



The Reinstatement of Alger Hiss's Law License

G. Edward White

THINGS WERE LOOKING UP for Alger Hiss in 1974. The three men most prominently associated with his conviction for perjury in 1950, Whittaker Chambers, J. Edgar Hoover, and Richard Nixon, were either dead or facing disgrace.¹ The difficulties of the Vietnam War had served to distance numerous Americans from the ideological litmus test of the “Cold War” years, rabid anti-Communism, and some were beginning to see Hiss, suspected but never proved of committing espionage for the Soviets in the 1930s, as a victim of Cold War witch-hunters.² Widely viewed as a pariah after his release from prison in 1953, Hiss was supplementing his income with lectures on college campuses. His govern-

ment pension had been restored, and he was mounting an eventually successful campaign to gain access to FBI files that he believed would help vacate his perjury conviction.

Despite his sense that the climate of public opinion was turning in his favor, Hiss had not considered seeking reinstatement of his license to practice law, which had been suspended after the Supreme Court of the United States upheld his perjury conviction in 1951.³ Hiss had been a member of the Massachusetts, New York, and District of Columbia bars, but since being released from prison had worked for a manufacturer of combs and a firm that sold stationery. Although Claude Cross, a Boston lawyer who had represented Hiss in his second perjury trial, had encour-

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- 1 Chambers died in 1961 and Hoover in 1972. In the course of the Watergate investigations that led to Nixon's resigning the presidency in 1974, the partisan activities of the FBI under Hoover had come to light.
- 2 Although Hiss's perjury conviction was based on his response to allegations by Chambers that he and Hiss had engaged in espionage, Hiss was not charged with espionage because the relevant statute of limitations governing espionage activities not committed in wartime had run. The activities Chambers charged Hiss as having committed took place between January and April, 1938, and Hiss was indicted for perjury in 1948; the espionage statute was three years. For more detail, see G. Edward White, *Alger Hiss's Looking-Glass Wars* 266–67 (2004).
- 3 *United States v. Hiss*, 185 F.2d. 822 (2d. Cir. 1950), cert. den., 340 U.S. 948 (1951).

aged Hiss to apply for reinstatement to the Massachusetts bar, Hiss had not thought that his petition would stand any chance of success.⁴ But after Cross's death in 1974, one of his partners, John F. Groden, convinced Hiss to file for reinstatement, which he did in November of that year.

In *the Matter of Alger Hiss*,⁵ the disposition by the Supreme Judicial Court of Massachusetts of Hiss's appeal from the denial of his reinstatement petition by the Massachusetts Board of Bar Overseers, was a decision that pivoted on two factors. One was the stance taken by the Overseers in denying Hiss's petition, which combined deference to a 1943 Massachusetts decision with signals that but for that decision they might have come out differently. The other was the distinctive posture in which Hiss's appeal reached the SJC. No one had opposed Hiss's petition before the Overseers, and the Boston Bar Association had filed an amicus brief supporting it. Hiss had produced several character witnesses who testified to his competence and good character. And by 1975 the question of Hiss's guilt had become clouded. A journalist, John Chabot Smith, was in the process of completing a book, *Alger Hiss: The True Story*, in which he would claim that Hiss had been framed. A 1973 article in *The Nation* had called for "fresh and thorough examination" of the Hiss case.⁶ At the bottom of *In the Matter of Alger Hiss* would lie the supposition, by the judges who decided that

case, that Hiss may well have not engaged in espionage at all.

II

The Overseers asked several persons if they wanted to be heard on Hiss's petition. These included the Attorney General of the United States, the Massachusetts Bar Association, the Committee on Grievances of the Association of the Bar of the City of New York, the Clerk of the Supreme Court of the United States, and federal district judge Thomas F. Murphy, who had prosecuted Hiss in his perjury trials. None of those persons responded. Although their disinclination to be heard could have been predicted,⁷ it may have surprised the Overseers that no one at all came forward to oppose Hiss's petition. Nor did any witnesses choose to make comments adverse to Hiss's character.

The result was that the evidence presented at the Overseers' hearing was entirely favorable to Hiss. He produced several character witnesses, three of whom, Richard Field, Victor Brudney, and Robert Von Mehren, were members of the faculty of Harvard Law School. He also submitted affidavits recommending reinstatement from Erwin Griswold, who had left the deanship of Harvard to become Solicitor General of the United States in 1969, and the well-known lawyers Benjamin Cohen, Charles Horsky, and Eli Whitney Debevoise. He submitted a letter

4 Hiss testified to that effect in a January 7, 1975 hearing before the Massachusetts Board of Bar Overseers. See Transcript, Board of Bar Overseers Hearing, Jan. 7, 1975, Supreme Judicial Court, Commonwealth of Massachusetts, 146. Hereafter cited as Overseers Transcript.

5 333 N.E.2d 429 (Mass. 1975).

6 Raymond A. Wechen @ Fred J. Cook, "New Light on the Hiss Case," *The Nation*, May 28, 1973, 684.

7 Neither the Attorney General of the United States nor the Grievance Committee of a bar in another state was likely to intervene in an internal proceeding of the Massachusetts bar. Thomas Murphy, being a federal judge, would hardly have wanted to appear to be taking a partisan interest in the proceeding. The Clerk of the Supreme Court of the United States had very probably been informed as a courtesy in order to acquaint members of the Court with the proceeding, and those persons had even fewer incentives than Murphy to be heard. The Massachusetts State Bar Association was not likely to intervene in a matter being decided by one of its own committees.

from retired Supreme Court Justice Stanley Reed recommending his reinstatement. His current employer, Tillie K. Novick of the stationery supplier S. Novick & Son, and his longtime attorney, Helen Buttenweiser, testified to his good character and keen interest in legal issues. Brudney, Field, and Buttenweiser indicated that Hiss would confine his law practice to areas where he had special expertise, which he identified as international law, constitutional law, and federal legislation.⁸

The standard for reinstatement, set forth in a rule of the Supreme Judicial Court, was whether an applicant had demonstrated "that he has the moral qualifications, competency and learning in law required for admission to the practice of law in this Commonwealth, and that his resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or the public interest."⁹ The Overseers found that Hiss was "presently of good moral character," that "he would almost certainly not commit any serious crime if readmitted to the bar," and that the granting of his reinstatement petition would "clearly have no actual adverse effect upon the integrity of the Bar." Nonetheless they felt constrained to deny Hiss's application.

The Overseers' decision was based on their application of a 1943 Massachusetts case, *In the Matter of Keenan*,¹⁰ involving a lawyer who had been disbarred after being convicted of attempting to corrupt three members of a civil jury. In *Keenan* the Court, in denying the lawyer's petition for reinstatement, noted that "[t]here was little evidence of repentance or reform" on his part, and in-

dicated that when a lawyer had been convicted of a "serious" crime, reinstatement could only occur when the lawyer had provided "absolute assurance of a complete change of moral character."¹¹ The Overseers concluded that they were bound by *Keenan*, and that decision was fatal to Hiss. As they put it,

When the disbarment is wholly based upon the conviction of the petitioner of an offense which is clearly a "serious crime" (perjury), which conviction has not been reversed, and the petitioner has not been pardoned, the task of a petitioner such as Mr. Hiss, who continues to assert his innocence, to satisfy this Board of his present good character, becomes logically impossible for him to meet . . . [S]o long as . . . he continues to deny his guilt of an offense of which he has been convicted, after what was ruled to be a fair trial, the Board finds, under the decisions by which it is bound, that [Hiss cannot be reinstated.]¹²

The Overseers accompanied that language, however, with the statement that "if [the Board] were free to consider the matter in the absence of the only evidence to the contrary (the conviction), it would unanimously find that Mr. Hiss is presently of good moral character and . . . that the granting of the petition would clearly have no adverse effect upon the integrity of the Bar."¹³

The way in which the Overseers rendered their decision strongly suggests that they were setting themselves up to be reversed on appeal. In addition to claiming that they were bound by the logic of the *Keenan* decision, the Overseers indicated that only Hiss's refusal to admit the justice of his conviction

8 Overseers Transcript, 148.

9 S.J.C. Rule 4:01, Sect. 18 (4) (Mass. 1974).

10 50 N.E.2d 785 (Mass. 1943).

11 *Id.* at 788.

12 Quoted in 333 N.E.2d at 435.

13 Quoted in 333 N.E.2d at 438-39.

disqualified him; in all other respects he had met the criteria for reinstatement. Moreover, by insisting that *Keenan* required them to bar Hiss because it forced persons who had been convicted of crimes to admit that they had been justly convicted, the Overseers were highlighting that they were placing Hiss, and all disbarred lawyers seeking reinstatement, in a dilemma. If they “repented” for such crimes, they were going against their convictions, even perjuring themselves; if they maintained their innocence, they could never practice law. The Overseers were well aware of that dilemma. Hiss made the argument himself in his reinstatement hearing, stating that he could not in good conscience renounce his belief that he was innocent and that “I have not had any complete change in moral character If that’s the law of Massachusetts, I am excluded.”¹⁴ Both the Counsel for the Massachusetts Bar and the Boston Bar Association, who submitted briefs to the SJC after Hiss appealed, were to support Hiss’s argument. The Counsel’s brief maintained that

It cannot be demanded that [an accused] deny his own conscience or his own knowledge, and that he assert a guilt which for him does not exist. The *Keenan* case does not make such a demand. Repentance is only one of several factors which may be considered.¹⁵

III

The Hiss reinstatement case thus came to the SJC in a posture that virtually assured that the Overseers’ decision would be reversed. But Chief Justice Joseph Tauro’s opinion in *In the Matter of Alger Hiss* took no chances. He made it clear that although the Overseers’ findings were entitled to “great weight,” they

were not binding on the SJC. He then proceeded to reject the Overseers’ conception of the Hiss reinstatement petition and the logic of their conclusions. In the process he changed the standard of proof for applicants seeking reinstatement in Massachusetts, formulated criteria for deciding future reinstatement cases, and clarified the *Keenan* decision. At the conclusion of Tauro’s opinion Alger Hiss’s license to practice law in Massachusetts had been reinstated even though he continued to maintain that he had been wrongly convicted of perjury.

Before considering Tauro’s opinion in more detail, it is necessary, in light of subsequent scholarship on the Hiss case, to focus on the opinion’s subtext. In his memoirs, which appeared in 1988, Hiss said that he had been told “that all seven judges of [the SJC] believed me to have been innocent” of perjury and espionage, “even though [i]t was . . . beyond their power to upset my conviction.”¹⁶ Hiss’s information may well have been accurate. Since 1954 he had waged a continuous campaign for vindication, centering primarily on a reputational defense. Hiss’s claim, which he would set forth in books and legal documents until his death in 1996, and which formed the basis of his enlistment of others in his cause, was that his background, career, and character could not be reconciled with his being a spy and a perjurer. He had no financial or political motives for spying, being a successful, well-connected, and tolerably affluent government employee with a bright future in the State Department. He had a reputation for intelligence, drive, and character. He was a product of Johns Hopkins and Harvard Law School, and a former legal secretary of Justice Oli-

14 Overseers Transcript, 148.

15 Quoted in 333 N.E.2d at 437.

16 Alger Hiss, *Recollections of a Life 200–01* (1988).

ver Wendell Holmes.¹⁷

By the 1970s, as noted, Hiss's reputational arguments had begun to penetrate. Alongside his principal accusers – Whittaker Chambers, former Bohemian and Soviet agent who by his own admission had gone through periods of sexual and emotional turmoil and who had lied about his past, J. Edgar Hoover, whose tendencies toward monomania and corruption had come to light before Hiss's reinstatement proceeding, and Richard Nixon, the only President in American history whose activities in office required a pardon from his successor to avoid criminal prosecution – Hiss appeared a model of rectitude. When one threw in Cold War politics and recalled the “dirty tricks” of Hoover's FBI and Nixon's White House, Hiss also seemed a potential victim and scapegoat, and his perjury trials the first of a series of McCarthy-style witch hunts.

It may be that many, or even all, of the judges who decided *In the Matter of Alger Hiss* had come to hold some of those perceptions about the Hiss case by the time Hiss sought reinstatement. There are some clues in Tauro's opinion that might be thought consistent with that supposition. Given that the validity of Hiss's 1950 perjury conviction was never at issue in his reinstatement petition, Tauro's opinion seemed to take excessive pains to suggest that he and his fellow judges strongly reaffirmed the validity of that conviction. Consider this early passage in the opinion:

At the outset, we stress that we are not here concerned with a review of the criminal case in which Hiss was tried, convicted, and sentenced. [At that point Tauro inserted a footnote which read,

“Hiss seeks reinstatement and not vindication.”] In his trial, he received the full measure of due process rights and opportunities to contest allegations of guilt: a trial before a jury of his peers supplemented by ample avenues of appeal. Basic respect for the integrity and finality of a prior unreversed criminal judgment demands that it be conclusive on the issue of guilt Thus, Hiss comes before us now as a convicted perjurer, whose crime, a direct and reprehensible attack on the foundations of our judicial system, is further tainted by the breach of confidence and trust which underlay his conviction. His conviction and subsequent disbarment are “conclusive evidence of his lack of moral character at the time of his removal from office.”¹⁸

One might wonder why Tauro felt compelled to include this passage, particularly its vivid characterization of how Hiss came before the SJC. No one was suggesting that Hiss's reinstatement proceeding, in a different state from that in which he had been tried and convicted for perjury, was in any way contesting the validity of that perjury conviction, which had occurred 25 years ago, had been twice appealed to the Supreme Court of the United States, and for which Hiss had completed his prison sentence. The seriousness of Hiss's crime, and its evidentiary weight in his reinstatement petition, were relevant to his appeal of the Overseers' decision, but not the validity of the crime. Why, then, did Tauro take pains to note that Hiss was seeking reinstatement, not vindication, and to portray him as a convicted perjurer whose breaches of trust and lack of moral character were self-evident in 1950?

17 For more detail, see G. Edward White, “Alger Hiss's Campaign For Vindication,” 83 B.U.L. Rev. 1 (2003).

18 333 N.E.2d at 432–33. In Tauro's opinion the phrase “at the time of his removal from office,” part of language quoted from the Keenan opinion, was italicized.

Perhaps because Hiss's petition for reinstatement *was* an effort at vindication. All the justices who decided *In the Matter of Alger Hiss* were well aware that Hiss's perjury conviction had been a surrogate for convicting him of espionage. The two statements for which he was indicted for perjury by a New York grand jury in December, 1948, had both involved espionage. One was whether he had passed stolen government documents to Whittaker Chambers in 1937, Chambers having admitted to being an undercover agent for the Soviet Union at the time. The other was whether he had known Chambers between January and April, 1938, when Chambers had said that he and Hiss were members of an underground espionage network. The purpose of indicting Hiss for perjury had been to expose him as a Soviet agent.

So the issue raised by Hiss's reinstatement petition was not whether a person convicted of perjury in 1950 might be able to demonstrate, through a showing of exemplary conduct over the intervening twenty-five years, that the 1950 presumption that he was not of good moral character no longer obtained. The issue was whether a person convicted in 1950 of *having spied for the Soviet Union*, with all the ramifications of that finding, could be admitted to the practice of law in 1975. Put that way, the Hiss reinstatement case seemed close to being in a category of cases in which, Tauro conceded, some states found that certain crimes were sufficiently "serious" to disbar their perpetrators forever.¹⁹ If Hiss really had been a Soviet agent in the 1930s, then he had been someone prepared to betray his country to one of its principal mid-twentieth-century enemies. Could a lapse of any length of time serve to allow such a person to once again practice law in the United States?

Apparently so, if one were not all that

sure that Hiss had been that person. He had stated at the hearing that his moral character had not changed since his conviction. He had also maintained that he had been wrongly convicted. If Tauro was prepared to say that Hiss, being a perjurer, was clearly not a person of good moral character in 1950, why was he inclined to find, in light of Hiss's comments, that by 1975 his character had been rehabilitated? Perhaps because Tauro was insisting on a separation between the *formal* validity of Hiss's conviction, which he took pains to endorse (even though it was not at issue in *In the Matter of Alger Hiss*) and the *actual* validity of Hiss's conviction, about which he had doubts.

Two passages from the latter portion of Tauro's opinion provide support for that supposition. One came in connection with Tauro's summary of the witnesses that had appeared at Hiss's reinstatement hearing. Tauro noted that Hiss had produced several witnesses or letters supporting his good character, but that both the Overseers and the SJC "have had to discount a part of this evidence because some of those did not accept Hiss's guilt of the crime for which he had been disbarred."²⁰ He then added a footnote which read as follows:

As noted above, some of the witnesses based their recommendations for Hiss's reinstatement on the belief that Hiss was innocent. It is true that the petitioner's record prior to the incident in question was outstanding and without blemish and that his life for the past two decades since his release from prison has been impeccable. It is equally true that nothing in the record corroborates in any way the fact of guilt and, further, that the Department of Justice, although invited, has declined to appear in the proceedings. Nonetheless, we emphasize

19 See 333 N.E.2d at 433-34.

20 Id. at 440.

that whether Hiss was innocent is not an issue in this matter and can receive no consideration. The record of conviction must stand without question.²¹

Here we see the implicit distinction between the formal and actual validity of Hiss's conviction that ran through Tauro's opinion. The Overseers and the SJC, Tauro stressed, could not give weight to the testimony of witnesses for Hiss who believed him to have been wrongly convicted in the first place. Those witnesses, in testifying as to Hiss's good character, failed to distinguish "the period before his conviction and disbarment from that which succeeded it."²² The SJC was insisting that "whether Hiss was innocent is not an issue" in his reinstatement, and that "the record of conviction must stand without question." But in the same passage Tauro pointed out that Hiss's "record prior to the incident was outstanding and without blemish," that "nothing in the record corroborates in any way the fact of guilt," and that the Department of Justice had declined to appear at the reinstatement hearing.

It is hard to grasp the relevance of those last statements *if the fact of Hiss's guilt was taken as conclusive*. Indeed if Hiss had been guilty of perjury (and implicitly of espionage), then "his record prior to the incident" (the incident of passing stolen government papers to Chambers and lying about it) was surely not "outstanding and without blemish." Moreover, both the fact that nothing in Hiss's reinstatement petition corroborated his guilt, and the fact that the Department of Justice did not appear at that proceeding, were immaterial. *Hiss's guilt was not being challenged*

at his reinstatement hearing.

So what was the point of the passages in Tauro's opinion? It was apparently to suggest that although the SJC was formally insisting that "whether Hiss was innocent is not an issue in this matter and can receive no consideration," and that "[t]he record of conviction must stand without question," it had been impressed by evidence about Hiss *before* as well as after his conviction. The obvious inference to be drawn was that the reputational defense that Hiss had mounted at the time of his perjury trials had penetrated the Supreme Judicial Court of Massachusetts twenty-five years later. After all, no potentially interested parties had come forward to oppose Hiss's reinstatement. No evidence had been put forward corroborating his guilt. The shadow of Hiss's potential innocence hung over Tauro's opinion.

With that shadow in place, Tauro made quick work of the Overseers' finding against Hiss. He ruled that repentance was only a factor to be considered in reinstatement proceedings, not a requirement.²³ He altered the standard of proof for applicants from "little less than absolute assurance of a complete change in moral character" to proof that the applicant "has become 'a person proper to be held out by the court to the public as trustworthy.'"²⁴ He pointed out the "cruel quandary" persons who honestly believed they did not convict criminal acts were put in by a requirement that they repent their crimes: they either perjured themselves or suffered permanent disbarment.²⁵ He described Hiss's own testimony, in which he denied having committed perjury, stated that

21 Id. (footnote 29).

22 Id. at 440.

23 Id. at 435.

24 Id. at 438 (quoting *Matter of Keenan*, 47 N.E.2d. 12, 32 (1943), and modifying *Matter of Keenan*, 50 N.E. 785, 788 (1943)).

25 333 N.E.2d at 437.

he found the charge “abhorrent,” and admitted that he had not undergone any complete change in moral character, as “forthright and principled.”²⁶ Finally, he noted that the record of Hiss’s hearing contained “no testimony in opposition to reinstatement,” and that even the Council of the Boston Bar Association (which had filed the information initially leading to Hiss’s disbarment) had stated that Hiss’s resumption of law practice “would not adversely affect the standing and integrity of the bar.”²⁷ Hiss’s law license was unanimously reinstated.

IV

If Tauro’s effort to preserve the formal validity of Hiss’s guilt while raising doubts about its actual validity was bottomed, as Hiss believed, on a conviction that Hiss had been innocent all along, Tauro and the other justices who joined his opinion were mistaken. Hiss had in fact participated in espionage with Chambers in the 1930s, and had continued as a Soviet agent after Chambers defected in 1937. For nearly the remainder of his career in the State Department, where he remained until resigning under pressure in 1946, Hiss had spied for the Soviets and passed them documents. He, along with the British agent Donald Maclean, had been responsible for most of the intelligence about postwar American strategic and military goals that so advantaged Stalin in his discussions with Churchill and Roosevelt at Yalta. He had been personally thanked by the Soviets for his efforts in a Moscow stopover after the

Yalta conference. He had received the Order of the Red Star from Soviet intelligence in the 1940s. He had ceased being a Soviet agent only when the FBI and State Department security officers managed to convince Secretary of State James Byrnes, in 1945, that he was a security risk. He had never admitted being a Soviet agent, had persistently maintained his innocence, and had, by the 1970s, convinced a good many people that he had been a victim of the Cold War. But he had not been. He had been a dedicated and effective spy, and only through the happenstance of Whittaker Chambers’s having randomly preserved copies of stolen government documents in Hiss’s handwriting, and typed on a Hiss family typewriter, had he been exposed.²⁸

Thus if the justices of the SJC who joined Tauro’s opinion in the Hiss reinstatement case had believed, down deep, in his innocence, they had been duped. But so had a great many other persons. Part of the reason that no one came forward to oppose Hiss’s reinstatement was that by 1975 the whole Hiss case, with its aura of Cold War politics and Hiss’s dubious adversaries, had come to be thought of more as a riddle than as a sinister episode. In 1976 a poll of public figures came out evenly divided on the question of Hiss’s innocence.²⁹ In 1986 a profile of Hiss in *The Washington Post* concluded that his life “will end in ambiguity.”³⁰ In 1996 George McGovern wrote that Hiss had been “a victim of the red scare, ... Nixon’s political rapacity, and ... the ignominious House Committee on Un-American Activities.”³¹ On Hiss’s death in

26 Id. at 441.

27 Id. at 441–42.

28 For more detail on the matters in this paragraph, see White, *Alger Hiss’s Looking-Glass Wars*.

29 See Philip Nobile, “The State of the Art of Alger Hiss,” *Harper’s Magazine*, July, 1976, 67–76.

30 David Remnick, “Alger Hiss: Unforgiven and Unforgiving,” *Washington Post Magazine*, October 12, 1986, 23–35.

31 George McGovern, “Nixon and Historical Memory: Two Reviews,” 34 *Perspectives* 1, 4 (1996).

November, 1996, ABC News reported that he had been cleared of espionage charges by the Russians themselves.³²

Alger Hiss's life story was apparently more resonant as an honest, impeccable scion of the Establishment besmirched by the cynical and duplicitous cold warriors of the 1950s than as a committed ideologue who thought he could make the world better by passing on military and diplomatic intelligence to the Soviet Union. Had the justices who decided *In the Matter of Alger Hiss* known that when Hiss beamed to the cameras at his 1975 swearing-in ceremony after his reinstatement,³³ his

was the smile of someone confident that his lies had taken hold, and that his public vindication was approaching, they might well have had second thoughts about their impressions of Hiss as candid and principled. But they had no way of knowing: Hiss was eventually betrayed by documents in U.S. and Russian archives that he could not have imagined would come to light.³⁴ Still, *In the Matter of Alger Hiss* remains a powerful testament to the capacity of humans to want to believe some things, even though they are not true, and to want to believe in some people, even if they are liars. *GB*

32 Transcript #6229-1, ABC World News Tonight, November 15, 1996. For more detail on the matters discussed in this paragraph, see White, *Alger Hiss's Looking-Glass Wars*.

33 That picture appears on page 142 of White, *Alger Hiss's Looking-Glass Wars*.

34 For the details, see id. at 220-30.