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Some Legal Aspects of Hiss Case

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CRIMINAL LAW CASE NOTES AND COMMENTS

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SOME LEGAL ASPECTS OF THE HISS CASE*

The Two-Witness Rule in Perjury Trials—Admissibility of Evidence of a Crime Barred by the Statute of Limitations—Secrecy of Jury Deliberations

On December 15, 1948, a Federal Grand Jury in New York indicted Alger Hiss for the crime of perjury.[1] This indictment of Mr. Hiss opened a new chapter in an already drama-filled controversy involving two protagonists: Whittaker Chambers, self-confessed Communist, later a senior editor of *Time* magazine, and Alger Hiss, former high State Department official, later president of the Carnegie Endowment for International Peace. The trial following this indictment attracted as much publicity as any other trial in recent history.[2] Buried beneath the avalanche of newspaper, magazine and radio reports were several important legal issues. The legal bases of the Hiss trial were little noted in the headlines; nevertheless, they raise some significant questions for the lawyer. Quite apart from the guilt or innocence of the defendant, the trial presented three unanswered legal problems. First, the two-witness requirement in perjury cases was dramatically demonstrated, creating a need for a re-evaluation of this requirement for a conviction of perjury. Second, a question of policy regarding the Statute of Limitations was ever-present in the shadows of the trial. Third, later repercussions of the trial, particularly the press and public reaction to the "hung jury," underscored the deplorable lack of safeguards for the secrecy of the jury room. Before examining these problems individually, a brief review of the trial itself is necessary to focus these issues in proper perspective.

The Trial

The Hiss-Chambers controversy turns on Mr. Chambers' testimony that during the late 1930's he worked as part of a Communist spy ring, and that Mr. Hiss supplied him with secret State Department documents for transmission to Russia. In November, 1948, Mr. Chambers produced microfilm copies of secret documents which he had hidden in

* Neither the author nor this *Journal* takes any position regarding either the guilt or innocence of Mr. Hiss or the general question of the fairness with which the trial was conducted. The only purpose of this comment is to highlight and discuss certain legal questions which were raised during the course of the trial.

1 35 Stat. 1111 (1909), 18 USCA §231 (1927). A defendant convicted of perjury may be fined up to $2,000, and imprisoned up to five years.

2 Judge Kaufman stated in his instructions to the jury: "This case has attracted much public comment. Numerous accounts of this case, including editorial and feature stories, have appeared in the public press, and it has been referred to over the radio, and on television, by news commentators, news analysts, and others. You would be more than human if you had been able to avoid all contact with some of the articles in the press or to avoid hearing accounts over the radio." The instructions then requested the jurors to discard "so far as is humanly possible" any consideration of this publicity in their deliberations on the trial.

a hollowed-out pumpkin on his Maryland farm. He claimed that these were the documents which Mr. Hiss had given him. As a result of Mr. Chambers' claims, a Federal Grand Jury in New York began an investigation of possible violations of federal espionage laws. During this investigation, Mr. Hiss was called as a witness. After his testimony, the Grand Jury charged that Mr. Hiss "did unlawfully, knowingly and wilfully, and contrary to . . . oath, state material matter which he did not believe to be true."

Specifically, the Grand Jury indictment charged that Mr. Hiss had perjured himself twice; first: by denying that he had ever given Mr. Chambers any documents, and second, by denying that he had ever seen Mr. Chambers after January 1, 1937.[3] Possible indictment for the crime of espionage[4] was barred by the three year Statute of Limitations.[5]

The trial began on May 31, 1949, and lasted until July 8, producing a record of 735,250 words in more than 2,941 pages. Seventy-seven witnesses gave their testimony. Climaxing the whole controversy, a jury which deliberated for over thirteen hours ultimately announced that it was unable to reach a unanimous verdict. One commentator has written: "Of all possible outcomes of this generations' most celebrated trial, a 'hung jury' was surely the one most in keeping with the general bewilderment. It was the denouement that most accurately reflected the prevalent doubt as to whether Alger Hiss was the victim of a personal conspiracy or the perpetrator of a political one."[6]

Underneath the pattern of "general bewilderment," the two conflicting stories of the principal characters in the drama emerged fairly clear. Mr. Chambers testified that he was introduced to Mr. Hiss by two other Communists in a Washington restaurant in 1934. After this introduction, Mr. Chambers claimed that he and Mr. Hiss became close friends while both served as members of the Communist party. During 1937 and 1938, Mr. Chambers claimed that they were both engaged in espionage, and that Mr. Hiss, then a State Department official, furnished him with secret documents to be transmitted to a Russian agent, Colonel Bykov. Mr. Chambers claimed also that he and his family had lived in the Hiss apartment, in May, 1935, for about six weeks, when Mr. Hiss became counsel for the Nye Committee, investigating the munitions industry. Mr. Chambers admitted being a Communist party member from 1924 to 1938, but claimed that he decided to leave the party in 1938 after pleading unsuccessfully with Mr. and Mrs. Hiss to join him in resigning. To bear out the existence of relations with Mr. Hiss after the crucial date of January 1, 1937, Mr. Chambers testified that the Hisses had driven to a play in New Hampshire in August, 1937; that Mr. Hiss loaned $400 to him sometime after November 19, 1937, to help him buy a car; that he and Mrs. Chambers had visited the Hisses in their home in December of 1937; that the 47 documents in issue were all dated in the early months of 1938.

In sharp contrast to Mr. Chambers' testimony, Mr. Hiss claimed that he had never at any time been a member of the Communist party, and that he had never transmitted any restricted documents to Mr. Chambers. Mr. Hiss testified that Mr. Chambers came to the Senate

3 U.S. v. Alger Hiss, Criminal No. 128-402 (S.D.N.Y. 1949).
4 40 Stat. 217 (1917), 50 USCA §§31, 32 (1928).
5 42 Stat. 220 (1921), 18 USCA §582 (1927).
6 Bendiner, The Trial of Alger Hiss: III (1949) Nation 52 (July 16, 1949).

Munitions Committee in 1934 or 1935, when Mr. Hiss was there employed as counsel. He claimed that Mr. Chambers introduced himself as "George Crosley," a free-lance magazine writer, and that he then gave "Crosley" some material for a magazine article, as he did other writers. Mr. Hiss admitted that he did sublet his apartment to "Crosley," who at no time indicated that he was a Communist. However, he claimed that he had completely severed relations with "Crosley" in 1936, when "Crosley" came to him requesting a small loan. Mr. Hiss testified that he refused to make the loan because "Crosley" had never repaid prior debts. He further denied making the $400 loan in November, 1937, to help Chambers buy a car; he also denied that the Chambers' had been in his home in December, 1937. He further maintained that he was in Chestertown, Maryland, on August 10, 1937, the date on which Mr. Chambers asserted that they had driven to New Hampshire to see a play.

All other evidence adduced during the trial served either to corroborate or refute these two conflicting stories. Wives of the two principals each testified in support of her husband; Mrs. Chambers filled in some minute details of the furnishings in the Hiss home and some incidents which occurred during the relationship of the two families. Mrs. Chambers also substantiated her husband's testimony that the Chambers' had been present at a New Year's Eve party in the Hiss home on December 31, 1937. Again in sharp contradiction, Mrs. Hiss denied any intimate relationship with the Chambers', and insisted that the Chambers' had not been present in the Hiss home at the 1937 New Year's Eve party.

Highlights of the other evidence included the actual introduction of the government documents[7] which Mr. Chambers claimed came from Mr. Hiss. All but four of the copies of the documents were typewritten, while the remaining four were admittedly in Mr. Hiss's handwriting. A surprise government witness was Henry Julian Wadleigh, a former State Department economist, who freely admitted that he had given restricted official documents to Mr. Chambers, but that none of the documents in issue at the trial were the ones he had delivered.[8] Other high points in the trial were the appearances of distinguished character witnesses for the defense. Two members of the Supreme Court, Justices Reed and Frankfurter, personally testified to Mr. Hiss's integrity and veracity.[9] Crucial defense witnesses were the past housekeeper for the Hiss's and her sons. They testified that the Hiss's had given them an old Woodstock typewriter when they moved to another house in 1936. This was the typewriter on which the prosecution contended that the official documents were copied.

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7 The documents were almost all in code, comprising 65 typewritten sheets, four hand-written memoranda, and two rolls of microfilm. Collectively, these papers contained a panorama of pre-war diplomatic moves by the United States in Europe and the Far East. One document was considered so secret that it was withheld from the Jury. N. Y. Times, June 2, 1949, p. 2, col. 3; N. Y. Times, June 15, 1949, p. 1, col. 1.

8 Mr. Chambers testified that he had five sources of information in Washington, naming Mr. Hiss, Mr. Wadleigh, Mr. W. Pigman Reno, Mr. H. D. White, and Mr. Vincent Reno. N. Y. Times, June 10, 1949, p. 1, col. 2.

9 Members of Congress have criticized the appearance of members of the Supreme Court as witnesses in the Hiss trial. A bill has been introduced in the House of Representatives which would bar federal jurists from serving as witnesses in future trials. N. Y. Times, July 14, 1949, p. 19, col. 2; N. Y. Times, July 18, 1949, p. 2, col. 6.

Judge Kaufman's charge[10] to the jury emphasized that the essential issue of the case was the veracity of the two principal witnesses, Mr. Hiss and Mr. Chambers. A part of the instructions follows: "The issue . . . to be determined by the jury is in substance a very narrow one: . . . Did the defendant willfully testify falsely when he stated . . . that he did not furnish secret documents of the Government to Chambers in February and March of 1938? . . . If you find that the defendant did not meet with Chambers on any of those occasions, you must also find that he did not testify falsely . . . that he had not seen Chambers after January 1, 1937."[11] Other parts of the charge stressed that the answer to these questions depended upon the credibility of the two protagonists in this vivid controversy.[12]

The Two-Witness Rule

Under the federal perjury "two witness" rule, the jury's decision as to whether or not the defendant willfully testified falsely depended ultimately on whether or not it believed Mr. Chambers' testimony. In his opening statement to the jury, prosecutor Thomas G. Murphy remarked: "If you don't believe Chambers, then we have no case." This statement summarized the effect of the "two witness" rule in perjury trials. Actually, the "two witness" title is a misnomer since the rule is satisfied when the falsity of the statement made under oath is established by the testimony of two independent witnesses or by one witness and corroborating circumstances.[13] In the Hiss trial, Mr. Chambers was the only witness to testify directly that Mr. Hiss had transmitted the secret documents to him, and that he had seen Mr. Hiss after January 1, 1937. Therefore, the rule would have been satisfied in the Hiss trial if the jury had believed Mr. Chambers' testimony and believed corroborative evidence of that testimony.

The law of evidence seldom requires a specified quantity of witnesses, emphasizing rather the quality of the testimony of even a single witness as being of sufficient weight to prove a fact in issue.[14] The "two witness" rule in perjury cases is therefore an exception[15] to this general doctrine; its explanation is largely historical. Dean Wigmore accounts for this exception through two circumstances.[16] First, until 1640, perjury was dealt with exclusively by the Court of Star Chamber. The Court of Star Chamber then followed the traditional ecclesiastical rule of two witnesses to prove a point in issue. When the Star Chamber's jurisdiction passed over to the King's Bench, the exceptional "two witness" requirement passed over, too, being adopted as a whole in the later common law practice. Second, in early criminal cases, an accused could

10 The instructions comprised 28 typewritten pages, and were read by Judge Kaufman in fifty-seven minutes at the trial. Neither the prosecution nor the defense objected to the instructions.

11 Judge Kaufman's charge to the jury, pp. 7, 8.

12 ". . . the credibility and veracity of Mr. Chambers and the weight to be given to his testimony are crucial in this case, and one of the questions for you to determine is whether you believe Mr. Chambers' testimony beyond a reasonable doubt." Judge Kaufman's charge to the jury, p. 18.

13 7 Wigmore, Evidence (3d ed. 1940) §2040.

14 7 Wigmore, Evidence (3d ed. 1940) §2034.

15 A similar exception exists in proving treason, 7 Wigmore, Evidence (3d ed. 1940) §2036.

16 7 Wigmore, Evidence (3d ed. 1940) §§2040, 2041.

not testify for himself, whereas in perjury trials, the accused was traditionally permitted to testify for himself. The courts argued, therefore, that in non-perjury trials, "one oath for the prosecution was in any case something as against nothing," while in a perjury trial, the defendant's oath was also in evidence—consequently, if the prosecution offered only one witness, it would merely be an "oath against an oath."[17] The "two witness" rule persisted through the 1700's, and was fully confirmed in England in the 19th century.[18]

Severe criticism has been levied at the "two witness" rule. Critics have pointed out that the "oath against oath" argument is unsatisfactory in modern times because of the modern realization that all testimony is not equally valuable, and that the testimony of one credible witness may carry more weight than a dozen less reliable witnesses.[19] Such criticism has been countered by attempts to justify the rule on policy grounds; defenders of the "two witness" requirement have argued that a less stringent rule would increase the likelihood of false accusations of perjury by defeated litigants seeking revenge.[20] The most recent defense of the rule in this vein was in the United States Supreme Court in 1945, when Mr. Justice Black, speaking for a unanimous court, stated: "The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. . . . Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon an 'oath against an oath.' The rule may have originally stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted."[21]

These policy reasons appear to have little application to a case like the Hiss trial, where the defendant was on trial for perjury based on his statements before a grand jury. In the Hiss case, the Federal Grand Jury which indicted Mr. Hiss was investigating espionage activities. The Grand Jury's indictment was based upon its belief that his answers were falsely made when he appeared as a witness. In such a Grand Jury investigation, there is no danger of defeated litigants, motivated by a desire for revenge, pressing for perjury prosecutions. Likewise, there is little danger of undue harassment of innocent witnesses when the perjury indictment stems from testimony before a Grand Jury. Therefore, it is submitted that there is sound basis for not applying the "two witness" rule to a case like the Hiss case, since the policy reasons for the rule have little validity in this situation.

Some states have completely rejected the "two witness" requirement, holding that perjury can be proved by circumstantial evidence alone.[22] In those states retaining the rule, and in the federal courts, the requirements of the original rule of two witnesses have been gradually relaxed.

17 Parker, C.J., in R. v. Muscot, 10 Mod. 192 (1714).

18 The rule has now been codified in England in the Perjury Act, 1911, 1&2 Geo. V., c. 6, §13, Public General Act, 1st & 2nd Geo. V., 1911.

19 7 Wigmore, Evidence, (3d ed. 1940) §2041. *See* Note (1941) 28 Va. L. Rev. 102, 103; Note (1945) Mich. L. Rev. 483, 484.

20 Best, Evidence (12th ed. 1922) §§605, 606.

21 Weiler v. U.S., 323 U.S. 606, 610 (1945).

22 State v. Storey, 148 Minn. 398, 182 N.W. 613 (1931); Marvel v. State, 33 Del. 110, 131 Atl. 317 (1925).

It is now generally held that one witness will suffice if corroborated;[23] this was the rule applied in the Hiss case. No exact test has been laid down as to the nature of the corroboration except that it must corroborate the testimony of the single witness in some material particular.[24] Thus, in the Hiss trial, the jury was instructed that: ". . . If you do not believe the testimony of Mr. Chambers beyond a reasonable doubt, the defendant must be acquitted; if you believe Chambers beyond a reasonable doubt, but do not find that there is independent corroboration of the falsity of the alleged perjurious statement, the defendant must be acquitted. If you believe the defendant, he must be acquitted; if however, you believe Chambers' testimony beyond a reasonable doubt . . . and that that testimony has been corroborated, then you may find the defendant guilty . . ."[25]

In the light of the so-called "two-witness" rule, Judge Kaufman's instructions were correct. In recent years, there has been considerable divergence of opinion regarding the desirability of maintaining the rule in perjury trials.[26] Complaints have been registered to the effect that perjury is too difficult to prove under the present rule.[27] The Hiss case has called attention to the rule, provoking a re-examination and evaluation of its policy defenses. As applied in the Hiss trial, the rule necessarily centered attention on the credibility of Mr. Chambers, and away from other independent evidence of the crime. The rule therefore placed an extremely heavy burden on the prosecution to provide a reliable witness, since other weighty circumstantial evidence would be completely disregarded if the jury did not believe Chambers' story.

Admission of Espionage Evidence

During the first few days of the trial, an issue of deep significance was raised by a defense motion to exclude any evidence of espionage in the trial for perjury.[28] The prosecution had offered some evidence regarding the alleged passage of the secret documents by Mr. Hiss to Mr. Chambers; defense counsel then argued that such evidence was inadmissible since it related to the commission of another crime, espionage.[29] Since the crime of espionage has a three year Statute of Limitations,[30] prosecution for espionage had been barred.

The rule has been clearly established that in a criminal trial, evidence

23 Weiler v. U.S., 323 U.S. 606 (1945). Illinois also follows this majority view, People v. Alkire, 321 Ill. 28, 151 N.E. 518 (1926).

24 U.S. v. Hall, 44 F. 864 (S.D. Georgia 1890); Hashagen v. U.S., 169 Fed. 396 (C.C.A. 8th 1909).

25 Judge Kaufman's charge to the jury, p. 26.

26 7 Wigmore, *loc. cit. supra*, note 19.

27 Comment (1949) 39 J. Crim. L. & Criminology 629, 633 discusses proposed Illinois legislation aimed at making it possible to convict for perjury by merely alleging and proving contradictory statements made under oath, eliminating the necessity of proving which statement is false. This proposal was aimed at removing a present difficulty in proving perjury with the resulting "paucity of perjury convictions." *See* McLintock, What Happens to Perjurers (1940) 24 Minn. L. Rev. 727, 728; Note (1934) 24 J. Crim. L. & Criminology 951. However, this suggestion would not help the prosecution in the Hiss case, since the defendant did not make any contradictory statements in his testimony.

28 N. Y. Times, June 2, 1949, p. 1, col. 1.

29 40 Stat. 217 (1917), 50 USCA §§31, 32 (1928).

30 42 Stat. 220 (1921), 18 USCA §582 (1927).

of other similar but unconnected crimes is inadmissible.[31] Such evidence is held inadmissible "not because it has no probative value, but because it has too much."[32] Since the defendant is on trial for one crime, the courts have argued that it would be prejudicial to allow evidence of the commission of another crime in the same trial.[33] However, the law has long drawn a distinction between evidence of similar but unconnected crimes, and evidence of other crimes so connected with the principal crime that the commission of the collateral crime tends directly to prove the commission of the principal crime, or the existence of any essential element of the principal crime.[34] This latter type of evidence is admissible, since without it, it would often be impossible to prove the commission of the principal crime. Thus, when two crimes are so intertwined that the proof of one may in effect also prove the other, the courts have consistently held such proof to be admissible. One judge has stated: "No man can by multiplying crimes diminish the volume of testimony against him."[35] Applying this to the Hiss case, it follows that evidence of espionage activity would be admissible in the trial for perjury, since such evidence would directly tend to prove the alleged perjury.

However, when the crime so indirectly proved is barred by the Statute of Limitations, as in the Hiss case, some serious questions of policy are presented. The Statute of Limitations on crimes is aimed at protecting individuals from tardy prosecution; it is based on a recognition of the fact that time gradually wears out proof of innocence.[36] Witnesses may die, records may be lost—with the resulting loss of possible exoneration of the defendant. To further this policy such statutes are generally construed favorably for the accused."[37]

Admitting evidence of espionage in a trial for perjury in the Hiss case squarely collides with the policy of the Statute of Limitations. In the Hiss case, the same facts would be in issue in a trial for espionage as were in issue in the perjury trial. The same documents, the same testimony, the same witnesses—all would be employed equally in prosecution of the two distinct crimes. Since identical proof would be required to convict for both crimes, the policy of the Statute of Limitations would clearly be frustrated. The Hiss trial strikingly exhibited the difficulty of proving either guilt or innocence based on events remote in time. Few people are able to account for their actions ten to fifteen years before trial. By prosecuting for a crime which is not outlawed by the Statute of Limitations, though requiring the same proof as a crime which is so outlawed, the purpose and policy of the Statute of Limitations are effectively skirted and circumvented. It may be thought that the purpose of the Statute of Limitations is subordinate to the prosecution of a crime not barred by the statute even though it necessitates

31 1 Wigmore, Evidence (3d ed. 1940) §192. A leading case on this rule is People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).

32 1 Wigmore, Evidence (3d ed. 1940) §194.

33 1 Wigmore, *loc. cit. supra* note 31.

34 Banning v. U.S., 130 F. (2d) 330 (C.C.A. 6th 1942); Minner v. U.S., 57 F. (2d) 506 (C.C.A. 10th 1932); Lovely v. U.S., 169 F. (2d) 386 (C.C.A. 4th 1948).

35 Brewer, J., quoted in 1 Wigmore, Evidence (3d ed. 1940) §216.

36 1 Wharton, Criminal Procedure (10th ed. 1896) §367.

37 People v. Ross, 325 Ill. 417, 156 N.E. 303 (1927); Hogoboom v. State, 120 Neb. 525, 234 N.W. 422 (1931); U.S. v. Zisblatt Furniture Co., 78 F. Supp. 9 (S.D.N.Y. 1948).

the use of the proof of a crime so barred. Whether or not this policy decision is made in the future, the fact remains that in the Hiss case more attention was focused on the evidentiary issue of espionage than on the major legal issue of the trial—perjury. As a result of this misplaced emphasis, many people doubtless thought that Mr. Hiss was actually on trial for espionage. Furthermore, from the standpoint of the defendant's accountability for proof of his innocence, this was substantially true.

Disclosure of Jury Deliberations

Reaction to the result of the Hiss trial was violent. The press,[38] members of Congress,[39] and private individuals protested over the way the the trial had been conducted. Charges of prejudice were made against Judge Kaufman;[40] some Representatives went so far as to demand a Congressional probe of the case.[41] Newspapers printed interviews with some of the jurors who claimed that the judge had been biased for the defense.[42] Some jurors disclosed what had happened in the jury deliberations,[43] and further announced which jurors had voted for conviction, and which jurors had voted for acquittal.[44]

Such disclosures are manifestly contrary to a strong policy in the law protecting the secrecy of jury deliberations.[45] It has long been recognized that freedom of debate and discussion might be stultified if jurors feared that their arguments and ballots were to be freely published to the world.[46] By granting a privilege against such disclosures on the witness stand, the courts have established some measure of protection against any disclosure of communications between jurors during retirement. Thus, if a juror is called as a witness in a later trial, he cannot testify as to communications with a fellow-juror in the jury room without the fellow-juror's consent. The courts have rationalized this privilege by arguing that such communications originate in a confidence built upon secrecy, and this confidence is essential to the proper functioning of the jury.[48]

Another implementation of this policy is found in Grand Jury practice. The Federal Rules of Criminal Procedure provide specifically that the deliberations and votes of any juror in a Grand Jury are to be kept secret.[49] Grand Jurors take an oath of secrecy when they begin their service as jurors.[50] No Grand Juror can be required to disclose how

38 Chicago Daily Tribune, July 17, 1949, Editorial, p. 18.

39 95 Cong. Rec., July 12, 1949 at A4640; 95 Cong. Rec., July 13, at A4674, 9566.

40 95 Cong. Rec., July 18, 1949, at 9904-9915.

41 New York Times, July 10, 1949, p. 1, col. 4. For a contrary view, see remarks of Representative Wayne Hays of Ohio, 95 Cong. Rec., July 14, 1949, at A4738-9.

42 New York Times, July 9, 1949, p. 1, col. 8; New York Herald Tribune, July 9, 1949, p. 1, col. 1.

43 *Ibid.*

44 One juror, James F. Hanrahan, made the following statement about the four jurors who voted for acquittal: "(They) were so stubborn you could have knocked their heads against the wall, and it would have made no difference. The foreman was emotional, two were blockheads, and one was a dope. Eight of us pounded the hell out of the four since Thursday night, but we couldn't get anywhere." N. Y. Journal American, July 9, 1949, p. 1, col. 3.

45 8 Wigmore, Evidence, (3d ed. 1940) §2346.

46 *See* Clark v. U.S., 289 U.S. 1 (1933).

47 8 Wigmore, *loc. cit. supra,* note 45.

48 *Ibid.*

49 Rule 6(e), 18 USCA (Supp. 1948) following §687.

50 Orfield, Criminal Procedure from Arrest to Appeal (1st ed. 1947) 167.

any juror voted, or what opinions were expressed in the deliberations of that body, or to state in detail the evidence upon which the action was had, or even to state whether or not an indictment was under consideration.[51] Such secrecy is to be maintained except when the court permits disclosure.[52] These restrictions are based on a concept of public policy requiring that inquiries and proceedings before a Grand Jury are private, and are not to be revealed to the general public.[53]

No such protections of the secrecy of petit juries exist, other than the privilege against disclosure on the witness stand. High speed mass communication has heightened the dangers created by disclosure of jury deliberations. Unpopular verdicts and unpopular votes can now be communicated quickly to the entire world. This is, of course, particularly true in a case of wide public interest like the Hiss trial. Results of the disclosure in the Hiss case are alarming. Some of the jurors who voted for acquittal have reported threats made to them as a result of the publication of the balloting.[54] All of the jurors in the Hiss trial reported receiving telephone calls and mail commenting on their stand.[55] One juror who voted for acquittal announced that he received a postcard written in red ink, calling him a "sucker for the Communists" and advising him to "go back to Russia."[56]

In the early development of jury trial, jurors were often fined and imprisoned when they rendered a verdict contrary to the judge's view of the case.[57] This treatment of the jury was ended by the landmark decision in *Bushel's* case in 1670.[58] In this case, the jurors who acquitted William Penn and William Mead on a charge of taking part in an unlawful assembly were fined and imprisoned. However, they were discharged on habeas corpus to the Court of Common Pleas, where Chief Justice Vaughan pronounced that the jurors were the final judges of fact, and were therefore not to be fined or imprisoned for their verdicts.[59]

In the Hiss case, jurors have been exposed to threats and condemnation when they voted for a verdict contrary to the beliefs of many private citizens. Surely, such reaction will discourage future jurors in this case from even taking part as jurors. It will discourage those who do become jurors from exercising an independent judgment on the merits of the case. The chances of a fair trial for both the defendant and the prosecution have been substantially decreased by such disclosure. There is scant possibility that the jurors at the next Hiss trial will remain unaffected by the treatment given the jury after the first trial. Bushel's case has declared that members of a jury are to be kept free from fines and imprisonment when they render a verdict out of keeping with the views of the judge. The Hiss case has spotlighted the need for protection of present-day petit jurors from public threats, ridi-

51 8 Wigmore, Evidence, (3d ed. 1940) §§2360-2362.
52 Schmidt v. U.S., 115 F. (2d) 394 (C.C.A. 6th 1940); United States v. American Medical Association, 26 F. Supp. 429 (Dist. Ct. D.C. 1939).
53 Orfield, *loc. cit. supra,* note 50.
54 N. Y. Times, July 23, 1949, p. 5, col. 6.
55 Liebling, The Wayward Press, (1949), New Yorker, p. 60 (July 23, 1949).
56 *Ibid.*
57 Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), 166.
58 Vaughan, 134, 135. A good discussion of Bushel's case is found in Plucknett, A Concise History of the Common Law (2d ed. 1936) 123, 124.
59 *Ibid.*