

REVIEWS

THE STRANGE CASE OF ALGER HISS. By The Earl Jowitt. New York: Doubleday & Company, 1953. Pp. 380. \$3.95.

WHILE the jury's verdict in the second Hiss case¹ decisively settled the defendant's fate,² it has by no means settled the question of his guilt or innocence in the minds of those who are either convinced of his innocence or have serious doubts about his guilt. There is no reason why it should have. No one would assert that the jury's verdict on the evidence before it was infallible.³ Moreover, there is a good bit of evidence about the case which—though such “as a reasonable mind might accept as adequate to support a conclusion”⁴—was not submitted to the jury, either because not admissible under the applicable rules of evidence or because it did not come to light until after the trial was concluded.

This is not to say that all those who disagree with the jury base their disagreement on a consideration of all the evidence. There are some whose disagreement seems to be based on little or nothing more than an unshakeable faith in the defendant. And, in any event, much of the evidence has not been readily available to all who wish to form their own opinion about the case. Whittaker Chambers' version of that evidence has been twice presented—once by Lasky and de Toledano⁵ and once by Chambers himself.⁶ Alistair Cooke has contributed his book⁷ which, though a considerable improvement over the daily newspaper reports which accompanied the trial,⁸ is still a journalist's account.

There remained, then, room for a careful and comprehensive analysis of the evidence which went to the jury in the second trial, with some testing of

1. Hiss was first brought to trial on a two count indictment for perjury on May 31, 1949. That proceeding ended with a hung jury on July 8, 1949. His second trial began on November 17, 1949, and resulted, on January 21, 1950, in a verdict of guilty on both counts.

2. Judgment and sentence of five years imprisonment entered on the verdict were affirmed. *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951). Motion for new trial based on newly discovered evidence was denied. *United States v. Hiss*, 107 F. Supp. 128 (S.D.N.Y. 1952), *aff'd*, 201 F.2d 372 (2d Cir. 1953), *cert. denied*, 345 U.S. 942 (1953). Hiss began serving his sentence on March 22, 1951. His application for parole was denied in November, 1952. *N.Y. Times*, Nov. 25, 1952, p. 1, cols. 4-5. It was denied again in November, 1953, *N.Y. Times*, Nov. 24, 1953, p. 16, col. 2.

3. See Donnelly, *Unconvicting the Innocent*, 6 *VAND. L. REV.* 20 (1952).

4. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

5. DE TOLEDANO & LASKY, *SEEDS OF TREASON* (1950).

6. CHAMBERS, *WITNESS* (1952).

7. COOKE, *A GENERATION ON TRIAL* (1950). The Hiss case also gets a chapter in MORRIS, *FAIR TRIAL* (1952).

8. See Wright, *Book Review*, 35 *MINN. L. REV.* 228 (1951).

that evidence against now-disclosed matters not submitted to the jury. This is precisely what The Earl Jowitt set himself to do in this fourth book on the Hiss case. He emerges from his task with serious doubts about Hiss' guilt. While I have similarly grave doubts on that score,⁹ I do not find Jowitt's account either persuasive to his conclusion or accurate in its presentation. One difficulty is that Jowitt is too consciously the English observer of an American phenomenon. At times this is merely amusing ("Wadleigh, I regret to say, though born in America, was educated in England"), but it seems also to have made it impossible for Jowitt to view in proper perspective much of the evidence which does not bear directly on matters charged in the indictment.

I

The charges on which Hiss was tried were that he perjured himself when he told the grand jury (1) that he had never turned over Government documents to Chambers or any other unauthorized person, and (2) that he had not seen Chambers after January 1, 1937. But at both trials a great mass of testimony was given by Mr. and Mrs. Chambers about their social relations with Mr. and Mrs. Hiss—most of it covering the years 1935 and 1936. Much of this evidence—Jowitt never tires of reminding the reader—"would have been inadmissible in England." And, since he does not believe it should have been admitted, Jowitt seems unable to appreciate its relevance.

One very good reason for its being admitted here, however, is that it was not objected to.¹⁰ As a consequence, the record now contains the Chambers version of a long and intimate relationship involving numerous trips taken with the Hisses and visits to and from the Hisses. And this is further supported by testimony of Mr. and Mrs. Chambers to detailed recollections of the various Hiss residences between 1934 and 1938. It is supported to some extent also by the testimony of Edith Murray, a surprise rebuttal witness who was called by the Government at the end of the second trial to testify that she had worked as a maid for Chambers and had seen Mrs. Hiss three or four times and Alger Hiss once at the Chambers home in 1935-36. Against all this is Hiss' insistence that he had known Chambers—as George Crosley—only slightly and for a brief period which ended in 1936, with the consequent denial by Mr. and Mrs. Hiss of most of the instances of social contact covered by the Chambers testimony.

Obviously, someone is deliberately lying here. And a decision to credit one version or the other cannot be considered irrelevant to the ultimate decision

9. My doubts are not based on any belief in the extraordinary persuasiveness of Hiss' testimony nor on any opinion about Hiss' character—about which I have no information. Rather, as I have indicated elsewhere, they are based on the inherent inconsistencies and improbabilities I find in Chambers' various versions of his story and on the revelations about his character contained in his book, *Witness*. Book Review, *Frontier Magazine*, August, 1952, p. 15.

10. Transcript of Record, pp. 242-53, 262-4, 266-9, 277-9, 956-70, *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950).

of Hiss' guilt or innocence of the matters charged, since that decision also necessarily involves a finding that either Hiss or Chambers is lying.¹¹

Jowitt never recognizes that the conflicting evidence about social relations has this significance. If he had recognized it, he might have assembled as a pattern of impeachment—in addition to Chambers' long history of admitted perjuries¹²—certain defects in the Chambers testimony which he either mentions at random or overlooks entirely:

(1) Although the Chambers testimony detailed a number of automobile trips with the Hisses—four in 1935 and one in 1937—only one of these trips involved any contact with third parties who could corroborate or deny the Chambers story. That was an overnight trip in 1937 in the course of which Chambers called on Harry Dexter White in Peterborough, New Hampshire. But Chambers did not recall this trip at all until his testimony at the first trial, a year after White's death.¹³ In his appearance before the Un-American Activities Committee while White was still alive, Chambers testified that he had not taken any overnight trips with the Hisses.¹⁴ By the time of the second trial he had recalled another overnight trip with Alger Hiss in 1935 which no one could corroborate.¹⁵

(2) When he testified before the Un-American Activities Committee in August, 1948, Chambers could remember virtually nothing about the floor plans, decorations, or furnishings of the four Hiss residences which he claimed to have visited.¹⁶ By the time of the trials in 1949 Chambers was able to testify to almost complete floor plans and his wife supplied numerous details about decorations and furnishings.¹⁷ But this was after Chambers had spent "every day except weekends" from December, 1948, to March, 1949, with the F.B.I. (which had acquired floor plans for at least two of the houses), had gone with F.B.I. agents to look at the exterior of the houses, and in an

11. See 3 WIGMORE, EVIDENCE §§ 1000-1015 (3d ed. 1940).

12. Chambers admitted having taken a number of false oaths while a member of the Communist Party, but explained that he then had "the Communist conception of an oath which is that an oath has no binding force upon a Communist." Transcript, *supra* note 10, at 316. His veracity did not improve after he left the Party, however. He told the story of his Party association with Hiss to an Assistant Secretary of State in 1939, to a State Department Security Officer in 1945 and again in 1946, and to agents of the FBI in 1942 and 1945. In none of these instances did he mention the passing of government documents. *Id.* at 353-4, 357, 359, 364, 373, 560, 670-1, 3323, 3325. In repeating the story under oath before the Committee on Un-American Activities in 1948, he specifically denied that any espionage was involved. *Hearings before House Committee on Un-American Activities Regarding Communist Espionage in the United States Government*, 80th Cong., 2d Sess. 565, 577 (1948). In his testimony before the Grand Jury in October, 1948, he was questioned about espionage and denied any knowledge of it. Transcript, *supra* note 10, at 347-52.

13. Transcript, *supra* note 10, at 358, 437.

14. *Hearings*, *supra* note 12, at 670.

15. Transcript, *supra* note 10, at 451.

16. See *Hearings*, *supra* note 12, at 667, 670-2, 1185.

17. Transcript, *supra* note 10, at 252-3, 267-8, 965-70.

F.B.I. office had interrogated two former maids of the Hisses about the interior of the houses.¹⁸

(3) Chambers told the Committee in August, 1948, that he had spent several nights at one of the Hiss residences.¹⁹ In November, 1948, in his deposition in pre-trial proceedings on Hiss' libel suit against him, he reaffirmed this testimony and added a tentative recollection that there were three bedrooms in that house.²⁰ But after he had been told by Hiss' former maid in February, 1949, that the house had only two bedrooms, both of which were occupied by the Hiss family,²¹ he lost all recollection of ever having spent a night in that house.²²

(4) At the first trial, Chambers recalled for the first time that he had borrowed \$400 from Hiss to purchase a car in November, 1937.²³ This testimony came several months after the Government had subpoenaed the Hiss savings account record—a record which showed a withdrawal of \$400 on November 19, 1937.²⁴

(5) Mrs. Chambers' description of one of the Hiss residences which the Chambers were supposed to have visited in 1937 or 1938 omitted a tree and put a concrete porch in its place.²⁵ This was accurate enough at the time of the trial, but the removal of the tree and the substitution of the porch did not take place until 1946.²⁶

II

In other respects Jowitt's account of the case seems to suffer from lack of complete information about it—a lack which can be only partially attributed to the distance from which he surveyed it.

Jowitt takes note of the testimony of Lee Pressman before the Un-American Activities Committee in 1950 in which Pressman admitted that he was a member of the "Ware group" of the Communist Party in Washington, D.C., in 1934-5, but testified that Hiss was not a member of that group at that time.²⁷ (This testimony contradicts Chambers' story before the Committee, wherein he had Hiss in the "Ware group" from 1934 until 1936,²⁸ but it is not necessarily inconsistent with his later testimony at the trials, wherein he had Hiss "separated" from the "Ware group" in 1934.²⁹) But Jowitt makes no mention of the testimony of Nathaniel Weyl before the Senate Subcommittee on Internal Security in February, 1952, that he was a member of the

18. *Id.* at 284, 434-5, 462-70, 670-3, 1734-45, 1546-8, 1570-2.

19. *Hearings, supra* note 12, at 1185.

20. Transcript, *supra* note 10, at 490-1.

21. *Id.* at 469-70, 1571-2.

22. *Id.* at 490-2.

23. *Id.* at 263-4, 547-8.

24. *Id.* at 689-99.

25. *Id.* at 968-9, 1054-60.

26. *Id.* at 1736-42.

27. *Hearings before House Committee on Un-American Activities Regarding Communism in the United States Government*, 81st Cong., 1st Sess. 2844-901 (1950).

28. *Hearings, supra* note 12, at 576-7, 1179-81.

29. Transcript, *supra* note 10, at 233-8.

"Ware group" during the first six months of 1934 and definitely saw Hiss at "more than two" though perhaps not as many as five meetings of that group.³⁰ (Weyl's greatly expanded recollection of January, 1953, that he had belonged to the group from the fall of 1933 to the summer of 1934 and had seen Hiss at from thirty-five to forty meetings,³¹ probably came too late for Jowitt's consideration.)

Jowitt makes much of the fact that at all times before Chambers produced the State Department documents which he allegedly received from Hiss he placed the date of his own break with the Communist Party as sometime in 1937; but after producing the documents (all of which were dated between January 5, 1938 and April 1, 1938) Chambers had to revise his recollection so that at the first trial he fixed the date of his break as April, 1938, and at the second trial he pin-pointed it precisely at April 15, 1938.³² But Jowitt does not follow up on this point with relevant additional facts: Chambers also testified that "about a month" after his break with the Party he secured employment with the Oxford University Press translating a book, and that he then went to Florida and spent the month of May or June, 1938, there doing the translation.³³ Documentary evidence from the files of the Oxford University Press, submitted with Hiss' unsuccessful motion for a new trial, shows that the Press was shipping manuscript of the book to Chambers pursuant to previous arrangements at least as early as March 18, 1938, and that Chambers mailed the first 100 pages of completed translation from Florida on May 1, 1938.³⁴

The point that most troubles Jowitt, of course, is the matter of the type-written copies of documents. They must have been typed at or after the dates of the originals—which bore dates from January through April 1, 1938. Mrs. Hiss testified that she had given away a Woodstock typewriter in December, 1937, but there was other evidence indicating that the gift was not made until sometime in 1938. Defense counsel produced in court a Woodstock machine which they had traced through the original and several successive donees and which the Hisses identified as the one they had formerly owned. A Government expert testified without contradiction that certain documents admittedly typed by the Hisses on the Woodstock which they had owned and the documents which Chambers allegedly received from Hiss were typed on the same machine.

Against all this, Jowitt offers only a half-hearted suggestion that Chambers

30. *Hearings before Senate Subcommittee on Internal Security on The Institute of Pacific Relations*, 82d Cong., 2d Sess. 2798-803 (1952).

31. Weyl, *I Was in A Communist Unit With Hiss*, U.S. News and World Report, Jan. 9, 1953, pp. 22-40.

32. Transcript, *supra* note 10, at 264, 486-7.

33. *Id.* at 264-5, 552. In his book, Chambers is less definite on dates, but tells essentially the same story. He broke with the Party in April, 1938, went into hiding in Maryland, and began work on the translation. Later, he went to Florida for "exactly a month" and while there he finished the translation. CHAMBERS, WITNESS 44-58 (1952).

34. Appendix to Brief for Appellant, pp. 99a, 102a, *United States v. Hiss*, 201 F.2d 372 (2d Cir. 1953).

"may possibly have had opportunity of getting access to the typewriter, either before or after" the Hisses gave it away.³⁵ He seems completely unaware of the fact that new defense counsel for Hiss had abandoned this theory at least as early as January, 1952, and by early March, 1952, had submitted in support of the motion for new trial the theory that the machine which was introduced at the trial was erroneously identified by the Hisses and was in fact a "forged" machine deliberately altered to resemble in its peculiar typing characteristics the still undiscovered Hiss machine. This theory was bolstered by affidavits of apparently qualified and disinterested experts to the effect that the introduced machine bore "positive signs of having been deliberately altered" and that specialists retained by defense counsel had, working entirely from samples of the typing of the introduced machine, constructed a test machine the typing of which so nearly duplicated that of the introduced machine that a qualified expert—who would never hitherto have supposed such a duplication possible—would be deceived.³⁶ There were, of course, contradictory affidavits from other apparently qualified experts for the Government, and the motion for new trial was denied without any resolution of this conflict among the experts. But, while the new defense theory may involve, as the judge denying new trial said, "many improbabilities,"³⁷ it is as entitled to mention as the equally improbable alternative Jowitt offers.

III

Perhaps it is expecting too much to ask an English writer to keep abreast of all relevant developments in this case. Certain allowances must doubtless be made for a foreign author far removed from and presumably unfamiliar with our sources of information. But there are other indications—which do not appear in his book as finally published in this country—that Jowitt did not employ the sources available to him with the greatest of care and industry.

As his book was originally written, published in England, and planned for publication here,³⁸ Jowitt referred to Noel Field and Laurence Duggan, both of whom were described by Chambers as persons who would have some knowledge of Hiss' alleged connection with the Communist Party, and added: "Chambers says in *Witness* that during the Hiss case Field . . . disappeared into Soviet-controlled Europe, and that Duggan had a 'fatal fall from his New York office window,' also during the case. He may well be right, for aught I know, in both these statements."³⁹ Later, Jowitt comments upon defense counsels' failure to call a number of witnesses for Hiss—including Duggan.⁴⁰ If he

35. P. 278.

36. Appendix to Brief for Appellant, *supra* note 34, at 59a, 63a, 126a.

37. *United States v. Hiss*, 107 F. Supp. 128 (S.D.N.Y. 1952).

38. The book was published in England on April 30, 1953. It was originally scheduled for publication here on May 28, 1953, but was not published until mid-July, 1953.

39. P. 125. Citations in this note and in notes 40 and 43 *infra*, are to advance copies of the American edition. The corrections referred to at note 46 *infra*, may be found in the published version of the American edition at the same page numbers.

40. P. 311.

had repressed his insouciance long enough to spend a few minutes with the newspaper files in any well stocked library, Jowitt could have learned that the State Department in October, 1949, announced that Field had disappeared the previous June,⁴¹ and that Duggan died December 20, 1948—five months before Hiss' first trial.⁴²

Again, Jowitt was sure that it might have made some difference to the jury, in passing upon the authenticity of the documents incriminating Hiss, if it had known that Chambers attempted suicide before producing them.⁴³ It might, if that were the fact. But Chambers' book, which contains the only account of his attempted suicide, clearly fixes that event as subsequent to his production of the documents.⁴⁴

It was after an English reviewer⁴⁵ had pointed out these errors that the unhappy American publisher recalled advance copies of the Jowitt book to make the necessary corrections.⁴⁶

But if some of the relevant evidence in the Hiss case is overlooked or misconstrued in Jowitt's account, other evidence is made to do remarkable duty. At the second trial, as he had before, Donald Hiss emphatically denied Chambers' testimony that he was a member of the Communist Party and was not cross-examined on his denial.⁴⁷ Jowitt professes to be quite aware of the hazards of cross-examining "a witness whose evidence is in direct conflict with the evidence given by your own client" when there is no "material on which to base the cross-examination," and he concedes that Prosecutor Murphy apparently had "no material of any sort or kind on which to cross-examine Donald Hiss."⁴⁸ Yet, solely on the basis of Murphy's failure to cross-examine, Jowitt concludes: "If ever a man was cleared of the aspersions cast upon him, that man was Donald Hiss. This, in turn, casts doubt and discredit on the story Chambers has told."⁴⁹ The fact that Alger Hiss was not cross-examined on his testimony that documents which he gave to Chambers while counsel for the Nye Committee were not confidential is similarly treated as demonstrating that Chambers lied when he said they were confidential, and hence as again

41. N.Y. Times, Oct. 8, 1949, p. 5, col. 2.

42. The Times (London), Dec. 22, 1948, p. 3, col. 3.

43. Pp. 45, 58, 183, 187, 282, 336.

44. CHAMBERS, WITNESS 744-7, 773-5 (1952).

45. The Times (London) Literary Supplement, May 15, 1953, p. 315.

46. Jowitt also took advantage of the occasion to make at least one other correction. In his first appearance before the Un-American Activities Committee, Chambers testified that Harold Ware was the organizer of a communist group to which Hiss allegedly once belonged. He was then asked, "What was his real name?" and replied, according to the official transcript, "As far as I know, Harold Ware. I never knew him." *Hearings, supra* note 12, at 575. Jowitt originally noted the discrepancy between this reply and Chambers' later testimony that he had met Ware many times and that it was Ware who introduced him to Hiss, but has now corrected his account to add that he has been advised that the official transcript is erroneous and that the full answer was "I never knew him to use any other name." P. 121.

47. Transcript, *supra* note 10, at 1700-7.

48. Pp. 233-4.

49. P. 342.

impeaching Chambers' credibility.⁵⁰ The fact that some of the documents in Hiss' penciled handwriting which Chambers produced were first jotted down in extremely elliptical form and were later expanded in pencil of a different color is treated as corroborating Hiss' testimony that these were hurried notes he made to enable him to summarize the contents of longer documents for his chief in the State Department,⁵¹ rather than notes which he might have made—in an equal hurry—to turn over to Chambers.

The direction in which each of these astounding inferences tends is illustrative of another serious shortcoming in Jowitt's book. Every conceivable doubt is resolved in favor of Hiss, no matter how difficult it may be to do so. Jowitt even seems to find some support for Hiss in the fact that some of the documents produced by Chambers were in Hiss' handwriting and others were identified as being typed on his typewriter. If Hiss had turned over to Chambers such easily traceable documents, says Jowitt, we have a picture of a man "at one and the same time . . . being very wicked and very foolish." And this, to Jowitt, is inherently improbable. Why? Because Jowitt, "in the course of a long life in the law," has found that "as a general rule the wicked people are not foolish, and the foolish people are not wicked."⁵²

A book may some day be written which contains a thorough and objective analysis of the Hiss case, and such a book may support Jowitt's thesis that Hiss was not proven guilty beyond all reasonable doubt. In the meantime, however, the book which offers that thesis the most support is not Jowitt's effort, but that amazing mixture of mysticism and malevolence—Whittaker Chambers' *Witness*.

VERN COUNTRYMAN†

REPORT TO THE PRESIDENT AND THE CONGRESS (RANDALL REPORT). By The Commission on Foreign Economic Policy. Washington: Government Printing Office, 1954. Pp. v, 94. \$.35.

If the accumulation of official reports is any index of a nation's concern with an issue of public policy, there can be little doubt of the importance the United States attaches to the responsible handling of its foreign economic affairs. In little over three years we have been treated to four detailed studies on the subject.¹ The last of these is the recently published *Randall Report*²—the work of a Commission which Congress created at the behest of the

50. Pp. 37, 225-31, 312.

51. Pp. 279-99.

52. P. 297.

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1. The first three reports were: GRAY, REPORT TO THE PRESIDENT ON FOREIGN ECONOMIC POLICIES (1950) (the Gray Report); INTERNATIONAL DEVELOPMENT ADVISORY BOARD, PARTNERS IN PROGRESS (1951) (the Rockefeller Report); PUBLIC ADVISORY BOARD FOR MUTUAL SECURITY, A TRADE AND TARIFF POLICY IN THE NATIONAL INTEREST (1953) (the Bell Report).

2. Named for Clarence B. Randall of the Inland Steel Co., chairman of the seventeen-member Commission which drafted it.