

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE PETITION OF NATIONAL SECURITY))
ARCHIVE, AMERICAN HISTORICAL))
ASSOCIATION, AMERICAN SOCIETY OF LEGAL)) Miscellaneous Action
HISTORY, ORGANIZATION OF AMERICAN))
HISTORIANS, SOCIETY OF AMERICAN))
ARCHIVISTS, AND SAM ROBERTS))
FOR ORDER DIRECTING RELEASE OF))
GRAND JURY MINUTES))
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DECLARATION OF ATHAN G. THEOHARIS

I, Athan G. Theoharis, hereby state as follows:

1. I am currently Professor Emeritus of History at Marquette University, having taught at the University for 38 years. I specialize in twentieth-century United States history. I submit this declaration in support of the petition to unseal the grand jury records related to the indictment of Julius and Ethel Rosenberg.

2. I am the co-author, editor, or author of twenty books (and hundreds of articles) focusing on Cold War politics, McCarthyism, federal loyalty-security programs, federal surveillance policy, and more recently, on the history and role of the Federal Bureau of Investigation (FBI). [Attached as Exhibit 1 is a list of my publications.] In 2004, I authored *The FBI & American Democracy: A Brief Critical History*, which details the growth of the FBI over the past century, its shift in focus from domestic law enforcement to intelligence operations, and the consequences of this shift on American democracy. My most recent book, *The Quest for Absolute Security: The Failed Relations Among U.S. Intelligence Agencies*, surveys the history of U.S. intelligence agencies since 1882, with a specific focus on the failures of the FBI's counterintelligence investigations and the politicization of intelligence. I am the recipient of

various awards, including a Certificate of Merit from the American Bar Association in its Gavel Award competition for an article on wiretapping, the Organization of American Historians' Binkley-Stephenson Award for an article on FBI preventive detention policy, and was recently selected as a Fellow to the Wisconsin Academy of Sciences, Arts and Letters. I have also served as a consultant to the Senate Select Committee on Intelligence Activities (the so-called Church Committee) and the National Archives' FBI Records Appraisal Staff.

3. My interest in the Rosenberg case differs from that of other historians, political scientists, and journalists in that I have a particular interest in understanding the role and policies of the FBI. As a historian of the FBI, I have explored the relationship between the Bureau and the Department of Justice and the FBI's reliance on illegal investigative techniques. These agencies worked together to ensure internal security after World War II without a concern for the legal authority of FBI activities. They sought to contain Soviet and communist activities at times by securing indictments against alleged Soviet spies, including the Rosenbergs. In 1998, I submitted a declaration to this Court for the unsealing of the grand jury records in the Alger Hiss case, believing the Hiss records would provide new insights into the FBI and Department of Justice relationship and the FBI's relationship with then Congressman Richard Nixon and the House Committee on Un-American Activities (HUAC). After the records were released, I used information from them to produce a chapter in a book I published in 2002, titled *Chasing Spies: How the FBI Failed in Counterintelligence but Promoted the Politics of McCarthyism in the Cold War Years*. The release of the Hiss records raised new questions – questions that many of my fellow historians and I had not anticipated. Specifically, the Hiss records raised the issues of (a) the abuses of the grand jury process and (b) the politicization of justice by government

officials.¹ As explained below, the Rosenberg grand jury records will likely offer new insights into these two issues.

4. **(a) Abuse of the Grand Jury Process.** The Hiss grand jury records revealed various abuses of process by FBI and other government officials. From the records, we learned that during the questioning of grand jury witnesses, prosecutors used information obtained from FBI wiretaps and that grand jury witnesses (HUAC counsel Robert Stripling and member Karl Mudt) confirmed the close, covert relationship between the FBI and HUAC during 1948. The information obtained from wiretaps was not directly usable during the trial either because it was not admissible (and would taint any indictment, requiring dismissal under *U.S. v. Nardone*) or would raise questions about the partisan purpose of the case. Rather than ignoring this crucial information, the prosecution sought to exploit the wiretap information to intimidate the witnesses (notably, Harry Dexter White and Felix Inslerman) to testify as government witnesses – the wiretaps suggesting their vulnerability to obstruction of justice charges. A similar attempt to use inadmissible evidence was likely employed by prosecutors with the Rosenberg grand jury; however, only the grand jury records can confirm this. In addition, while information from the code-named VENONA program (wherein Soviet consular messages had been intercepted during the World War II period and by 1949-1950 had been successfully deciphered by military intelligence agents) was not available to prosecutors at the time of the Hiss grand jury proceedings in 1947-1948, this information was available in 1950 (and had been the basis for the arrests of the Rosenbergs and Greenglass). The VENONA information was not directly usable at trial because the Government did not want to publicly disclose that the U.S. had intercepted and deciphered Soviet consular messages. Yet, from the released FBI records relating to Theodore

¹ For a detailed discussion of the Hiss (and the William Remington) grand jury records and these two issues, see Chapter Five, “Politicizing Justice: The Hiss and Remington Indictments,” from my book, *Chasing Spies*, p. 110-138.

Hall and Saville Sax (both of whom were involved in atomic espionage in 1944-1945 although, unlike the Rosenbergs and Greenglass, were not indicted), we know that FBI agents used the VENONA information in an unsuccessful attempt during separate interviews of Hall and Sax to get one (or both) to break and offer admissible evidence (testimony) which could be used to indict and then convict at trial.² The Rosenberg grand jury records would confirm whether VENONA information was used to break various witnesses and ensure the indictment of the Rosenbergs. This, in turn, may help answer a more perplexing question: why were the Rosenbergs and Greenglass, whose names and involvement in Soviet espionage were learned from the VENONA decrypts, prosecuted while Hall and Sax, whose names and involvement were also known concurrently through these decrypts, were not indicted? Greenglass was a military recruit with a high school education assigned to Los Alamos while Hall graduated from Harvard College at the age of 18 with a B.S. in physics and was recruited to Los Alamos, further confirming Soviet officials' high assessment of the value of the information he provided through his courier, Saville Sax.

5. **(b) The Politicization of Justice.** The Hiss grand jury records document how the FBI and the Department of Justice purposefully politicized the grand jury process in order to secure the indictment and conviction of Hiss. For example, the records detail how Whittaker Chambers, Hiss' primary accuser, was repeatedly called before the grand jury to provide information about Hiss' activities and involvement. The grand jurors were highly skeptical of Chambers' testimony and even considered indicting Chambers for perjury. But despite their skepticism, the grand jury was ultimately swayed to indict Hiss, and not Chambers, by politically powerful witnesses such as Congressman Richard Nixon. In his second appearance before the

² For a fuller discussion of this matter, see my book, *The FBI & American Democracy: A Brief, Critical History*, p. 84-85.

grand jury, Nixon gave impassioned testimony, implying that Hiss had unquestionably committed espionage and that the jurors should not let him go “Scot-free.” Nixon stated that even if the jurors failed to indict Hiss, the House Committee on Un-American Activities, on which Nixon played a leading role, would continue its investigation of Hiss. The prosecution, the FBI, and Congressman Nixon exploited the jurors’ deeply rooted, Cold War-era fears of the looming Soviet threat to obtain Hiss’ indictment, and their actions were insulated by the policy of secrecy for grand jury proceedings. The unsealing of the Hiss grand jury records exposed the tainting of the grand jury process by political maneuvering (violating the sanctity of the grand jury and the reason for confidentiality – to ensure that grand jury decisions were based solely on the evidence and not influenced by politicians) and the ways in which the secrecy of proceedings and information can abet abuses of power. Discovering to what extent the politicization of justice occurred with the Rosenberg grand jury is of even greater significance and interest, for unlike Hiss who was accused only of perjury and spent years in prison (and who eventually even regained his license to practice law), the Rosenbergs were ultimately executed for their alleged crimes.

6. Overall, the unsealing of the Alger Hiss grand jury records has had a value beyond that originally imagined by historians. Aside from the issue of Hiss’ guilt or innocence, the records raised critical questions about the FBI’s internal security programs, about the ways in which information illegally obtained by the FBI was passed to DOJ attorneys and used to question witnesses before the grand jury, and about the use of political persuasion to levy both the hysteria and secrecy surrounding Soviet espionage activities to secure indictments. Therefore, while the grand jury records related to the Rosenbergs will provide valuable insights into the guilt or innocence of Julius and Ethel, the records will also offer some answers to the

questions generated by the Hiss records and, like those in the Hiss case, will almost certainly produce new lines of historical inquiry.

7. Both the public and academic interest in the Rosenberg case have proven to be long-lasting. Indeed, J. Edgar Hoover, former Director of the FBI, called the Rosenberg case “the crime of the century.” The grand jury records are of enormous historical import and interest, and they should be released.

8. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

Executed in Fox Point, Wisconsin, on this 7th day of December, 2007.



Athan G. Theoharis

EXHIBIT 1 TO DECLARATION OF ATHAN G. THEOHARIS

BOOKS BY ATHAN G. THEOHARIS

co-author, *Anatomy of Anti-Communism* (Hill & Wang, 1969)

author, *The Yalta Myths: An Issue in U.S. Politics, 1945-1955* (University of Missouri Press, 1970)

author, *Seeds of Repression: Harry S. Truman and the Origins of McCarthyism* (Quadrangle Books, 1971)

co-editor, *The Specter: Original Essays on the Cold War and the Origins of McCarthyism* (New Viewpoints, 1974)

author, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Temple University Press, 1978)

co-author, *The United States in the Twentieth Century* (Prentice-Hall, 1978)

editor, *The Truman Presidency: The Origins of the Imperial Presidency and the National Security State* (Earl Coleman, 1979)

editor, *Beyond the Hiss Case: The FBI, Congress, and the Cold War* (Temple University Press, 1982)

co-author, *Imperial Democracy: The United States Since 1945* (Prentice-Hall, 1982)

co-author, *The Boss: J. Edgar Hoover and the Great American Inquisition* (Temple University Press, 1988)

editor, *From the Secret Files of J. Edgar Hoover* (Ivan R. Dee, 1994)

editor, *The FBI: An Annotated Bibliography and Research Guide* (Garland Publishing, 1994)

author, *J. Edgar Hoover, Sex, and Crime: An Historical Antidote* (Ivan R. Dee, 1995)

editor, *A Culture of Secrecy: The Government Versus the People's Right to Know* (University Press of Kansas, 1998)

editor, *The FBI: A Comprehensive Reference Guide* (Oryx Press, 1999)

author, *Chasing Spies: How the FBI Failed in Counterintelligence But Promoted the Politics of McCarthyism in the Cold War Years* (Ivan R. Dee, 2002)

co-author, *These Yet to Be United States: Civil Rights and Civil Liberties in America Since 1945* (Wadsworth, 2003)

author, *The FBI & American Democracy: A Brief, Critical History* (University Press of Kansas, 2004)

editor, *The Central Intelligence Agency: Security under Scrutiny* (Greenwood Press, 2006)

author, *The Quest for Absolute Security: The Failed Relations Among U.S. Intelligence Agencies* (Ivan R. Dee, 2007)