

# *From the Bag*

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## The Alger Hiss Case

JUSTICES FRANKFURTER & REED AS CHARACTER WITNESSES

G. Edward White

On June 22, 1949, Justices Felix Frankfurter and Stanley Reed testified as character witnesses on behalf of Alger Hiss, during Hiss's first trial for perjury. A stenographic version of that testimony follows this essay. The perjury prosecution was based on statements Hiss had made in August 1948 before the House Committee on Un-American Activities (HUAC). Testifying before the HUAC, Hiss had denied allegations by Whittaker Chambers, a confessed former Communist spy, that he and Hiss were members of a Soviet intelligence network in the 1930s. Hiss's first perjury trial ended in a hung jury on July 8, 1949; he was retried and convicted of two counts of perjury on January 21, 1950 and began serving a five-year sentence on March 22, 1951. He spent 44 months in prison, all the while maintaining his innocence. He continued to do so until his death in August 1996 at the age of 92.

— *The Editors*

**T**HE ALGER HISS CASE has been one of the great stories of the second half of the twentieth century. A definitive recreation of its true nature has remained elusive, however, even to those, such as the historian Alan Weinstein, who have been deeply invested in the case for decades. But Weinstein's dogged persistence, the somewhat inadvertent cooperation of Soviet intelligence agencies in the years shortly after the break up

of the Soviet Union, and the U.S. Army's success in decoding encrypted Soviet diplomatic correspondence after 1943 have resulted in some facts about the Hiss case now being virtually "established," insofar as that term can ever be applied to the actions and motivations of complex human beings.

From at least 1933 through at least 1945, Hiss was likely an agent for Soviet military intelligence.<sup>1</sup> He had shown some enthusiasm for

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<sup>1</sup> A note on sources seems appropriate at this point. The Hiss case, and its connections to the Cold War and mid-twentieth-century American political history, have been the subject of a vast literature.

collectivist political ideologies from at least 1932 on, and by the winter of that year was meeting regularly, in New York, with persons who were either members of the American Communist party or regarded themselves as Communists. In the spring of 1933 he moved, along with his wife Priscilla and her son from a previous marriage, to Washington to take a position at the Agricultural Adjustment Administration. Jerome Frank, general counsel to the AAA, and Felix Frankfurter, then on the Harvard law faculty, played large roles in Hiss's move from private practice to government service. Frank was eager to staff the AAA with bright young lawyers, and Frankfurter strongly recommended Hiss to him. Frankfurter had known Hiss well in the last two years of Hiss's tenure as a Harvard law student (which stretched from the fall of 1926 through the late spring of 1929), and had chosen Hiss as law clerk for Justice Oliver Wendell Holmes during the 1929 Supreme Court Term.

Although Hiss, in an interview with Alan Weinstein in 1975, was to describe his decision to move to the AAA as an enlistment in response to a national emergency, he may well have had additional aims. Hiss's New York acquaintances had included Harold Ware, who edited a magazine of the American Com-

munist Party. Ware, like the Party's president, Earl Browder, was a Soviet agent, and his duties included recruiting additional agents. Ware formed a "Marxist study group" in Washington, and when Hiss joined the AAA he also joined that group. By 1934 Hiss was reportedly paying dues to the Party and participating in the process of funneling information – by all accounts largely innocuous – from the AAA to the Party's New York headquarters.

Around this time another Soviet agent, Whittaker Chambers, began assisting Ware as a courier for documents stolen from government offices and delivered to the Party. In July 1934, Hiss was "loaned" by the AAA to a Senate Committee, chaired by Gerald Nye, which was investigating the role of American armaments manufacturers in affecting foreign policy. Hiss's appointment had been facilitated by Lee Pressman, a fellow Harvard law school graduate and AAA staff member who was also involved with the Ware group. The theory of Hiss's transfer, from the point of view of Ware and Josef Peter, the resident coordinator of Soviet agents in the United States at the time, was that his position on the Nye Committee would give him access to U.S. military intelligence documents. With Hiss's transfer to the Nye Committee, he became the center of a

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The most exhaustive treatments of the case, and its relationship to Soviet espionage networks in the United States from the late 1920s through the 1950s, are two books by Alan Weinstein, *Perjury* (2d ed., 1997), and, with Alexander Vassiliev, *The Haunted Wood* (1999). The latter work is a study of Soviet espionage in America during Stalin's tenure as Premier of the Soviet Union, based in part on files in KGB archives to which Weinstein and Vassiliev, a former employee of the KGB, were granted access between 1994 and 1996.

Two books which appeared in the 1970s, John Chabot Smith's *Alger Hiss: The True Story* (1976) and Tony Hiss's *Laughing Last* (1977), present Hiss's side of the case, emphasizing the number of allegations against Hiss that were not accompanied by corroborating evidence and the personal and ideological motivation of Hiss's accusers, notably Whittaker Chambers and Richard Nixon. Both Hiss and Whittaker Chambers wrote autobiographies in which they defended their positions, Chambers's *Witness* (1952) and Hiss's *In The Court of Public Opinion* (1957) and *Recollections of a Life* (1988). Sam Tannenhaus, *Whittaker Chambers: A Biography* (1997), supports Chambers's allegations against Hiss. Of the major books on the Hiss case, those by Weinstein surpass the others in thoroughness of research and painstaking attention to detail. Nonetheless Weinstein's occasional truculence or belligerence toward his critics, and a tendency to repeat his central claims excessively, detract from the image of balanced detachment that he seeks to maintain.

Soviet military intelligence network in the United States, and soon Chambers became his chief courier for purloined information.

In 1935 two events occurred which were to have a significant effect on the later history of the Hiss case. A memo in whose drafting Hiss had participated, which advocated collective bargaining for sharecroppers, became the basis of a “purge” of the AAA general counsel’s office, including Frank and Pressman. Hiss was not publicly identified with the memo, and was not forced to resign, apparently because Chester Davis, an influential member of the AAA staff, had an affectionate regard for him and Hiss was serving with the Nye Committee when the “purge” was announced.<sup>2</sup> The notoriety of the episode, with its implications that the AAA was a center of radical politics, would later work to Hiss’s disadvantage, especially when Pressman invoked the Fifth Amendment, in testimony before the HUAC in 1948, when asked whether he had been a Communist and a member of Harold Ware’s group.

The second event was the death of Harold Ware in a car accident, which resulted in the dissolution of the study group and an enhanced role for Chambers. Between 1935 and early 1938 Chambers photographed, or received copies of, a significant collection of government documents supplied to him by Hiss. These documents, according to Chambers, were procured by Hiss from the Nye Commission, which had some access to copies of State Department files, and from the State Department itself, for which Hiss worked from September, 1936 until he was forced to resign in January, 1947.

In early 1938 Chambers suddenly abandoned his role as a courier for Soviet intelligence and went into hiding, keeping copies of incriminating documents to protect himself from reprisals by the Soviets. His motivation, at the time, was self-preservation: the Stalinist purges had begun in Russia and Chambers was fearful that he might somehow offend Russian intelligence officials. After the Nazi-Soviet pact in 1939 Chambers’s fear of the Soviet Union turned to revulsion, and he resurfaced as a virulent anti-Communist, eventually landing a position as editor at *Time* magazine.

In Hiss’s two perjury trials he continued to deny being an agent for the Soviet Union or being sympathetic to international Communism. After his release from prison in 1954 he vigorously sought to overturn his perjury conviction and to reinstate his eligibility to practice law, achieving the latter goal in 1975, when his license to practice in Massachusetts was restored. Hiss’s continued affirmation of his innocence was supported by a great many persons. But it flew in the face of four independent pieces of evidence that were not part of Hiss’s perjury trials, and some of whose existence has become public knowledge only recently.



In 1939 Chambers, as part of his new role as defector, had a confidential interview with Adolf Berle, then Assistant Secretary of State, in which he revealed the names of several underground Soviet agents, including Hiss.

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2 In separate memoranda describing the circumstances of the “purge,” Jerome Frank and Hiss gave conflicting accounts of Hiss’s role in the original memorandum and its consequences. Frank recorded a conversation, shortly after he and Pressman were publicly dismissed, in which Pressman and Hiss told him that Hiss had been offered the position of general counsel to the AAA. Frank responded by telling Hiss that he would be deeply offended if Hiss accepted the position, because then it would appear that Frank’s dismissal was not based on ideology but on incompetence. Hiss, in a memorandum prepared for his defense at his first perjury trial, denied that he had received the offer and that he had had the conversation with Frank and Pressman. See Weinstein, *Perjury* at 135.

Berle made a memorandum of the conversation, but delayed an investigation into Chambers's charges for two years, and then made only a cursory inquiry, mainly composed of conversations about Hiss with Frankfurter, now on the Supreme Court, and Dean Acheson, for whom Hiss was working in the State Department. Frankfurter and Acheson suggested that the charges against Hiss were preposterous, and Berle did not pursue the matter.<sup>3</sup>

In late 1945 Hiss was identified as an undercover Soviet agent by two sources, both of them defecting Soviet agents. One agent, Elizabeth Bentley, had, after the death of her lover and fellow agent Jacob Golos, entered into a relationship with an American counter-intelligence agent, who apparently convinced her to defect. In an interview with the FBI on the heels of her defection, she recalled Hiss's attempting to recruit into his own underground Soviet network an agent from a parallel network with which she and Golos were associated. Bentley also told the FBI that Hiss had continued to work for the Soviets after becoming Acheson's assistant in the State Department in the early 1940s. The other agent, Igor Gouzenko, was a code clerk in the Soviet Embassy in Ottawa, Canada, who, after defecting to the Canadian authorities along with large numbers of documents, told the FBI that the Soviets had a highly placed agent who was currently an assistant to Secretary of State Edward Stettinius. Hiss held that position in 1945.<sup>4</sup>

Finally, there was "VENONA," the successful

program for deciphering encrypted Soviet diplomatic cables that was run by Army Signal Intelligence Service from 1943 until 1948, when its existence was revealed to the Soviets by an Army cipher clerk who was a Soviet agent. One of the decrypted cables, sent on March 30, 1945 by Anatolij Gromov, the resident head of Soviet State Security in Washington, to his superiors in Moscow, summarized a conversation between Hiss (known as "ALES") and a field agent. The conversation described "ALES" as working for Soviet military intelligence, as being the leader of a small group of undercover agents, as obtaining military information despite his working at the State Department, as having recently been awarded a Soviet decoration, and as having received the "gratitude" of "a Soviet personage in a very responsible position" (whom "ALES" thought was Foreign Minister Andrey Vyshinski), on a brief visit to Moscow after attending the Yalta conference. Hiss attended the Yalta conference as an assistant to Stettinius in February, 1945, and made a stopover in Moscow after the conference.<sup>5</sup>

All of this information, with the exception of the VENONA cable, was available to the FBI, and to high officials in the State Department, by the end of 1945, and officials at the Army Security Agency could have granted high FBI and State Department sources access to the VENONA cable had they chosen to do so. Apparently neither the FBI nor the Army felt it appropriate to make the information available to the government prosecutors in the Hiss perjury trials. The FBI did communicate some

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3 Berle was called as a witness by the HUAC, and gave a highly varnished account of the incident, declining to remember the memorandum he had made of Chambers's interview. He wrote Jerome Frank a letter after his testimony in which he admitted that he thought Hiss was "pretty deep in something or other in the early days," but that "he was not a traitor." *Perjury* at xix-xx, 55-59, 292-93.

4 The interviews Bentley and Gouzenko had with the FBI are discussed in *Perjury* at 316, citing FBI correspondence and files.

5 The decoded March 30, 1945 cable is reproduced in *The Haunted Wood*, photographic section following page 196. A footnote to the cable, probably inserted on August 8, 1969, states that "ALES" is "Probably Alger HISS."

of the information to internal State Department security officials, prompting a probe of Hiss in late 1945 and early 1946. Nonetheless Hiss remained in the State Department through 1946, although he was informed, early in that year, that his chances of further promotion or influence in the State Department were remote. Through contacts between Dean Acheson and John Foster Dulles, then practicing law in New York and a member of the Board of Trustees of the Carnegie Endowment for International Peace, Hiss was offered the Presidency of the Carnegie Endowment, the position he still held at the time he was indicted for perjury in December, 1948.<sup>6</sup>



Among the strategies Hiss employed at his first perjury trial, consistent with his general claim that someone such as himself could not possibly have been a Soviet agent, was the enlistment of a long line of distinguished witnesses in his defense, including two sitting members of the Supreme Court of the United States. The voluntary appearance of two Justices, in a trial in which national security issues were at the forefront and the alleged penetration of the United States government

by Communists was a burning contemporary issue, was itself extraordinary. Of the nine sitting Justices of the Court on June 22, 1949 only two, Felix Frankfurter and Stanley Reed, would have been particularly valuable to the Hiss defense.<sup>7</sup> Frankfurter was not only a close friend and patron of Hiss's, but he had recommended him, as he testified, for a position of trust with the government, that of law clerk to Justice Holmes. Reed had actually hired Hiss for a position of trust, that of special assistant in the Solicitor General's office.

Neither position that Hiss held, however, was necessarily one "of trust" in the context of Chambers's accusations that Hiss had been a Soviet agent. Although, as Holmes's law clerk, Hiss was potentially privy to the internal deliberations of the Supreme Court of the United States, neither he nor any law clerk would have been exposed to documents with national security implications, except where a particular case raised such issues. Moreover, Chambers had not suggested that Hiss had been a Soviet agent, or that Hiss had shown him any purloined documents, until 1935 at the earliest, six years after the Holmes clerkship. As for Hiss's employment with Reed, he had been hired primarily to work on a particular case, *United States v. Butler*, which was a con-

6 The details of the growing suspicion of Hiss in late 1945 and early 1946, originating in exchanges between the FBI and internal security staff in the State Department, are set forth in *Perjury* at 316-18. Decoded cables from the VENONA files in the same time period confirm Moscow's considerable anxiety after learning of the defections of Bentley and Gouzenko, and that another Soviet agent, Harold Glasser of the Treasury Department, had informed Anatoly Gorsky that materials turned over to the FBI after Gouzenko's defection had identified a highly placed State Department official as the source of confidential Department documents which had turned up in Gouzenko's possession. On the significance of Glasser as a Soviet agent, confirmed by KGB files, see *The Haunted Wood* at 265-71, which also stresses Glasser's close contacts with Hiss.

7 The Justices on the Court at the time were Fred Vinson (Chief Justice), Hugo Black, Reed, William O. Douglas, Frankfurter, Robert Jackson, Harold Burton, Tom Clark, and Sherman Minton. All of the Justices undoubtedly had known of Hiss before his appearance before the HUAC, since Hiss, as a participant in the Yalta Conference, the chief organizer of the 1946 San Francisco conference in which the United Nations was created, and the President of the Carnegie Endowment, was a public figure. But Black, Douglas, Vinson, Burton, Clark, and Minton had not held any governmental positions in which they would have come into contact with Hiss, and although Jackson had been Solicitor General of the United States between 1938 and 1940, Hiss had by that time left the Solicitor General's office for the State Department.

stitutional challenge to the federal statute creating the Agricultural Adjustment Administration. As an AAA staff member, and a lawyer with strong credentials, Hiss might well have been expected to be helpful with the government's brief in support of the AAA, but that was hardly a matter of great interest to Soviet military intelligence.

Frankfurter and Reed were witnesses, in short, whose eminence was supposed to accentuate Hiss's own eminence, and whose willingness to come forward in support of Hiss was supposed to reinforce the incredibility of someone such as Hiss being a Soviet agent. But in fact neither justice was particularly effective in conveying the impression that to imagine Alger Hiss sympathizing with the Soviets was simply not possible.

Lloyd Stryker, defending Hiss, apparently felt that by asking Justice Frankfurter to discuss the process of selection for the *Harvard Law Review*, to which Hiss had been elected after his first year at Harvard, 1926-27, he might establish not only Hiss's superior academic standing but his good character. Nowhere in the exchange between Stryker and Frankfurter recorded in the trial transcript is there any acknowledgment that membership on the *Law Review* at Harvard, although technically in the discretion of the existing student members, was in 1927, as it is today, based on academic accomplishment, which in Hiss's day meant high grades in first- or first- and second-year law school courses. It may have been theoretically possible for the

existing Review members to reject a student whose grades qualified him for membership, or to accept one who did not, but there is no evidence that this practice was followed.<sup>8</sup> Thus it is not clear what Stryker meant by suggesting that the "young men chosen for [the Review were selected] on the basis ... of integrity." It is also not clear what Frankfurter meant, in responding to Stryker's question ("Would you say the character [of board candidates] enters into the appointments on the board?") by his response, "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." "[T]heir qualifications are passed upon by their fellow students," Frankfurter continued, but the only "qualifications" involved an aspiring student's grades and rank in class.

The relevance of Hiss's membership on the *Harvard Law Review* to his character nonetheless continued to dominate Stryker and Frankfurter's conversation after this initial exchange. Stryker asked Frankfurter if he chose law clerks for Justice Holmes, and how he came to know Hiss, expecting to steer Frankfurter to the conclusion that Frankfurter had thought Hiss the sort of student he could recommend as a law clerk to a particularly gifted Supreme Court justice. The transcripts record an extended conversation in which Stryker attempted to get Frankfurter to focus on the importance of character in the selection of Hiss for a position of trust, and Frankfurter

8 For confirmation that membership on the *Harvard Law Review* was solely on the basis of grades and class rank during Hiss's time, see Arthur Sutherland, *The Law at Harvard* 248-49 (1967). Joel Seligman, in another history of Harvard Law School, *The High Citadel* 40 (1978), stated that this practice dated back to 1902 (the *Review* was founded in 1887); that fact is also confirmed in the *Centennial History of Harvard Law School, 1817-1917* at 40 (Harvard Law School Association, 1917). Seligman also quoted Frankfurter, in a conversation that took place after he retired from the Court in 1962, as saying the following about criteria for election to the *Review*:

[A]fter the first year ... the very good men were defined by the fact that they got on the Harvard Law Review. This was determined entirely on the basis of your work as a student by examinations at the end of the year. Election to the Harvard Law Review followed academic rank, an automatic affair. (Seligman, 40-41.)

occasionally cooperated. At one point Frankfurter testified that “to be of any use at all [a law clerk to a Supreme Court Justice] must be in the complete confidence of the justice, which means he must know secrets of importance as enter into the affairs of government.” At another he said that in selecting Holmes’s clerks “I had kept an eye on the personality, the characteristics, the character, and all the things that go to make up the kind of man that anyone in my position would think had the indispensable characteristics for a law clerk for Mr. Justice Holmes.”

But along the way Frankfurter, rarely inclined to be sparing in his comments, gave the following answer to the question, “When did you first become acquainted with [Alger Hiss]?”

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 students. 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 letter 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, ... 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 judgment. And, so, men who made the Law Review, editors of the Law Review, [and] 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.

A disinterested listener to this response might have taken Frankfurter to be saying, “normally I paid no attention to students until I had them in my classes their third year, but, of course, I made an exception for Law Review students.” The “of course” was not explained, except perhaps that both *Law Review* students and faculty members shared “matters [ostensibly of legal scholarship] on which they have to write, or report, or pass judgment.” Frankfurter took it for granted that he and other faculty members would make themselves accessible to *Law Review* students even though other students, at least in his case, could not be expected to come within his purview unless they had a letter of commendation.

In fact the statement, if anything, underestimated Frankfurter’s implicit prioritizing of the Harvard student body. Of all the Harvard faculty members during Hiss’s time as a student, Frankfurter was the most attentive to, and inclined to make judgments about, *Law Review* students. He did not serve as a mentor or patron of all such students. But when a *Law Review* student made a favorable impression upon him, Frankfurter, absent some rift with the person in question, became a sponsor of that student for an extended period.<sup>9</sup>

Frankfurter chose law clerks for both Holmes and Justice Louis Brandeis during the period in which Hiss was in law school, and his sample of potential clerks typically included *Law Review* members. “I would keep a sharp eye, as sharp an eye as I could,” he told

9 For more detail, see G. Edward White, “Felix Frankfurter, The Old Boy Network, and the New Deal,” in *Intervention and Detachment: Essays in Legal History and Jurisprudence 149-174* (1994).

Stryker, “on the potential choices that I would eventually make. ... So early in the spring [of the candidate’s third year in law school,] 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 ... [the man who] had the indispensable characteristics for a law clerk for Justice Holmes.”<sup>10</sup>

Although Frankfurter had listed character as one of his criteria for a Holmes clerkship, a list of the clerks whom Frankfurter selected for Holmes indicates that, at least until Holmes retired from active judicial service midway through the 1931 Term, two other criteria were perhaps more “indispensable.” One criterion was membership on the *Harvard Law Review*; the other was being a white Anglo-Saxon Protestant. Of the law clerks that Frankfurter recommended to Holmes for the 1915 through the 1931 Terms, only one, Thomas Corcoran, was a non-WASP, and all were members of the *Law Review*.<sup>11</sup> Hiss not only fit both criteria, he had, Lee Pressman recalled, “a kind of distinction that had to be seen to be believed. ... He gave you a sense of absolute command and absolute grace and I think Felix [Frankfurter] felt it more than anyone. He seemed to have a kind of awe for Alger.”<sup>12</sup>

After a largely irrelevant effort on the part of Stryker to ask Frankfurter what Holmes had thought of Hiss, notwithstanding the hearsay rule, Stryker concluded Frankfurter’s direct examination by asking whether the justice could state “whether the reputation of Mr.

Alger Hiss for loyalty to his government, integrity and veracity is good or bad.” Frankfurter answered, “I never heard it called into question,” and in response to a brief follow-up, “I would say it was excellent.” Stryker ended his questioning of Frankfurter at that point.

Prosecutor Thomas Murphy’s first question on cross-examination attempted a slight impeachment of the witness. “Didn’t you hear in 1944 it wasn’t too good, about that time?,” he asked Frankfurter, referring to Hiss’s reputation. The choice of the year 1944 was awkward for Murphy, who apparently was referring to 1934, the year of the AAA purges. Frankfurter parried by responding “I can’t answer Yes to that date.” Realizing (or perhaps oblivious) to his mistake, Murphy asked Frankfurter if “Judge [Jerome] Frank [had] ever talk[ed] to you about [Hiss].”

The mention of Jerome Frank, and his relationship with Hiss, apparently stimulated some free associations in Frankfurter. Frankfurter knew a great deal about that relationship. He had not only recommended Hiss to Frank for a position in the AAA, he had known Frank (and Lee Pressman) well at the time of the AAA “purge,” and very likely disapproved of their peremptory dismissal. As he put it, “while I was away in ’33 and ’34 ... there were some differences of opinion among lawyers and non-lawyers [Chester Davis, who forced Frank to resign, was not a lawyer] in the Department of Agriculture, and since several of them were friends of mine, including Judge Frank, I heard about that.” Frankfurter went on to say that “I

10 In Hiss’s case Frankfurter had written Holmes with his recommendation quite “early in the spring” because Holmes wrote Frankfurter on January 29, 1929, that “[t]he account you give of Mr. Hiss sounds most prepossessing and if he is willing to take the chances I shall hope to have him.” Quoted in Robert L. Mennel & Christine L. Compston, eds., *Holmes and Frankfurter, Their Correspondence, 1912-1934* at 234 (1996).

11 For a list of Holmes’s law clerks, see G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 489 (1993).

12 Lee Pressman, interview with Murray Kempton, quoted in Kempton, *Part of Our Time: Some Monuments and Ruins of the Thirties* 20 (1967). Frankfurter’s attraction for persons whom he perceived as representatives of upper class WASP society is discussed in White, “Felix Frankfurter, the Old Boy Network, and the New Deal.”



would deny unequivocally having heard that whatever the differences were they affected loyalty to this country." How about "loyalty of [Hiss] to Judge Frank's superior?" Murphy countered. "I wouldn't know a thing about that," Frankfurter responded. Although Frankfurter undoubtedly knew that Hiss had been part of the pro-sharecroppers group in the AAA, Davis had not singled Hiss out, and had not asked him to resign, so the question of Hiss's "loyalty" to Davis might not have been aired with Frankfurter. But the mention of Frank and the AAA was a ticklish point for him, perhaps because he may have been aware that Frank had declined to serve as a character witness for Hiss.<sup>13</sup>

Murphy seized on Frankfurter's apparent discomfort. He got Frankfurter to confirm, in a rambling discussion, that he had recommended Hiss to Frank for the AAA, although Frankfurter gave the impression that since he was making so many recommendations of Harvard graduates to so many people at the time, he could not remember his recommendation of Hiss vividly. Then came the following exchange:

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

Frankfurter: Certainly.

Murphy: Did you recommend Lee Pressman?

That question was an awkward one for Frankfurter. Pressman had joined the AAA before Hiss, close to the time when Frank was appointed its legal counsel. Pressman and Hiss had both been members of the same *Law*

*Review* class at Harvard. Pressman had also been identified by Chambers as a member of the Ware group in Washington and as a Communist, and had invoked the privilege against self-incrimination when asked about those affiliations by the HUAC. Stryker immediately moved to strike Murphy's question as irrelevant, and Judge Kaufman sustained the objection, eventually giving as the ground that "Hiss is the only one on trial here."

Nonetheless Frankfurter proceeded to answer Murphy's question. "I should say," he testified, "it is highly unlikely." He also confirmed, in response to a follow up question, that Lee Pressman was a member of the *Harvard Law Review*. Murphy's point was obvious enough. Stryker had encouraged Frankfurter to associate membership on the *Review* with character and trustworthiness; Murphy was suggesting that at least one member of the *Review* in Hiss's class had very probably joined the American Communist Party in the 1930s. Judge Kaufman struck Frankfurter's answer, to which Frankfurter said, "I bow to your ruling, ... but I have no unwillingness to answer any of these questions." But after one very mild additional effort to impeach Frankfurter as a character witness,<sup>14</sup> Murphy concluded his cross-examination.

Frankfurter's appearance, on the whole, had said a great deal more about Frankfurter than about Hiss, and, although it had not done Hiss any particular harm, it had not done him much good. The most positive feature of Frankfurter's testimony was the spectacle of a Justice of the Supreme Court vouching for the character of a person charged with a serious

13 See *Perjury* at 136, quoting a memorandum in the Jerome Frank Papers.

14 Murphy's last question to Frankfurter was whether he could "recall testifying to the Federal Court before today on the character of anybody at all." His point, apparently, was to suggest that Frankfurter was sufficiently close to Hiss that his views on Hiss's "character" should not be given great weight. He followed up that question by asking Frankfurter whether the Supreme Court had adjourned for the summer, perhaps hoping to establish that it was no particular effort on Frankfurter's part to appear in another Washington courtroom when his own court was in recess. If those were Murphy's goals, they were not successful. Frankfurter stated that he had never appeared

and sensational offense. That fact alone added to the aura of veracity and incorruptibility which Hiss was seeking to project. But on specifics, Frankfurter had not produced any hard evidence of Hiss's good character. He had principally described his great interest in members of the *Harvard Law Review*, his role as a patron and sponsor of Harvard law students, and his friendships with Justice Holmes, Jerome Frank, and Hiss. None of that information gave any concrete support for the implicit claim that Hiss could not have lied to the House Committee on Un-American Activities because he was incapable of doing so. If anything, Frankfurter's comments suggested that perhaps he had not made as judicious an assessment of Alger Hiss as he thought he had.



The next Supreme Court Justice testifying in support of Hiss, Stanley Reed, might have been thought to be more promising from the Hiss defense's point of view. Reed had actually been Hiss's superior in the Justice Department. He had sought out Hiss, and hired him, for an important position. He had worked closely with him on the preparation of a legal argument. He had agreed to lend his prestige to the Hiss defense. But, when Reed's brief testimony concluded, his comments were not a great deal of help to Hiss. In fact, they could have been thought of as even less helpful to him than those of Frankfurter.

Most of Stryker's direct examination of Reed was designed to elicit two conclusions: that the Solicitor General's office was one of great public trust, and that Reed's hiring of Hiss in that office reflected favorably on Hiss's character and trustworthiness. Stryker chose

to proceed toward those conclusions indirectly, which resulted in a relatively lengthy and somewhat awkward exchange with Reed about how important the Solicitor General's Office really was. (At one point Stryker said, "One of the great roles [of the SG's office] is to argue the great cases in the Supreme Court of the United States, is that right?," and Reed, whose level of modesty was somewhat higher than that of Frankfurter, responded, "The reason I hesitate is there are many great cases argued by other people than the Solicitor General.")

But eventually Stryker got to the point, and the following exchange occurred:

Stryker [having established that Reed had hired Hiss as a special attorney in the SG's office]: Is the position of the attorneys in the Solicitor General's Office, and the special attorneys, one of trust and confidence?

Reed: Yes.

Stryker: In other words, would it be fair to say that the Solicitor General appoints those men not only on the basis of their legal competence, but on the basis of character and integrity?

Reed: The appointments are made by the Attorney General and the recommendation of the Solicitor General.

Stryker: However they are made, those considerations I mentioned would enter in very strongly?

Reed: Yes. They have legal responsibility.

Reed's testimony in the exchange must have been moderately disappointing to Stryker. Although confirming that in working as a special attorney in the SG's office Hiss had held a position of trust and confidence, Reed seemed to evade making a clear affirmation that "character and integrity" were important considerations in the hiring of special attorneys. He first simply stated how the appointments were

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before as a character witness in any court case, and that the Supreme Court was still in session, although not on that particular day. The cumulative effect of those comments was to suggest that a sitting Justice of the Supreme Court was going out of his way to lend support to Alger Hiss.

made, and then emphasized that the attorneys had “legal responsibility.” One listening to Reed might have taken him only to be saying that Hiss was a competent and responsible lawyer.

A little later Stryker decided to return to the “character and integrity” issue:

Stryker: 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.

Reed: That is correct.

Stryker: Was Mr. Alger Hiss named to the position of special attorney in that way?

Reed: He was, at my request.

At this point Stryker moved to clinch his point. “Mr. Justice Reed,” he asked,

do you know people who know Mr. Alger Hiss?

Reed: Oh, yes.

Stryker: 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?

Reed: I have never heard it questioned until these matters came up.

Stryker: From that can you state that his reputation in those respects is good?

Reed: As far as I know.

One might compare this exchange with that which concluded Stryker’s examination of Frankfurter, in which Frankfurter, in response to the same questions, had said that he had “never heard [Hiss’s] reputation called into question,” and that “it was excellent.” Here was a witness who had actually worked in a government office with Hiss, as his superior, reminding the jury that some challenges to Hiss’s character had recently “c[o]me up,” and that all he could say about Hiss’s character was that it was “good ... [a]s far as I know.” At that

point Stryker may well have concluded that he had squeezed about as much from Justice Reed as he could, and ended his questioning.

Things did not improve for Hiss on Murphy’s cross-examination of Reed. Murphy shortly zeroed in on that ticklish connection between Hiss, Jerome Frank, and the purge of Frank and Pressman from the AAA which had nettled Frankfurter. He asked Reed whether anyone had recommended Hiss to him when Reed hired Hiss, and Reed answered, “I think it was Judge Jerome Frank.” After some additional efforts on Murphy’s part to discount the possibility that Frankfurter may have also recommended Hiss, Murphy reached the point he sought. He had succeeded in getting Reed to say that he was “looking for someone familiar with the Agricultural Adjustment Administration” when he hired Hiss. Then he turned back to the question of Hiss’s recommender:

Murphy: Do you have an independent recollection, Judge, whether it was Judge Frank at all?

Reed: No. I know that I talked with Judge Frank about him.

...

Murphy: And you know there had been quite a shakeup in the AAA?

Reed: Yes, I was familiar with that.

...

Murphy: Judge Frank resigned from the AAA?

Reed: And joined my staff at [the Reconstruction Finance Corporation, to which Reed had been general counsel before becoming Solicitor General].

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

Reed: Quite clear.

This exchange was something of a minor coup for Murphy. He had not only reminded the jury of Hiss’s being on the staff of the AAA during the purge, he had connected Hiss, Jerome Frank, and Reed. One could have taken

Reed's testimony to be saying something like, "I now remember, quite clearly, that, about a year after I gave Jerome Frank a job with the Reconstruction Finance Corporation after he and some alleged 'radicals' were fired from the AAA, Frank then recommended to me, in my new position as Solicitor General, that I hire Alger Hiss, a former AAA staffer." This interpretation of Reed's testimony, coupled with his disinclination to give Hiss a categorical endorsement on character, resulted in the one government employer of Hiss's who had agreed to be a character witness neither being able to reassure the jury that he had considered "loyalty, integrity and veracity" in hiring Hiss nor being able to disengage Hiss from Jerome Frank and the AAA purge. At that point Murphy excused Reed as a witness, and Stryker chose not to redirect any questions to him.



In retrospect, why did Frankfurter and Reed agree to appear as character witnesses in the first place? They declined to appear in that role in Hiss's second trial, perhaps because their first experience had not been all that comfortable. In attempting to recreate their motivation, one should recall two features of the Hiss case.

First, almost all of the persons with whom Alger Hiss had an extended "junior" relationship from the 1920s through the Second World War, from Frankfurter through Holmes to Frank, Reed, Stettinius, and Acheson, were very impressed with him, Frank being the only exception. Hiss was, in their collective view, an exceptionally personable and competent staffer, capable of making such a favorable impression on his seniors that Chester Davis declined to include him in the AAA purge. Part of Hiss's incredible good fortune in a series of government jobs which

stretched from the AAA through the State Department – he survived or avoided public censure despite being associated with quite controversial issues or activities – undoubtedly came from this impression he made on his seniors. Hiss's persona caused his superiors to invest in him far more than subsequent evidence suggested they should have. Frankfurter and Reed were among those investors, although it was obvious, by the time they testified at Hiss's first perjury trial, that they were beginning to wonder about the basis of their investment, a concern reflected in Frankfurter's edginess and Reed's caution.

Second, there was another side to Alger Hiss which no one except his closest ideological intimates saw, and which may not have been crystal clear to them (both Whittaker Chambers and Priscilla Hiss, who was legally separated from Alger from 1961 until her death in 1984, intermingled a deep sense of affection with occasional expressions of personal betrayal, in their recollections of him).<sup>15</sup> Hiss was an extremely goal-oriented person capable of a frightening degree of self-absorption and self-protectiveness. He was, from this perspective, an ideal undercover espionage agent, in that he was capable of subordinating his human relationships, and his overt career positions, to his covert career ends. He seemed to have no difficulty nurturing and protecting his covert self through a series of deceptions, including not only the deceptions of his overt life as a lawyer and government employee but also the deceptions of his espionage work and the deceptions of his private life. For reasons hidden deep in his emotional makeup, about which one can only speculate, he was temperamentally, as well as intellectually, suited to be a model spy. At bottom he seems to have been able, without great emotional strain, to deflect the series of misleading impressions, half-truths, and lies that composed so much of his

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<sup>15</sup> For examples, see *Perjury* at 478, 482-83.

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 –

*The Alger Hiss Case*

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*