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In Re Alger Hiss: Petition for a Writ of Error

BOOK REVIEW

IN RE ALGER HISS: PETITION FOR A WRIT OF ERROR CORAM NOBIS. Edited by Edith Tiger. New York: Hill and Wang. 1979. Pp. xxiv, 438. $8.95

Some will say it reads like a script for an afternoon soap opera. All the prerequisites are there: suspense, lust for power, jealousy, deceit, revenge, sabotage, and even a homosexual encounter. Perhaps more seductive is the fact that the important emotions of our lives are passed before us: greed, magnanimity, guilt, innocence, pettyness, greatness, etc. For the attorney, however, it is not the often unfamiliar set of a general hospital or an afternoon tea but the courtroom. The script is better yet. Guided by the already prepared petitions, pleadings, and exhibits, each attorney may fill in his or her own details. Few will read through it without being hooked by some part(s).

On first impression the contents appear rather dry. A photocopied version of the legal pleading of the most recent appeal in the Alger Hiss case along with a brief introduction by Thomas I. Emerson, Yale first amendment scholar, are indexed, bound, and wrapped in a paper cover. Rarely can a legal pleading be published as a book that someone other than the principals might be expected to read, and this review was approached with such skepticism. This one, however, not only has all the elements of melodrama, but also presents the legal profession with some of the most difficult—and important—policy questions of our time.

For those too young to remember, the highly publicized case originated in 1948 with a hearing before the House Committee on Un-American Activities, and culminated in the federal prosecution of Alger Hiss for perjury.[1] Cold War, Senator Joe McCarthy, frantic politics, rampant publicity, and some questionable justice pervaded two

1. For an extensive report of the House Un-American Activities Hearings, the trials, and related events see A. HISS, IN THE COURT OF PUBLIC OPINION (1957).

trials of Hiss.[2] The first trial resulted in a hung jury, the other in a three and a half year prison term which ended for Hiss in 1954 but continues to cloud his professional life. The book and the latest legal action attempt to put the fairness of the trials and particularly the activities of the federal prosecutors before the public and the court in an endeavor to vindicate Hiss.

If the case itself is familiar to most of us, the form which the most recent appeal takes, a petition for a writ of error coram nobis, is not. The writ of error coram nobis is a sixteenth-century English writ designed to allow the reopening of a case due to an error of fact.[3] Its use in this country has been infrequent but of a broader nature.[4] Closely related to the writ of habeas corpus, coram nobis provides for perfection of an appeal subsequent to the serving of a sentence. This is to allow the convicted person to recover from harm resulting from a wrongful conviction.[5]

The Hiss petition alleges violations of his fifth amendment right to due process and sixth amendment right to legal counsel. The specific charges, found in the text, resemble a check list for prosecutorial misconduct. They include: misuse of inside information received from the defense attorneys, concealment of evidence potentially useful to the defense, excessive coaching of witnesses, and knowing use of false and grossly misleading evidence. The allegations are based largely on Federal Bureau of Investigation documents (often appearing old and oblique in the book) which are copied verbatim and made exhibits to the petition. The task facing the Hiss lawyers is twofold. They must prove the facts, a burden which should easily be met, plus convincingly argue judicial policy. Federal Bureau of Investigation records cast a strong doubt on the government's fairness, and should be sufficient evidence to prove the facts.

Resolution of the policy question will be difficult because it touches a current weakness in the criminal justice system, i.e., clogged court dockets which inescapably lead to some injustice. The decision to

2. Over a dozen books have been written on the case and the surrounding events and others are now in preparation. *See, e.g.*, F. COOK, THE UNFINISHED STORY OF ALGER HISS (1958).

3. 49 C.J.S. *Judgments* §§ 311, 561 (1947).

4. "The writ of error coram nobis is one of the oldest writs known to the English Common Law. Blackstone refers to it as a 'writ of most remedial nature which seems to have been invented lest in any way there should be oppressive defeat of justice.'" Central Franklin Process Co. v. Gann, 175 Tenn. 267, __, 133 S.W.2d 503, 509 (1939). *See also* 24 C.J.S. *Criminal Law* § 1606(1)-(2) (1947).

5. 24 C.J.S. *Criminal Law* § 1606(1)-(2) (1947).

grant this appeal will likely turn on the balancing of two impalpable factors: the need for speedy, final, and certain resolution of criminal proceedings, against the need to protect the due process rights of the accused. In the instant case public policy would seem stacked against Hiss. Due process does not require errorless trials, and the use of post-detention hearings to achieve such have never received much favor. The coram nobis writ is an extreme remedy used only under the most compelling circumstances.

The Alger Hiss case may present just such circumstances, not solely because of the reasons already discussed, but also because of the political nature of the case and its important symbolic value. Hiss was no ordinary man, and many lawyers will see at least parts of their own aspirational selves in his career. Alger Hiss, upon graduation from Harvard Law School, served as a law clerk for Justice Oliver Wendell Holmes, Jr. He worked in the State Department and accompanied President Franklin D. Roosevelt to the 1945 Yalta Conference. His career in public service found him serving as Secretary-General of the founding conference of the United Nations, and at the time of the indictment Hiss was president of the Carnegie Endowment for International Peace. If ex-Senator Joe McCarthy was correct in his insinuation that Hiss was a communist agent aiding an attempt to overthrow the goverment, then he was right to stalk Hiss until he ran him from public power. But if Joe McCarthy was wrong, and the federal prosecutors rigged the trial for political or otherwise improper purposes, both Alger Hiss and the American people were wronged. If the latter is likely, the case should be reopened, reopened not only to protect Hiss's private rights and to vindicate our system of justice, but also to protect our system of government.

Our form of democratic self-government has at least two operational principles. These are the right to speak and publish whatever sentiments the citizen considers appropriate, and the right to act upon those sentiments through the vote.[6] Both are premised on the inherent rationality of individuals and the idea that each person is his or her own best master.[7] So long as he or she acts responsibly, he or she will

6. One of the most important discussions of the history and the context of the founding documents of the country is found in C. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (1942). *See also* C. BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE (1945).

7. A brief history of the philosophical development of the idea of a liberterian society is contained in K. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE (1962).

be left alone; if others allege irresponsibility, he or she is guaranteed due process to protect against unwarranted punishment. These basic principles of our govermental system have been at issue in the Hiss case. If the court finds that Hiss has not yet received a fair trial, the public policy favoring full participation of each individual in democratic decision making dictates the case be reopened.

There is another fascinating issue buried in this latest round of the Hiss case. The documents that comprise the evidence supporting the defendant's case were obtained through a Federal Bureau of Investigation file search requested by Hiss himself under the 1974 amendments to the Freedom of Information Act.[8] Though often thought of as legislation aiding journalists in the gathering of important public information, it was used here by attorneys as a discovery device. The Freedom of Information Act was originally vetoed by President Gerald Ford, largely because he thought it both inflationary, due to the cost of complying with requests, and intrusive on day-to-day goverment activities. Recently the Act has received renewed criticism both on those scores and because of problems with exposure of trade secrets and some intrusion on individuals' rights to privacy.[9] For these and other reasons, recent amendments to the Act have been considered by both houses of Congress. The Hiss case could well serve as the basis to support the continuation of at least those parts of the Freedom of Information Act involved here.

Though government secrecy is often suspect, the records of criminal investigative agencies have always been largely beyond the searching eye of the public. That policy exception has sometimes been questioned,[10] and the charges brought in this case suggest that such questions may be warranted. Though some investigative secrecy is probably required, the inherent problem with such secrecy is its potential for abuse. The temptation to cover investigative mistakes and misdeeds with the shield of secrecy is especially dangerous.

If some investigative secrecy is necessary, then it may be that the Freedom of Information Act in allowing access to one's own old criminal file, coupled with recognition of the coram nobis writ, may be a prophylactic device to minimize the dangers of such secrecy. Investigative agencies could quickly learn that although secrecy may allow

8. 5 U.S.C. § 552 (1976).
9. See D. GILLMORE & J. BARRON, MASS COMMUNICATION LAW 440-60 (3d ed. 1979).
10. *See, e.g.*, National Public Radio v. Bell, 431 F. Supp 509 (D.D.C. 1977).

temporary concealment of misdeeds, eventually the embarrassing truth will emerge. That truth would come from a very damaging place, their own files.

In summary, for a subject that would seem hardly appropriate for a book at all, and one which resulted in a book whose pratical use is marginal at best, this petition may nonetheless prove worthwhile for many. It presents interesting insights into our political and judicial history as well as insight into problems that may need resolution by this generation of the practicing bar. There may be no better time to review our past in order to obtain insight into these still unresolved problems.

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