

life. He appears, ultimately, as a truly formidable version of a defended personality, and at the

same time as a truly anarchic soul. No wonder his case continues to grip us.



TESTIMONY OF JUSTICES FRANKFURTER & REED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America

vs.

C. 128-402

Alger Hiss

Before: Hon. Samuel E. Kaufman, D.J.
New York, June 22, 1949

Stenographer's Minutes
Southern District Court Reporters
United States Court House
Foley Square 7, New York

FELIX FRANKFURTER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STRYKER:

Q Mr. Justice Frankfurter, are you a justice of the Supreme Court of the United States?

A I am.

Q How long have you been a member of that Court?

A Since January 30, 1939.

Q Before you became a justice of the United States Supreme Court were you associated with the Harvard Law School?

A I was a professor at the Harvard Law School from 1914 until I took my seat on the Supreme Bench.

Q Did you know Mr. Justice Holmes?

A I knew Mr. Justice Holmes.

Q Are you familiar with the nature and quality of the Harvard Law Review?

A I think so. I think I can say I am.

Q I mentioned it in my opening and now that I have a chance will you tell us what the Harvard Law Review is.

A The Harvard Law Review is a publication devoted to matters of law, founded by the students of the Harvard Law School in 1887 and since then, and to this day, so far as I am aware, edited by the students of the Harvard Law School, in which appear articles from writers on law from English-speaking or the non-English-speaking world under their names, and comments on legal matters, usually current cases, by students that are assigned, some in length anywhere from 750 to 1500 or 2000 words, or some shorter, and also the back book review, as is customary with legal periodicals.

Q About what proportion of each class is chosen for the editorial board of the Harvard Law Review?

A The board is a self-perpetuating body. That is, it was founded by some men, one of the founders, in fact the founder was once a judge of this court, or rather the Circuit Court, Judge Mack. It has been a self-perpetuating body. They choose their own successors. I am not precisely arithmetic, but I should say it has varied. As the student body increased the editorial board has been larger, and something like 15 or 20, maybe 22, but I should think something like 20, are chosen from the second year after the

- students prove their worth at the end of the first year, and perhaps as many from the third year, so the board runs something like 25 on the board. I gather from seeing the list of names now it is larger, something like 40, and I should say about 20 from the second year and 30 from the third, respectively.
- Q Twenty from a class of how many?
- A That, of course, has varied with the years.
- Q From four to six hundred?
- A Pardon me?
- Q From four to six hundred?
- A During the third year it must have been upwards as against these days, that is, within the last 15 to 20 years, somewhere around 300. Of course, these figures are susceptible of accurate formulation, and it is rather difficult for me to try to mention them all, as I have left that institution for ten years, so I am just giving approximations.
- Q Justice Frankfurter, are the young men chosen for that editorial board on the basis not only of integrity but by reason of character? Would you say the character enters into the appointments on the board?
- A His Honor will keep me within bounds if I stray outside of them, but inasmuch as men are chosen by the students, which students make the choice by their own minds and who I should think have a very direct and rather fair determination, as we all know, as their qualifications are passed upon by their fellow students.
- Q Mr. Justice, did you have something to do over the years with the selection of secretaries for the great Mr. Justice Holmes?
- A I think a year after I joined the faculty of the law school Mr. Justice Holmes was good enough to ask me to designate for him – perhaps “recommend” would be the more accurate word, but it was in fact a designation because he did not know the man who was to be designated for what you call secretaries, but who are technically known as law clerks to the justices. And each year in the early – well, after I came to know him, and know the quality of the available materials in the class, I would write to Justice Holmes stating that I suggested so and so, giving him the name and an estimate, and he would write back to tell the young man to report at 10 o'clock the Friday preceding the first Monday in October.
- Q Now, will you be good enough –
- A And that lasted –
- Q I am sorry.
- A And that lasted, I think, from '15 throughout Justice Holmes' life, because even after he retired as a justice he continued to have the services of such a young man. I think there was an intervening year when I was away from the school during the First World War, and then somebody else made the designation.
- Q Now, will you be kind enough to give us a word for the benefit of the foreman and these ladies and gentlemen here of the nature of the work of the law clerk to the Justice of the Supreme Court of the United States, giving me some idea of the nature of the confidential duties and the trust and confidence that is reposed in those young men by the justices of that great Court.
- A Well, since nine justices always have been very distinctive individuals, the use that a justice makes of his law clerk depends upon the particular characteristics and aptitude and interest of the justice. Justice Holmes had, of course, quite apart from the gifts that God gave him, he had long years of judicial experience, so he made one kind of use as compared to a man who might be a member of the Court and who had less experience. But basic to all justices is, of course, the deeply confidential relation that a law clerk bears to a justice of the Court, and to be of any use at all he must be in the complete confidence of the justice, which means he must know secrets of importance

as enter into the affairs of government.

Q Now, did there come a time, Mr. Justice Frankfurter, when you knew Alger Hiss?

A There came such a time.

Q When did you first become acquainted with him?

A I could not fix the precise date, Mr. Stryker, but I can fix it within limits.

Q All right, sir.

A If I am not wrong, Mr. Alger Hiss was graduated from the Harvard Law School in 1929. That means he entered the school in 1926. I certainly did not know him or know of him until he became a student at the Harvard Law School. I cannot tell you how early after he entered that school that I became aware of his existence. The chances are rather remote that I knew him during his first year, during his freshman year, because in those days I did not have first-year classes. The chances normally would be remote, and that I would not know a student until the third year, because I only had third-year and graduate students, unless through friends or classmates or whatnot a young man would be commended to me by a note of introduction. However, the men I knew were those who what is called made the Law Review. Those men who were chosen for editorship on the Law Review, I had rather frequent and gradually more or less close contact with, and who had close contact with members of the faculty, because while it is true, as I have indicated earlier, in answer to your question, the Law Review is run by or in the ultimate control of students. They are after all undergraduate students and they avail themselves of the opportunity of freely being accessible and are freely granted contact with professors of the law faculty in matters on which they have to write, or report, or pass judgments. And, so, men who made the Law Review, editors of the Law Review, or professors, even though they do not take courses with

them, or had not as yet taken courses with them, come in contact, so that my best judgment is that I came to know Mr. Hiss during his second year in that school.

Q And then did you become [sic] to know him better as time went on during the second and third years?

A No doubt about that.

Q Were you by reason of that contact and the milieu that you have described afforded an opportunity to appraise his work as to character, integrity, reliability, as well as scholarship?

A The privilege and duty which Justice Holmes conferred upon me in asking me to select his law clerk from year to year was a very serious trust and responsibility. In discharging it, apart from all other considerations, I would keep a sharp eye, as sharp an eye as I could, on the potential choices that I would eventually make. And so from the time that men emerged on my horizon I would watch them and try to find out as best as one can what manner of man or what manner of men they were in making the final choice that I had to make. So early in the spring in writing Justice Holmes, if on the whole I decided that John Smith is the man who would satisfy you and the man that you need most, and tell him that I had kept an eye on the personality, the characteristics, the character, and all the things that go to make up the kind of a man that anyone in my position would think had the indispensable characteristics for a law clerk for Mr. Justice Holmes.

Q And those characteristics were the characteristics that you have already defined as being the necessary ingredients for the appointment to that very important post?

A Yes.

Q Now, then, having in mind what you have already testified will you be good enough to tell the foreman and these ladies and gentlemen whether or not you chose or recom-

- mended Mr. Alger Hiss for the position of law clerk to Mr. Justice Oliver Wendell Holmes?
- A I did. Sometime in the spring, perhaps late winter, probably early spring of '29, having run them through my mind and reflected upon them I thought as best I could, I decided that of all the men in that class Alger Hiss was the man I could most confidently recommend to Mr. Justice Holmes.
- Q Would this happen, Mr. Justice, that after you sent the young man down there to Mr. Justice Holmes you would meet Mr. Justice Holmes from time to time and he would discuss with you how he liked your selection and whether he thought the person –
- MR. STRYKER: I am not asking for the conversation if you are about to rise.
- Q – and he discuss with you his opinion as to whether or not the young man rose to the standards that he and you had set for this high post?
- A I will try to bear in mind the limits of –
- Q Of the hearsay rule.
- A Mr. Murphy, I once was in your place for a good many years.
- MR. MURPHY: I realize that, Judge.
- A (Continuing) I will try to bear in mind the limits of legal requirements, but I am, after all, a witness, and the responsibility for that will have to rest with the Court and –
- Q My only question, Justice, –
- A (Continuing) – with the lawyers on the other side. I will do the best I can, however. I corresponded with Justice Holmes with some frequently [*sic*] throughout his life. I usually saw him, oh, several times in the course of the year, especially during the summer. He was a resident of Beverly Farms not far from Boston, and I saw him on those occasions with some frequency.
- Q Well, I presume Mr. Murphy would object if I asked you what Mr. Justice Holmes said.
- THE COURT: I think he should, Mr. Stryker.
- MR. MURPHY: I think I should, too, your Honor. I am under an obligation here.
- MR. STRYKER: All right, sir.
- THE COURT: I think it will suffice if you ask Mr. Justice Frankfurter whether he had occasion to discuss Mr. Hiss with Mr. Justice Oliver Wendell Holmes.
- THE WITNESS: The answer to that is Yes.
- MR. STRYKER: All right.
- Q Now, was Mr. Justice Oliver Wendell Holmes one of many persons from time to time that you talked with who knew Alger Hiss?
- A Yes, sir.
- Q In the course of your acquaintance with him beginning back I think you place it, as I gather your testimony, about the winter of 1927, or spring of 1927, have you had occasion to meet many, many persons in Cambridge, the Harvard Law School, Washington and elsewhere who know Alger Hiss?
- A Without placing them geographically I should say Yes.
- Q Can you state to these ladies and gentlemen whether they [*sic*] reputation of Mr. Alger Hiss for loyalty to his government, integrity and veracity is good or bad? Can you state that?
- A I never heard it called into question.
- Q And from the speech of people would you say that his reputation is good in those respects?
- A I would say it was excellent.
- MR. STRYKER: That is all.
- CROSS-EXAMINATION BY MR. MURPHY:
- Q Didn't you hear in 1944 that it wasn't too good, about that time?
- A Well, I can't answer Yes to that date.
- Q Let me see. Did Judge Frank ever talk to you about him, Judge Jerome Frank?
- A I think I hesitate about that, because certainly not in '44.

Q Well –

A I think Judge Jerome Frank had differences of opinion with Mr. Hiss, in the Department of Agriculture about which I heard contemporaneously, and that did not bear on questions of loyalty or integrity.

Q It didn't, Judge?

A Not as far as my memory goes.

Q But you remember talking to Judge Frank about it?

A No, I remember his talking to me.

Q Then I assume that you talked to him when he talked to you?

A Well, let us not fence. All I meant to say was –

Q Well, you were the one that started fencing with me, weren't you, Judge? I asked you whether you talked to Judge Frank and you said that Judge Frank talked with you. Am I accurate?

A I am trying to answer as carefully as I can with due regard to your responsibility and mine and the jury's and the responsibility of this case. I have a vague memory that sometime in – while I was away in '33 and '34, when I was one year abroad visiting a professor at Oxford, and while abroad, unless I am wrong there, but about that time, during that period, there were some differences of opinion among lawyers and non-lawyers in the Department of Agriculture, and since several of them were friends of mine, including Judge Frank, I heard about that. But if you pin me down to what I heard and how I had come to hear it, I would find it impossible to answer. I repeat that I have absolutely no recollection and I would deny unequivocally having heard that whatever the differences were they affected loyalty to this country, or involved in the slightest betrayal of this country. I have no doubt on that subject whatever.

Q Would you expand it a bit, Judge, by saying that it involved loyalty of that man to Judge Frank's superior?

A I wouldn't know a thing about that.

Q You wouldn't?

A No.

Q Do you have any idea how Mr. Hiss became employed by the Government in 1933 or '34?

A I am not too sure, but it may well – it may well be that after Mr. Frank, after now Judge Frank became Solicitor of the Department of Agriculture, he turned to me, as did members of the Bar throughout the country in Government and out of Government turned to me while I was at the Harvard Law School to recommend men of competence and character, and they turned to me not because they liked my pretty eyes but because they had long years of experience both at the Bar and in Government and out of Government, and I had particular equipment for knowing the kind of people that lawyers prefer, Cravath Henderson, or Sullivan & Cromwell, or the Department of Agriculture, and the Solicitor's Office, and my guess is, although I am not dead sure, Mr. Murphy, but I think it is highly likely that Judge Frank, having been charged with the responsibility of an important headship of a law office in Washington, would ask me for suggestions, and I certainly would have recommended Mr. Hiss unqualifiedly.

Q But you have no independent recollection?

A Well, it is a little vague, because that is true of so many of these things, but I made a good many recommendations, as I said, whether it was Cravath & Henderson, or Mr. Buckner, when he was United States Attorney here, or lawyers in Los Angeles. I have not an independent recollection but I think it is highly likely.

Q Well, do you have any independent recollection of others that you recommended to Government service?

A Certainly.

Q Did you recommend Lee Pressman?

MR. STRYKER: I object to that as immaterial.

THE COURT: I sustain the objection.

A I should say –

THE COURT: I sustained the objection, Mr. Justice.

A (Continuing) I should say it is highly unlikely.

Q Was Lee Pressman a member of the Harvard Law Review, do you know?

A Yes, I believe he was.

MR. STRYKER: I object to it.

THE COURT: I sustain the objection. Strike out the answer.

MR. MURPHY: Well, your Honor, I submit that I should be allowed to ask the Justice that.

THE COURT: I have ruled, Mr. Murphy.

THE WITNESS: I bow to your ruling, Judge Kaufman, but I have no unwillingness –

THE COURT: I understand that, sir.

THE WITNESS: – to answer any of these questions.

THE COURT: I understand that, sir.

MR. MURPHY: So that I may be guided, your Honor, may I not ask this witness who the other members of the Harvard Law Review were?

THE COURT: Correct.

MR. MURPHY: And that I can only ask him about the defendant Hiss?

THE COURT: Yes. Hiss is the only one on trial here.

MR. MURPHY: That is true, your Honor, but we discussed at length Mr. Justice Holmes and this man's association with a great many people.

THE COURT: There has been a ruling, Mr. Murphy. It will serve no useful purpose.

Q Judge, do you recall testifying to the Federal Court before today on the character of anybody at all?

A I do not. I am quite sure I never did, Mr. Murphy.

Q And this is your first time?

A This is the first time that I have had this role.

Q And has the court adjourned for the summer, your court?

A It has not, sir.

Q It has not?

A No.

MR. MURPHY: Thank you. No further questions.

THE WITNESS: But it is not in session today, Mr. Murphy.

MR. STRYKER: Thank you very much, Mr. Justice Frankfurter.

THE WITNESS: Thank you.

(Witness excused.)

MR. STRYKER: Mr. Justice Reed.

STANLEY REED, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STRYKER:

Q Mr. Justice Reed, are you a Justice of the Supreme Court of the United States?

A I am.

Q How long have you been a member of that Court?

A January 31, 1938.

Q And before becoming a Justice of that Court did you occupy some other official position?

A Yes, I occupied a number of positions.

Q Going backwards, would you tell me what position you held when you were appointed to the Supreme Court?

A I was Solicitor General of the United States.

Q Do you recall how long you were Solicitor General?

A From 1933 until 1938.

Q Prior to that you held other positions, did you not, under the Government?

A I was the general counsel of the Reconstruction Finance Corporation. Prior to

- that I was general counsel of the Federal Farm Board.
- Q Did there come a time when Mr. Alger Hiss became a member in some capacity of your legal staff while you were Solicitor General of the United States?
- A Yes, sometime in the summer of 1935.
- Q And would you recall at all, perhaps I can supply the date, about how long he continued there?
- A Well, a short time. I should say something over a year, about a year.
- Q I have it about August, 1936. Would you think that would be substantially correct?
- A Yes.
- Q What was his official title there in the Solicitor General's office, if you can remember, Mr. Justice Reed?
- A I think he was a special attorney.
- Q About how many were there then in the Solicitor General's office, in that time? I imagine it was smaller then than now.
- A I don't know how many there are now. I should say there were seven or eight lawyers there, perhaps as many as ten.
- Q We have had one brief description by former Solicitor General, Mr. John W. Davis, of the Office of Solicitor General. Perhaps you would not mind giving us a word about what the Solicitor General's office is and what it does.
- A The most important function of the Solicitor General's office is to represent the United States in cases before the Supreme Court of the United States. He is also charged with responsibility of authorizing appeals when the Government loses cases in any of the district courts of the United States and the circuit courts of appeals, or any court the Government may be in. He also acts for the Attorney General in the absence of the Attorney General.
- Q One of the great roles is to argue the great cases in the Supreme Court for the United States, is that right?
- A The reason I hesitate is there are many great cases argued by other people than the Solicitor General.
- Q The reason you hesitate is my question was poorly phrased. I mean where the United States is a party one of the great roles of the Solicitor General is arguing appeals for the United States in the Supreme Court on behalf of the United States is that correct?
- A That is correct.
- Q Is the position of the attorneys in the Solicitor General's Office, and the special attorneys, one of trust and confidence?
- A Yes.
- Q In other words, would it be fair to say that the Solicitor General appoints these men not only on the basis of their legal competence, but on the basis of character and integrity?
- A The appointments are made by the Attorney General on the recommendation of the Solicitor General.
- Q However they are made, those considerations I mentioned would enter in very strongly?
- A Yes. They have legal responsibility.
- Q I think while Mr. Hiss was there he argued one case, and only one case, in the Supreme Court. With all the business you had I doubt if you remember the case, or perhaps you do. I doubt if you did with all the cases you had.
- A Well, I don't remember the name of the case. I remember the case had to do with the priority of the Government, the case that he argued.
- Q Before he came to the Solicitor General's Office had Mr. Hiss worked for the Agricultural Adjustment Administration?
- A He had.
- Q And was he familiar with the problems involved in the litigation concerning the Agricultural Adjustment Act?
- A Yes, he was.
- Q And did this culminate among other things

- in the case of *Butler v. The United States*, decided by the United States Supreme Court in January 6, 1936?
- A Yes, sir.
- Q Did Mr. Hiss appear as of counsel in that case?
- A Well, I don't think he took part in the argument. His name was on the brief.
- Q You yourself, as Solicitor General, argued the *Butler* case in the Supreme Court, did you not?
- A My recollection is no one else argued it except me.
- Q What is that?
- A I think I was the only counsel for the Government in that case that argued.
- Q Did there come a time when Mr. Hiss left the staff of the Solicitor General, your staff, in order to accept a position in the State Department?
- A Yes, he was transferred to State in 1936.
- Q Before he left you had he worked on trade agreement problems, and was it by reason of this, if you know, that the State Department requested his services to carry on this particular type of work over in the State Department?
- A I am not familiar with that.
- Q Coming specifically to Mr. Alger Hiss, I think you told me that the special attorneys are named by the Attorney General but on the nomination or recommendation of the Solicitor General?
- A That is correct.
- Q Was Mr. Alger Hiss named to the position of special attorney in that way?
- A He was, at my request.
- Q Mr. Justice Reed, do you know people who know Mr. Alger Hiss?
- A Oh, yes.
- Q And from the speech of people can you tell this Court and jury whether his reputation for integrity, loyalty and veracity is good or bad? Can you tell us that?
- A I have never heard it questioned until these matters came up.
- Q From that can you state that his reputation in those respects is good?
- A As far as I know.
- MR. STRYKER: That is all.
- CROSS-EXAMINATION BY MR. MURPHY:
- Q Just a few questions, Mr. Justice: Can I take it from your next to the last answer that until 1948 you had not heard any charge or rumors that Mr. Hiss was a Communist?
- A Not at all.
- Q Until the Congressional hearings?
- A Not at all.
- Q That is the first time you heard it?
- A Whenever the Congressional hearings started, or whenever the matters here under trial began.
- Q Do you recall who it was, if anyone, that recommended Mr. Hiss to you when he became a member of your staff?
- A I think Judge Jerome Frank.
- Q You think it was Judge Frank or Judge Frankfurter?
- A I am quite sure it was not Judge Frankfurter.
- Q You do feel that strongly? I am talking about 1935.
- A Yes, sir, as far as I know I was looking around for someone familiar with the Agricultural Adjustment Administration and Mr. Hiss spent a good part of the time when he was in the Solicitor General's office working on that case.
- Q Do you have an independent recollection, Judge, whether it was Judge Frank at all?
- A No. I know that I talked with Judge Frank about him.
- Q Prior to your selection of him?
- A Prior to my selection of him.
- Q And you know there had been quite a shakeup in the AAA?
- A Yes, I was familiar with that.
- Q And Judge Frank –

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A And Judge Frank –

Q Excuse me. Judge Frank resigned from the
AAA?

A And joined my staff at R.F.C.

Q And your recollection is you talked to Judge
Frank about Mr. Hiss?

A Quite clear.

Q You say it is quite clear now?

A Quite clear.

MR. MURPHY: No further questions.

(Witness excused.) *JB*