 n.6.

38. CHAMBERS 347, 434.

39. *Id.* at 434.

Pennsylvania, together with a fellow Communist named Maxim Lieber, and that Mrs. Hiss visited them there for a week or ten days. The Hisses denied it. Chambers' landlord, a Mr. Boucot, and Boucot's sister, both of whom were on terms of great neighborliness with their tenants and lived only a short distance away, testified that they had no recollection of seeing either Mr. or Mrs. Hiss, and that they could not have avoided meeting them had they been there any length of time. Indeed, Chambers testified that he believed that Mr. Boucot had met both Mr. and Mrs. Hiss.

The Hisses might be thought to have had somewhat the better of this skirmish. But the matter can hardly be considered settled, in view of the fact that the only other alleged eyewitness, Maxim Lieber, was not called as a witness by either the prosecution or the defense. In his book Chambers takes the bull by the horns and says: "Though he [Lieber] was available, and probably in New York during both Hiss trials, the Hiss defense never called him to the stand."⁴⁰ This is gamesmanship at its best. Surely the prosecution must bear predominant responsibility for not calling Lieber. If his testimony had been that the Hisses were there, that would have been better corroboration of Chambers than anything else that was brought forth at the trial. If his testimony had been that they were not there, the prosecution would have been most derelict in suppressing it. Perhaps a likelier possibility than either was that the prosecution determined in advance that Lieber would in all likelihood refuse to testify on fifth amendment grounds.

Lieber's testimony would be a most important piece of evidence, since it would provide proof or disproof in a sharply contested instance of the truth or falsity of Chambers' assertion and Hiss's denial of the continuing close and friendly connection between the two families.⁴¹

3. *The Rug*—Chambers testified that late in 1936, on the instructions of his superior in the Soviet espionage apparatus, Colonel Bykov, he ordered through Professor Schapiro of New York University, a close friend and an authority on art history, four costly Oriental rugs to be given to Hiss and three others as gifts from "the grateful Soviet people."⁴² Chambers directed the rugs to be

40. *Id.* at 377.

41. Although Hiss mentions the Smithtown matter, and relies on the testimony of Mr. Boucot and his sister to support his denial of Chambers' assertion, Hiss 231, 334, he does not mention Maxim Lieber.

42. CHAMBERS 416.

sent to George Silverman, a fellow Communist in Washington.⁴³ Chambers then had Silverman bring Hiss's rug to a restaurant on the Washington-Baltimore road, where Chambers, who was waiting there with Hiss, transferred it from Silverman's car to Hiss's, without the one seeing the other.

Hiss, on the other hand, testified that he received a rug from Chambers in the *spring* of 1936, more or less as part payment for the rent on Hiss's apartment where the Chamberses had lived for a couple of months in 1935. Hiss's version tends to be corroborated by the testimony of his ex-maid, who remembered seeing the rug on the floor of the house in which the Hisses lived in the spring of 1936 and which they vacated on June 15, 1936. Chambers' story is corroborated by the testimony and records of the rug dealer from whom Schapiro ordered the rugs to this extent: the dealer verified that the rugs were ordered sent to Schapiro when Chambers said they were, and Schapiro testified that they were shipped, as Chambers said they had been, to George Silverman.⁴⁴ Neither the dealer nor Professor Schapiro was, of course, in a position to say what had subsequently become of the rugs.

The question is an important one. If Chambers is right, then there was certainly close contact, most likely of a conspiratorial nature, between him and Hiss at a time when, according to Hiss, their former casual relationship had long since been broken off.⁴⁵ If Hiss is right on this issue, as to which Chambers testified in such circumstantial detail, then Chambers' credibility diminishes to the vanishing point.

Silverman was not produced as a witness and examined about the incident on the Baltimore road.⁴⁶ The Hiss rug itself was not produced and the rug dealer was therefore not given an opportunity

43. See note 46 *infra*.

44. According to Chambers, the other rugs were given to Silverman, to Harry Dexter White, and to Henry Julian Wadleigh. CHAMBERS 415-17. Silverman was not called to testify at Hiss's trials; White was dead; Wadleigh, who admitted stealing state department documents for the Communists, testified that he had received such a rug. Transcript of Record, p. 1130.

45. Hiss was charged with perjury for denying that he had seen Chambers after January 1, 1937. The chronology of the rug incident is such that, if Chambers is believed, Hiss could not have received the rug before January 1, 1937.

46. Silverman had been named as a Communist and a participant in espionage by Elizabeth Bentley in 1948. *Hearings, supra* note 36, at 517. He appeared before the House Un-American Activities Committee, denied the espionage charge, but refused to answer most questions on fifth amendment grounds. *Id.* at 835-50. It is a matter for conjecture why the Government did not call him to testify at the Hiss trials. Two other witnesses who might have been expected to invoke the fifth amendment and in fact did so were called. They were William Rosen, the transferee of Hiss's Ford car, and Felix Inslerman, the alleged photographer of the purloined documents.

to say whether it was the one which he sent to Meyer Schapiro on December 29, 1936, some months after the Hisses insisted they received it. The prosecutor made a great point, in his summation, of the defense's failure to produce the rug for the dealer's inspection; but it seems equally remarkable that the prosecution did not ask the defense to do so.⁴⁷

4. *Timothy Hobson*.—If the relationship between the Hisses and the Chamberses was as close as Chambers has made it out to be, and if it continued as long as he said it did (almost four years), there exists a witness whose testimony is of the greatest importance. That is Timothy Hobson, Mrs. Hiss's son by an earlier marriage. He was eight years old when Hiss and Chambers first met and twelve when, according to Chambers, the final break came. I do not for a moment suggest that if Hiss and Chambers were engaged in an espionage conspiracy Timothy would have known about it. But if the Hisses and the Chamberses were such close friends, if they visited back and forth, if they took trips together, and if, finally, Chambers regularly turned up on Hiss's doorstep to receive the documents, it is almost inconceivable that Timothy should not have remembered him, and remembered the frequency of his visits.

Did Timothy Hobson remember? We do not know. The House Un-American Activities Committee would have liked to talk to him, at the time Chambers' charges were first made. It became clear that a difficult family situation was involved, and that Hobson, now twenty-two, was to some extent estranged from his stepfather, or, at any rate, was not at his beck and call. The matter was not pursued.⁴⁸

We do not know whether anyone—the Committee, the grand jury, the FBI, the prosecution, the defense—questioned Timothy Hobson in private. The public record does not show. Again, testimony that could go a long way to convict or to acquit in the court of public opinion.⁴⁹

III

The four examples of loose ends just described all illustrate vividly the truth of the proposition with which we started this

47. Hiss says that the prosecutor "must have known that he could have had the rug for the asking." Hiss 337. That is reasonable enough, as far as it goes, but why did the defense wait for the prosecutor to ask?

48. *Hearings*, *supra* note 36, at 942-44.

49. Hiss asserts that "Timothy never saw him [Chambers] (or his wife) except during their brief stay at P Street [in the spring of 1935] while waiting for their goods to arrive." Hiss 282. As indicated in the text, there is no support in any public record for this assertion.

discussion of the Hiss case: "The trial . . . is not an investigative, but a demonstrative proceeding." For many reasons—reasons of remoteness, reasons of trial tactics, reasons of time and expense—all the evidence bearing on the ultimate issue of Alger Hiss's alleged complicity in clandestine Communist activity was not brought out at the trials. Underlying these reasons was a more fundamental one: lack of judicial power to compel testimony in the face of a plea of the privilege against self-incrimination. That reason, which existed at the time of the trials, no longer exists. In 1954 Congress passed an immunity act, under whose provisions a witness may be compelled to testify about "national security" matters before a congressional committee as well as before a federal grand jury and in federal litigation, in exchange for immunity from prosecution "for or on account of any transaction, matter, or thing concerning which he is so compelled . . . to testify or produce evidence"⁵⁰

Opinions may and do differ on whether there are any circumstances in which a witness's testimony should be so compelled.⁵¹ Even if the constitutionality of the procedure is eventually vindicated *in toto*,⁵² doubts persist as to its wisdom. But it can be argued that if there is any situation which justifies overriding the privilege against self-incrimination in favor of compelling the testimony of reluctant witnesses, the present posture of the Hiss case presents that situation. Here is a *cause célèbre* of the first magnitude, whose political repercussions far transcend the immediate issues determined by Hiss's perjury conviction. Yet many of the facts on whose assumed existence weighty judgments of public policy have been made remain in doubt. The people who have knowledge

50. 68 STAT. 745 (1954), 18 U.S.C. § 3486 (Supp. III, 1956).

51. See *Ullmann v. United States*, 350 U.S. 422, 440-55 (1956) (dissenting opinion).

52. The immunity provision with respect to testimony before grand juries was sustained in *Ullmann v. United States*, *supra* note 51. There is a substantial question, however, about the constitutionality of the provision relating to congressional committees. Unlike the grand jury provision, the procedure for compelling testimony before a congressional committee requires the "approval" of the U.S. district court for the district where the hearing is taking place. This provision is thought to impose a nonjudicial function on article III courts, which are constitutionally incapable of exercising such functions. See Rogge, *The New Federal Immunity Act and the Judicial Function*, 45 CALIF. L. REV. 109 (1957). However, this argument overlooks the fact that the District Court for the District of Columbia is capable of receiving nonarticle III functions, see *O'Donoghue v. United States*, 289 U.S. 516, 545-46 (1933); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-43 (1923), that most congressional hearings take place in the District, that Congress can take care that litigation about the immunity act is confined to the District, and that it is doubtful whether a witness, summoned to testify in the District, would have standing to attack the constitutionality of the statute as applied to courts outside the District. See generally HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 156-92 (1953).

of the true facts are in no real danger of prosecution. The transactions in question occurred twenty years ago. It is hard to imagine how a grant of immunity could impair the prosecutorial work of the Justice Department. Nor is any legitimate interest of the potential witnesses in jeopardy. They will, it is true, be exposed to infamy if their testimony establishes complicity in underground Communist operations. But that, as the Supreme Court held in *Ullmann v. United States*,⁵³ is not an interest which the fifth amendment protects. Under the circumstances, the privilege against self-incrimination should not bar their interrogation. Granted the premise, embodied in the immunity act, that there are circumstances in which it is desirable to exchange immunity for testimony, is this not an appropriate occasion for doing so?

Proponents of the unlimited veracity of Whittaker Chambers as a witness to acts of betrayal should welcome the opportunity to include in the public record the corroboration of his narrative that has, up till now, largely been lacking. Equally, those who still believe that Alger Hiss was the victim of a miscarriage of justice⁵⁴ should be glad to see Chambers' story put to the kind of test that it has not yet received. But more than to either of these two committed viewpoints about the Hiss case, a thorough exposure of the still-clouded facts of the case should appeal to those who believe that a full and informed awareness of the dangers of the Communist conspiracy, past and present, is not inconsistent with fairness to individuals accused of complicity in that conspiracy.

While I believe that a strong case can be made for the desirability of using the immunity act to compel hitherto withheld testimony about the Hiss case, I hesitate to suggest yet another congressional investigation. The problem is that there is no other feasible mechanism. Inquisition by a grand jury would not serve the interest of making the facts public. There is nothing left to litigate, and even if there were, we would still be faced with the limitations of a procedure that is demonstrative rather than investigative. In saying that a congressional investigation is the obvious mechanism, I do not mean to suggest that the procedure

53. 350 U.S. 422 (1956).

54. See, e.g., Cook, *Hiss, New Perspectives on the Strangest Case of Our Time*, 185 THE NATION 142 (1957). By the expedients of (1) weighing as a thirteenth juror the evidence adduced at the trials and (2) accepting as data the surmises contained in the motion for new trial Mr. Cook has no difficulty in concluding that Hiss was unjustly convicted.

has no shortcomings. The history of committee action since the end of World War II does not, to put it mildly, suggest that either fairness or competence are values that are recognized with any degree of uniformity. It would be preferable, if it were possible, to have an investigation of this magnitude and this delicacy undertaken by a group of eminent citizens drawn from government and private life, somewhat along the lines of a British Royal Commission, but armed by Congress with full powers to compel the attendance of witnesses, including the power contained in the Immunity Act of 1954. But although that might be the more desirable course, it is probably impracticable at this time. And the problem is not one for which time will stand still. The people who know the facts about the Hiss case are, by now, middle-aged or older. If we are ever to see the loose ends tied up, it will have to be done soon.

The most practicable approach would probably be the creation of a select committee of both Houses to re-examine the testimony in the Hiss case, as well as other cases involving disputed questions of fact about the extent and nature of Communist infiltration in the Government. Such a committee would have to be chosen with great care so as to avoid the pitfalls of a predetermined position or of a disposition to justify everything that has been done in the past. The problems of its composition would be great. The problems of staffing such a committee would also not be easy. There would be the question of weighing the worth of expertness against the value of the uncommitted mind. It would be essential to get the services of a distinguished and impartial lawyer to act as counsel, both for his own contribution and for the tone he could be expected to set.

The committee's agenda with respect to the Hiss case should include two general topics which I have referred to as "the tale of two typewriters" and "the loose ends." Whatever else may be said about Mr. Lane's motion for a new trial, it has certainly raised questions which deserve more definitive answers than have yet been forthcoming. It may be questionable whether the battle of experts can be expected to shed much more light, but the problem of 230099's provenance should certainly be investigated further. The facts that Mr. Lane was unable to secure by voluntary cooperation should be brought out under subpoena. But, even if the committee should be able to establish that 230099 is not the typewriter

which Mr. Fansler gave to the Hisses, it would be wrong, for the reasons I have suggested, to conclude that Hiss is to be absolved of all complicity in Communist activity. So, in any event, the inquiry should also extend to the loose ends.

Each of the persons named by Chambers as a member of the Ware group should be required to tell what he knows. Maxim Lieber should be required to say whether either Alger or Priscilla Hiss visited the Chamberses at Smithtown. The rug should be ordered produced and every effort made, through the rug dealer who testified at the trial, to determine whether it is one of the rugs ordered on Chambers' behalf by Professor Schapiro. Timothy Hobson should be examined on his recollection of Mr. and Mrs. Chambers and of the extent and duration of their contact with the Hisses. And, surely, Chambers should be required to divulge the name of the man who "knows the pertinent facts in the Hiss case," so that he can be examined about those facts. Not until these possibilities, and others, have been exhausted will we be able to say with any confidence that the case of Alger Hiss has ceased to be, as Lord Jowitt put it, "strange."

It remains to ask whether the game is worth the candle. Perhaps it is not. Perhaps we would do better to forgo knowledge in favor of repose. Hiss has had his day in court. Society owes him nothing more. Does society owe itself anything more? Does it owe itself the whole truth, if the whole truth can be ascertained (can it ever be ascertained)? Is the dislocation of still other lives a price we should be willing to pay for more nearly complete knowledge? I cannot answer these questions to my own satisfaction. But one thing is clear to me and, I hope, to the reader. If we now close the books on the Hiss case, it must be with the consciousness that we have stopped far short of even as imperfect an approximation of "truth" as the processes of law permit.