



Cold War Justice: The Supreme Court and the Rosenbergs

Author(s): Michael E. Parrish

Source: *The American Historical Review*, Vol. 82, No. 4 (Oct., 1977), pp. 805-842

Published by: American Historical Association

Stable URL: <http://www.jstor.org/stable/1865114>

Accessed: 20/01/2010 23:08

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=aha>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



American Historical Association is collaborating with JSTOR to digitize, preserve and extend access to *The American Historical Review*.

<http://www.jstor.org>

Cold War Justice: The Supreme Court and the Rosenbergs

MICHAEL E. PARRISH

ON JUNE 19, 1953, THE BEGINNING OF THAT “QUEER, SULTRY SUMMER” DESCRIBED by Sylvia Plath’s heroine in *The Bell Jar*, the United States executed Julius and Ethel Rosenberg for conspiring to commit espionage on behalf of the Soviet Union. Nearly a quarter century has not quieted the controversy that surrounded the trial and sentence of the only persons ever put to death by a civil court in America for such a crime. “The Rosenberg case won’t go away,” Ted Morgan wrote recently. “It lingers, like the smell left in a room after a corpse has been removed. . . . I cannot think of another case in the annals of twentieth-century American justice that has received as much sustained attention over so long a period. The Rosenbergs have become the most internationally celebrated martyrs since Captain Dreyfus.”¹

Recent events—including television specials, the popularity of E. L. Doctorow’s *The Book of Daniel*, the re-emergence of the Rosenbergs’ two sons, and the opening of previously classified documents from the files of the Federal Bureau of Investigation—have stimulated fresh interest in the case among those born or raised after 1953 and revived old passions in those who lived through the era; but no one yet has resolved what are surely the principal issues: did the Rosenbergs conspire to give national defense secrets to the Russians? And, regardless of their guilt or innocence, did they nonetheless receive the full measure of American justice? The answers to these questions in the 1960s, as Allen Weinstein has noted, tended to be influenced by one’s perceptions and attitudes respecting the Cold War, Stalinism, and the McCarthy period generally. By the 1970s both the questions asked and the answers given have been increasingly influenced by revelations surrounding Watergate and the lawless behavior of the FBI during J. Edgar Hoover’s long directorship.²

I wish to thank the National Endowment for the Humanities and the Committee on Research of the Academic Senate at the University of California, San Diego, for their financial support that made the research and preparation of this article possible. My colleagues, Harry Scheiber and Earl Pomeroy, offered intellectual encouragement and spirited criticism, for which I am very grateful.

¹ Sylvia Plath, *The Bell Jar*, (Bantam edition, New York, 1973), 1; Ted Morgan, “The Rosenberg Jury,” *Esquire*, May 1975, p. 105.

² Allen Weinstein, “The Symbolism of Subversion: Notes on Some Cold War Icons,” *Journal of American Studies*, 6 (1972): 165; and Allen Weinstein, “The Hiss and Rosenberg Files,” *The New Republic*, February 14, 1976, pp. 16–17, 20–21.

On the one hand, there are those who believe that the Rosenbergs were innocent of spying, the hapless victims of anti-Communist hysteria, lying relatives, a vindictive trial judge, and perhaps a conspiracy manufactured by government officials anxious to soothe the public's fears of domestic subversion and the Russian atomic bomb. The Rosenbergs' defenders point out that their arrest and trial took place in 1950–51, one of the darkest periods in the Cold War, at a time when the political fortunes of the Truman administration reached their nadir. Mao Tse-tung stood victorious in China, and the Soviets had broken the United States' atomic monopoly. In addition to these foreign calamities, 1950 brought the conviction of former New Dealer Alger Hiss for perjury, the confession of Klaus Fuchs that he had passed secrets to the Russians, and the intensification of Republican attacks on Franklin Roosevelt, Harry Truman, and the entire Democratic party for betraying the nation's interests to the Communists. Congressman Richard Nixon of California warned the country against "traitors in the high councils of our own government [who] have made sure that the deck is stacked on the Soviet side of the diplomatic tables." The Truman administration, hoping to blunt the impact of right-wing charges, escalated its own anti-Communist crusades. It indicted leaders of the Communist party for violating the Smith Act, pushed the development of the hydrogen bomb, responded unilaterally to North Korea's attack against Syngman Rhee's tottering regime to the south, and prosecuted America's own "atom spies," including the Rosenbergs.³

In addition to the claims made by the Rosenbergs' sons, Michael and Robert Meeropol, the most forceful defense of the couple has been offered by Walter and Miriam Schneir.⁴ Their arguments have persuaded some who once judged the Rosenbergs guilty, including Father Charles Rice, former president of the bitterly anti-Communist Association of Catholic Trade Unionists. He wrote recently in the *Pittsburgh Catholic*, "We were nearly all naive in that day and for years to come. Even the defense attorney trusted the FBI and the prosecutor, and allowed tainted evidence into the record. . . . The Rosenbergs were Communists but probably they were innocent of spying. . . . We were looking for scapegoats. . . . The Korean fracas was going on, the prosecution blamed the Rosenbergs for it, and fools like yours truly believed that."⁵

On the other hand, many remain convinced of the Rosenbergs' treachery and find nothing to question in either the trial or the subsequent legal efforts to overturn the convictions. In his best-selling recapitulation of the case, based largely upon the official trial record, Louis Nizer, for example, deplored the death sentences, but found the evidence against the pair to be overwhelming.

³ Eric F. Goldman, *The Crucial Decade—And After* (New York, 1960), 91–201.

⁴ Robert Meeropol and Michael Meeropol, *We Are Your Sons: The Legacy of Ethel and Julius Rosenberg* (Boston, 1975), especially 347–88; and Walter Schneir and Miriam Schneir, *Invitation to an Inquest: Reopening the Rosenberg "Atom Spy" Case*, (Penguin edition, Baltimore, 1973), 261–443. Other defenses of the Rosenbergs include William Reuben's *The Atom Spy Hoax* (New York, 1954) and John Wexley's *The Judgment of Julius and Ethel Rosenberg* (New York, 1955).

⁵ Quoted in *Commonweal*, December 28, 1973, p. 330.

He noted, moreover, that, of the 112 judges who reviewed the various applications and appeals in the case, only 16 dissented. Although he refused to confront critics of the case directly, Nizer concurred with those contemporaries who argued that “the Rosenbergs received every protection of the democratic process of justice: jury trial, legal counsel, right of defense and of appeal. The United States gave them twenty-seven months of legal review. Their appeals and proceedings exemplify the presumption of regularity and due process attending judgments of conviction. More than two years lapsed before they had exhausted their legal recourses, which is a tribute to the thorough legal processes afforded by American jurisprudence.”⁶

The Rosenbergs attracted the attention of ideologues, amateur detectives, and students of the Red Scare. But, although both their proponents and their opponents have long argued the importance of the case to American justice (as either one of the worst or one of the best examples thereof), surprisingly little has been written about the case from the perspective of American legal institutions. Few have analyzed the constitutional and statutory issues raised by the litigation or examined the bitter divisions these issues aroused within the Supreme Court of the United States.⁷ Since 1954 only a half dozen articles about the case have appeared in American law journals; most historical surveys of the Supreme Court do not treat the case in detail and some fail to mention it at all.⁸ The Schneirs’ account of the Rosenbergs’ postconviction efforts to secure a new trial remains the most accurate version of these tangled events, yet that analysis is both incomplete and inaccurate with respect to the conflicts within the Supreme Court.⁹

But these legal issues presented by the Rosenberg case merit examination and how they were resolved by the nation’s courts needs to be assessed. Now, in addition to letters and memoranda from the personal files of one circuit court judge, Jerome Frank, and two Supreme Court justices, Harold Burton and Felix Frankfurter, the documents released by the FBI under compulsion of the Freedom of Information Act make it possible to reconstruct and analyze the legal dimensions of the Rosenberg case with greater historical accuracy and understanding than before. To investigate the judicial process involved is

⁶ Louis Nizer, *The Implosion Conspiracy* (New York, 1973), 485–95; and Rosemarie Serino, “Espionage Prosecutions in the United States,” *Catholic University Law Review*, 4 (1954): 46. Also see Norman S. Beier and Leonard B. Sand, “The Rosenberg Case: History and Hysteria,” *American Bar Association Journal*, 40 (1954): 1046–50. Leslie Fiedler, the literary critic and ex-radical, wrote one of the earliest vindications of the government’s case, and he also chided American liberals for their naive and sentimental defense of the Rosenbergs in *An End to Innocence* (Boston, 1955), 25–45.

⁷ Even the most exhaustive legal scholarship on the Rosenberg case has usually emphasized one or two issues, particularly the dramatic stay of execution issued by Justice William O. Douglas and the controversy over the applicability of the Atomic Energy Act. Other matters—e.g., the treason clause, the behavior of the chief prosecutor during the trial, and allegations of perjured testimony—have not been discussed. See, for example, two unsigned analyses: “The Rosenberg Case: Some Reflections on Federal Criminal Law,” *Columbia Law Review*, 54 (1954): 219–60; and “The Rosenberg Case: A Problem of Statutory Construction,” *Northwestern University Law Review*, 48 (1954): 751–59.

⁸ Alfred H. Kelley and Winfred Harbison devote a sentence to the case in their survey, *The American Constitution: Its Origins and Development*, (5th ed., New York, 1976), 827; but Paul L. Murphy, in his *The Constitution in Crisis Times, 1918–1969* (New York, 1972), fails to mention the case, although he discusses other Cold War issues at great length.

⁹ Schneir and Schneir, *Invitation to an Inquest*, esp. 175–212, 237–53.

not, strictly speaking, to invite another inquest. The question of whether Julius and Ethel Rosenberg were “archtraitors” or “martyred saints” cannot be resolved here; what can be judged is the manner in which American legal institutions—especially the Supreme Court—responded to the most politically sensitive litigation of the Cold War era.

THE REFUSAL OF THE SUPREME COURT TO REVIEW THE ROSENBERGS’ CONVICTIONS on at least seven occasions became for Justice Frankfurter one of the gravest moral crises in his lifetime. He wrote several public dissents at the time, but they pale by comparison with the bitterness he expressed privately. “The last days in Washington were not edifying,” he told Herbert Feis in June, 1953, following the Rosenbergs’ execution. “Men’s devotion to law is not profoundly rooted.”¹⁰ The published record before the Supreme Court, he wrote, two weeks before their deaths, “does not tell the story. Indeed, it distorts the story; it largely falsifies the true course of events. What really took place . . . is, on the whole, the most disturbing single experience I have had during my term of service on the Court.”¹¹ Three years later he continued to echo these sentiments to Justice John M. Harlan: “The merits aside, the manner in which the Court disposed of that [the Rosenberg] case, is one of the least edifying episodes in its modern history.”¹²

The legislative origins of the case that so alarmed Justice Frankfurter in the early 1950s go back to World War I. In June 1917, following American intervention into World War I, Congress enacted an omnibus Espionage Act which provided criminal penalties for those who engaged in seditious activities against the war effort or who delivered to any foreign government information relating to the national defense.¹³ Three decades later, during the first summer of the Korean War, the United States indicted four people—the Rosenbergs; Morton Sobell, a friend and college classmate of Julius Rosenberg; and Anatoli A. Yakovlev, a former vice-consul of the Soviet Consulate in New York City—for conspiring to commit espionage from 1944 until 1950. Under the statute, those convicted of such a conspiracy in wartime could be punished by either death or imprisonment for up to thirty years.¹⁴

¹⁰ Frankfurter to Feis, June 29, 1953, Box 35, Frankfurter Papers, Library of Congress (hereafter cited as FFPLC).

¹¹ Frankfurter, “Rosenberg Memorandum,” June 4, 1953, Box 65, File 1, Frankfurter Papers, Harvard Law School Library (hereafter cited as FFPPLS).

¹² Frankfurter to Harlan, October 23, 1956, Box 169, File 15, FFPPLS.

¹³ The pertinent sections of the Espionage Act, 50 U.S.C. 32 (a), 34, as they relate to the Rosenberg case are “(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits or attempts to communicate, deliver, or transmit, to any foreign government . . . or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be imprisoned not more than twenty years. (b) Whoever violates subsection (a) in time of war shall be punished by death or by imprisonment for not more than thirty years. (d) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.”

¹⁴ *Ibid.*

According to the original indictments, the Rosenbergs had been central figures in a Communist spy ring that gave national defense secrets, specifically sketches of high-explosive lens molds and the atomic bomb, to the Soviet Union. Allegedly, David Greenglass, Ethel's brother, who was a machinist at Los Alamos, provided this information between January and September 1945. Eleven of the twelve overt acts charged against the Rosenbergs related to atomic energy secrets, but one dealt with nonatomic, though still classified, documents, which Sobell supposedly obtained from Max Elitcher, an engineer in the navy department, during 1944.¹⁵ Although not included among the overt acts listed in the indictment, David Greenglass also testified that Julius Rosenberg told of stealing the proximity fuse from Emerson Radio, received information "from one of the boys" about a sky platform project in 1947, and gathered other secret material from a contact at General Electric.¹⁶

Elitcher was the only witness to link Sobell to the conspiracy. In building their case against the Rosenbergs, the prosecutors in fact relied upon the testimony of three confessed accomplices—Greenglass; his wife Ruth, who remained unindicted throughout the trial; and Harry Gold, a Philadelphia chemist who testified that he had been a courier for Yakovlev and who had already been convicted for another espionage charge. The physical evidence introduced to buttress this incriminating testimony consisted of only five items, all dubious: drawings of lens molds and an atomic bomb, made from memory by David Greenglass; a photocopy of Gold's hotel registration card from Albuquerque, New Mexico, where, according to Gold and Greenglass, secret documents had been exchanged; a replica of the Jello box lid the Greenglasses said Julius Rosenberg had devised to facilitate the New Mexico meeting; snapshots of the Greenglasses that they claimed were passport photos taken at Rosenberg's urging; and \$4,000 that the Greenglasses said Rosenberg had given them in June 1950 in preparation for their flight from the United States.¹⁷

¹⁵ Supreme Court of the United States, *Transcript of Record: Rosenberg v. United States* (Washington, 1952), c-e.

¹⁶ *Ibid.*, 613, 731-32, 734; and Schneir and Schneir, *Invitation to an Inquest*, 127.

¹⁷ The Greenglasses and Gold, who provided the most damaging testimony against the Rosenbergs, made convincing witnesses because of their extraordinary recollection of the dates, times, and places when information had been exchanged. This precision gave rise, both at the trial and later, to defense charges that they had been carefully coached by the prosecution. In retrospect, it is clear that the Rosenbergs' lawyers, Emanuel and Alexander Bloch, committed major blunders in their cross-examination of the government's star witnesses and in their treatment of evidence. Gold, for example, whose testimony linked Greenglass and therefore Rosenberg to the missing Russian, Yakovlev, was not even cross-examined by the defense. The attorneys accepted at face value Gold's lurid tale of Soviet espionage, of receiving a Jello box lid from Yakovlev and giving the password—"I come from Julius"—to Greenglass, and of his meeting with Greenglass in Albuquerque and the transmission of material back to Yakovlev. Yet, as the Schneirs and others have pointed out, Gold proved to be a less convincing witness in later trials when he endured searching cross-examination. Under questioning by U.S. Attorney Miles Lane, for example, Gold testified that as a Soviet espionage courier "in all cases when I introduced myself I used a false name and in all cases I never indicated my true place of residence." When he met Greenglass in Albuquerque on June 3, 1945 to receive secret information, however, Gold registered at the Hotel Hilton under his real name and occupied a room there for only a few hours before meeting his contact and returning to New York. For a secret agent who during his testimony took great pains to explain all the devious methods of Soviet espionage, Gold's behavior in Albuquerque was indeed strange. In addition, as the Schneirs note, the photocopy of Gold's hotel registration card introduced by the prosecution (and not challenged by the defense) shows two

George Bernhardt, a physician, testified that Rosenberg had sought information in 1950 concerning inoculations required for admission into Mexico. Benjamin Schneider, a photographer, testified that he had taken passport pictures of the Rosenbergs in May 1950 and that Julius had told him "they were going to France." Elizabeth Bentley, an erstwhile Communist party member and highly paid journalist who specialized in exposés of former spies, reported several telephone conversations with a man known to her only as "Julius." The prosecution noted, too, that Julius Rosenberg had been fired from his engineering job with the U.S. Army Signal Corps in 1945 for alleged party affiliation.¹⁸

The Rosenbergs and Sobell denied participation in the conspiracy. Taking the stand in their own defense, the Rosenbergs launched various attacks on their accusers. They denied knowing Gold, Yakovlev, or Bentley. The Greenglasses bore them enmity, they testified, because of family conflicts over their joint business affairs; and David wanted to protect his wife from prosecution and secure a lenient sentence for himself. Julius testified that he attempted to secure information about Mexican inoculation requirements at David's urging and because Ruth had told him that her husband was in trouble for stealing from the army. The Rosenbergs also denied that the photographs taken by Schneider had been passport photos. They both refused on Fifth Amendment grounds to answer questions regarding their membership in the Communist party.¹⁹

contradictory dates, one written in hand by the desk clerk (June 3, 1945) and the other a mechanical time stamp of June 4, 1945 when, Gold testified, he was enroute to New York City. Whether the FBI forged Gold's registration card, as the Schneirs broadly hint, or the double dating was the result of a defect in the Hilton's time-stamp machine, as the FBI later claimed, the Rosenbergs' attorneys obviously missed an opportunity to discredit Gold's testimony and, perhaps, the prosecution's entire case. The Blochs' cross-examination of the Greenglasses was also inept. Attempting to impugn the Greenglasses' character and motives, the Rosenbergs' lawyers failed to probe some rather extraordinary contradictions in the Greenglasses' testimony about their postwar relationships with the Rosenbergs. Their combined business ventures after 1945, for example, failed miserably and produced bad feelings on both sides. Julius attributed the setbacks to David's laziness and incompetence in running the machine shop. Julius finally forced David out of the business. Greenglass placed the blame for their reverses on Rosenberg's arrogance and personal hostility. Yet during this period of family strife, according to Greenglass, his brother-in-law offered to "have the Russians pay for part of my schooling" at the University of Chicago, M.I.T., or New York University "to acquire new friendships with people who were in the field[s] of research . . . like physics and nuclear energy." Although he obviously doubted David's capacity to manage a machine shop, Rosenberg was prepared to bankroll Greenglass's new espionage career at a major university with Russian money, despite the fact that David's entire academic career had thus far consisted of six months at Brooklyn Polytechnic where he had failed eight courses. Finally, the defense did not call its own scientific experts to evaluate Greenglass's sketches. The Blochs accepted the judgment of a single government witness, Walter Koski, an associate professor of physical chemistry, that the drawings were both classified and of great scientific value. *Transcript of Record*, 1150-1230, 656-84, 729-30, 870-73, 254-539, 547-617, 689-1001; and Schneir and Schneir, *Invitation to an Inquest*, 378-90.

¹⁸ The testimony of Bernhardt, Schneider, and the Greenglasses about the Rosenbergs' preparation to leave the United States in 1950 seemed especially incriminating to their case because Sobell had gone to Mexico and faced trial only after unusual extradition proceedings. Sobell claimed that his Mexican trip had been a vacation and that he had been kidnapped by Mexican and American authorities. Although the Rosenbergs admitted that they frequently had "snapshots" taken on family outings, the number of photographs requested from Schneider does seem rather large—"three dozen . . . passport size." On the other hand, Schneider offered confusing testimony about the photographs. He said that he normally charged one dollar for three passport photos but that the Rosenbergs paid him "about nine dollars." And he could produce neither the negatives nor a sales slip to verify the transaction. *Transcript of Record*, 1230-40, 1420-1516, 2124-46; and Schneir and Schneir, *Invitation to an Inquest*, 327-40.

¹⁹ Julius Rosenberg's behavior until the time of his arrest in June 1950 appears somewhat casual for a person whom the government characterized as a master spy, fearful of apprehension, and prepared to flee

On March 29, 1951, following almost a month of testimony, the jury returned a verdict of guilty against all three defendants.²⁰ Seven days later, after consulting two other judges, the chief prosecutor, Irving Saypol, and through Saypol other Justice Department officials, U.S. District Judge Irving Kaufman pronounced sentence: thirty years for Sobell, fifteen years for David Greenglass; death for the Rosenbergs. "I consider your crime worse than murder," Kaufman said, in explanation of the death sentences. "I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused the Communist aggression in Korea, with the resultant casualties exceeding fifty thousand and who knows but that millions more of innocent people may pay the price for your treason." "I feel," he continued, "that I must pass such sentence upon the principals in this diabolical conspiracy to destroy a God-fearing nation, which will demonstrate . . . that traffic in military secrets, whether promoted by slavish devotion to a foreign ideology or by a desire for monetary gains must cease."²¹

from the United States. Rosenberg had, according to Greenglass, urged him to leave the country in February, April, twice in May, and again in June, and had provided \$5,000 for the trip. During this same period, however, Julius redoubled his efforts to purchase David's interest in their Pitt Machine Products Co., pressured Greenglass into resigning as a director of the ailing firm on May 1, 1950, and also entered into an agreement with a second partner, David Schein, to repurchase his share in the company. Of course, the government could claim that Rosenberg's intense preoccupation with his business affairs had only been an elaborate charade, designed to give the appearance of normal behavior when he believed himself to be under FBI surveillance and to disguise conveniently travel payments to Greenglass. *Transcript of Record*, 741-42, 745-57, 801-03, 964-67, 1658-60, 1560-1913, 1924-2098.

²⁰ One juror, James A. Gibbons, an accountant for a New York bus company, refused for nearly two days to make the verdict unanimous, not because he believed the Rosenbergs and Sobell to be innocent, but because he did not want to be responsible for the execution of a woman with two small children. The other members of the jury, he later recalled, convinced him "that it wasn't the jury's job to even think about the sentence . . . I felt like Pontius Pilate washing his hands." Most of the jurors, according to Ted Morgan, quickly voted a guilty verdict because they believed the Greenglasses, not the Rosenbergs. "Why would a boy [Greenglass] go to this great length to testify against his sister . . . knowing it might mean their lives?" one asked Morgan. "I could not visualize this happening. I still can't. I felt that he could not have been lying about doing in his own sister." Morgan, "The Rosenberg Jury," 127, 131.

²¹ FBI documents, released to the Rosenbergs' sons and published by the National Committee to Reopen the Rosenberg Case, shed interesting but essentially confusing light upon Judge Kaufman's decision to sentence the Rosenbergs to death, one of the two options permitted under the Espionage Act. On March 16, 1951, before the case went to the jury, a high FBI official, A. H. Belmont, reported informally to the FBI that Kaufman would impose the death penalty upon Julius Rosenberg "if he [Kaufman] doesn't change his mind." On April 3, 1951, however, J. Edgar Hoover received word from his New York supervisor, D. M. Ladd, that Kaufman had consulted Jerome Frank of the court of appeals and District Judge Weinfeld "concerning the sentences he would impose on the defendants." Frank indicated that he was against the death penalty "for any of the defendants . . . Weinfeld indicated that he was in favor of the death penalty for Julius Rosenberg, Morton Sobell, and Ethel Rosenberg." On the day before imposing sentence, according to Saypol's later recollection, Kaufman asked him for his views and urged the chief prosecutor to solicit the opinion of the Department of Justice. "There were differences all around among them," Saypol wrote, "but capital punishment for one or both was in not out." Because of the division in Washington, Kaufman asked Saypol "to refrain from making any recommendation for punishment the next day." These documents refute Kaufman's assertion at the time that he "refrained from asking the Government for a recommendation," but not his other contention that "the Court alone should assume this responsibility." Failing to get a unanimous recommendation from Washington, Kaufman felt at liberty to impose the maximum sentence upon the Rosenbergs, whose crime he characterized as "loathsome." At the end of the trial, Kaufman complimented the jury for "a correct verdict"; and, before passing sentence upon the convicted spies, he recommended that Congress increase the twenty-year penalty for *peacetime* espionage. See Belmont to Ladd, March 16, 1951; Ladd to Hoover, April 3, 1951; Saypol to Clarence M. Kelley, March 13, 1975, all reprinted in "The Kaufman Papers," distributed by the National Committee to Reopen the Rosenberg Case; *Transcript of Record*, 2390-91, 2447-55. Doron Weinberg, past president of the National Lawyers Guild, who wrote an introduction to the FBI documents for the Rosenberg Committee, con-

Thus ended the trial phase of the Rosenberg case, amid the frustration over a bloody military stalemate in Korea, the shock of President Truman's dismissal of General MacArthur, the frenzied construction of fallout shelters, and Senator McCarthy's raucous attacks on Communist subversion in Washington. Over the next two years, in a political atmosphere filled with similar foreign crises and domestic alarms, attorneys for the Rosenbergs brought before the courts a multiplicity of petitions and motions that attempted on both constitutional and statutory grounds to overturn the death sentences and secure a new trial. A few of their legal arguments had little substance—such as the claim that the sections of the Espionage Act under which they had been charged should be declared void as an unconstitutional invasion of speech and press.²² But many of the Rosenbergs' other challenges raised serious issues relating to the fairness of their trial and the appropriateness of their sentences. At one time or another, from the spring of 1951 until June 19, 1953, lawyers for the Rosenbergs posed at least seven substantial objections:

- (1) Their convictions under the Espionage Act should be reversed, it was argued, because they had been secured in violation of Article III, Section 3 of the Constitution which requires that "Treason against the United States shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." The Rosenbergs had been charged with a conspiracy to commit espionage, not treason;²³ but throughout the trial they

demned Kaufman's unilateral discussions with the prosecution as "a flagrant breach of judicial etiquette," a violation of the American Bar Association's Rules of Professional Responsibility, and a subversion of the separation of powers between the judicial and the executive branches of government. *Ibid.*

²² See Justice Reed's opinion for a unanimous Supreme Court in *Gorin v. United States*, 312 U.S. 19 (1941), where the justices specifically rejected a First Amendment attack on the Espionage Act.

²³ It is doubtful that the government could have succeeded with a treason indictment against the Rosenbergs, not only because the courts demanded strict rules of evidence in such cases, but also because the Rosenbergs, according to the government, aided the Soviet Union, with which the United States had never been at war. In *Cramer v. United States*, 325 U.S. 1 (1945), 33-34, the Supreme Court held that "the protection of the two-witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given . . . Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses." This high standard of proof led Justice Jackson, the author of the *Cramer* opinion, to suggest that the government would be better advised to employ other legal weapons when attempting to protect national security. "The power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety," he wrote. "The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focused upon defendant's specific intent to do those particular acts thus eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities." He specifically cited the Espionage Act as an alternative to an indictment for treason. See 325 U.S. 1, 45. In *United States v. McWilliams*, 54 F. Supp. 791, 793 (Dist. Ct. D.C. 1944), an indictment for treason had been thrown out "since an essential element therein is aid and comfort to 'enemies' and Germany did not become a statutory enemy until December, 1941." Despite abundant rhetoric about a "Cold War," the Soviet Union had not been a "statutory enemy" during the period of the Rosenbergs' activities in 1944-50. *Cramer* and *McWilliams* no doubt suggested to prosecutors that a charge of treason against the Rosenbergs would face many obstacles and that these could be avoided through resort to the espionage statute. The Rosenbergs' lawyers argued, on the contrary, that their clients could be tried only for the offense of treason, relying upon another observation by Justice Jackson in *Cramer*: "Of course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense [treason] another name [espionage]." See 325 U.S. 1, 45.

had been branded by the government as “traitors,” and under the Espionage Act they had been convicted for what amounted to treason without the constitutional safeguards required in a treason trial—above all the “two witness” rule. Much of the evidence about their alleged spying, for example, had been provided by a single witness or the uncorroborated testimony of an accomplice.²⁴

(2) Attorneys for the Rosenbergs maintained that to permit imposition of the death penalty for a crime similar to treason (but without the constitutional protections of the treason clause) comprised “cruel and unusual” punishment banned by the Eighth Amendment. The death sentences also violated the Eighth Amendment because no civil court had ever imposed such a penalty under the Espionage Act and the Rosenbergs’ accomplices had received lighter sentences. Finally, Judge Kaufman had abused his discretion in sentencing them to death and the penalty should be reduced.

(3) The prosecution, the Rosenbergs’ attorneys argued, violated chapter 18, section 3432 of the federal criminal code, which requires that a person charged with a capital offense “shall at least three entire days before . . . trial be furnished with . . . a list . . . of the witnesses to be produced . . . for proving the indictment.” Not only did the name of the photographer, Benjamin Schneider, not appear on the list of witnesses for the prosecution, but the government called him to testify *after* the Rosenbergs rested their case.

(4) Judge Kaufman had consistently exhibited hostility toward the Rosenbergs, specifically his refusal to grant a defense motion that the jury reconsider Ruth Greenglass’s testimony on cross-examination in addition to rehearing her testimony for the prosecution. Their lawyers claimed that both portions of the testimony, reheard together, would have permitted the jury to determine whether or not she had been coached by the prosecution.

(5) The Rosenbergs, according to their lawyers, had been denied a fair trial because one witness, Schneider, admitted to giving false testimony and others, including David Greenglass, might have committed perjury within the knowledge of the prosecutors.

(6) The out-of-court behavior of chief prosecutor Irving Saypol deprived the defendants of a fair and impartial trial. With Ruth Greenglass on the witness stand, Saypol’s office announced the arrest of William Perl, a former classmate of Rosenberg and Sobell, on charges of perjury before the grand jury. Perl’s arrest and indictment became front-page news in New York along with the remarks of Irving Saypol. The *New York Times*, for example, reported

²⁴ The Federal Rules of Criminal Procedure permitted a defendant to be convicted upon the uncorroborated testimony of an accomplice, although many states required corroboration of an accomplice’s testimony. “Had the Rosenbergs been tried across the street, in a New York State court where corroboration is required,” one critic noted at the time, “a conviction would have been unlikely on this record.” See “The Rosenberg Case: Some Reflections on Federal Criminal Law,” 233-34.

on March 15, 1951, "Mr. Saypol said . . . that Perl had been listed by the government as a potential witness in the current atomic espionage trial. His intended role on the stand, Mr. Saypol added, was to corroborate certain statements made by David Greenglass and the latter's wife, who are key government witnesses in the trial." Despite Saypol's assurances that Perl's indictment had not been timed to influence the trial, the Rosenbergs claimed that his conduct violated their right to due process of law guaranteed by the Fifth Amendment.

(7) Finally, the indictment, trial, and sentence had been secured under the wrong law. In 1946 Congress provided specific penalties for espionage activities relating to atomic secrets in the Atomic Energy Act. That statute allowed judges to impose the death penalty, but only when the jury so recommended and when the offense had been committed with intention to injure the United States, which are findings not required by the Espionage Act. Since the indictment alleged a conspiracy lasting until 1950, their lawyers contended that the government should have been bound by the requirements of the 1946 law.²⁵

On February 25, 1952 the Court of Appeals for the Second Circuit, in an opinion by Judge Jerome Frank, who had earlier advised Kaufman not to impose the death penalty, affirmed the Rosenbergs' conviction and sentence. Six weeks later, the same court denied their motion for a rehearing.²⁶ In so doing, the three-judge panel, including Tom Swan and Harrie Chase, rejected the first four grounds for a new trial outlined above, but also suggested that its rulings deserved consideration by the Supreme Court of the United States. The tone of the opinion reflected divisions on the circuit court over several issues relating to the Rosenbergs, and the judges split 2-1 in affirming Sobell's conviction, with Frank dissenting.²⁷

²⁵ *Transcript of Record*, 2498-2589; and Schneir and Schneir, *Invitation to an Inquest*, 180-84, 196-212, 238. Section 10(b) (2) of the Atomic Energy Act of 1946, 42 U.S.C. 1810, provides that "Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with, any document, writing, sketch, photograph, plan, model, instrument, appliance, note or information involving or incorporating restricted data—(A) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with intent to injure the United States or with intent to secure an advantage to any foreign nation, upon conviction thereof, shall be punished by death or imprisonment for life (but the penalty of death or imprisonment for life may be imposed only upon recommendation of the jury and only in cases where the offense was committed with intent to injure the United States); or by a fine of not more than \$20,000 or imprisonment for not more than twenty years, or both; (B) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be used to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction, be punished by a fine of not more than \$10,000 or imprisonment for not more than ten years, or both."

²⁶ *United States v. Rosenberg*, 195 F. 2d 583 (1952). See note 21 above.

²⁷ Sobell deserved a new trial, Frank argued, because Judge Kaufman had not permitted the jury to determine whether he had joined the Rosenberg-Greenglass-Gold conspiracy relating to atomic secrets or had participated only in a second, distinct conspiracy involving nonatomic secrets. The sole testimony linking Sobell to Rosenberg had been provided by only one witness, Elitcher, who alleged that Sobell and Rosenberg asked him to provide information from the navy department. In Frank's opinion Elitcher's testimony was not sufficient to prove a single, unified conspiracy embracing Sobell, Rosenberg, Greenglass, and Gold. *Ibid.*, 601-02.

Frank's law clerk had mounted a vigorous effort on behalf of the Rosenbergs. In a long, passionate memorandum he called their sentences unjust and accused Kaufman of vindictive behavior.²⁸ He urged Frank to meet the penalty issue directly by reducing the death sentences rather than overturning the convictions on procedural grounds.²⁹ At the same time, he outlined possible grounds for a new trial based on Kaufman's refusal to grant the defense motion concerning Ruth Greenglass's cross-examination testimony. He attributed Kaufman's refusal to extreme prejudice against the defendants.³⁰

Frank did not take his clerk's advice and voted to affirm the Rosenbergs' conviction and sentences. His opinion, however, invited review by the Supreme Court. Indeed, he virtually begged the Court to resolve his own doubts. With Chase and Swan, Frank ruled against the cross-examination point, but he parted with them on three other issues: the use of Schneider as a government witness; the power of appellate courts to modify a death sentence; and the relationship between that penalty, the treason clause, and the Eighth Amendment. Swan and Chase, for example, held that section 3432 of the federal criminal code did not apply to so-called rebuttal witnesses, a category into which they neatly placed Schneider. Frank, on the other hand, argued, "It might well have been error to refuse a reasonable request for adjournment. . . . But defendants made no such request."³¹

The death sentences, according to Swan and Chase, could not be reduced by an appellate court when imposed by a trial judge acting under a valid statute. Frank remained more skeptical. He noted that appellate courts modified financial penalties in civil cases where the zeal of a particular judge led to unjust, inflated awards. He questioned whether defendants should receive less protection in a capital case, and, to support this thesis, he cited an obscure section of the United States Code (2106), dating back to the original Judiciary Act of 1789, that gave both appellate courts and the Supreme Court the power "to affirm, modify . . . , or reverse a Judgment." No decision of the Supreme Court, he concluded, "seems to have cited or considered this statute in passing on the question of the power to reduce a sentence. . . . It is clear that the Supreme Court alone is in a position to hold that . . . 2106 confers authority to reduce a sentence." Frank then added a devastating footnote: "Had this court such power [to reduce the sentence], it might take into consideration the fact that the evidence of the Rosenbergs' activities . . . came almost entirely from accomplices." Those accomplices, including Gold and Greenglass, had all received lighter sentences than the Rosenbergs and one, Ruth Greenglass, had not even been indicted.³²

²⁸ "Memo on Rosenberg, et al.," (n. p., n. d.), 1, Box 105, Rosenberg File, Jerome Frank Papers, Yale University (hereafter cited as JFPY). (Restrictions imposed by Judge Frank and his literary executor prohibit direct quotation from Frank's circuit court papers.)

²⁹ *Ibid.*, 5.

³⁰ *Ibid.*, 3. Also see "The Court's Refusal to Ask the Jury Specifically Whether They Wanted to Hear Read the Cross Examination of Ruth Greenglass, When Requested to do so by the Defense, Constitutes Reversible Error" (n. p., n. d.), 4, Box 105, Rosenberg File, JFPY.

³¹ *United States v. Rosenberg*, 195 F. 2d 583 (1952), 600.

³² *Ibid.*, 605-06, 607 (n. 30).

Finally, Frank urged the Supreme Court to review the case in order to clarify important constitutional issues relating to the treason clause, the espionage statute, and the Eighth Amendment. He rejected the Rosenbergs' arguments that their convictions under the Espionage Act violated Article III, Section 3 of the Constitution. Conspiracy to commit espionage and treason, he noted, were distinct offenses; and in *Ex parte Quirin*, the 1942 Nazi saboteurs case, the Supreme Court had upheld the death penalty for a crime more specific than treason.³³ On the other hand, Frank quoted critics of the *Quirin* decision and pointed out that the Court had not resolved whether or not the death penalty violated the prohibition against "cruel and unusual" punishment when imposed for a crime similar to treason. The Supreme Court, he added wistfully, "may well think it desirable to review that aspect of our decision in this case."³⁴

The Supreme Court, however, on June 7, 1952, rejected Frank's overtures by refusing to hear the Rosenbergs' case, and five months later, the Court also denied the petitions for a rehearing. The brief order denying review noted merely that Justice Hugo Black believed the petitions should have been granted. Justice Frankfurter wrote a separate, public memorandum. He explained that the rejection meant "there were not four members of the Court to whom the grounds . . . seemed sufficiently important." Unwilling to disclose his own vote, he nonetheless took a position on one issue raised in Frank's opinion for the circuit court: "A sentence imposed by a . . . district court," he wrote, "is not within the power of this Court to revise."³⁵

In addition to Black, two other justices had actually voted to hear the case in the secret conferences of June 7 and November 8: Frankfurter and Harold Burton. Black, according to Frankfurter's account of the June 7 conference, "thought the fact that a death sentence had been imposed in time of peace for what was in effect a charge of treason . . . without observance of the constitutional requirement . . . presented a serious question." Burton's notes on the same conference indicate that he wished the Court to consider three aspects of the case: (1) Sobell's conviction; (2) the validity of the death penalty; (3) the treason clause. Frankfurter made "an extended argument" in favor of review-

³³ *Ibid.*, 610-11. *Ex parte Quirin et al.*, 317 U.S. 1 (1942). Justice Jackson had reiterated the distinction between treason and other crimes involving national security in *Cramer v. United States*. See note 23 above. During the drafting of the Constitution, Rufus King had also made the observation that "the legislature might punish capitally under other names than Treason." See Willard Hurst, *The Law of Treason in the United States* (Westport, Conn., 1971), 131.

³⁴ *United States v. Rosenberg*, 195 F. 2d 583 (1952), 611. Clearly, Frank did not find much merit in these arguments. He noted that no court had ever found a sentence imposed under a valid law to be "cruel and unusual." The Rosenbergs' claim, in addition, presumed that Congress would always punish treason with death and that therefore such a penalty for the lesser crime of espionage amounted to "cruel and unusual" punishment. In fact, Congress had made treason punishable by fine and imprisonment as well as death and recent treason cases had not involved the death penalty. See *Cramer v. United States*, 325 U.S. 1 (1945), and *Haupt v. United States*, 330 U.S. 632 (1947). Frank deplored the sentence in the Rosenberg case and no doubt hoped that the Supreme Court would review the case, but on November 18, 1952 he wrote to Zechariah Chafee of the Harvard Law School, "the defendants received a fair trial. Indeed, it was more fair than many in which convictions have been affirmed . . . However, if our court had had power to modify the sentence, I would have voted to do so because . . . testimony was given in circumstances that would not have convinced me sufficiently to serve as a basis for a death sentence." See Frank to Chafee, November 18, 1952, Box 35, File 21, Chafee Papers, Harvard Law School (hereafter cited as CPHLS).

³⁵ *Rosenberg et al. v. United States*, 344 U.S. 838, 850, 889-90 (1952).

ing the case, after both Stanley Reed and the chief justice, Fred Vinson, voted against the petitions. "I expressed no view on the merits," he wrote, but "the rare cases in which federal courts imposed death sentences should generally, I said, be reviewed by us." "We ought," he continued, "to be moved by the fact that . . . [Judge] Frank . . . had given expression to a hope that we would take the case. . . . It was in the public interest to put such doubts to rest, and we alone could do it."³⁶

Three other justices, however, Tom Clark, Sherman Minton, and Robert Jackson, voted against review. Jackson, Frankfurter noted, "saw no point in the case which . . . could possibly lead to reversal. That being so, he [Jackson] thought the principal consideration was not to permit proceedings in the case to drag out." Justice William O. Douglas, therefore, cast a decisive vote. "His 'deny's' are usually curt and unaccompanied by argument," Frankfurter wrote. "His 'deny' this time was unaccompanied by argument. But it was uttered with startling vehemence." The same 6-3 division, one vote short of the four required to grant review, persisted in the conference of November 8 when the justices turned down the Rosenbergs' petition for a rehearing. "Douglas again announced his 'deny,'" Frankfurter remarked, "with unwonted vehemence." Burton's diary notations about the meeting confirm much of Frankfurter's account: "I voted, on 1st pet. [petition] . . . to grant (especially to hear argument on treason issue), but at that time Douglas voted to deny [the petitions]."³⁷

With the exception of Burton and Douglas, the alignment of the Court on June 7 and November 8 is not difficult to understand. Vinson, Clark, and Minton, whom a reporter once described as Harry Truman's law firm, had not usually exhibited intense concern for the rights of defendants who were members of extremist political groups.³⁸ Reed and Jackson, the Court's brilliant eccentric, generally demonstrated more sensitivity to such problems, except in the case of the Communist party where both had compiled less than enviable records.³⁹ Burton, a militant advocate of civil rights for racial minor-

³⁶ Frankfurter, "Rosenberg Memorandum" (FFPHLS), 1-2; and Burton, Conference Sheets, Certs, and Appeals for 1952 Term, Box 248, Harold Burton Papers, Library of Congress (hereafter cited as HBPLC). Frankfurter's brief summary of Black's concerns suggests that the latter was prepared to reconsider his position on certain aspects of the treason clause. Black had joined the Court's opinion in the Nazi saboteurs case, *Ex parte Quirin et al.*, 317, U.S. 1 (1942), and had supported Justice Douglas's dissent against Jackson's restrictive interpretation of the treason clause in *Cramer v. United States*, 325 U.S. 1 (1945), 48-67.

³⁷ Frankfurter, "Rosenberg Memorandum" (FFPHLS) 1-2; and Burton, Rosenberg Memorandum, June 19, 1953 in Diary, June 18 and 19, 1953, Box 248, HBPLC.

³⁸ Clark, for example, had been Truman's first Attorney General from 1945 to 1948. He spearheaded the administration's drive against the "Red menace" in American society, compiled the government's official list of subversive organizations, and launched the successful prosecution of twelve Communist party leaders under the Smith Act. Vinson, of course, had written many of the Court's uncompromising anti-Communist opinions between 1948 and 1952, including *Dennis v. United States*, 341 U.S. 494 (1951), where the justices upheld the convictions of CPUSA leaders for conspiring to advocate the overthrow of the government. See Robert Griffith and Athan Theoharis, *The Specter: Original Essays on the Cold War and the Origins of McCarthyism* (New York, 1974), 84, 179, 188; and Murphy, *The Constitution in Crisis Times*, 252-60, 262-68, 297-309.

³⁹ Murphy, *The Constitution in Crisis Times*, 266-67, 295, 306. Jackson, one of the five remaining New Dealers on the Vinson Court, generally wrote liberal opinions—e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which overturned the compulsory flag salute on First Amendment grounds; and *Cramer v. United States*, 325 U.S. 1 (1945), which imposed strict limitations upon treason prosecutions.

ities did not show similar passion for political ones. His vote to hear the Rosenberg case arose as much from judicial courtesy as from a strong belief in the merits of their petition. "Two justices seemed to have strong feelings," Frankfurter reported Burton as saying on June 7. "He would join them [Black and Frankfurter] for a grant." Candidly, Burton described his own position: "In each instance I was ready to vote against their [the Rosenbergs'] proposals if a vote was necessary, yet I would prefer to give them a chance for argument before the Court acted."⁴⁰

According to Frankfurter's notes, Black seems to have been the only member of the Court with a clear civil libertarian analysis of the case rooted in his concern about the treason clause. Frankfurter's own anxiety at this point arose largely from his belief in the Court's institutional responsibility to hear the case and his desire to calm popular alarm over the legality of the convictions. "I had been reinforced in my views," he wrote of the November 8 decision. "I pointed to heightened public feeling, not the irrational passions aroused in and by the Communists . . . but the disquietude of impartial men of good will."⁴¹ The alliance of Black and Frankfurter on the Rosenberg case was hardly fortuitous, although they had found themselves on the opposite side of most constitutional issues for over a decade. The senior justice from Alabama—regarded as the leader of the Court's liberal, activist wing in the 1940s—preached a vigorous doctrine of legal positivism which required that every action by public officials flow from an unambiguous statutory or constitutional provision. Black abhorred discretionary power, whether manifested in the equity jurisdiction of courts, the rule-making authority of regulatory commissions, or grandiose claims to "inherent authority" put forth by the president. In addition, he had spoken out many times in defense of persecuted ideological minorities.⁴² Frankfurter, the principal spokesman for judicial restraint on the Court, had aroused the concern of civil libertarians largely because of his conservative views on the First Amendment, but he held very fastidious notions about federal criminal procedure and the duty of the

But like Justice Frankfurter, his closest friend on the Court, he manifested a deep preoccupation with social cohesion, which led him at times to sanction rather repressive state controls over unpopular political or social minorities. A former attorney general and chief prosecutor of Nazi war criminals, Jackson also believed that the community had to defend public order by rooting out conspiracies, whether organized by businessmen attempting to subvert the antitrust laws, Jehovah's Witnesses bent upon a disruptive proselytizing campaign, German stormtroopers, or the American Communist party. See his views in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Martin v. City of Struthers*, 319 U.S. 141 (1943), 171–82; also see his concurring opinion in *Dennis v. United States*, 341 U.S. 494 (1951).

⁴⁰ Frankfurter, "Rosenberg Memorandum" (FFPHLS), 2; and Burton. Rosenberg Memorandum (HBPLC), June 19, 1953.

⁴¹ Frankfurter, "Rosenberg Memorandum" (FFPHLS), 2.

⁴² On Black generally, see Gerald T. Dunne, *Hugo Black and the Judicial Revolution* (New York, 1977), 224–94; and G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York, 1976), 221–36, 328–39, 346–65. On his judicial positivism, see especially *Board of Commissioners of the County of Jackson, Kansas v. United States*, 308 U.S. 343 (1939), 354, which denied the courts the authority to make financial restitution to Indians without statutory authorization; and *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which denied the president the authority to seize steel mills without congressional sanction. See also his vigorous defense of the First Amendment in the Smith Act-Communist Party case, *Dennis v. United States*, 341 U.S. 494 (1951).

Supreme Court to supervise the administration of justice in the federal courts.⁴³

Justice Douglas, a paladin among American liberals, was the true anomaly. He had consistently joined Black in First Amendment cases and had written several free-speech opinions that other justices regarded as invitations to anarchy. The Court's youngest member at 54, Douglas also maintained an active public life off the bench through lectures, books, and travel geared to his dwindling constituency among the old New Dealers in the Democratic party, some of whom in the summer of 1952 still looked to him as a viable presidential or vice-presidential candidate. A *Nation* magazine poll, published on May 10, 1952, indicated that two-thirds of its readers favored Douglas as the party's candidate.⁴⁴ If Douglas's ambitions for political office remained alive, a confrontation in the Court over domestic espionage amid the fetid atmosphere of 1952 would have presented a dilemma best avoided by refusing to hear the Rosenberg case. Yet Douglas made no effort to secure the Democratic nomination, did not possess a coherent political organization, and still voted against a rehearing in the Rosenberg case three days after Eisenhower's landslide victory in November. A more plausible, if still unflattering, explanation of his behavior is that Douglas, unlike Black and Frankfurter, believed the case then presented neither significant constitutional issues nor a threat to the Court's moral authority.⁴⁵

⁴³ On Frankfurter generally, see C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (New York: 1948), 132-35, 280-84; and White, *The American Judicial Tradition*, 325-56. Certainly Frankfurter could not be accused of harboring sentimental feelings about the Communist party. In addition to concurring in the *Dennis* case, he had voted to uphold the deportation of William Schneiderman and Harry Bridges as well as the anti-Communist provisions of the Taft-Hartley Act. See *Schneiderman v. United States*, 320 U.S. 118 (1943); *Bridges v. Wixon*, 326 U.S. 135 (1945); and *American Communications Association v. Douds*, 339 U.S. 382 (1950). But, in contrast, in decisions involving the administration of justice, see, for example, his opinion in *McNabb v. United States*, 318 U.S. 332 (1943), which reversed two murder convictions because federal officers secured confessions prior to bringing the suspects before a magistrate, and his support of Douglas in *Nye et al. v. United States*, 313 U.S. (1941), which curbed the contempt powers of federal judges, although he refused to sanction a similar limitation upon state courts in *Bridges v. California*, 314 U.S. 252 (1941), 291-300.

⁴⁴ Murphy, *The Constitution in Crisis Times*, 188; and see especially Douglas's opinion in *Terminiello v. Chicago*, 337 U.S. 1 (1949), and the dissents by Frankfurter and Jackson. For the poll and Douglas's political ties, see, for example, *Nation*, May 10, 1952, pp. 444-45, and "Justice Douglas Is Available," *Nation*, January 26, 1952, p. 73. "Think of the rubbishy stuff that so good a person as Freda Kirchway prints . . . that Douglas is available," Frankfurter wrote to Charles C. Burlingham. "What does she really know about him, except what he has told about himself? And has she any realization at all of what it means to have political considerations, consciously or unconsciously, enter into a court that is entrusted with the ultimate disinterested say in the vital affairs of this nation?" Frankfurter to Burlingham, January 25, 1952, Box 36, FFPLC. Frankfurter, of course, tended to be sanctimonious about his colleagues, especially Black and Douglas. The latter he regarded as a ruthless opportunist and judicial chameleon who had used his seat on the Court as a springboard to higher political office and had twisted legal doctrine in order to further these ambitions. Jackson held similar feeling about his youngest colleague; and, in addition, he blamed Douglas for joining with Black to deny him the chief justiceship in 1946. See *From the Diaries of Felix Frankfurter*, ed. Joseph P. Lash (New York, 1974), 161, 173-76, 177-82, 226-27, 283, 301-02, 338, 342-43; and Pritchett, *The Roosevelt Court*, 26-29.

⁴⁵ Douglas and Black had strong civil libertarian records in First Amendment cases that involved speech, press, and association but rather mixed records in national security cases where patriotic emotions tended to run high. In *Viereck v. United States*, 318 U.S. 236 (1943), 253, for example, they dissented when the Court reversed the conviction of a German agent for failure to register with the secretary of state and to disclose his propaganda activities on behalf of the German government. The Court held that Viereck was not

Although Ethel Rosenberg denounced the “pusillanimous rottenness” of the Court’s decision not to hear the case, her husband believed that the action would finally generate an avalanche of protest among progressives and liberals “to grant us our day in court.” Progressives in the legal profession, however, were far less optimistic. “Who will save the Rosenbergs from death?” Burlingham asked Frankfurter after the denial of review. “The British gave [Klaus] Fuchs only 14 years or less. Canada gave its traitors only a few short years. The R’s [Rosenbergs’] treason was when we were friends of Russia. We must not go back to the 16th Century.”⁴⁶ Following the Supreme Court’s action, Judge Kaufman scheduled the Rosenbergs’ execution for the week of January 12, 1953.

REBUFFED BY THE NATION’S HIGHEST COURT, THE COUPLE’S LAWYERS INSTITUTED new proceedings before U. S. District Court Judge Sylvester Ryan early in December 1952. In their petition they alleged principally that Saypol’s conduct during the Perl indictment and false statements by Schneider entitled their clients to a new trial. On the witness stand Schneider testified that he had not seen the Rosenbergs since 1950 when they came to his photography shop to pick up passport photos. After the trial, however, Schneider admitted that he had been brought into Kaufman’s courtroom on the day before his testimony by FBI agents. The Rosenbergs’ lawyers urged Judge Ryan at the very least to hold a hearing on these issues and receive oral testimony. He rejected their pleas, finding “no relevant or material issue of fact . . . which requires a hearing . . . or which renders the taking of oral testimony either necessary or helpful.”⁴⁷

Schneider had not committed perjury, Ryan argued, merely because he testified that the “last time” he saw Julius Rosenberg had been in the spring of 1950, when in fact Schneider had seen the defendant the day before he testified in court. “There was no motive for falsehood on the part of Schneider and there is not the slightest evidence that Schneider’s testimony on this was intentionally false.” With equal speed Ryan disposed of the Perl indictment: “There is not the slightest proof that any of the trial jurors read of the arrest or indictment . . . or that it came to their attention in any manner.” And, in

required under the law to disclose activities undertaken on his own behalf and reprimanded the government prosecutor for inflaming the jury with his remarks: “It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime. . . . We are at war. You have a duty to perform here.” In his dissent, Douglas characterized the prosecutor’s remarks as merely “stirring eloquence” which “cannot convict him of hitting foul blows.” Likewise, in *Cramer v. United States*, 325 U.S. 1 (1945), 67, Douglas and Black attacked Jackson’s opinion on the treason clause as one that “makes the way easy for the traitor, does violence to the Constitution, and makes justice truly blind.”

⁴⁶ Meeropol and Meeropol, *We Are Your Sons*, 151–52; Burlingham to Frankfurter, November 17, 1952, Box 36, FFPLC. “As a matter of justice,” Zechariah Chafee wrote to Jerome Frank, “a death sentence for spying in war should . . . be enforced only when the secrets were given to an enemy in the war. Here they were given to an allied [sic]. . . . It is absurd to punish the betrayal to Russia in 1944 or 1945 with death when a similar betrayal today, which would be far more injurious to the United States, would be punished only with life imprisonment.” Chafee to Frank, November 14, 1952, Box 35, File 21, CPHLS.

⁴⁷ *United States v. Rosenberg*, 108 F. Supp. 798 (1952), 799–800.

addition, he noted, "The petitioners . . . elected not to move for a mistrial; they may not now object."⁴⁸

Three weeks later, on December 31, 1952, the Circuit Court of Appeals affirmed Ryan's decision, but not without serious reservations expressed privately by Jerome Frank and more openly by one of the senior judges, Tom Swan. In his memoranda to the other members of the court, Frank condemned Saypol's behavior at the time of the Perl indictment. The chief prosecutor, he wrote, told the press what he did not attempt to prove in court: (1) that the government had planned to use Perl's testimony to corroborate the Greenglasses' story; (2) Perl had later backed out; and (3) on this account Perl had been indicted for perjury. If the Rosenbergs' lawyers had then moved for a mistrial, he concluded, Judge Kaufman would have been obliged to grant it. No such motion had been made, however, and this point became decisive for Frank: the defendants could not, after an adverse verdict, obtain a new trial because of misconduct they had elected to ignore. Although their lives were at stake, Frank doubted they could succeed with the argument that their lawyers had made an unwise choice during the trial. Swan's final opinion for the Court followed Frank's analysis. He branded Saypol's conduct as "wholly reprehensible"; but the Rosenbergs had not requested a mistrial, he concluded, and "there is no allegation or evidence that any juror read the newspaper story."⁴⁹

Having lost for a second time in the circuit court, the defense strategists for the Rosenbergs now pursued three related efforts in order to save the couple from execution. The lawyers prepared an appeal of Swan's ruling to the Supreme Court, applied to Judge Kaufman for a reduction in the sentences, and petitioned President Truman for clemency. On January 2, 1953, although Kaufman granted a stay of execution pending a clemency decision from the White House, he refused to modify the sentences. The death penalty would "serve as an example to those who may . . . be tempted to commit similar acts," he argued, and it would protect America against "the home grown and foreign variety of spies, which are and will be a continuing threat to our security." The Rosenbergs, he concluded, had not shown any remorse for their crime and he would stand firm against "a mounting organized campaign of vilification, abuse and pressure" to set aside the sentences.⁵⁰ Harry Truman left office on January 20 without acting on their clemency petition or the thousands of pleas for mercy, including one from Albert Einstein, that poured into the White House. Truman, of course, had endured four years of Republican invective that his administration coddled subversives, lost China to the

⁴⁸ *Ibid.*, 806, 804. Of course, one might argue that the relevance of the Perl indictment could only be determined by a hearing. The Rosenberg jury was not sequestered during the trial, and one member reported to Ted Morgan, "You can shut yourself off to a certain extent, but I'd be riding the subway, and I'm a guy that likes to read sports, you're bound to see a newspaper. . . . Anyone who tells you he can shut himself off completely during a trial has never served on a jury." See Morgan, "The Rosenberg Jury," 126-27.

⁴⁹ Jerome Frank, "United States v. Rosenberg," December 27, 1952, 3-4, Box 105, Rosenberg File, JFPY; and *United States v. Rosenberg*, 200 F. 2d 666 (1952), 670.

⁵⁰ *United States v. Rosenberg et al.*, 109 F. Supp. 108 (1953), 115-16.

Communist hordes, and encouraged Red aggression in Korea. After he had begun prosecutions against Communist party leaders and then the Rosenbergs, it was unlikely that he would commute their sentences and provide the opposition with still another example of the Democrats' "softness" on Communism. Nor could the views of his successor be in doubt. Eisenhower, whatever his private doubts about the lunatic fringe in his own party, had restored the Republicans to power with a campaign that stressed the Democrats' failure to defeat Communism at home and abroad. On February 11, he tersely rejected the Rosenbergs' petition for clemency on the grounds that they had "betrayed the cause of freedom for which free men are fighting and dying at this very hour."⁵¹

The Circuit Court of Appeals for the Second Circuit provided the one ray of hope for the Rosenbergs in an otherwise dark January and February. On February 17, over the objection of government attorneys, the judges stayed the couple's execution until after the Supreme Court had acted on their petition to review Swan's decision. Although he had joined Swan's opinion, Jerome Frank noted that the argument put forth by the defense had merit, "and for my part, I believe the Supreme Court should hear it."⁵² Learned Hand, perhaps the second circuit's most cautious jurist, chastised the government for resisting the stay of execution. "People don't dispose of lives," he said, "just because an attorney didn't make a point . . . There are some Justices on the Supreme Court on whom the conduct of the Prosecuting Attorney might make an impression. . . . Your duty, Mr. Prosecutor, is to seek justice, not to act as a time-keeper."⁵³ At least one member of the judiciary, however, was not plagued by doubts and did act as a time-keeper. Judge Kaufman expressed alarm to FBI officials in New York over the circuit court's action. He feared that the Supreme Court might not dispose of the appeal before their traditional June recess, and he urged the Justice Department to "push the matter vigorously" in order to bring it before the high Court.⁵⁴

During its regular conference on April 11, however, the Supreme Court again denied the Rosenbergs' petition for review, thereby allowing Swan's opinion for the circuit court to stand. Judge Hand had been correct: the prosecutor's conduct and Swan's criticism made an impression upon some of the justices, but not enough to force review of the case. Frankfurter's docket book and memorandum of the meeting indicate that only he and Black now voted to hear the petition. Justice Burton, who had urged review six months before, "thought the issues raised in this new proceeding were without merit," while Justice Douglas, according to Frankfurter's notes, also turned down the case "in the same harsh tone."⁵⁵

⁵¹ Schneir and Schneir, *Invitation to an Inquest*, 192; also see 186-93; and Richard M. Fried, *Men Against McCarthy* (New York, 1976), especially 219-53.

⁵² *New York Times*, February 17, 1953, pp. 1, 19, and February 18, 1953, pp. 1, 12.

⁵³ Quoted in Meeropol and Meeropol, *We Are Your Sons*, 187.

⁵⁴ Even FBI officials were surprised by Kaufman's intervention. A. H. Belmont told J. Edgar Hoover that "this is a matter which should be handled by the Department [of Justice] and we should not express an opinion." See Belmont to Hoover, February 19, 1953, "Kaufman Papers."

⁵⁵ Frankfurter, "Rosenberg Memorandum" (FFPHLS), 4; Jules [sic] Rosenberg and Ethel Rosenberg v. United States," No. 687, Docket File 15, Box 67, FFPPLS. Burton's conference sheet for May 2, 1953

The Saypol incident, coupled with Swan's rebuke, stirred in Frankfurter a powerful conviction that the Supreme Court should hear the case and an equally intense frustration that he could do very little about it. Over the objections of Vinson, Clark, Minton, and Reed, the official order denying the petition was held up for more than a month until May 20 as Frankfurter debated whether or not to write a dissent from the Court's refusal to review the case.⁵⁶ In those weeks he weighed several considerations: personal disgust at Saypol's actions, a concern for the Court's future reputation, and fear that he might feed "flames of disquietude and passion and disunity." On the one hand, the death sentences should not be carried out, he told the other justices, "without putting behind" those sentences "the moral authority that would come from a finding by this Court, after an examination of the record and hearing argument, that there was no flaw in the trial that calls for reversal." Unless the Supreme Court acted, he said, doubts about the case would multiply because judges on the court of appeals had made observations "which naturally enough arouse disquietude in minds that are as fiercely hostile to the Communist danger as are Messrs. Jenner, McCarthy and Velde, but who are also concerned for those American traditions which make them hostile to Communism." He could not justify a dissent without describing in detail what he called "Saypol's inexcusable conduct," yet to do so, he reasoned, "might help to make a hero of him [Saypol], as Judge Medina has been made a hero of for conduct in which no English judge would dare to indulge, no matter what his passion or his egotism."⁵⁷

On the other hand, Frankfurter believed that whatever he wrote in dissent might become grist for the propaganda mills of the Communist party or lead "high-minded and patriotic laymen who do not understand these things to believe that I implied that the Rosenbergs were convicted though innocent." Although Frankfurter professed not to be "awed by fear of the puny force of Communist influence in this country," he finally decided not to dissent because he believed radicals would distort his views. Following his discussions with Justice Black, both agreed to append to the denial order a simple paragraph: "Mr. Justice Black and Mr. Justice Frankfurter, referring to the positions they took . . . last November, adhere to them."⁵⁸

After Frankfurter's own ordeal of indecision, the memorandum of May 22 circulated by Justice Douglas announcing his change of position startled Frankfurter and the other justices. That memorandum threw the Rosenberg case and the Court deeper into controversy and confusion than ever before. "I have done further work on this case and given the problem more study," Douglas wrote. "I . . . have reluctantly concluded that certiorari should be granted," he continued. "I ask that the order of denial carry the following notation: Mr. Justice Douglas, agreeing with the Court of Appeals that some

indicates that the petition was turned down on a 7-2 vote, with Burton voting with the majority: See Box 248, HBPLC.

⁵⁶ Frankfurter to Vinson, May 16, 1953, Box 65, File 7, FFPHLS.

⁵⁷ Frankfurter, "Memorandum for the Conference," May 20, 1953, Box 65, File 7, FFPHLS. Harold Medina had served as the trial judge in the *Dennis* case.

⁵⁸ *Ibid.*

of the conduct of the United States Attorney was ‘wholly reprehensible’ but, believing in disagreement with the Court of Appeals that it probably prejudiced the defendants seriously, votes to grant certiorari.”⁵⁹ Douglas, who had on three occasions voted against hearing the case, now proposed to dissent on the merits. Not only had an important question been raised, he argued, but the Rosenbergs had been “seriously” prejudiced and the Supreme Court seemed not to care. At the urging of Frankfurter and others, Vinson agreed to reopen discussion of the case at the regular conference scheduled for May 23.⁶⁰

Stunned by Douglas’s “last-minute change of position” but also sensing an opportunity for the Rosenbergs, Frankfurter wrote a moving letter to Burton and caucused briefly with Jackson in the hope of gaining their support to review the case. He quoted to Burton a short poem by Eugene Wambaugh, who half a century earlier had taught constitutional law at the Harvard Law School:

Let not the judgment that is just
 Be judged too soon,
 But be reserved, if judge one must,
 Till noon.
 Or yet till Evening, that the way
 Repentant may lie open all the day.

Douglas’s memorandum, Frankfurter wrote Burton, “put the whole Court in a hole” but that should not prevent them from “examining the hole in order to see whether it is for the good of the Court to remain in the hole.” He reminded Burton of both the *Mooney* case—in which Tom Mooney, a California labor leader, had been sentenced to death because of perjured testimony—and the *Sacco-Vanzetti* case, both of which, he said, had stained the highest courts of California and Massachusetts when the judges refused to face questions of potential injustice. Here, too, was such a case, and “we cannot ostrich-like bury our heads in the sand” in a position of being “heedless to the pronouncement of a member of the Court [Douglas] . . . who has created for himself the reputation of being especially sensitive to the claims of injustice.”⁶¹

To Jackson, Frankfurter indicated that, if the Court refused to hear the case, he would probably write a dissent of his own so that Douglas’s views would not stand alone. Frankfurter did not wish to dissent, he also told Jackson, but Douglas’s memorandum made it almost inevitable. Jackson, in turn, commenced a savage attack upon Douglas. “Don’t worry,” Jackson told Frank-

⁵⁹ Douglas, “Memorandum to the Conference, Re: Rosenberg v. United States; Sobell v. United States,” May 22, 1953, Box 248, HBPLC. Certiorari is the legal term for the writ issued by the Supreme Court when it grants review.

⁶⁰ “After having reached what I had assumed was the end of a long and laborious intellectual journey,” Frankfurter wrote to the other members of the Court, “I must now, in view of Brother Douglas’ memorandum, retrace it in light of the new situation created by that memorandum. . . . Brother Douglas’ change of position obviously requires a reopening of the discussion at Conference.” Frankfurter, “Memorandum for the Conference,” May 22, 1953, Box 248, HBPLC.

⁶¹ Frankfurter to Burton, May 23, 1953, Box 65, File 2, FFPPLS. Also see Richard H. Frost, *The Mooney Case* (Stanford, Calif., 1968).

furter, "Douglas's memorandum isn't going down." It was, Jackson added, "the dirtiest, most shameful, most cynical performance that I think I have ever heard of in matters pertaining to law." If Jackson's meaning was lost upon Frankfurter at the moment, it emerged more clearly in the afternoon conference when the Rosenberg case came up for discussion. Even in the face of Douglas's provocative document which accused them of indifference to due process, five members of the Court—Vinson, Clark, Reed, Minton, and Burton—remained opposed to review. Black, ill at home, had left a vote in favor of taking the case. Douglas now said he would review it and so did Jackson, who administered a sharp rebuke to Douglas and let it be known that he cast his "yes" vote only to quash publication of Douglas's dissent and to extricate the Court from a dilemma. By this time, Jackson noted, four justices had voted for review on different occasions—Black, Frankfurter, Burton, and Douglas. These votes would be leaked to the press and create still more furor over the case. In such circumstances, Jackson saw no alternative but to review it.⁶²

Clearly, Jackson had become a reluctant ally. Several weeks earlier he refused to hear the case, but he told Frankfurter he might join a dissent that reprimanded Saypol. "I cannot imagine," Jackson said, "that you can be too severe on him [Saypol] to suit me." Like Douglas, he had consistently voted against the Rosenbergs' petitions; but now, although he believed his original position to be fundamentally sound, he provided the fourth vote to review Swan's opinion. "Since there were thus four votes," Frankfurter wrote of the meeting, "we proceeded to discuss when the case should be heard." Burton volunteered to cancel his European vacation in order to hold oral arguments on or before July 6, but at this point, according to Frankfurter, Douglas interrupted the discussion: "What he [Douglas] had written was badly drawn, he guessed. He hadn't realized it would embarrass anyone. He would just withdraw his memorandum if that would help matters." Immediately, Jackson announced that he would not vote to grant the petition because Douglas had taken back the offending document and the Court was now where it had been before. The conference dissolved in confusion, with no one, save perhaps Douglas, certain whether he had rejoined those voting to deny review or whether he remained in dissent, even without the memorandum. One thing was certain: for the fourth time, the Rosenbergs had failed to muster the necessary votes. In the hallway outside the conference room, Jackson stopped Frankfurter and said triumphantly with reference to Justice Douglas, "That S.O.B.'s bluff was called."⁶³

On May 25, 1953, the Monday following its stormy conference, the Court released a formal order denying the Rosenbergs' petition. It noted merely that Justice Douglas "is of the opinion [it] . . . should be granted."⁶⁴ Absent was his reference to Saypol's "wholly reprehensible" conduct; missing, too, was

⁶² Frankfurter, "Rosenberg Memorandum" (FFPHLS), 6, 7.

⁶³ *Ibid.*, 8, 9. Burton had scheduled a European vacation for early July. He left on July 11, 1953; see his Diary, July 11, 1953, Box 2, HBPLC.

⁶⁴ *Rosenberg et al. v. United States*, 345 U.S. 965 (1953), 966.

Douglas's conclusion in the memorandum of May 22 that this conduct "probably prejudiced the defendants seriously." Douglas, indeed, had backed down, but the intriguing question remains: why had he done so? Douglas's own explanation, given to and reported by Black to Frankfurter, was that he withdrew the memorandum when it became clear the Court would only grant a hearing on the question of whether or not to grant certiorari. "Of course," Jackson responded, "that is wholly false It wasn't that at all. We voted to grant until Douglas withdrew his memorandum."⁶⁵ The harshest interpretation, provided by Jackson through Frankfurter, suggests that Douglas did not want the case brought before the Court where he, like the others, would be forced to affirm or reverse the convictions. At the same time, many, particularly those of the American Left, believed that the Rosenbergs had not received a fair trial. The memorandum of May 22 provided a way out of his predicament: Douglas could dissent vigorously from the denial of certiorari, affirm his liberal credentials, yet not be required to vote on the case after full arguments. He withdrew the memorandum in the conference when it became clear that the Court, above all Jackson, preferred to hear the case rather than endure a provocative dissent. Sensing Jackson's motives, Douglas retreated, encouraged Jackson to switch his vote, and thereby killed the grant of certiorari.

One must, of course, view with skepticism this interpretation, contained in documents prepared by a justice who from the beginning of their association on the bench found himself at odds, personally and ideologically, with Douglas. Although Frankfurter may have embellished his account, he certainly did not invent Douglas's memorandum of May 22. His careful reconstruction of the conference, moreover, including what lay behind Jackson's vote and the details of Burton's projected trip, also lends credibility to his analysis of Douglas's behavior. Is there another, reasonable interpretation? Perhaps. Douglas, who tended to write his legal opinions quickly, may have composed the dissent of May 22 in haste, encountered withering criticism in the meeting, and retreated without devious motives. If so, regardless of the presence or absence of a formal vote to hear the case (assuming he cared about the Rosenbergs' petition), Douglas becomes a timid poker player whose bluff had been called. His threatened dissent had forced the Court to reconsider its denial of review. He thus entered the conference with a strong hand. And, from all we know of his behavior in other cases, Douglas thrived on tough intellectual combat, enjoyed the role of dissenter, and was not easily intimidated by his colleagues' wrath. Certainly Douglas was no stranger to the rough-and-tumble of Court politics, and he knew how to round up votes. Franklin Roosevelt believed him to be one of the best poker players in Washington. If Jackson's conduct did not exhibit the highest level of judicial integrity, Douglas's remains inexplicable in view of his own later apparent interest in the case.⁶⁶

⁶⁵ Frankfurter, "Rosenberg Memorandum" (FFPHLS), 6.

⁶⁶ In his recently published autobiography, Douglas does not discuss at length his judicial career, with one exception—the Rosenberg case. When recounting the public abuse he suffered while on the Court,

INSTEAD OF SEALING THE ROSENBERGS' FATE, THE SUPREME COURT'S NEGATIVE decision on May 25 served only as a prelude to the tangled legal and political conflicts of the following month as America's atom-spy drama moved to its grim conclusion against a backdrop of Cold War propaganda, diplomatic crises, and military disasters. Like the battleground in Korea, where Red Chinese troops upset the truce lines on June 14 with the heaviest assault in two years, the Rosenberg case had become a minefield for every judge, lawyer, and politician trapped not only in its reality but in its symbolism as well. Justice Frankfurter's memoranda indicate how a normally bold jurist, outraged by the prosecution's tactics, could be intimidated by the prospect that words of dissent could be used against the nation in its global battle against Communism. Justice Black, usually a pugnacious dissenter in cases that touched sensitive political issues, apparently shared some of Frankfurter's fears. It is not surprising that in the final weeks of the Rosenberg case passion often triumphed over reason. Whatever opportunities for reconsideration or compromise may have once existed at either the judicial or executive level quickly vanished in June once the couple refused to confess their guilt and cooperate with authorities in exchange for clemency. The Rosenbergs were thus finally left at the mercy of others: tired and desperate defense lawyers, many of them strangers to the case; a combative trial judge unwilling to back down under any circumstances; an executive branch anxious to rid itself of the whole affair as quickly as possible, but afraid of jarring its allies abroad or tarnishing its anti-Communist image at home; and, finally, a Supreme Court openly split by ideological divisions and torn asunder by personal feuds and hatreds.

Following the Supreme Court's action, Kaufman once again refused to reduce the sentences and rescheduled the Rosenbergs' execution for the week of June 18—a decision upheld by the circuit court without opinion on June 5. Kaufman's "patriotic" rhetoric during and after the trial made him a principal villain in the case, especially for those who believed that the death sentences were inspired more by anti-Communist hysteria and a desire for vengeance than by the need to protect national security in the future. As criticism mounted over his conduct, Kaufman developed a siege mentality and endowed his own role with the romantic aura of a lone judicial crusader against subversion, who, despite Russian propaganda "poisoning the mind of the peoples of the world" and threats against his life, intended to punish America's chief traitors.⁶⁷

Reality in the White House was far more complex. What to do about the Rosenbergs never became the principal question before Eisenhower and his

Douglas twice refers to his votes for a stay of execution in the case but not to his position on earlier petitions for review. See William O. Douglas, *Go East, Young Man* (New York, 1974), 23, 469–70. In a letter to Mr. Justice Douglas on November 26, 1974, I asked him to comment upon the memorandum of May 22. He declined to do so. Instead, he provided copies of the Court's official reports for the case and concluded, "I am puzzled by your inquiry as the journal entry makes everything clear." In my opinion, the official reports do nothing of the kind. William O. Douglas to author, December 19, 1974.

⁶⁷New York *Times*, June 6, 1953, p. 7; *United States v. Rosenberg et al.*, 109 F. Supp. 108 (1953), 115; and Belmont to Hoover, February 19, 1953, "Kaufman Papers."

staff during early June, except as the couple's case related to other pre-occupations of the Cold War. In addition to the murderous Chinese offensive, the president faced a rebellion by the volatile Syngman Rhee; the South Korean leader released North Korean prisoners in defiance of agreements with the United States, denounced Eisenhower's truce plan as "the death of Korea," and vowed to fight on alone against the Communist menace. On June 17, moreover, Russian tanks put down anti-Soviet demonstrations in East Berlin. Under these circumstances, it is amazing that the administration offered to commute the Rosenbergs' death sentences in return for their confessions and assistance in tracking down other spies—a proposition which the couple spurned on June 2 and the Justice Department denied having made.⁶⁸ But Eisenhower, despite his desire to maintain a resolute anti-Communist image, also recognized that the case had engendered huge protests in England, France, and Belgium and had inspired pleas for commutation from twenty Israeli religious leaders and the Pope. At the same time that it made overtures to the Rosenbergs, the administration flexed its atomic muscles by announcing that the United States had detonated a plutonium bomb twice as powerful as the ones dropped on Japan. The two events were hardly isolated or unrelated to the deteriorating situation in Korea. The "Eisenhower waltz," as Senator Lester Hunt once observed, usually involved "one step forward, two steps backward and one sidestep!"⁶⁹

While Judge Kaufman remained steadfast in his refusal to modify the death sentences and the Eisenhower administration pursued its characteristic strategy of indecision and obfuscation, the Rosenbergs' principal lawyer and friend, Emanuel Bloch, clutched at every legal device that might possibly save the couple. In these efforts Bloch was aided by several enterprising newspaper reporters and a new team of lawyers, including Malcolm Sharp, a professor of law at the University of Chicago, and the legendary John Finerty, a long-time defender of civil liberties, who had unsuccessfully appealed the convictions of Sacco and Vanzetti to the Supreme Court and secured a measure of legal vindication for Tom Mooney. Finerty joined Bloch in presenting the Rosenbergs' second petition to the Supreme Court and there can be little doubt that his presence strongly influenced Justice Frankfurter, who, like Finerty, had played an active role in both the Sacco-Vanzetti and Mooney cases.⁷⁰ On June 6, these lawyers filed a brief with Judge Kaufman detailing the discovery of "new evidence" in the Rosenberg case which, they argued, indicated that the prosecution had knowingly used the perjured testimony of the Greenglasses.

⁶⁸ According to Julius Rosenberg's version of the offer, James V. Bennett, Federal Director of Prisons, suggested on behalf of Attorney General Herbert Brownell that "Judge Kaufman made a terrible blunder with this outrageous sentence and he has the bull of [sic] the tail and he can't let go. . . . He needs you to help him change this sentence and you can do this by telling all you know." Meeropol and Meeropol, *We Are Your Sons*, 211. On events in Korea and East Berlin, see the *New York Times*, June 12, 1953, pp. 1-2; June 15, 1953, pp. 1, 3; and June 18, 1953, pp. 1, 3, 8.

⁶⁹ Hunt as quoted in Fried, *Men Against McCarthy*, 262. Also see Schneir and Schneir, *Invitation to an Inquest*, 180, 192-94; and *New York Times*, June 5, 1953, pp. 1, 11.

⁷⁰ Frost, *Mooney Case*, 289, 303, 401; and Felix Frankfurter, *Felix Frankfurter Reminisces*, ed. Harland B. Phillips (New York, 1960), 130-39, 202-17.

They asked Kaufman to order a new trial or, at the very least, to hold a hearing during which the “new evidence” could be carefully examined by both the defense and the prosecution.

The “new evidence”—according to Bloch, Sharp, and Finerty—proved that the Greenglasses lied during the trial about three matters: (1) Russian “gifts” to the Rosenbergs; (2) pretrial statements made to the FBI; and (3) the theft of uranium from Los Alamos by David Greenglass. During his testimony, David alleged that the Rosenbergs had received several presents from the Russians as payment for their espionage activities, including watches and a console table. Moreover, David said, “Julius told me that he did pictures on that table.” Ruth Greenglass did not describe the table as a gift from the Russians; but both Rosenbergs, she said, told her it was given to them by a friend. “There was a portion of the table that was hollowed out for a lamp to fit underneath it,” Ruth added, “so that the table could be used for photographic purposes.” Evelyn Cox, the Rosenbergs’ housekeeper during the war years, also testified that Ethel Rosenberg had told her that “a friend of her husband gave it [the console table] to him as a gift.” The Rosenbergs, she added, sometimes kept the table in a closet.⁷¹ In the trial, this testimony regarding the console table had been extremely damaging to the case for the defense. It conveyed to the jury a frightening stereotype of secret agents, crouched over a table in a darkened room, snapping photographs of classified documents. The Rosenbergs denied that the table had been a gift or that it served any special purpose other than as a place where meals were occasionally served. Julius claimed that he purchased the table from Macy’s department store. Macy’s employees could neither confirm nor refute his testimony because their sales records from 1944–45 had been destroyed and the defense did not produce the table in court because they assumed that all of the Rosenbergs’ furniture had been sold following their arrest.⁷²

In the spring of 1953, however, a reporter for the *National Guardian* located the mysterious console table in the apartment of Julius’s mother, Sophie Rosenberg, who had taken custody of the two Rosenberg children and some of the couple’s old household possessions. An illiterate, Sophie Rosenberg had not followed the trial of her son in the newspapers, and she did not, therefore, understand the significance of the console table until the reporter questioned her about it. The defense lawyers introduced before Kaufman photographs of the table, affidavits from the family, and a statement by a Macy’s employee, all of which tended to confirm much of the Rosenbergs’ account and to cast doubt upon the testimony offered by the Greenglasses. The photographs did not indicate that the table had been “hollowed out” underneath and the Macy’s employee, who had been a buyer of furniture for the store in 1944 and 1945, believed it to be one of their “lower-priced tables,” probably sold “sometime during or subsequent to the year 1944.” By themselves, of course, neither the photographs nor the affidavits could prove that the Greenglasses

⁷¹ *Transcript of Record*, 737–41, 900–01, 1014, 2104.

⁷² Schneir and Schneir, *Invitation to an Inquest*, 200–01.

had lied or, more crucially, that the prosecution had known of their perjury. Although the table may not have been “hollowed out” underneath as Ruth Greenglass claimed, her husband had only testified that Julius Rosenberg “did pictures on that table.” The fact that Macy’s sold the table in 1944 or 1945 did not resolve the issue of who had purchased it—the Rosenbergs, a friend, or the Russians? These were issues that could be settled only in the course of a formal hearing where both the table and the witnesses would be subjected to further examination. Kaufman, however, refused to take that step, because, he argued “there would still be lacking any showing that the Government knowingly used perjurious testimony.” He also branded the console table testimony as insignificant and rebuked the lawyers for failing to produce the evidence during the trial.⁷³

The Rosenbergs’ lawyers also sought to persuade Kaufman that many of the Greenglasses’ pretrial statements, made to their attorneys following interrogation by the FBI, contradicted later testimony and indicated that David and Ruth had committed perjury. The attorneys also presented to Kaufman several memoranda prepared by the Greenglasses’ lawyers in July 1950, later stolen from the law firm’s files, and published by *Combat*, a Parisian newspaper, in April 1953. These documents show that David Greenglass told his lawyers he had made “a number of confusing statements purposely in order to confound the FBI and to draw attention from his wife.” What David recounted to the FBI during his initial interviews and then recited to his lawyers was indeed very confusing with respect to his own espionage activities and the roles played by his wife, Harry Gold, and the Rosenbergs. David told his lawyers that “Julius Rosenberg is apparently very close to this whole situation” and added that Rosenberg had once introduced him “to a man in a car somewhere in New York who apparently made this request” to supply information from Los Alamos. On the other hand, Greenglass said to his lawyers, “I told them [the FBI] that . . . my wife asked me if I would give information. I made sure to tell the F.B.I. that she was transmitting this info from my Brother in Law Julius and was not her own idea.” He informed the FBI of his meeting with Gold in Albuquerque, Greenglass said, including the fact that “I identified Gold by a torn or cut out piece of card”; but, he continued, “I definitely placed my wife out of the room at the time of Gold’s visit. Also I didn’t know who sent Gold to me.” In a discussion with lawyers on the day of her husband’s arrest, Ruth Greenglass told them that “she had remembered no visitors at her house in New Mexico, that David had a “tendency to hysteria,” and that “he would say things were so even if they were not.”⁷⁴

The purloined memoranda did not present a prima facie case of perjury but did raise serious questions about the Greenglasses’ credibility and their relationship to the FBI and government prosecutors. In his initial interview with the FBI, according to the lawyers’ account, David did not mention his

⁷³ *Ibid.*, 199–200, 202.

⁷⁴ *Ibid.*, 204–07.

sister, Ethel, and attempted to “draw attention from his wife.” He even placed her out of the room during Gold’s visit to Albuquerque, yet on the witness stand Ruth Greenglass told a very different story: “David gave him [Gold] the written sheets of information and we all spoke for a few minutes and we went out for a walk.” David also told his lawyer on June 17, 1950 that he could not remember certain details of Gold’s visit, “but I allowed it in the statement.” When did the Greenglasses begin to fill in the details about Ethel Rosenberg’s espionage activities, about visitors to their home in Albuquerque, and about who sent Harry Gold? Did their memories become more acute under relentless FBI interrogation? Had David attempted to save both his wife and sister, but failed? Had the Greenglasses invented large portions of their testimony in order to please the government and receive lighter punishment? Kaufman brushed aside these considerations. The evidence did not entitle the Rosenbergs to a new trial or a preliminary hearing, he said, because David Greenglass had made six or seven statements to the FBI and may have added information each time. Pretrial documents, he added, did not prove that the Greenglasses testified falsely at the trial.⁷⁵

Finally, the defense presented Kaufman with an affidavit from David’s brother, Bernard Greenglass, who swore, “my brother David told me he had taken a sample of uranium from Los Alamos without permission of the authorities.” Bernard also stated that, prior to David’s arrest in June 1950, his brother indicated that “he had thrown this uranium into the East River.” Bernard Greenglass’s affidavit, the Rosenbergs’ lawyers argued, suggested that David had been involved in a separate espionage offense, feared detection by the FBI, and had sought assistance from Julius Rosenberg, including money and information about smallpox vaccinations. Even if true, Kaufman responded, the theft of uranium did not “provide a motive for perjury, designed to implicate innocent members of Greenglass’s family in this most serious crime.” He studied the defense’s “new evidence” for two days, heard three hours of oral argument, and after a recess of fifteen minutes denied the Rosenbergs a new trial or a hearing. He called their contentions “unsupported and incredible.” Two days later, in a *per curiam* opinion, the court of appeals affirmed this ruling and denied a further stay of execution.⁷⁶

On June 12, with only six days remaining before the scheduled executions and three days before the Supreme Court adjourned for the summer, Bloch and Finerty applied to Justice Jackson for a stay of execution in order to give the defense additional time to prepare the briefs for an appeal of Kaufman’s ruling on the “new evidence.” Jackson hesitated to act alone, but referred their application to the entire Court with a recommendation that the justices hear oral argument on Monday, June 15, the final day of the Court’s regular term. Jackson’s recommendation provoked a sharp division among the justices during their regular conference on Saturday, June 13. He gained the

⁷⁵ *Transcript of Record*, 1002–07; and Schneir and Schneir, *Invitation to an Inquest*, 210.

⁷⁶ *New York Times*, June 9, 1953, p. 13; Schneir and Schneir, *Invitation to an Inquest*, 211–12; and *United States v. Julius Rosenberg and Ethel Rosenberg*, 204 F. 2d 688 (1953).

support of three others to hear oral argument—Black, Frankfurter, and Burton—but Douglas, who had proposed to write a dissent on the basis of injustice several weeks before, again joined the four stalwarts who had consistently voted against the Rosenbergs' efforts to secure review by the Supreme Court. Douglas said that he would grant a stay of execution and hear the case "on the merits" but that "there would be no end served by hearing oral argument on the motion for a stay." Having rejected Jackson's recommendation, the justices also turned down the application for a stay of execution *without* an oral hearing by a 5–4 vote with Justice Burton switching to the majority. Burton, in other words, refused to grant a stay but would hear oral argument on the question. Douglas would grant a stay but dismissed the necessity for any argument. Three justices—Black, Frankfurter, and Jackson—voted for either formula. Douglas's intransigence clearly doomed the application because, although both he and Burton insisted upon all or nothing, Burton asked for much less: a hearing on the application. Justice Black, for example, who never waived in his support of the Rosenbergs' various petitions, agreed with Douglas that the case should be faced on the merits, but he nonetheless supported Jackson's recommendation to hear argument on the question of a stay. A stubborn devotion to principles, Black reasoned, should not foreclose any opportunity to bring the case before the Court.⁷⁷

The justices' weekend deliberations took place against a background of mounting protests on behalf of the Rosenbergs and the unexpected intervention into the case by two lawyers, Fyke Farmer and Daniel G. Marshall, who represented a loose coalition of civil libertarians and church activists, including Irwin Edelman, the author of a critical pamphlet on the case. On Saturday, as pro-Rosenberg pickets demonstrated in front of the White House and thousands of letters reached the president pleading for their lives, Farmer petitioned Judge Kaufman for a stay of execution and a writ of habeas corpus based in part upon an argument that they had been indicted, tried, and sentenced under the wrong law. Kaufman rejected Farmer's efforts on Monday at about the same time that the Supreme Court announced its refusal to stay the executions or hold oral argument on the application. Kaufman dismissed Farmer as an "intruder" and "interloper," who was attempting to insinuate himself into the litigation without the consent of the Rosenbergs or their attorneys.⁷⁸

On Monday the Court prepared to adjourn after turning down Jackson's recommendation, but Finerty quickly moved to file an original writ of habeas corpus, based upon the Saypol incident and the perjury issues raised before

⁷⁷ *Rosenberg et al. v. United States*, 345 U.S. 989 (1953). Also see Frankfurter to the Conference, June 15, 1953, Box 65, File 2, FFPHLS; and Burton to the Conference, June 15, 1953, Box 65, File 3, FFPHLS.

⁷⁸ *New York Times*, June 14, 1953, pp. 1, 30; and June 16, 1953, pp. 1, 19. Over 6,000 pickets paraded before the White House that weekend. On June 12, Harold Urey, the distinguished nuclear scientist, condemned the government's case as an outrage against logic and justice. "A man of Greenglass's capacity," he said, "is wholly incapable of transmitting the physics, chemistry, and mathematics of the atomic bomb to anyone." The "new evidence" presented to the courts, he told President Eisenhower, made it plain that the prosecution depended upon "the blowing up of patently perjured testimony." *New York Times*, June 13, 1953, pp. 1, 8.

Kaufman and the court of appeals. He carefully structured his arguments around successful pleadings in the *Mooney* case, in which the Supreme Court had entertained, on a writ of habeas corpus, the claim that knowing use of perjured testimony by the prosecution deprived the accused of due process and justified a new trial. In conference that afternoon, the justices voted to deny Finerty's application, although Black dissented and Frankfurter argued for what he called an "open hearing" on the question. To the latter's amazement, Douglas "quite vehemently" sided with the majority and engaged Frankfurter in an acrimonious debate over *Mooney*, which indicated—at least as Frankfurter saw it—that Douglas either had misinterpreted Finerty's motion or did not grasp the doctrine of the *Mooney* case. Frankfurter became so agitated by this dialogue with Douglas that he made a longhand transcript on the back of an envelope:

Douglas: "[You've] got to do more than use perjured testimony, [you've] got to manufacture it."

Frankfurter: Oh! no! Oh! no! [The] knowing use of perjured testimony is enough. I know a good deal about *Mooney*."

Even Jackson, who voted against habeas corpus, tried to convince Douglas that Finerty had participated in the *Mooney* case and modeled his claims on that precedent; but Douglas, according to Frankfurter, remained adamant: "He couldn't see . . . that Finerty's pleadings here went to anything that he would call jurisdictional. He was still willing to grant certiorari, but could not see how these allegations could be entertained on habeas corpus."⁷⁹

Douglas's resistance to Finerty's application no doubt surprised Frankfurter because only a year before Douglas and Black had rested a dissent upon the principles of the *Mooney* case. By now, both Frankfurter and Jackson believed that Douglas had contradictory motives in the Rosenberg litigation. On the one hand, he worked to retain his image as a liberal tribune who, when necessary, fought alone on behalf of the oppressed. On the other, he thwarted collective efforts to review the case. "Every time a vote could have been had for a hearing," Jackson complained, according to Frankfurter, "Douglas opposed a hearing in open Court, and only when it was perfectly clear that a particular application would not be granted, did he take a position for granting it."⁸⁰ Douglas had voted against three certiorari petitions and had refused to support both Jackson's recommendation to hear oral arguments for a stay and Finerty's habeas corpus plea; but two days after the Court recessed he acted independently to stay the Rosenbergs' executions and precipitated a dramatic special session of the full Court on June 18 and 19.

⁷⁹ Frankfurter, "Rosenberg Memorandum—Addendum," 1, June 19, 1953, Box 65, File 1, FFPHLS; and "Notes of Meeting with W.O.D.," Box 65, File 2, FFPHLS. For Frankfurter's position on Finerty's application, see *Rosenberg et al. v. United States*, 346 U.S. 282 (1953). For the precedents of the *Mooney* case, see *Mooney v. Holohan*, 294 U.S. 103 (1935).

⁸⁰ *Remington v. United States*, 343 U.S. 907 (1952, Cert. denied); and Frankfurter, "Rosenberg Memorandum—Addendum" (FFPHLS), 4.

This is not to suggest that Douglas acted frivolously when he granted the Rosenbergs a stay of execution on June 17. Farmer and Marshall, whose petitions Kaufman had rejected, presented the justice with a persuasive argument: the Rosenbergs might be put to death illegally because the 1917 Espionage Act, upon which they had been indicted and sentenced, had been superseded by the penalty provisions of the Atomic Energy Act of 1946. Under this statute, a death sentence could be imposed for atomic espionage only if the jury recommended it and if the crime had been committed with the intent to injure the United States. The nation must be secure, Douglas wrote in his opinion, against “the nefarious plans of spies who would destroy us.” But he had serious doubts about the imposition of the death penalty, and he stated that the Rosenbergs “should have an opportunity to litigate that issue” in the district court and the circuit court of appeals.⁸¹ At the same time, Douglas also knew before he issued the stay that his performance did not have the support of either the chief justice or a majority of the Court and that even those who remained sympathetic to the legal arguments he presented neither approved of his methods nor, in some instances, trusted his motives. Legally, his position was strong; politically and morally, however, Douglas now functioned in a vacuum without the support of most of his colleagues.

Although he acted independently on June 17, Douglas did not reach his decision to grant the stay hastily. From late Monday afternoon, June 15, until Wednesday morning, he poured over the briefs and statutes, drafted his opinion, and worried endlessly about the response of the other justices. On Tuesday evening Frankfurter told him that the Atomic Energy issue “seemed . . . [to be] one that should be looked into,” but Frankfurter refused to read Douglas’s opinion. Did Frankfurter know, Douglas asked, how Jackson felt about the matter? Should he consult Jackson and Burton? The chief justice, Douglas informed Frankfurter, believed that the issue of the appropriate penalty under the Atomic Energy Act had already been disposed of in “my published memorandum of November 17, 1952 in which I noted that it was clear . . . we had no power to revise the sentence imposed by a District Judge.” Vinson had also told him, Douglas said, that Farmer, the new attorney, had no standing to litigate the issue and that Douglas should lay the entire problem before the conference. The attorney general, Vinson added, had also urged that the new matter go to conference. “Do . . . what your conscience tells you,” Frankfurter lectured him on Wednesday morning, “not what the Chief Justice tells you. . . . Tete-a-tete conversation cannot settle this. . . . That was all I could tell him.” Black, the only justice who saw the opinion before Douglas issued it, thought that Douglas had written an “enduring document.”⁸²

Frankfurter maintained an icy neutrality in the face of Douglas’s repeated calls for advice and support. The chief justice and Jackson, on the other hand, worked to counteract the impact of the expected stay of execution. According

⁸¹ *Rosenberg v. United States*, 346 U.S. 273 (1953), 321.

⁸² Frankfurter, “Rosenberg Memorandum—Addendum” (FFPHLS), 5–6.

to Frankfurter's account, Jackson indicated that he had no objection to Douglas's entertaining Farmer's motion. But FBI documents suggest that Jackson, contrary to the position he took with Frankfurter and Douglas, and at the same time he was discussing the case with them, arranged a meeting on June 16 with Attorney General Brownell and Chief Justice Vinson at which they talked about the unusual strategy of reconvening the entire Court to overturn the stay: "Jackson felt that the whole theory of listening to Farmer's motion was ridiculous and Douglas should have turned it down. . . . Vinson said that if a stay is granted he will call the full Court into session Thursday morning to vacate it."⁸³ Shortly after Douglas issued the stay, Brownell petitioned the Court to vacate it on the grounds that the penalty clauses of the Atomic Energy Act did not pose a substantial question. Over Black's objections the full Court assembled on June 18 to hear arguments, although at least two members of the Court—Vinson and Jackson—had already decided to reverse the stay even before Douglas's opinion had been published.⁸⁴

During the nearly three hours of oral argument on June 18, lawyers and judges frequently erupted with accusations that had little to do with the two principal legal issues before the Court: (1) did they have the authority to vacate Douglas's stay? and (2) did the apparent conflict between the penalty provisions of the Espionage Act and the Atomic Energy Act present "a substantial question" requiring further study and litigation? Attorneys for the Rosenbergs, who had expected Douglas's stay to remain in force over the summer, bitterly condemned the government's efforts to vacate it. Finerty, in addition, lashed out at Irving Saypol: "There never was a more crooked District Attorney in New York than the one who tried the Rosenbergs," he said. Justices Clark and Jackson questioned the presence of Farmer and Marshall as attorneys for the Rosenbergs, and Jackson wanted to know if Irwin Edelman was the same Edelman convicted for vagrancy in California, a remark which prompted another sharp exchange between Jackson and the defense lawyers. Frankfurter asked both the government and the defense whether, assuming Douglas's stay remained in force, the Rosenberg jury could be reconvened after two years or a reconstituted jury would be necessary. Jackson finally indicated that in his opinion the Supreme Court should dispose of the issues without further delay. "It is a point of law," he stated. "Why shouldn't we stay here and decide it and tell the lower court what to do instead of asking them to tell us?"⁸⁵

During the afternoon of June 18 and the morning of June 19, the justices met

⁸³ Belmont to Ladd, June 17, 1953, "Kaufman Papers." According to Belmont's memorandum, Judge Kaufman was the source of this information. He learned of the Brownell-Jackson-Vinson meeting from James B. Kilsheimer III, the assistant United States attorney in New York, who had helped to prosecute the Rosenbergs. Kaufman, in turn, passed the information along to Tom McAndrews, FBI supervisor in New York.

⁸⁴ Many of the justices had already left Washington when Vinson called them back for the special session. Frankfurter, finally located at Owen Roberts's farm in Pennsylvania, hurried back to Washington and spent the night of July 17 at the home of Joseph Rauh, Jr., his former law clerk and one of the founders of Americans for Democratic Action. Rauh recalls that Frankfurter spend a restless night and had harsh words for Douglas. Interview with Joseph Rauh, Jr., August 12, 1975.

⁸⁵ New York Times, June 19, 1953, p. 8.

twice before vacating Douglas's stay in a brief *per curiam* opinion prepared by Justice Reed. Burton's notes of those meetings indicate that the discussions became very heated. Black, for one, denounced the special session and the haste involved in the proceedings. "It was terrible," he said, "to come in and consider this issue as though we had it before us." Frankfurter questioned whether the full Court had authority to vacate a stay which Douglas had issued in chambers. Burton tended to agree on this point. Overruling Douglas, he told the others, would undermine the stay system, for it had never been done before. "Let it take due course," Burton said. "There is a substantial question. That's all we should pass on now." But the others rejected these arguments in favor of deciding the question on the merits. Clark said it was "wrong to hold up [the case] any longer." Reed disputed Frankfurter's contention that the Court could not review the stay; Jackson, Minton, and Vinson all believed that the Atomic Energy Act did not apply to the case. The Court was not deciding hastily, Minton concluded, for "the case has been here many times and these questions should have been raised earlier."⁸⁶

Finally, the justices voted on three separate issues. A motion to uphold Douglas's stay, pending complete proceedings in the lower courts, lost 5-3. Burton joined Black and Douglas in the minority, but, according to Burton's notes, Frankfurter abstained. Four justices (Black, Douglas, Burton, and Frankfurter) then voted to shorten the stay by hearing further arguments and requesting additional briefs on the Atomic Energy Act within three weeks. When that motion failed, the Court voted 6-3 to vacate the stay. Burton, who had expressed strong reservations about such an action, cast his vote with the majority when the first two motions failed. Black, Douglas and Frankfurter dissented. That night, after Eisenhower again rejected a plea for clemency, the Rosenbergs were put to death.⁸⁷

The Court's behavior during the final hours of the Rosenberg case became for Frankfurter one of the most depressing episodes in the entire litigation. In contrast to Minton, Frankfurter thought the Court acted in haste, which seemed to him irresponsible, if not worse. Burton, although inclined to accept the government's position on the merits, gave voice to similar feelings. "We should take the time necessary for a regular case," he said. "This has never been adequately briefed by anybody for us." Before the final votes, Burton assured Frankfurter that if four justices wished to uphold the stay or shorten it for additional arguments, he would provide the fifth vote in either

⁸⁶ Burton, Conference Notes on Douglas's Stay, Box 257, HBPLC. Prior to the Rosenberg case, the full Court had always declined to overturn a stay granted by a single justice. See, for example, *Johnson v. Stevenson*, 335 U.S. 801 (1948) and *Land v. Dollar*, 341 U.S. 737 (1951). Ironically, the majority in the Rosenberg case cited these two decisions as authority for vacating Douglas's stay.

⁸⁷ Burton, Conference Notes on Douglas's Stay (HBPLC). Eisenhower declined clemency less than one hour after the Court vacated Douglas's stay, so that he probably did not have the opportunity to read the closing words in Jackson's concurring opinion: "Vacating this stay is not to be construed as endorsing the wisdom or appropriateness to this case of a death sentence." *Rosenberg v. United States*, 346 U.S. 273 (1953), 292-93. In his statement to the press Eisenhower said that he would not intervene because "the Rosenbergs may have condemned to death tens of millions of innocent people all over the world. The execution of two human beings is a grave matter. But even graver is the thought of the millions of dead whose death may be directly attributable to what these spies have done." *New York Times*, June 20, 1953, p. 1.

case.⁸⁸ In his opinion for the majority, published after the executions, Chief Justice Vinson wrote that they had “deliberated in conference for several hours” before deciding that the questions raised in Douglas’s stay were not substantial and that it should be vacated. On the face of a page proof of Vinson’s opinion, Frankfurter wrote an angry notation:

The fact is that all minds were made up as soon as we left the Bench—indeed, I have no doubt . . . before we met on it! At the conference “several hours” were consumed by the remarks of the nine Justices, in their usual order of seniority. The C.J. [Chief Justice] talked at length, mostly in support of his view that there was “waiver,” whatever point was “raised or raisable”—a point he . . . formally abandon[ed]. . . . Most of the time was consumed by consideration whether [the] result should be announced that afternoon . . . or delayed until next day noon! No discussion of [the] merits.⁸⁹

A month later, Frankfurter gave full vent to his displeasure in a published dissent. He argued that the Atomic Energy statute presented a grave question and that Douglas’s stay should not have been vacated: “Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion. . . . We have not had the basis for reaching conclusions and for supporting them in opinions. Can it be said that there was time to go through the process by which cases are customarily decided here?”⁹⁰

Indeed, the majority opinions—written by Vinson, Jackson, and Clark—betray the absence of adequate study and reflection expected in a decision patched together in a day or two. At the threshold, the Court had to meet the question of its power to vacate Douglas’s stay and the necessity for doing so. Vinson could cite neither a prior judicial decision nor a statute that authorized the Court’s action; in fact, all of the case law pointed in the opposite direction. “So far as I can tell,” Justice Black wrote in dissent, “the Court’s action here is unprecedented.” The Chief Justice finally rested the authority upon the Court’s “responsibility to supervise the administration of criminal justice” or, as one critic of the decision noted, the Court’s “inherent powers to control the actions of its judges.” But that vague doctrine ran against the Court’s general reluctance to claim implied or inherent powers for itself and suggested that Douglas acted irrationally or arbitrarily, a point of view categorically rejected by Vinson because “the stay issued . . . was based . . . on a new claim—a question which had not been considered in any prior proceeding.” Unable to provide a coherent answer to the first question, the majority moved to its corollary: the necessity to vacate the stay. If Douglas’s stay remained in force, Vinson argued, many months of litigation would ensue in the lower courts. This process would subvert the proper administration of the laws, because the reasons behind Douglas’s action “raised no doubts of

⁸⁸ Burton, Conference Notes on Douglas’s Stay; and Frankfurter, “Rosenberg Memorandum—Addendum” (FFPHLS), 6.

⁸⁹ For these handwritten remarks, see *Rosenberg v. United States* [346 U.S. 273 (1953), page proof; the Chief Justice], Box 65, File 4, FFPHLS.

⁹⁰ *Rosenberg v. United States*, 346 U.S. 273 (1953), 309.

such magnitude as to require further proceedings.” The issues were, in fact, so simple and free from doubt that six members of the Court resolved them in less than forty-eight hours.⁹¹

The majority, Vinson wrote, “did not entertain the serious doubts which Mr. Justice Douglas had,” because in their opinion the Atomic Energy Act of 1946 “did not displace” the Espionage Act. When Congress punished conduct by more than one statute, Clark added, the government might invoke either law. It was a “cardinal principle of construction,” he wrote, that the repeal of one law by another was not favored by implication and that “when there are two acts upon the same subject, the rule is to give effect to both if possible.” Finally, both Clark and Jackson argued that the Atomic Energy Act did not apply to the Rosenberg case in any event, because “the crux of the charge alleged overt acts committed in 1944 and 1945,” before that law had been adopted. The government could not have prosecuted the Rosenbergs under the Atomic Energy Act, Jackson declared, because to do so would have violated the constitutional prohibition against *ex post facto* laws. “Since the Atomic Energy Act thus cannot cover the offenses charged,” Clark concluded, “the alleged inconsistency of its penalty provisions with those of the Espionage Act cannot be sustained.”⁹² On the substantive issue of the relationship between the two laws, the views of Vinson, Jackson, and Clark, and the majority possessed an elegant simplicity that seemed to lay to rest all doubts, but as the dissenters wrote at the time and as legal scholars have noted since, this simplicity had been achieved through the avoidance of several thorny matters.

The provisions of one statute did not repeal by implication those of a later statute, Clark wrote, unless the Court found “positive repugnancy” between the provisions of each. Section 10 (b) (6) of the Atomic Energy Act, he noted, provided that “the applicable provisions of other laws shall not be excluded.” Congress intended, he argued, to preserve with “undiminished force” the penalty provisions of the Espionage Act. But Clark’s conclusion did not rest upon an analysis of the legislative history of the 1946 law, which indicated that a major reason for its adoption had been the fear among scientists and legislators that the draconian penalties of the 1917 law inhibited research and the exchange of scientific information.⁹³ Section 10 (b) (6), moreover, referred only to applicable provisions of other laws, not to *all* provisions of existing statutes. The Court did not consider that Congress in 1946 may have intended a partial repeal to the Espionage Act. Furthermore, the Court had long held as a “cardinal principle of construction” that a law adopted with the purpose

⁹¹ *Ibid.*, 208, 287–88; and “The Rosenberg Case: Some Reflections on Federal Criminal Law,” 247–48.

⁹² *Rosenberg v. United States*, 346 U.S. 273, 286, 294–95, 290, 296.

⁹³ As Frankfurter noted in his dissent, there “was not time within twelve waking hours to dig out, to assess, to assemble, and to formulate the meaning of legislative materials,” but he cited the conclusion of James R. Newman, who had been chief counsel for the Senate committee which drafted the Atomic Energy Act in 1946: “It is reasonable to suppose that Congress did not intend to give the prosecuting attorney the option of moving under the Espionage Act instead of the Atomic Energy Act where an offense involving information relating to atomic energy is specifically described in the latter and only broadly and generically encompassed by the former.” *Rosenberg v. United States*, 346 U.S. 273, 307–08.

of regulating a particular phase of a general subject repealed an earlier statute dealing with the entire subject. As precedent for that principle the majority could have cited Justice Jackson in *Massachusetts v. United States*: “. . . this Court has rarely hesitated to interpret the old and general statutes as yielding to the newer and specific statutory scheme.” This rule might have been applied to the Rosenberg case, because the 1917 law punished all types of espionage, while the 1946 statute, which was “newer and specific,” covered only atomic espionage. Finally, Jackson’s and Clark’s *ex post facto* rhetoric only served to obscure further the relationship between the two laws. Since 1798 the Court had held that “an *ex post facto* law is one which imposes a punishment for an act that was not punishable when it was committed or imposes additional punishment.”⁹⁴ The Rosenbergs’ conspiracy, begun in 1944, was punishable at the time of its inception by the Espionage Act. The Atomic Energy Act did not create a new offense or make punishable in 1946 what had not been punishable before 1946. Nor did the “newer and specific” law impose “additional” penalties upon those who committed espionage.

The decisive issue—as Black, Frankfurter, and Douglas pointed out—was that the Rosenbergs had been charged with a conspiracy to commit espionage, including atomic and nonatomic subjects, from 1944 to 1950. No question would have arisen had they been charged only with nonatomic espionage or with a conspiracy lasting from 1944 to 1946, before the Atomic Energy Act came into force. But the Rosenbergs’ conspiracy, Frankfurter wrote, “is one falling in part within the terms of the Atomic Energy Act,” and he doubted that they could be executed for that conspiracy under the Espionage Act, especially in view of the sentencing provisions adopted by Congress in the “newer and specific” law. “Congress does not have to say in so many words that hereafter a judge cannot without jury recommendation impose a sentence of death on a charge of conspiracy that falls within the Atomic Energy Act,” Frankfurter concluded. “It is enough if in fact Congress has provided that hereafter such a death sentence is to depend on the will of the jury.” Before the final arguments Douglas wrote, “I knew only that the question was serious and substantial. Now I am sure of the answer. I know deep in my heart that I am right on the law.” It is difficult, moreover, to refute the harsh conclusion of at least one legal scholar that “in this last stage of an extraordinarily protracted litigation, the rights of the Rosenbergs did not receive the precise and extensive consideration that must characterize the administration of the criminal law.”⁹⁵

FROM THE PERSPECTIVE OF MORE THAN TWENTY YEARS, IT SEEMS VERY DOUBTFUL that the Vinson Court would have saved the Rosenbergs even had the case

⁹⁴ *Massachusetts v. United States*, 333 U.S. 611 (1948), 639; and *Calder v. Bull*, 3 Dall. 386 (1798), 390.

⁹⁵ *Rosenberg v. United States*, 346 U.S. 273 (1953), 304–07, 313; and “The Rosenberg Case: Some Reflections on Federal Criminal Law,” 260. Also see “The Rosenberg Case: A Problem of Statutory Construction,” 754–59.

been fully argued on four occasions. Since 1946 at least five of its members and sometimes seven had displayed a growing reluctance to include Communists or Communist "sympathizers" within the protections of the Constitution and the Bill of Rights. Members of the Communist party and other groups deemed subversive had been denied benefits under the nation's labor laws, jailed for preaching about revolution, deported from the country, and imprisoned without indictment or trial, all in the name of national security and judicial deference to policy choices made by Congress and the executive branch.⁹⁶ Nor was the Court alone in its capitulation to the Red Scare during the early 1950s. Both the Truman and Eisenhower administrations kept public anxiety about Soviet Communism at a high level with strident rhetoric about Red conspiracies abroad and disloyalty at home. In the summer of 1954, Senate liberals, led by Hubert Humphrey, proposed legislation making membership in the Communist party a crime, subject to fine and imprisonment.⁹⁷ It is little wonder that two people, convicted of stealing atomic secrets for the Russians, "did not receive the precise and extensive consideration that must characterize the administration of the criminal law."

Although Douglas's final gamble failed, it seems very likely that had his stay remained in force until lower courts disposed of the issues raised by the Atomic Energy Act or until the Supreme Court reconvened in the fall of 1953, the Rosenbergs might not have been executed. The climate of the Cold War shifted radically in the months following their deaths. On July 28, after three years and 25,000 American casualties, the guns finally fell silent in Korea. Two days after the official armistice, Senator Ralph Flanders of Vermont introduced Senate Resolution 301 calling for the censure of McCarthy and on September 27 a special Senate committee recommended the latter's condemnation for "contemptuous, contumacious, and denunciatory" behavior. More significantly, on September 8 Fred Vinson died and within five months Earl Warren had been sworn in as the new Chief Justice. Although the might-have-beens of history are impossible to calculate, it is difficult to imagine that the Court which toppled racial segregation on May 17, 1954 would have also condemned the Rosenbergs. "The question that faced the Justices," noted Alexander Bickel, one of Frankfurter's law clerks during the final Vinson term, "was whether meeting the latest schedule set for the Rosenbergs' execution was a more important objective than allowing time for the deliberate resolution of difficult legal problems of first impression. The Vinson Court met the schedule with a few hours to spare. . . ."⁹⁸

On the Vinson Court only Black and Frankfurter voted consistently to review the case. At most, three or perhaps four justices might have voted to

⁹⁶ In addition to the examples in notes 38 and 43 above, see *Carlson v. Landon*, 342 U.S. 524 (1952), which upheld the deportation of a mother of three American-born children, who had been a member of the Communist party from 1919 to 1936; and *Shaughnessy v. U.S. ex rel Mezei*, 345 U.S. 206 (1953), which upheld the discretionary imprisonment of an alien without indictment or trial on the grounds that he was a danger to national security.

⁹⁷ Fried, *Men Against McCarthy*, 301-03; and Mary S. McAuliffe, "Liberals and the Communist Control Act of 1954," *JAH*, 63 (1976): 351-67.

⁹⁸ Bickel, *The Supreme Court and the Idea of Progress* (New York, 1970), 5.

reverse the convictions on several issues, but they did not form a coherent bloc of sentiment. Black, for example, was the only justice apart from Burton to express reservations about their convictions in light of the treason clause. Although Burton expressed a willingness to give the couple a hearing, he also indicated that on the merits of each petition he supported the government's position. Four justices—Black, Frankfurter, Douglas, and Jackson—condemned the Saypol incident, but only the first three believed it to be serious enough to warrant review after the circuit court's decision. And they remained the only three who wished to uphold Douglas's stay of execution. In addition to the question of statutory authority, Frankfurter would probably have granted the Rosenbergs a new trial on the basis of Saypol's behavior during the Perl indictment. "Saypol's conduct as set forth in Swan's opinion," Frankfurter told Burlingham, "could not but leave me with disquietude and the Government never contested the allegations against Saypol which Swan condemned. I could say much more—but the rest is silence."⁹⁹

In the margins of one memorandum on the Rosenberg case, Frankfurter made two significant notations: one to his dissenting opinion in *Fisher v. United States*, a federal murder case decided in 1946; the other to section 457 of the American Law Institute's model criminal code, which suggests that courts review "the evidence to determine if the interests of justice require a new trial." His reference to *Fisher* is important in view of Swan's opinion for the circuit court on the Saypol incident. Because the Rosenbergs' lawyers failed to move for a mistrial at the time of the prosecutor's statements to the press, Swan argued, they could not raise this issue on appeal for the purpose of securing a new trial. The *Fisher* case presented a striking analogy. In *Fisher* the Supreme Court affirmed the death sentence of a black janitor, over defense objections that the trial judge failed to instruct the jury on the elements of premeditation required for conviction. Lawyers for the accused had failed to enter a protest during the trial against the judge's error and therefore, wrote Justice Reed for the majority, Fisher had waived this issue for purposes of appeal in the circuit court and the Supreme Court. In a sharply worded dissent, Frankfurter called upon the Court to reject "strangling technicalities," especially in capital cases. Fisher ought not to die, he argued, because of mistakes made by his attorneys and the trial judge or "because this Court thinks that conflicting legal conclusions of an abstract nature seem to have been 'nicely balanced' by the Court of Appeals."¹⁰⁰ The failure of the Rosenbergs' lawyers to move for a mistrial may not have seemed to him the decisive issue, but only a "strangling technicality." Did not the trial judge, Kaufman, have an obligation to declare a mistrial when confronted with Saypol's conduct? Could Kaufman or the Rosenbergs' attorneys, through either carelessness or indifference, somehow "waive" the rights of criminal defendants on trial for their lives?

⁹⁹ Frankfurter to Burlingham, June 24, 1953, Box 36, FFPLC.

¹⁰⁰ *Fisher v. United States*, 328 U.S. 463 (1946), 476–77, 489. Frankfurter's notations on *Fisher* and section 457 can be found on his Rosenberg opinion, November 17, 1952, in bound volumes for the October term, 1952. FFPPLS.

Why engage in this reconstruction and analysis when the outcome for the Rosenbergs seems so inevitable? Perhaps the answer is found in Frankfurter's last dissent: "To be writing an opinion in a case affecting two lives after the curtain has been rung down on them," he said, "has the appearance of pathetic futility. But history also has its claims. This case is an incident in the long and unending effort to develop and enforce justice according to law. The progress in that struggle surely depends on searching analysis of the past, though the past cannot be recalled, as illumination for the future." For, he continued, "Only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain."¹⁰¹ Time and again he lectured his colleagues on their own fallibility as men and judges. Culture, experience, and prejudice, he argued, so individualized and fragmented reality that one should not presume to have a monopoly upon truth, virtue, or desirable public policy. Skeptical of absolutes, he articulated a gospel of relativism that encouraged judicial modesty in certain areas, but also made him very sensitive to human failings throughout the legal order. In the case of the Rosenbergs, these convictions served him well, because they suggested the terrible possibility of judicially sanctioned death through error, bias, or deceit that would return to haunt the Supreme Court and the American system of justice in the years ahead.

¹⁰¹ *Rosenberg v. United States*, 346 U.S. 273 (1953), 310.