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# Government against Two: Ethel and Julius Rosenberg's Trial

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# THE GOVERNMENT AGAINST TWO: ETHEL AND JULIUS ROSENBERG'S TRIAL

*It is important that the country be protected against the nefarious plans of spies who would destroy us. It is also important that before we allow human lives to be snuffed out we be sure – emphatically sure – that we act within the law.*

*Justice Douglas<sup>1</sup>*

In January 2003 as the United States was preparing to invade Iraq, the two-week trial of accused spy Brian Patrick Regan<sup>2</sup> came to a close. Regan was arrested in August 2001 in Dulles International Airport on charges of attempting to sell classified military data to Iraq, Libya, and China. At the time of his arrest, he was found to have hidden in his shoes encrypted coordinates of a surface-to-air missile site in the no-fly zone in northern Iraq where U.S. and British warplanes regularly patrolled.<sup>3</sup> He also had coordinates of a missile site in China and addresses of the Chinese and Iraqi embassies in Europe.<sup>4</sup> During Regan's trial, prosecutors read from a letter he had written to Saddam Hussein asking for thirteen million dollars in exchange for military secrets. They put on experts who testified that the information he was hoping to sell would damage the United States and argued that the "keyword is intent." And although Regan's attempts were not successful, he intended to harm the United States.<sup>5</sup> Defense attorneys, in turn, tried to show that all of Regan's "military secret information" was available on the Internet and was "worthless." They argued that his attempt was "a case of bad judgment or stupidity" but one that

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<sup>1</sup> *Rosenberg v. United States*, 346 U.S. 273, 320 (1953) (staying the Rosenbergs' execution two days before they were electrocuted.)

<sup>2</sup> Regan is a former Air Force sergeant and a forty-year old father of four. He pleaded not guilty to three counts of attempted espionage and one count of mishandling classified information. See Tom Jackman, *Execution Possibility Intensifies Spy Trial; Jury Selection Opens In Landmark Case*, WASH. POST, Jan. 13, 2003, at B01.

<sup>3</sup> See Tabassum Zakaria, *U.S. Espionage Trial Accused: Spy or Bumbler?*, REUTERS, Jan. 27, 2003, available at <http://www.reuters.com/newsArticle.jhtml?type=topNews&storyID=2118940> (last visited Feb. 19, 2003).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

would “not have harmed the national security of the United States.”<sup>6</sup>

Regan’s indictment did not allege any important security leaks because he never succeeded in passing along classified information to foreign governments. But in the wake of September 11, 2001, Attorney General John Ashcroft announced that Regan would face the death penalty. With that announcement, Regan became the first espionage defendant to face execution since Julius and Ethel Rosenberg were put to death fifty years ago for passing U.S. atomic secrets to the Soviet Union.

The new war on terrorism with its resultant wave of patriotism, heightened secrecy surrounding issues of national security, anti-Iraq sentiment, and the government’s logic of good versus evil conjures up an atmosphere similar to the one during the Cold War when the Rosenbergs were tried. Given the government’s past tendency to bend or break the rules to serve its own purposes, the government’s tactics in bringing to trial such high profile defendants should be under special scrutiny. Compared to the Rosenbergs, and as a testament to the past fifty years’ expansion of procedural due process safeguards, Regan was afforded a more even-handed trial, and the jury spared his life.<sup>7</sup> But we must ensure that we do not take steps back towards an era of governmental secrecy and manipulation of the media that may fuel national hysteria and result in a violation of the defendants’ right to a fair trial under the Constitution. Examination of the Rosenbergs trial reveals what could, and did, go wrong.

This Comment reviews the Rosenbergs’ trial proceedings. Special emphasis is placed on those aspects of the trial that have raised passionate concerns among commentators for five decades, such as the effect of the adverse publicity and general political atmosphere on the trial; the government’s heavy reliance on the testimony of confessed spies who had strong motives to lie and were susceptible to great influence by the government; the exaggeration of the transmitted information as “The Secret” of the atomic bomb; the overall weak case against Ethel Rosenberg; the government’s use of Ethel’s arrest and final execution as leverage to induce Julius to confess; the disproportionate sentences handed down (especially with regards to Ethel); the expedited appeals process; and the Supreme Court’s repeated refusal to review the case.

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<sup>6</sup> *Id.*

<sup>7</sup> See Jerry Markon, *Convicted Spy Won’t Get Death Penalty; Regan Prosecutors Didn’t Prove Serious Potential Harm, One Juror Says*, WASH. POST, Feb. 25, 2003, at B01, available at 2003 WL 13334648.

## I. BACKGROUND TO THE ROSENBERG CASE

In 1945, World War II ended with America and the Soviet Union as allies, but by 1946 the Cold War had started.<sup>8</sup> America was confident that the Soviets could not make an atomic bomb, but in 1949, President Truman shocked the public by announcing that an atomic explosion had occurred in the Soviet Union. Widespread panic enveloped the U.S. On June 25, 1950, North Korea launched a surprise attack on South Korea to which the United States responded immediately with military force. Also in 1950, a Russian communist spy list found in Germany was decoded; it revealed the name of Klaus Fuchs, a German born nuclear physicist who was designated by England to go to Los Alamos and cooperate with the U.S. effort to build an atomic bomb. Fuchs was arrested in England and confessed to transmitting atomic information to the Soviet Union. He was tried and sentenced to fourteen years in prison. He named Harry Gold as one of his couriers. Gold was arrested in the U.S. and in his confession implicated David Greenglass. When arrested, Greenglass confessed that he had engaged in espionage at the invitation of his sister and her husband, Ethel and Julius Rosenberg.<sup>9</sup> The FBI deduced that two of Rosenberg's classmates, Max Elitcher and Morton Sobell, were part of a spy ring. They arrested Elitcher, who confessed and implicated Julius Rosenberg and Sobell.

Julius and Ethel were arrested. Sobell, on "vacation" in Mexico, was abducted by Mexican secret police, "deported" across the border, and arrested. The Rosenbergs and Sobell were charged with "conspiracy to commit wartime espionage."<sup>10</sup> After a trial

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<sup>8</sup> The following summary is excerpted from BERNARD RYAN, JR., *GREAT AMERICAN TRIALS* 452-56 (Edward W. Knappman, ed., 1994).

<sup>9</sup> Julius Rosenberg was an electric engineer. Between 1940 and 1945, he worked for the Army Signal Corps. In 1945, he was dismissed on charges of Communism. He took a job at the New York plant of the Emerson Radio Company, where he had done some of his work for Signal Corps. After the war, he started a small machine shop with his brother-in-law, David Greenglass, who became a foreman, stockholder, officer, and director of the company. The business went through periods of modest success and financial difficulty until 1950 when Rosenberg was arrested. Towards the end, there was considerable friction between Greenglass and Rosenberg, and Greenglass left the business in 1949. The Rosenbergs lived in the Knickerbocker Village, a low-cost housing project in lower Manhattan. See MALCOLM P. SHARPE, *WAS JUSTICE DONE? THE ROSENBERG-SOBELL CASE 45-46* (1956).

<sup>10</sup> The Espionage Act of 1917, 50 U.S.C. §32(a) (1946) read:

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, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, . . . either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to national

lasting three weeks, Julius and Ethel Rosenberg were convicted and sentenced to death. They were executed two years later, becoming the only persons ever put to death in America for such a crime.

## II. SUMMARY OF THE TRIAL

The trial of Julius and Ethel Rosenberg started on March 6, 1951.<sup>11</sup> The main prosecutors were Irving Saypol,<sup>12</sup> Roy Cohn,<sup>13</sup> and James Kilsheimer III. The defense attorneys were Emanuel Bloch<sup>14</sup> (for Julius) and Alexander Bloch<sup>15</sup> (for Ethel).

The first witness was Max Elitcher. He had been a high school friend of Sobell and the man who had induced Sobell to join the Young Communist League.<sup>16</sup> He was a junior engineer in the Navy's Bureau of Ordnance between 1938 and 1944. He testified that Julius had approached him to leak out information from the Bureau of Ordnance and that Julius had told him that Sobell was also giving him information.<sup>17</sup> Elitcher's cross-examination did not produce any major inconsistencies.<sup>18</sup>

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defense, shall be punished by imprisonment for not more than twenty years: Provided, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years.

<sup>11</sup> The following summary concerns only evidence presented against the Rosenbergs. Several other witnesses and pieces of evidence admitted against Morton Sobell are not discussed here. Citations to the Trial Transcript refer to the eight-volume version of the trial transcript reprinted by the National Committee to Secure Justice in the Rosenberg Case, which accompanied the petition for writ of *certiorari* in 1952. Excerpts of the trial transcript are available at <http://www.law.umkc.edu/faculty/projects/ftrials/rosenb/ROSENB.HTM> [hereinafter Trial Transcript].

<sup>12</sup> Saypol had already won convictions against Alger Hiss, William Remington, and the eleven communist leaders tried under the Smith Act. *Time* magazine had dubbed him "the nation's number one legal hunter of Communists." Later, he became a Justice of the Supreme Court of New York. See Ted Morgan, *The Rosenberg Jury*, *ESQUIRE*, May 1975, at 105, 107-08.

<sup>13</sup> Cohn later became counsel for the McCarthy Committee.

<sup>14</sup> Emanuel ("Manny") Bloch specialized in civil rights cases and had defended several Communists. During and after the trial, he became emotionally engrossed in the Rosenberg case. He took care of the Rosenberg children while their parents were in prison and brought them for monthly visits to the death house. He later fought for the children's placement with the appropriate foster parents. He devoted all his energy to saving his clients' lives. His emotional involvement was so complete that he died only several months after the Rosenbergs' execution at the age of 44. See LOUIS NIZER, *THE IMPLOSION CONSPIRACY* 1-2 (1973).

<sup>15</sup> Alexander Bloch was Emanuel's father. At seventy-four, he was a business lawyer specializing in the sale of bakeries. He had never practiced criminal law. See Morgan, *supra* note 12, at 108.

<sup>16</sup> Max Elitcher's testimony, Trial Transcript, *supra* note 11, at 197-394. Most of Elitcher's testimony implicated Morton Sobell, and in fact the entire case against Sobell rested on Elitcher's testimony. See RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILE: A SEARCH FOR THE TRUTH* 175 (1997).

<sup>17</sup> *Id.* at 175-77. The most dramatic part of his testimony was the recital of a nighttime drive to Catherine Slip; Elitcher had gone to Sobell's house while being followed by the FBI.

The two key witnesses against the Rosenbergs were David Greenglass, Ethel Rosenberg's brother, and Ruth Greenglass, his wife. David Greenglass had been a machinist at Los Alamos, New Mexico, where the Manhattan Project was underway to make the first atomic bomb. He recounted<sup>19</sup> how in November 1944 his wife Ruth had asked him, at Julius's insistence, to leak information out of Los Alamos in order to help the Soviet Union, an ally of the United States.<sup>20</sup> David agreed with this reasoning because as he explained, he had a kind of "hero worship" for Julius Rosenberg.<sup>21</sup> He started by giving Julius a general description of the Los Alamos facility and the names of the scientists working there. Later, he drew sketches of the implosion lens molds used to detonate the atomic bomb and another sketch and a twelve-page description of the implosion-type A-bomb used at Nagasaki.<sup>22</sup> He drew four sketches from memory during the trial. At this point, in a dramatic move, *defense* counsel asked that Exhibit 8, the cross-sectional sketch of the Nagasaki bomb, be impounded.<sup>23</sup> Then an expert took the stand and testified that the sketches were essentially accurate; he explained the principle of "implosion" and the fact that it was a secret at the time.<sup>24</sup> The sketches and accompanying description were considered to be the true "secret of the atom bomb."

David testified about a certain console table that the Rosenbergs owned. This table, according to Greenglass, was a gift from the Russians to expedite Julius's spy activities and was modified to make it suitable for microfilming.<sup>25</sup> The table was never produced at trial.<sup>26</sup> David also described how Julius had cut the side of a Jell-O box so that the two halves could be used as a recognition signal when a contact was sent to retrieve information from

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Sobell, after expressing much anger at his friend's lack of caution, drove to Catherine Slip to deliver a can of film to Rosenberg. Elitcher never saw Rosenberg on that occasion. He saw only that Sobell left with the can of microfilm and returned without it.

<sup>18</sup> *Id.* at 177-78.

<sup>19</sup> David Greenglass's testimony, Trial Transcript, *supra* note 11, at 394-430, 438-66, 489-500, and 510-76.

<sup>20</sup> NIZER, *supra* note 14, at 75-77. According to Ruth Greenglass, Julius had said that "[t]he United States and Britain are working on the atom bomb project but they are not sharing with our most valuable ally, Russia. . . . [But] if all nations had the information, then one nation couldn't use the bomb as a threat against another." Ruth later testified that during the same conversation, Ethel Rosenberg had interjected that David has a chance to prevent a third world war and that he can help create a balance of power to preserve peace. *Id.* at 77.

<sup>21</sup> *Id.* at 114.

<sup>22</sup> *Id.* at 78-79.

<sup>23</sup> See RADOSH & MILTON, *supra* note 16, at 188.

<sup>24</sup> NIZER, *supra* note 14, at 83-88.

<sup>25</sup> *Id.* at 231.

<sup>26</sup> The table was later found and formed the basis for an unsuccessful appeal for a new trial. See *infra* text accompanying notes 211-12 for a discussion of the fate of this appeal.

David.<sup>27</sup> He testified that he gave an envelop containing six to seven pages of written information as well as the sketches of the implosion lens mold to Harry Gold, the contact who had appeared with the cut half of the Jell-O box.<sup>28</sup> He recounted how Julius came to see him upon hearing that Fuchs was arrested, gave him \$4,000 wrapped in a brown paper bag, and urged him to take six sets of passport photographs and flee to Mexico. David, however, had decided against flight and was arrested by the FBI. He used the \$4,000 to retain a lawyer.<sup>29</sup> David's wife, Ruth, corroborated her husband's testimony.<sup>30</sup> She also added that Ethel was present when the Jell-O box had been cut up and that Ethel had typed David's handwritten reports.<sup>31</sup>

Next, Harry Gold, a spy who had already been convicted and sentenced to thirty years, took the stand.<sup>32</sup> He had been the courier between the "master" Russian spy, Anatoli Yakovlev, and Fuchs and David Greenglass. He testified how he had received orders from Yakovlev to go to New Mexico to meet a new contact, David Greenglass, with the cut half of the Jell-O box and the recognition signal "I come from Julius."<sup>33</sup> He had received an envelope containing information from David and had given it to Yakovlev. Also, David had given Gold a New York telephone number (Julius's) so that Gold could contact David during his next furlough in New York.<sup>34</sup> The defense counsel did not cross-examine Gold.

The prosecution's glamorous star witness was Elizabeth Bentley, former fascist turned communist "spy extraordinaire,"<sup>35</sup> turned FBI informant and double agent; she was dubbed the "Red Spy Queen."<sup>36</sup> She testified<sup>37</sup> that as a confidential assistant to Jacob Golos when he was chief of espionage operations in the U.S., she had received various phone calls from a man called "Julius" who was an engineer living in the Knickerbocker Village. She also provided her "expert" opinion that the American Communist Party was subordinate to Communist International and received orders

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<sup>27</sup> NIZER, *supra* note 14, at 79-80.

<sup>28</sup> Radosh & Milton, *supra* note 16, at 70.

<sup>29</sup> NIZER, *supra* note 14, at 97-101.

<sup>30</sup> Ruth Greenglass's testimony, Trial Transcript, *supra* note 11, at 677-787.

<sup>31</sup> NIZER, *supra* note 14, at 119-30.

<sup>32</sup> Harry Gold's testimony, Trial Transcript, *supra* note 11, at 798-848.

<sup>33</sup> NIZER, *supra* note 14, at 157-59.

<sup>34</sup> *Id.* at 159-60.

<sup>35</sup> *Id.* at 177.

<sup>36</sup> RADOSH & MILTON, *supra* note 16, at 224.

<sup>37</sup> Elizabeth Bentley's testimony, Trial Transcript, *supra* note 11, at 964-1023.

from Moscow. This provided a link between being a Communist and "aiding a foreign nation."<sup>38</sup>

The defense's case consisted only of the testimony of Julius and Ethel Rosenberg.<sup>39</sup> They denied all allegations of espionage and related activities.<sup>40</sup> What attracted everyone's attention, and their most important tactical decision, was the refusal to answer any questions relating to their involvement in the Communist Party on the grounds that it would incriminate them.<sup>41</sup> Their testimony was studded with invocations of the Fifth Amendment. In another memorable moment, Julius Rosenberg, in response to the prosecutor's questions about his conversation with Greenglass about money, said that Greenglass had asked him for money and that when Rosenberg refused to give it to him, Greenglass had "threatened" and "blackmailed" him. These words planted the seed of doubt in the jurors' minds.<sup>42</sup> Ethel testified along the same lines, refusing to answer questions about the Communist Party.<sup>43</sup>

During Rosenberg's cross-examination, Saypol learned that the FBI had found a new surprise witness.<sup>44</sup> His lengthy cross-examination of Rosenberg was intended to allow time for this witness to secretly identify the Rosenbergs in the courtroom. Then, after Julius denied having ever taken a set of passport photographs of his family in preparation for flight from the country,<sup>45</sup> Saypol announced the existence of his surprise rebuttal witness: the photographer who had taken the photographs.<sup>46</sup> The photographer testified<sup>47</sup> that Julius and Ethel had gone to his shop for an unusually large order of three dozen passport-type photos.<sup>48</sup> The other rebuttal witness was the Rosenberg maid, who testified<sup>49</sup> that Mrs. Rosenberg had once told her that the console table was a "gift

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<sup>38</sup> RADOSH & MILTON, *supra* note 16, at 227.

<sup>39</sup> Julius Rosenberg's testimony, Trial Transcript, *supra* note 11, at 1051-1199, 1282-86 and 1307-10; Ethel Rosenberg's Testimony, *id.* at 1293-1402.

<sup>40</sup> For example, Julius denied receiving a console table from the Russians, especially outfitted for microfilming, and ever giving Ruth \$150 to help pay for her trip to New Mexico to convince David to commit espionage. He testified that he had never received information from David about the atom bomb, never introduced David to a man who asked for details of the bomb, and never introduced Ann Sidorovich to David as an espionage courier. RADOSH & MILTON, *supra* note 16, at 238-39. According to Rosenberg, the Jell-O box incidence never happened, and he had visited Max Elitcher in Washington during a routine business trip when he had felt lonely and looked up a college acquaintance he had not seen for years. *Id.* at 241.

<sup>41</sup> See NIZER, *supra* note 14, at 223-29.

<sup>42</sup> See Morgan, *supra* note 12, at 128.

<sup>43</sup> See NIZER, *supra* note 14, at 241-59 (excerpting Ethel Rosenberg's testimony).

<sup>44</sup> RADOSH & MILTON, *supra* note 16, at 250-51.

<sup>45</sup> *Id.* at 251.

<sup>46</sup> The photographer's name, Ben Schneider, was not on the prosecution witness list.

<sup>47</sup> Ben Schneider's testimony, Trial Transcript, *supra* note 11, at 1424-40.

<sup>48</sup> NIZER, *supra* note 14, at 278-83.

<sup>49</sup> Evelyn Cox's testimony, Trial Transcript, *supra* note 11, at 1406-12.



from a friend” and that the table was kept in a closet even though it was the finest piece of furniture in the Rosenberg home.<sup>50</sup>

After summation<sup>51</sup> and the judge’s charge, the jury deliberated for most of the evening, and at 11:00 a.m. the next day, it returned a verdict of guilty for all three defendants. Judge Kaufman sentenced Julius and Ethel Rosenberg to death and Sobell to thirty years in prison.<sup>52</sup>

The Rosenbergs’ trial and their subsequent executions attracted furious debate between those who believed that the Rosenbergs were framed by the government and received an unfair trial,<sup>53</sup> and those who believed that the spies who had given the Soviets “the secret” of the atomic bomb were responsible for the deaths of thousands of American soldiers in North Korea and deserved to die.<sup>54</sup> In 1975, pursuant to the Freedom of Information Act,<sup>55</sup> the secret documents of the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), Department of Justice (DOJ), Atomic Energy Commission (AEC), and U.S. Army Intelligence were released and put yet another light on the proceedings before, during, and after the trial.<sup>56</sup> They revealed that although Julius was a spy, the atomic information he passed onto the Russians was of very little value.<sup>57</sup> Furthermore, Ethel had a minor role, if any, in Julius’s espionage activities. The government was aware of both of these facts at the time of trial and still sought the death penalty, mainly to get Julius to confess.<sup>58</sup> Julius’s refusal to cooperate with the government put an end to the government’s hunt for Soviet spies.

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<sup>50</sup> NIZER, *supra* note 14, at 275-77.

<sup>51</sup> Unlike the accepted modern day practice, defense counsel had to go first and prosecution had the last word.

<sup>52</sup> RADOSH & MILTON, *supra* note 16, at 284-85.

<sup>53</sup> See generally ROBERT MEEROPOL & MICHAEL MEEROPOL, WE ARE YOUR SONS: THE LEGACY OF ETHEL AND JULIUS ROSENBERG (1975); WILLIAM A. REUBENS, THE ATOM SPY HOAX (1955); WALTER SCHNEIR & MIRIAM SCHNEIR, INVITATION TO AN INQUEST: A NEW LOOK AT THE ROSENBERG-SOBELL CASE (1968); JOHN WEXLEY, THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG (1977); Micheal E. Parrish, *Cold War Justice: The Supreme Court and The Rosenbergs*, 82 AM. HIST. REV. 805 (1977).

<sup>54</sup> See, e.g., NIZER, *supra* note 14, at 485-95 (maintaining that the government’s case had been compelling, and the defendants were extended “every protection of the democratic process of justice: jury trial, legal counsel, right of defense and appeal. . . . [A] tribute to the thorough legal processes afforded by American jurisprudence); see also LESLIE A. FIEDLER, AN END TO INNOCENCE (1955).

<sup>55</sup> 5 U.S.C. § 552(b) (2000).

<sup>56</sup> For an account of the contents of these voluminous records in the context of the trial see RADOSH & MILTON, *supra* note 16.

<sup>57</sup> See *infra* Part V for a discussion of the significance of the scientific information.

<sup>58</sup> See *infra* Part VI for a discussion of the evidence against Ethel Rosenberg.

III. NEWS COVERAGE<sup>59</sup> AND BIASA. *Anti-Communism Sentiment*

The Rosenbergs' case came at the height of anti-communist hysteria in America when fear of Communists and communism was widespread. The people of the United States were told that a vast Communist conspiracy at home and abroad was trying to subvert and overthrow the American government. In 1946, Winston Churchill made his famous "iron curtain" speech. In 1947, President Truman instituted a federal loyalty program<sup>60</sup> that required extensive background investigations of all federal workers and the dismissal of those found to be "disloyal." Communist Party membership, even "sympathetic association" with the Party, was *prima facie* evidence of disloyalty and mandated dismissal.<sup>61</sup> In 1948, the first Smith Act indictments of leaders of the U.S. Communist Party were handed down. In 1950, the Korean War broke out, and Senator Joseph McCarthy made his "I hold here in my hand a list" speech claiming communist infiltration of the State Department.<sup>62</sup> In this atmosphere:

[t]o be a Communist, know a Communist, or to have had the slightest association with the American Communist Party quickly became the secular equivalent of consorting with the devil. In this new religion of anti-communism, redemption was possible only through the public act of informing, by renouncing one's previous political beliefs and naming names.<sup>63</sup>

From the outset of the trial, the prosecutor launched into a line of argument designed to appeal to the jury's feelings about Communism. In his opening statement, Saypol stated "the evidence will show that the loyalty and the allegiance of the Rosenbergs . . . were not to our country, but that it was to Communism, Commu-

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<sup>59</sup> For a full discussion and analysis of the news coverage of the Rosenberg case, how the government managed the press, and its effect on the trial and its aftermath, see JOHN F. NEVILLE, *THE PRESS, THE ROSENBERGS, AND THE COLD WAR* (1995).

<sup>60</sup> The President's Loyalty Order, Exec. Order No. 9,835, 12 C.F.R. 1935 (March 25, 1947), *revoked* by Exec. Order No. 10,450, 18 C.F.R. 2489 (April 29, 1953).

<sup>61</sup> See ILENE PHILIPSON, *ETHEL ROSENBERG: BEYOND THE MYTHS* 198 (1988).

<sup>62</sup> See Jesse Friedman, *The Fight For America: Senator Joseph McCarthy*, <http://mccarthy.cjb.net> (quoting McCarthy's first speech against Communism before the Republican Women's Club in Wheeling, West Virginia, on February 9, 1950. It started with: "I have in my hand a list of 205 cases of individuals who appear to be either card-carrying members or certainly loyal to the Communist Party") (last modified August 27, 2000).

<sup>63</sup> PHILIPSON, *supra* note 61, at 199.

nism in this country and throughout the world.”<sup>64</sup> Bloch objected to this theme, stating that remarks about Communism were irrelevant because “Communism is not on trial here.”<sup>65</sup> But Judge Kaufman allowed testimony about the defendant’s belief in Communism in order to establish their motivation.<sup>66</sup> Saypol continued in this vein during both his direct examination of government witnesses and his cross-examination of Julius and Ethel.<sup>67</sup> Saypol went on to make the case in his closing argument that all of the defendants had indeed been members of the Communist Party.<sup>68</sup>

This was perhaps a legitimate inquiry. Although motivation was not an element of the charge,<sup>69</sup> the prosecutors had to show why an ordinary couple would engage in a conspiracy for a foreign country. Being a Communist, or even sympathetic to the Soviet regime, could have provided that motive and, even today, may be a proper and admissible inquiry. But the deliberate emphasis on Communism had two effects. First, during the trial whenever Julius and Ethel were asked about their past communist activities, both repeatedly took the Fifth Amendment.<sup>70</sup> Ironically, the

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<sup>64</sup> RADOSH & MILTON, *supra* note 16, at 172.

<sup>65</sup> *Id.* at 173.

<sup>66</sup> *Id.*

<sup>67</sup> Communism and the Young Communist League, to which Rosenberg and several of his college friends belonged, had been mentioned several times by the prosecutor’s witnesses. During Julius’s cross-examination, Saypol directed a stream of questions designed to bring out the fact that Rosenberg’s friends were Communists. Despite Rosenberg’s refusal to answer any questions regarding his own Communist activities (on the grounds that it might incriminate him), Saypol’s line of questioning left no room for doubt regarding what type of activity or membership in a political group Rosenberg refused to testify about. For example, Saypol asked Rosenberg about his college friends and whether there was any “club or anything like that” that Julius and his friends had all belonged to. What group had Rosenberg in mind that made him so “reticent?” “Is there a group that all of you were active in together, as to which you raise the question of your constitutional privilege, that you don’t want to tell us about?” RADOSH & MILTON, *supra* note 16, at 246-47. Then, when Bloch objected to this line of questioning, and Saypol was searching for a word that would be acceptable to the court, Rosenberg interjected that “if Mr. Saypol is referring to the Young Communist League of the Communist Party, I will not answer any question on it.” *Id.* Saypol continued to make the point indirectly during his cross of Ethel. Indeed, he asked Ethel whether she had helped David join the Communist Party when there was no indication that David had actually ever been a member of that party. *Id.* at 261.

<sup>68</sup> “While Sobell was chairman of his Communist Party unit in Washington, delivering to its members weekly directives concerning worship of the Soviet Union, Rosenberg was working his way up in the Communist Party underground.” Saypol’s Closing Argument, NIZER, *supra* note 14, at 109-10. This is only one of several other references to the Rosenbergs’ communist activities. *Id.* at 310-19.

<sup>69</sup> See *supra* note 10 for the text of the statute.

<sup>70</sup> The first of the many refusals to answer such questions came when Judge Kaufman asked Julius whether he had ever belonged to “any group” that had discussed the system of government in Russia. Julius answered “[W]ell your Honor, are you referring to political groups – is that what you are referring to?” The judge replied “Any group.” Rosenberg responded, “Well you Honor, I feel at this time that I refuse to answer a question that might tend to incriminate me.” RADOSH & MILTON, *supra* note 16, at 241.

Rosenbergs' invocation of the Fifth Amendment had a more deleterious effect on the jurors and has long been viewed as a grave tactical error.<sup>71</sup> In an interview by Ted Morgan, one of the jurors recalled that "[t]hey used the Fifth so damn many times. They must have thought it would be very damaging not to take it."<sup>72</sup> Another juror reminisced that "to me it meant they were hiding something, even though it was their constitutional privilege."<sup>73</sup> Second, the repeated references to Communism could be seen as an appeal to the public's and the jury's anti-communist feelings.

If one juror is to be believed, the judge himself influenced the jury during the trial. By coincidence, when the Rosenberg trial was in its final week, a famous trial of several underworld criminals was under way in the same courthouse. These criminals also took the Fifth whenever they were asked about their ties to organized crime. One day, according to one juror, Judge Kaufman cleared the court and brought in Senator Charles Tobey who impressed upon the jury the connection between the gangsters and the Rosenbergs and their invocation of the Fifth Amendment.<sup>74</sup>

### B. Saypol and the Media

Saypol was a well-known media hound.<sup>75</sup> He held informal press conferences in his office every day after court, and his every word had the potential of making front-page news. An astute prosecutor, Saypol knew how to "frame" the case for the news media so as to keep it in the headlines.<sup>76</sup> On the other hand, only two out of a sample of national papers reported on the defense lawyer's opening statements.<sup>77</sup> Even the request by Bloch that the court impound Exhibit 8 went conspicuously unreported.<sup>78</sup>

In a thorough analysis of the news media coverage of the Rosenberg case, John Neville states that "[t]here have been many famous trials in the American history, but agenda setting, gate keeping, news media black-outs, and patriotism make the Rosen-

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<sup>71</sup> The defense strategy has been much criticized on other grounds. For example, Radosh & Milton make the point that "the absence of a single friendly witness" to corroborate Rosenberg's version of events or to provide support of Rosenberg's character "was striking." *Id.* at 244. However, it was later said that the Rosenbergs wanted to spare their many friends the persecution that would have inevitably followed anyone who spoke on their behalf. *Id.* at 241.

<sup>72</sup> See Morgan, *supra* note 12, at 127.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 128.

<sup>75</sup> See RADOSH & MILTON, *supra* note 16, at 99; see also NEVILLE, *supra* note 59.

<sup>76</sup> See NEVILLE, *supra* note 59, at 35-51, for a discussion of the agenda setting role of Saypol's tactics and news coverage of the trial.

<sup>77</sup> *Id.* at 36.

<sup>78</sup> *Id.* at 40.

bergs' case unique because this phenomena occurred in an epoch of political ferocity that time has not diminished."<sup>79</sup> Neville used a systematic documentary analysis of the content of twelve national newspapers, four newsweekly news magazines, and eleven other local and international newspapers and periodicals.<sup>80</sup> The newspapers almost exclusively printed the FBI and DOJ's version of the stories without questioning their sources, starting with a press release from FBI Director Hoover and Attorney General McGrath.<sup>81</sup> Moreover, the newspapers were selective and often inaccurate about what they printed. Despite the enormous publicity the case engendered, the jury was never sequestered, and although it was under strict instructions not to read newspapers, it is difficult to believe that each and every one of the jurors remained ignorant of headline news. One member of the Rosenberg jury later recalled: "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 . . . [A]nyone who tells you he can shut himself off completely during a trial has never served on a jury."<sup>82</sup>

One of Saypol's press releases in particular caught the attention of the trial's critics. On the same day that Bloch was scheduled to cross-examine Ruth Greenglass, newspapers across the country announced the arrest of William Perl, a suspected spy and classmate and friend of Julius Rosenberg.<sup>83</sup> Perl was formally charged with perjury for having lied to the grand jury by denying that he ever knew Julius, but Saypol went on to tell the press that Perl was listed by the government as a potential witness in the Rosenberg trial and that Perl's intended role was to corroborate

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<sup>79</sup> *Id.* at 8.

<sup>80</sup> *Id.* at 8.

<sup>81</sup> FBI Director J. Edgar Hoover and Attorney General J. Howard McGrath issued a press release in Washington, D.C., as Julius was hustled up the stairs of the building in Foley Square. The press release said that the fourth American member of the spy ring had just been arrested in New York City. NEVILLE, *supra* note 59, at 16.

<sup>82</sup> Morgan, *supra* note 12, at 124-25.

<sup>83</sup> William Perl was suspected of being a member of the wider Rosenberg spy ring. He was questioned in the summer of 1950 before a grand jury and denied ever knowing Julius Rosenberg or Morton Sobell. However, the FBI knew about Perl's longstanding friendship with both men. Since neither the FBI nor the US attorney's office had enough proof to indict Perl for espionage, he was indicted for perjury. RADOSH & MILTON, *supra* note 16, at 129. The FBI hoped that Perl would break down and confess under pressure, which would be helpful not only to the trial of Rosenbergs but the investigation of the spy ring generally. *Id.* at 204. However, a few days before his indictment, Saypol's assistant, Roy Cohn, called Perl into his office and in effect warned Perl that the government was after him for information. This move had the exact opposite effect. Perl consulted a lawyer, who advised him of his Fifth Amendment rights, and he refused to divulge any information. *Id.* at 205. The FBI's only hope of convicting Perl for espionage was if Rosenberg confessed. Since this did not happen, Perl was only tried for perjury and served 5 years. *Id.* at 302-03.

certain statements made by a key government witness.<sup>84</sup> The next day, Edward Kuntz, Sobell's defense counsel, lodged a complaint about the inappropriate newspaper headline.<sup>85</sup> However, after an *in camera* conference with Saypol and the judge, the defense attorneys decided not to take this up further.<sup>86</sup> There was no motion for a mistrial, and the jurors were never asked whether they had actually seen the newspaper headline. As a result of this concession, defense counsel lost its chance to use Saypol's statement to the newspapers as grounds for appeal.<sup>87</sup> The district court's opinion stated that "[t]he petitioners did bring the matter of Perl's indictment before the trial judge but they elected not to move for a mistrial; they may not now object."<sup>88</sup> While characterizing Saypol's statement to the press as "wholly reprehensible," the Second Circuit Court of Appeals, nevertheless, affirmed the trial court's rejection of a new trial based on the Perl incident.<sup>89</sup>

Not only was Saypol aware of the influence of the media generally, he specifically used the media to his tactical advantage. Arresting Perl during trial for denying under oath that he knew Julius Rosenberg may have been a tacit attempt to influence the jurors, the implication being that the government had expected to use Perl's testimony to corroborate the Greenglasses', but that because Perl had backed out, he had been indicted for perjury.<sup>90</sup> Neville describes Saypol's conduct regarding the Perl arrest as "an agenda-setting coup par excellence," which grabbed front-page headlines coast to coast.<sup>91</sup> Another prosecution tactic was to place the names of top scientists, such as Robert Oppenheimer (wartime scientific director at Los Alamos), Harold Urey (Nobel

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<sup>84</sup> The *New York Times* ran side-by-side articles linking Perl to the Rosenberg trial: front-page headlines read "Columbia Teacher Arrested, Linked to 2 on Trial as Spies" and "Greenglass Wife Backs His Testimony as Theft of Atom Bomb Secrets." NEVILLE, *supra* note 59, at 42.

<sup>85</sup> Kuntz complained that "I have never before tried a case in the newspapers in my life." RADOSH & MILTON, *supra* note 16, at 26.

<sup>86</sup> Manny Bloch later stated that the defense's failure to move for a mistrial right there and then was based on Saypol's assurances that the indictment and press release were not deliberately timed to affect the trial. See SHARPE, *supra* note 9, at 108.

<sup>87</sup> To make matters worse, Julius Rosenberg, when testifying, referred to the newspaper article. When asked by the prosecutor whether he knew William Perl, Rosenberg replied that he had read in the newspapers "about a man being arrested for perjury," that his name was mentioned, and so he should "refuse to answer any question that might tend to incriminate" him. Thus, since Julius had informed the jurors of Perl's arrest, the defense could not later claim that the jurors' knowledge had prejudiced his case. See RADOSH & MILTON, *supra* note 16, at 245.

<sup>88</sup> *U.S. v. Rosenberg*, 108 F. Supp. 798, 804 (S.D.N.Y. 1952).

<sup>89</sup> *U.S. v. Rosenberg*, 200 F.2d 666, 670 (2d Cir. 1952) (affirming Ryan's dismissal of the petition because there was "no allegation or evidence that any juror read the newspaper story and the defendants deliberately elected not to ask for a mistrial.>").

<sup>90</sup> *Id.*

<sup>91</sup> NEVILLE, *supra* note 59, at 41.

laureate and professor of nuclear science at the University of Chicago) and George Kistiakowski (former Manhattan Project physicist and Harvard University chemistry professor) on the witness list.<sup>92</sup> None of them appeared at trial, indeed Urey was not even aware that his name was on the list, but the move implied that these scientists were in agreement with the government's scientific interpretation of the case.<sup>93</sup> Because the media accepted the government's version of events without investigating or even reporting the opposition's claims, it gave the government an incentive to use the press to its advantage. It is also worth remembering that "the news media have no foolproof filtration system for the elimination of government bias, distortion, manipulation, or propaganda."<sup>94</sup>

#### IV. THE TESTIMONIES

Almost the entire case against the Rosenbergs was based on the testimony of David and Ruth Greenglass, but they had a strong motivation for cooperating with the government, overstating the events, and even lying. For example, Ruth was a member of the conspiracy and could have been indicted at any moment. In addition, the Greenglasses had long-term financial disagreements with the Rosenbergs, and David himself faced the death penalty as a member of the atomic espionage ring. Despite the defense's attempts to discredit their testimony by pointing out that they were betraying their kin to save their own skin, the jurors bought the Greenglasses' version of events precisely because to do something as terrible as testifying against one's own sister and brother-in-law, the Greenglasses had to be telling the truth.<sup>95</sup>

After the release of the FBI files, however, two key pieces of testimony by the Greenglasses have caused much concern. One is the last-minute alignment of the testimonies of David Greenglass and Gold about the pass-phrase that Gold had used when he met David. The other is the Greenglasses' sudden recollection of the fact that Ethel had typed the information David had given Julius.

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<sup>92</sup> *Id.* at 33 (citing *FBI Heads Alerts Nation on Security*, N. Y. TIMES, Feb. 28, 1951, at 5; *Spy Trial to Hear 3 Atom Scientists*, N. Y. TIMES, March 1, 1951, at 14).

<sup>93</sup> *Id.* See also *infra* notes 153-58 and accompanying text for these scientists' views on the importance of the scientific information leaked by Greenglass.

<sup>94</sup> NEVILLE, *supra* note 59, at 142.

<sup>95</sup> Morgan, *supra* note 12, at 127.

## A. "I come from Julius"

During the trial, David Greenglass described how Julius had cut a Jell-O box in half so that the two halves could be used as a recognition signal when a contact was sent to retrieve information from David. He then testified that it was Harry Gold who turned up at his apartment with Rosenberg's cut half of the Jell-O box using the pass-phrase "I come from Julius."<sup>96</sup> Gold corroborated this testimony.<sup>97</sup> Since Gold had been sent by Yakovlev and got his half of the Jell-O box from Yakovlev himself, this was the only piece of evidence that connected Julius with Gold and Yakovlev.

The phrase "I come from Julius" aroused suspicion because the use of Julius's, or any other agent's, real name as a code was highly unlikely. Furthermore, there is evidence that the FBI essentially suggested to Gold that that was the phrase he used. Three months before trial, Gold and Greenglass were brought together in an effort to "iron out" the differences between their testimonies.<sup>98</sup> On December 28, 1950, Gold and Greenglass were interviewed jointly in the hope that Gold could obtain "their concentrated effort in recalling" certain details.<sup>99</sup> Problems arose when Greenglass and Gold had a different recollection of the password Gold had used. Gold's initial recollection was that he had brought greetings from "Ben in Brooklyn,"<sup>100</sup> but Greenglass did not remember the name "Ben," and in his statement to his attorney said "I didn't know who sent Gold to me."<sup>101</sup> However, after several more interviews, and just before the trial began, Gold became "quite certain" that on the day of his meeting with Greenglass he had brought greetings from "Julius."<sup>102</sup>

That the FBI planted the phrase "I come from Julius" in Gold's mind is further suggested by FBI agent Richard Brennan, who was present at the joint interview and later insisted that feeding a name to a witness "was not wrong as such" and that in any case the FBI "didn't plant that idea in Gold's mind . . . it was given to him as a suggestion."<sup>103</sup>

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<sup>96</sup> See *supra* text accompanying notes 27-28.

<sup>97</sup> See *supra* text accompanying note 33.

<sup>98</sup> RADOSH & MILTON, *supra* note 16, at 160.

<sup>99</sup> *Id.*

<sup>100</sup> See NEVILLE, *supra* note 59, at 31.

<sup>101</sup> SHARPE, *supra* note 9, at 194.

<sup>102</sup> RADOSH & MILTON, *supra* note 16, at 162.

<sup>103</sup> *Id.* (quoting Richard Brennan during an interview with the filmmaker Alvin Goldstein). Another inconsistent piece of testimony was that he had signed the hotel register in Albuquerque in his own name, a seemingly incredible move by a seasoned espionage agent. The government corroborated this by producing the hotel registration card. The registration card itself has been viewed as one of the more suspicious pieces of evidence in the case. The proponent of the



Given these facts, the defense counsel's failure to cross-examine Gold was undoubtedly a mistake. Under pressure, Gold might have admitted that he had originally recalled bringing greetings from "Ben in Brooklyn."<sup>104</sup> Moreover, the phrase was an unnecessary duplication since he already had the cut Jell-O box signal. The defense could also have minimized the importance of David Greenglass's information by making Gold elaborate on the information he had received from Klaus Fuchs, a physicist with a much better understanding of the atomic bomb.<sup>105</sup> Finally, six months earlier in the trial of accused spy Abe Brothman, Gold had admitted that he had fabricated a series of lies about having a wife, twin children, and a brother killed in military action.<sup>106</sup> Since the transcript of that trial was available, Gold could at best have been impeached using his prior testimony or at worst been shown to be a "practiced liar."<sup>107</sup>

Had the trial occurred a decade later, we can speculate as to whether the prosecution would have had to turn over this information under the more liberal rules of criminal procedure, in particular *Brady v. Maryland*<sup>108</sup> and the Jencks Act,<sup>109</sup> which require broad disclosures by the prosecution. But the question remains whether then, as now, the political climate might have influenced the quality and quantity of such disclosures.

### B. Ethel's Typing

The prosecution's case against Ethel was very weak until Ruth and David Greenglass "remembered" something that placed her in the eye of the spy ring.<sup>110</sup> At an FBI "interview" about a

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Rosenbergs' innocence theorized, credibly, that the card was forged by the FBI. See SCHNEIR & SCHNEIR, *supra* note 53, at 378-91; WEXLEY, *supra* note 53, at 328-33. However, with the release of FBI files, the card seems to have been authentic after all. See RADOSH & MILTON, *supra* note 16, at 455-70.

<sup>104</sup> Radosh & Milton speculate that Bloch may have taken this course after consulting with Julius Rosenberg, who might have told Bloch that Gold could supply further damaging testimony, for example their meeting in the Queens subway station. RADOSH & MILTON, *supra* note 16, at 216.

<sup>105</sup> See *infra* note 159 and accompanying text for a discussion of the importance of Fuchs's information.

<sup>106</sup> See RADOSH & MILTON, *supra* note 16, at 34-37.

<sup>107</sup> NIZER, *supra* note 14, at 164.

<sup>108</sup> 373 U.S. 83 (1963) (mandating the disclosure of exculpatory evidence by the prosecution).

<sup>109</sup> 18 U.S.C. § 3500 (2000). The Jencks Act, and later Rule 26.2 of the Federal Rules of Criminal Procedure, mostly codified the decision in *Jencks v. United States*, 353 U.S. 657, 668 (1957), and provided that after a government witness has testified on direct, the court should, on motion of the defendants, order the government to produce any statement relating to the subject matter of his testimony.

<sup>110</sup> See *infra* Part VI for a discussion of the case against Ethel Rosenberg.

week before start of trial, Ruth “volunteered additional information” about Ethel.<sup>111</sup> Ruth said that in September 1945, when David gave his handwritten notes and sketches of the lens mold to Julius in the Rosenberg’s living room, Ethel, at Julius’s command, “sat down at the typewriter which she had placed on a bridge table in the living room and proceeded to type the info which David had given to Julius.”<sup>112</sup> Two days later, David Greenglass “furnished in substance the same information as related by Ruth Greenglass.”<sup>113</sup>

The prosecutors explained the late appearance of this information as the Greenglasses’ desire to shield Ethel. According to Kilsheimer, David gradually broke down under pressure and gave additional information.<sup>114</sup> However, the FBI files show that rather than a gradual disgorgement of information, this “additional information” was a flat-out contradiction of the earlier account of the same incident given by David Greenglass in a statement dated July 1951. According to that statement, David had given his notes and the sketches to Julius “on the street somewhere in the city.”<sup>115</sup> Up to this interview, David had also consistently maintained that Ethel was not present in any of the occasions when David gave Julius information.<sup>116</sup> Recent interviews with the Greenglasses did not erase these doubts since they seemed unable to recall the details of the “typing episode” despite the fact that they had vivid memories of other conversations and incidents.<sup>117</sup>

There is evidence that Gold’s readiness to testify that he had carried greetings from “Julius” and David and Ruth’s testimony about Ethel’s typing made the prosecution’s task much easier and led to a shorter, more efficient trial strategy.<sup>118</sup>

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<sup>111</sup> RADOSH & MILTON, *supra* note 16, at 163.

<sup>112</sup> *Id.* at 164 (quoting from a FBI cablegram to FBI Director Hoover, summarizing the contents of these interviews.) Interestingly, the FBI files contain only summaries of these late interviews; earlier interviews were recorded and transcribed verbatim. *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (citing a recent interview with Kilsheimer in his private practice office in New York).

<sup>115</sup> *Id.* at 164 (quoting from a July 17, 1951, statement describing the September 1945 transaction).

<sup>116</sup> *Id.* at 165.

<sup>117</sup> *Id.* at 165-66. To explain how the suggestion that Ethel had typed David’s notes came about, Radosh & Milton propose the following hypothetical: during interviews of David and Ruth someone asked them “who typed the material” in terms that suggested that it was known that *someone* had typed the data, and that in an effort to deny that it was Ruth, Ruth or David could have said “it must have been Ethel” and the other felt pressure to confirm the statement. *Id.*

<sup>118</sup> *Id.* at 174-75.

### C. *Schneider's Perjury*

The prosecution's rebuttal witness, photographer Ben Schneider, was not on the prosecution's witness list.<sup>119</sup> His "discovery" by the FBI on the penultimate day of the trial was a very convenient coincidence for the prosecution and has long been viewed as one of the more suspicious elements of the prosecution's case, especially since he happened to run a business in the neighborhood of the courthouse that was frequented by federal employees.<sup>120</sup> In addition, Schneider committed perjury when he testified that he had not seen the Rosenbergs since the day he took their photographs. In fact he had been brought into the courtroom the day before his testimony to see whether he could identify Ethel and Julius.<sup>121</sup> Counsel for the Rosenbergs contended that the examination of Schneider constituted the knowing use of perjured testimony by the prosecution. The district court judge held that it was not on a material point,<sup>122</sup> and the Second Circuit Court of Appeals held that prosecution had treated the question as meaning whether he had seen the Rosenbergs "before the trial."<sup>123</sup>

After the release of the FBI papers, Radosh & Milton explained how jailhouse informant Jerome Eugene Tartakow gained Julius's confidence during his detention and later provided the FBI with the photographer's name.<sup>124</sup> Tartakow's reliability as an informant, however, has been questioned.<sup>125</sup> There is no explanation as to why Julius would share such incriminating information with Tartakow, a convicted felon seeking favors from the government. One theory even suggests that the post-trial FBI memo mentioning Tartakow's "tip" was prepared to account for the highly suspicious appearance of Schneider as a "surprise witness" on the very last day of trial and was designed as "insurance" for the prosecution in case of an appeal or motion for a new trial by the defense.<sup>126</sup>

## V. SIGNIFICANCE OF THE SCIENTIFIC INFORMATION

Exactly how important was the Greenglass information to the Russians? The accuracy and significance of the Greenglass

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<sup>119</sup> See *supra* note 46 and accompanying text.

<sup>120</sup> RADOSH & MILTON, *supra* note 16, at 265.

<sup>121</sup> *Id.* at 342.

<sup>122</sup> *Rosenberg v. United States*, 108 F. Supp. 798, 806 (S.D.N.Y. 1952).

<sup>123</sup> *United States v. Rosenberg*, 200 F.2d 666, 671 (2d Cir. 1952).

<sup>124</sup> See RADOSH & MILTON, *supra* note 16, at 291-93.

<sup>125</sup> See WEXLEY, *supra* note 53, at 231-32; Walter and Miriam Schneir, Letter to the Editor, *THE NEW REPUBLIC*, Aug. 4-11, 1979, at 26 (cited in RADOSH & MILTON, *supra* note 16, at 534).

<sup>126</sup> See WEXLEY, *supra* note 53, at 486-87.

sketches and descriptions has been much disputed. The AEC's and FBI's released files show that before trial the AEC went to great lengths to establish the accuracy and source of Greenglass's information.<sup>127</sup> The AEC broke down the information in Greenglass's statements into discrete areas according to its sensitivity: (1) general background information about the layout and the organization of the Los Alamos facility and the names of the scientists working there; (2) sketches of the lens molds used in implosion experiments; (3) a general description of the bomb type which had been used at Nagasaki; and (4) a description and sketch of reduction experiments designed to reduce the amount of plutonium or uranium necessary to detonate a bomb.<sup>128</sup> The first two items were deemed the least sensitive and okay to be used in the trial.<sup>129</sup> Only the lens sketches made their way into the trial transcript, while the cross-sectional sketch and description of the Nagasaki bomb were impounded at Bloch's request.<sup>130</sup>

After Greenglass had drawn his sketches from memory, Walter Koski, a professor of physical chemistry and the AEC's expert witness, was asked about the importance of the lens mold sketches. He explained the meaning of "implosion" and "implosion lens."<sup>131</sup> He then testified that Greenglass's sketches of the lens mold were "substantially accurate," and that the designs used were "new and original in 1945" and therefore secret.<sup>132</sup> Saypol then asked the judge to enter into the record a statement that the subject matter of Koski's testimony had been declassified for the purposes of the trial and that subsequent to the trial it was to be reclassified.<sup>133</sup> This was an obviously senseless statement since the reclassified information had just been divulged in an open court full of reporters. The statement had the effect of using the AEC to corroborate and heighten the importance of the information. Defense counsel decided not to object to this statement, and by doing so, impliedly admitted that the lens mold sketches were important enough to merit classification status even in 1951.

Even more incredibly, Bloch asked that Exhibit 8, Greenglass's sketch and a twelve-page description of the Nagasaki

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<sup>127</sup> See generally RADOSH & MILTON, *supra* note 16, at 432-49.

<sup>128</sup> *Id.* at 143-44.

<sup>129</sup> *Id.* at 144.

<sup>130</sup> See *supra* note 23 and accompanying text.

<sup>131</sup> Koski first explained the difference between *explosion*, in which the shock waves travel outward, and an *implosion* in which "the waves are converging and the energy is concentrating itself." An implosion lens is a device for shaping charges of explosives so that they would produce a converging detonation wave. NIZER, *supra* note 14, at 83-88.

<sup>132</sup> RADOSH & MILTON, *supra* note 16, at 185.

<sup>133</sup> *Id.* at 186.

bomb, be impounded "so that it remains secret from the Court, the jury and the counsel," and later requested that Greenglass's testimony about the contents of the twelve-page description "be done *in camera* without the spectators being present."<sup>134</sup> Later in the day, over Bloch's objections, the judge decided to let the press back in.<sup>135</sup> The result was that Exhibit 8 and Greenglass's description of the bomb were excluded from the trial transcript and the scrutiny of higher court judges despite the fact that much of Greenglass's testimony on the impounded evidence was reported in newspapers. Lastly, rather than put the government to the task of proving that Greenglass's data included secret information related to national defense, defense counsel volunteered to stipulate that it did,<sup>136</sup> violating the cardinal rule that defense counsel should never concede a point that prosecution has not proved.

Compared to the AEC's suggestion that the information be "reclassified" after its disclosure in open court, Bloch's move to have this testimony impounded was more effective in preserving the mystique of atomic secrecy.<sup>137</sup> The jury had already heard a distinguished expert testify how Greenglass's information accurately described the development of the atomic bomb, something no other nation had. Then the defense counsel asked that the testimony be kept secret. This move helped convince the jury that the Rosenbergs had in fact stolen the most important secret of the atomic age. Bloch's motive for asking for the impoundment was clear – he wanted to impress the court and the jury with the defense's patriotism and concern for national security. He had no way of judging how important the allegedly stolen information was. He had no expert witnesses because "not one of [the scientists] would speak up for fear of getting involved."<sup>138</sup> Since he could not challenge the scientific information, he "almost had to take the government's word."<sup>139</sup> Later, perhaps realizing the effect of his request, Bloch tried to regain some of the lost ground. When John Derry,<sup>140</sup> the AEC expert, authenticated Exhibit 8 by declaring a copy of the sketches "substantially accurate,"<sup>141</sup> Bloch

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<sup>134</sup> *Id.* at 188-89.

<sup>135</sup> *Id.* at 190.

<sup>136</sup> *Id.* at 186 (quoting the Trial Transcript, *supra* note 11, at 478-79).

<sup>137</sup> *Id.* at 191. Even the prosecution expressed surprise at this astonishing move by the defense which had the effect of convincing the jury that what they were about to hear was "the secret of the atom bomb." *Id.* at 189.

<sup>138</sup> Morgan, *supra* note 12, at 127.

<sup>139</sup> *Id.*

<sup>140</sup> Derry was a former liaison officer who reported on the technical progress of research and production of the bomb to General Groves, who was in charge of the Manhattan Project. *Id.*

<sup>141</sup> RADOSH & MILTON, *supra* note 16, at 222.

tried to get Derry to admit that the sketches were by no means a “complete” or “detailed” representation of the Nagasaki bomb.<sup>142</sup> But Judge Kaufman intervened and would not allow this line of cross-examination.<sup>143</sup> Kaufman offered “clarification” from the prosecutors by asking Saypol about his theory.<sup>144</sup> So while Saypol was allowed to interject his observation that the sketch had been enough to “tip off” the Soviets,<sup>145</sup> Bloch was not allowed to ask whether the sketch could have been done by “a machinist without any degree in engineering” on the grounds that defense was indulging in “a bit of summation.”<sup>145</sup>

The AEC’s expert witnesses, as well as FBI Director Hoover who had closely followed Fuchs’s case, knew that there were gross errors in the Greenglass testimony but did nothing to point this out to the judge and jury.<sup>146</sup> But then it was not the government’s burden to point out the flaws in the Greenglass testimony, and Bloch’s request for the impoundment prevented the exposure of Greenglass’s error. The government did everything “legal and illegal” to assure that the judge, jury, media, and public believed that what the Rosenberg-Sobell conspirators had done was nothing short of theft of the atomic bomb secret.<sup>147</sup> This was partly to remedy the shock and dismay that the government felt at the extent of Russian infiltration through the lax security at Los Alamos. This lax attitude stemmed from a widely believed, but mistaken, theory, promulgated by none other than chief of the Manhattan Project General Groves, that the Russians had no high-grade Uranium ore and could not possibly make a serious effort to develop an atomic bomb.<sup>148</sup>

To secure a conviction, the success of the Rosenbergs conspiracy was not at issue. The only issue was whether they had engaged in such activity with the “intent or reason to believe”<sup>149</sup> that

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<sup>142</sup> *Id.* (quoting the Trial Transcript, *supra* note 11, at 915).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Gerald E. Markowitz & Michael Meeropol, *The “Crime of the Century” Revisited: David Greenglass’s Scientific Evidence in the Rosenberg Case*, 44 *SCI. & SOCIETY* 1, 22-23 (1980). General Groves, who was in charge of the Manhattan Project, told a closed meeting of the AEC that:

I think that the data that went out in the case of the Rosenbergs was of minor value. I would never say that publicly . . . because irrespective of the value of that [information] in the overall picture the Rosenbergs deserved to hang, and I would not like to see anything that would make people say General Groves thinks they didn’t do much damage after all.

RADOSH & MILTON, *supra* note 16, at 449.

<sup>147</sup> RADOSH & MILTON, *supra* note 16, at 445-46.

<sup>148</sup> *See id.* at 446-47.

<sup>149</sup> *See supra* note 10 for the text of the Espionage Act.

it might be to the advantage of a foreign power. However, the importance of the information was the key factor in the severity of the sentences they received. In sentencing them to death, Judge Kaufman opined:

Putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more innocent people may pay the price of your treason. Indeed by your betrayal, you undoubtedly have altered the course of history to the disadvantage of our country.<sup>150</sup>

Even earlier, the government knew that only by demonstrating that Rosenberg, through Greenglass, had passed crucial atomic information would the government be able to impose the death penalty on Rosenberg and get him to divulge further information. In a meeting before the Joint Congressional Committee on Atomic Energy, the prosecution's representative, Myles Lane, told the Committee that if Rosenberg would confess and name names, the government could forge ahead with the arrest of various other espionage agents. Lane felt that:

the only thing that will break this man Rosenberg is the prospect of a death penalty or getting the chair, plus that if we can convict his wife, too, and give her a stiff sentence of 25 or 30 years, that combination may serve to make this fellow disgorge and give us the information on these other individuals.<sup>151</sup>

Gordon Dean, Chairman of the AEC, explained that "Mr. Lane feels that if you don't prove in this case that he transmitted something very vital as of 1945 . . . you certainly couldn't impose a death penalty on the man."<sup>152</sup>

In 1966, when the impounded cross-sectional sketch of the Nagasaki bomb was released, several former Los Alamos scientists were asked to examine it. Top scientists Dr. Philip Morrison<sup>153</sup>

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<sup>150</sup> RADOSH & MILTON, *supra* note 16, at 284.

<sup>151</sup> Markowitz & Meeropol, *supra* note 146, at 23-24 (quoting from the transcript of meeting of United States Joint Congressional Committee on Atomic Energy, February 8, 1951, at 7).

<sup>152</sup> *Id.* at 24.

<sup>153</sup> Morrison was a professor of physics at MIT and co-holder of the patent on the implosion-type bomb. RADOSH & MILTON, *supra* note 16, at 433.

and Dr. Henry Linschitz<sup>154</sup> concluded that the descriptions were “factually incorrect” and therefore “gave a false depiction of what is purported to be the cross-section of the atomic bomb.”<sup>155</sup> Both agreed that there was no such thing as a single “secret” of the atomic bomb,<sup>156</sup> but that in any case, Greenglass’s sketch and testimony could in no way be considered to have conveyed that secret.<sup>157</sup> Their assessments were supported by Harold Urey, J. Robert Oppenheimer, and George Kistiakowski, all of whom had appeared on the prosecutor’s witness list before trial.<sup>158</sup>

In the 1990’s, the opening of Soviet intelligence archives, the revelations of a former agent, and the release of the CIA’s decryption exercise revealed that while Julius Rosenberg was engaged in espionage, he played only a minor role in Soviet atomic espionage. Fuchs<sup>159</sup> and another scientist, Theodore Alvin Hall,<sup>160</sup> were the ones who provided the Soviets with the “implosion” principle for the bomb.

## VI. ETHEL ROSENBERG

Perhaps the most poignant criticism of the government’s behavior was its strategy against Ethel Rosenberg. Recently released documents show that from the very beginning Ethel Rosenberg

<sup>154</sup> Linschitz was a professor of chemistry at Brandeis University who had also worked in the explosives chemistry section at Los Alamos. *Id.*

<sup>155</sup> Markowitz & Meeropol, *supra* note 146, at 9 (quoting affidavit of Philip Morrison, prepared for Sobell’s appeal).

<sup>156</sup> Dr. Morrison restated this view in 1973:

From 1945 on, there is certainly no Atomic secret, the secret is out. Fission will make it work. There are thousands of little secrets . . . volumes of technical skill, laboratories full of people, factories, machinists, machines, all sorts of things. That’s what it takes. It’s an industry, not a recipe.

*Id.* at 16.

<sup>157</sup> Both of these scientists, however, were careful to only question the accuracy of Greenglass’s testimony rather than contending that there was no espionage at all. Radosh & Milton provide an explanation of how the Greenglass testimony might have been of some value to the Russians: first, that Greenglass was recruited during a gap in Fuchs’s active espionage career, and later, as a check on what Fuchs was offering and informing the Russians that the Americans had abandoned the Uranium type bomb dropped on Hiroshima and were now settled on the implosion-type Plutonium bomb. See RADOSH & MILTON, *supra* note 16, at 441-42.

<sup>158</sup> See *supra* note 92 and accompanying text for a discussion of Saypol’s use of these scientists’ names on the witness list.

<sup>159</sup> An FBI document summarizing the interrogation of Fuchs by FBI agents revealed that it was Fuchs’s information which gave away the real “atomic secret” of the implosion bomb. See RADOSH & MILTON, *supra* note 16, at 442.

<sup>160</sup> See JOSEPH ALBRIGHT & MARCIA KUNSTEL, BOMBSHELL: THE SECRET STORY OF AMERICAN’S UNKNOWN SPY CONSPIRACY (1997) (revealing that what Hall gave up was not merely knowledge of the bomb’s existence, but technical information that helped the Soviet Union build a bomb years earlier than would have been possible otherwise).



was seen not as a key accomplice of Julius but rather as a "lever" to pressure Julius into confessing the names of other spies.

Up to the day of Julius's arrest, the FBI had no interest in Ethel Rosenberg. When Julius failed to give FBI any information, FBI Director Hoover made it clear that arresting Ethel would be advantageous and serve as "lever" to induce Rosenberg to confess.<sup>161</sup> But there was not enough evidence against Ethel, and even when she appeared before the grand jury, they showed no interest in indicting her.<sup>162</sup> Three days after Ethel's first grand jury appearance, Saypol issued a summons to bring her before the grand jury a second time in order "to stage her arrest under the most dramatic circumstances possible."<sup>163</sup> After she testified and was leaving the courthouse, she was accosted by two FBI agents and brought back into the Bureau's offices. Her arrest warrant was issued while she was waiting in an adjoining room, her arraignment followed momentarily, and bail was set at \$100,000. The U.S. Commissioner refused to delay her arrest long enough to allow her to make some arrangements for her sons who had been left with a neighbor for the afternoon.<sup>164</sup>

The key evidence implicating Ethel Rosenberg as an accomplice to Julius was the testimony of David and Ruth Greenglass that she had typed the information given to Julius by David.<sup>165</sup> During the six-month period between Ethel's arrest and the trial, the FBI had failed to dig up any additional information about her. Suddenly, ten days before trial in an interview by FBI agents, Ruth "volunteered additional information" on Ethel – that she had typed the information that David had given Julius. Ruth also said that at a January 1945 dinner party Ethel had told her that she was tired

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<sup>161</sup> See RADOSH & MILTON, *supra* note 16, at 98 (quoting from a note written to the Attorney General, in which J. Edgar Hoover, head of the FBI, wrote "there is no question . . . [that] if Julius Rosenberg would furnish further details of his extensive espionage activities it would be possible to proceed against other individuals . . . . [P]roceeding against his wife might serve as a lever in this matter.") (emphasis added).

<sup>162</sup> *Id.* at 100-01.

<sup>163</sup> *Id.* at 101.

<sup>164</sup> The sons were picked up by Ethel's mother, Tessie Greenglass, who was unable to look after them, and before long the boys were removed to the Hebrew Children's Home in the Bronx. *Id.* at 101-02.

<sup>165</sup> Until this piece of evidence was offered, the only evidence against Ethel was two incidents mentioned by Ruth. One was that Ethel had been present on the occasion of Julius's first suggestion to Ruth to ask David to participate in a "mutual exchange of information." On this occasion, Ethel had apparently urged Ruth to give David the message and let David decide for himself. *Id.* at 162. The second event was that Ethel had been present when Julius cut up the Jell-O box side that was used as a recognition signal. *Id.*

because had been "up late" the night before typing the material that David had just given to Julius.<sup>166</sup>

Ethel's testimony in her defense essentially mirrored the testimony of Julius; she denied all allegations of having ever engaged in any conspiracy and refused to answer questions relating to possible communist activities on the grounds of self-incrimination.<sup>167</sup> Interestingly, Ethel's attorney Alexander Bloch was strongly against his son and the Rosenbergs' decision to take the Fifth Amendment on questions of their communist activities. He argued that "since the prevailing public attitude was hostile toward anyone 'hiding behind the Fifth Amendment,' perhaps it would be best [for Julius] to come right out and frankly admit his student membership in the YCL," especially since Julius's dismissal from the Signal Corps on charges of Communism was bound to come up at trial.<sup>168</sup> However, the Rosenbergs felt on principal that their political ideologies were not on trial and decided to take the Fifth because to do otherwise could be used "only to turn us into informers or to create the idea [that] all Communists are spies."<sup>169</sup>

In the end, it was Ethel's widely reported "cold, virtually emotionless demeanor" during her trial appearance that was probably instrumental in turning the jury against her. She was pictured as a heartless spy<sup>170</sup> who "thought and felt whatever [her political commitment required] her to think and feel."<sup>171</sup> Saypol, in his closing argument, condemned Ethel by describing her as striking the keys of her typewriter like a "blow by blow against her own country, in the interests of the Soviets."<sup>172</sup>

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<sup>166</sup> See *supra* notes 110-18 and accompanying text for a discussion of the Greenglasses' testimony regarding Ethel's typing.

<sup>167</sup> See *supra* note 43 and accompanying text.

<sup>168</sup> PHILIPSON, *supra* note 61, at 272 (quoting from WEXLEY, *supra* note 53, at 226).

<sup>169</sup> *Id.* at 273 (quoting Emanuel Bloch's paraphrasing of the Rosenbergs' position reprinted in VIRGINIA GARDNER, *THE ROSENBERG STORY* 98 (1954)).

<sup>170</sup> Ethel's character has become the subject of many myths. Her expressionless face at the trial, her loyalty to her ideals and her husband, her choice to orphan her children rather than cooperate with the government, and her published correspondence with Julius while in prison have all fed the myths. Those who believe that the Rosenbergs were framed by the government characterize her acts as an enormous sacrifice made by a devoted mother in the service of some of the highest human values and in an attempt to prevent the government from enlarging its witch-hunt. Those who believe in the Rosenbergs' guilt see her actions as the workings of a heartless political fanatic whose commitment to Communism outweighed her capacity for maternal feeling. For a full discussion see PHILIPSON, *supra* note 61. When she was first arrested, the matrons in charge of the ninth floor of the Women's House of Detention where Ethel was kept reported that she was devastated by her arrest, sobbing herself to sleep at night, and spending all her outside recreation time glued to a fence with the hope that she might catch a glimpse of Julius in the nearby men's facility. See RADOSH & MILTON, *supra* note 16, at 102.

<sup>171</sup> PHILIPSON, *supra* note 61, at 2 (quoting ROBERT WARSHOW, *THE IMMEDIATE EXPERIENCE: MOVIES, COMICS, THEATRE & OTHER ASPCTS OF POPULAR CULTURE* 80 (1962)).

<sup>172</sup> NIZER, *supra* note 14, at 313.

When it came to sentencing, the judge made the unusual step of asking the prosecutor not to submit a formal sentencing recommendation in an apparent step to be "independent" of any influence from the government or outside sources.<sup>173</sup> However, what went on in the judge's chambers tells a different story. According to Saypol, he was summoned to the judge's chambers the morning of April 4, 1951.<sup>174</sup> The judge asked for Saypol's recommendation and pressed Saypol to find out what the FBI thought the judge should do.<sup>175</sup> He urged Saypol to go to Washington that same day to discuss the matter. To the judge's irritation, he found that neither Ford, the Deputy Attorney General, nor McInerney, chief of the DOJ's criminal division, nor even FBI Director Hoover were in favor of imposing a death sentence on Ethel.<sup>176</sup> When Saypol reported this serious opposition, Kaufman found the news so distressing that he had Saypol call Ford on the phone in his presence and confirm Washington's position.<sup>177</sup> After hearing Saypol's narration of the Washington position, Kaufman asked Saypol to refrain from making any recommendation for punishment in the course of his closing argument the next day.<sup>178</sup> Radosh & Milton explain Kaufman's decision not to hear Saypol's recommendation as follows: fearing that Washington's ideas would influence Saypol's statements in court, the judge did not wish to have it known that his sentence went beyond what the government thought advisable.<sup>179</sup>

After her sentence, Ethel was immediately removed to the Sing Sing "death house" prison in upstate New York where she

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<sup>173</sup> RADOSH & MILTON, *supra* note 16, at 276. The judge had also participated in a number of highly irregular *ex parte* communications with the prosecution before the trial began. For example, even before the start of trial, there is an entry in the AEC chairman's diary stating that "McInerney [chief of the Department of Justice's criminal division] said there is no indication [of confession] at this point and he doesn't think there will be unless we get a death sentence. He talked to the judge and he is prepared to impose one if the evidence warrants." *Id.* at 277 (quoting Gordon Dean Diary, Feb. 7, 1951, AEC files).

<sup>174</sup> *See id.* at 278-79 (quoting letter from Irving Saypol to Clarence Kelley (1975)).

<sup>175</sup> *Id.*

<sup>176</sup> While Ford was against sending a woman to the electric chair, the FBI's reasons were based on public opinion and the fear that "a psychological reaction [on the part] of the public" would reflect badly on the FBI, Justice, and entire government. *Id.* at 280 (quoting memorandum from J. Edgar Hoover to his aides Tolson, Ladd, Belmont, and Nichols (April 2, 1951)).

<sup>177</sup> *Id.* at 279.

<sup>178</sup> *Id.* at 281.

<sup>179</sup> *Id.* at 281-82. Released DOJ papers also show that the judge, before passing on a motion by the Rosenbergs for a reduction of sentence, considered evidence not presented at trial. This "evidence," about the existence of the Rosenberg spy-ring, was incorporated in a secret Justice Department memorandum and was based mainly on the reports of a jail-house informant of Rosenberg to the FBI. *Id.* at 317 (quoting "Top Secret" memorandum with cover letter from U.S. Attorney Myles Lane to Daniel M. Lyons, Esq., Pardons Attorney, the President's Office (Jan. 14, 1953)).

was kept in solitary confinement for two years without frequent contacts with her attorney or the possibility of visits with her husband. Manny Bloch charged that such government action “was a cruel attempt to break her.”<sup>180</sup>

With the passage of time and the “theory” that it was Ethel and not Julius who was the stronger of the two and the “mastermind” behind the spy ring, FBI Director Hoover and President Eisenhower became determined that Ethel’s death was justified.<sup>181</sup> But for many Americans as well as the rest of the world, her death sentence came as a shock, especially since the double execution would orphan the Rosenberg children overnight.

After the trial and while the appeal was still pending, the FBI came across information supplied by a secret informer that Julius himself had been the one who typed material and that in order to alleviate the noise, he would place rubber caps under the typewriter table legs and would have the bathroom tap running.<sup>182</sup> The FBI, however, never mentioned this information in the Bureau’s summary report.<sup>183</sup> On the day before the Rosenberg executions, a carload of FBI agents set up a secret command post in the prison warden’s garage, ready to relay the contents of an interrogation of either Julius or Ethel should either of them show signs of wanting to confess.<sup>184</sup> There were carefully planned procedures for how to stop the execution “if the Rosenbergs desire to talk after they go into the execution chamber and even after they are strapped into the chair.”<sup>185</sup> The contents of the one of the FBI’s memos, dated June 17, 1953, makes for shocking reading. Among the list of questions FBI agents were to ask Julius was only *one* question concerning Ethel. It read “Was your wife cognizant of your activities?”<sup>186</sup> The U.S. government was about to execute Ethel as a “full-fledged partner” in her husband’s crimes when the FBI was not sure if she was even aware of Julius’s espionage activities.

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<sup>180</sup> *Id.* at 296.

<sup>181</sup> For example, in a personal letter to Professor Clyde Miller, Eisenhower wrote that Ethel did not deserve leniency because she was “the more strong-minded and the apparent leader of the two.” *Id.* at 78 (quoting letter from Eisenhower to Clyde Miller, “Personal and Confidential” (June 10, 1953) (Eisenhower Library)). In another letter to his son, Eisenhower wrote “[I]n this case it is the woman who is the string and recalcitrant character, the man who is the weak one. She has obviously been the leader in everything they did in the spy ring.” *Id.* at 379. Ironically, this characterization of Ethel stemmed from the mock “psychological report” of Morris Ernst, the ACLU leader, as well as rumors spread by FBI Director Hoover. *Id.*

<sup>182</sup> *Id.* at 169.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 416.

<sup>185</sup> *Id.* (quoting memorandum from Ladd to Hoover (June 15, 1953)).

<sup>186</sup> *Id.* at 417 (quoting memorandum from W.A. Branigan to A.H. Belmont (June 17, 1953)).

## VII. SENTENCED UNDER THE WRONG STATUTE

Finally, the most persuasive argument for a mistrial, and the one that led to Justice Douglas's stay of execution, challenged the power of the district court to impose the death sentence on the Rosenbergs.<sup>187</sup> Since the government's indictment alleged conspiracy that had continued until 1950, the indictment and sentencing should have been under the Atomic Energy Act of 1946<sup>188</sup> (AEA). That statute was passed in order to "ameliorate the penalties imposed for disclosing atomic secrets."<sup>189</sup> Thus for a death sentence under the AEA, there had to be not only an intent to give an advantage to a foreign power, but also an intent to injure the United States. Moreover, the Act allowed judges to impose the death penalty only where a jury had so recommended. In his opinion, Douglas briefly stated that the AEA may apply in this case because (1) "the offense charged was a conspiracy commencing before but continuing after the date of the new Act"; (2) "although the overt acts *alleged* were committed in 1944 and in 1945, the Government's case showed acts of the Rosenbergs' in pursuit of the conspiracy long after the new Act became effective" (quoting from the Government's brief in opposition to the petition of the Rosenbergs for *cert*); and (3) that the "proof against . . . [the] Rosenbergs extended well beyond the effective date of the act."<sup>190</sup> He explained that he had granted his stay to give counsel for both sides more time to prepare arguments on this issue.<sup>191</sup> Two other justices agreed that under the canons of construction, if two statutes are in effect as of the date of sentencing, a court should impose sentence under the less harsh statute, especially since the later 1946 Act "barred the imposition of the death penalty by district judges acting without a jury's recommendation."<sup>192</sup> The day after Douglas issued his stay, the Supreme Court, in a Special Term called at the prosecution's request, vacated the Douglas stay. The opinion stated that the Constitution prohibited passage of any *ex post facto* act and that the AEA did not supercede the earlier Espionage Act.<sup>193</sup>

Had the judge asked for the jury's recommendation, there is strong evidence that at least Ethel would not have received a death

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<sup>187</sup> See *infra* notes 214-16 and accompanying text for a discussion of Douglas's last minute stay and its aftermath.

<sup>188</sup> 42 U.S.C. § 1810 (1946).

<sup>189</sup> *Rosenberg v. United States*, 346 U.S. 273, 317 (1953).

<sup>190</sup> *Id.* at 318-19.

<sup>191</sup> *Id.* at 320.

<sup>192</sup> *Id.* at 299 (Black, J., dissenting).

<sup>193</sup> *Id.*

sentence. There was at least one juror who was strongly opposed to the possibility of Ethel receiving a death sentence.<sup>194</sup> But when this juror asked the judge whether he could recommend leniency for one of the defendants, Judge Kaufman told the jury that punishment was not their concern and that the thought of such recommendation should not in any way affect their decision as to whether or not to convict.<sup>195</sup>

More importantly, many feel that the Rosenbergs were tried for *espionage* but sentenced for *treason*.<sup>196</sup> In his opening statement, Saypol linked Communism with treason, a shrewd trial tactic that not only ensured a high level of media coverage,<sup>197</sup> but also equated, in the jury's minds, conspiracy to commit espionage with treason. Indeed, the judge himself referred to treason in his remarks accompanying the sentence.<sup>198</sup> But the Soviet Union was not at war with the United States at the time of the alleged theft of atomic secrets. Since the Rosenbergs were not helping an "enemy," they were not guilty of treason.

The standard of proof in a trial for treason is very stringent. The Constitution's Treason Clause requires that "two independent witnesses" testify to each and every overt act cited in the charge.<sup>199</sup> This was not the case in the Rosenbergs' trial, as none of the overt acts were corroborated by two independent witnesses. On the other hand, the standard of proof for a conspiracy charge conviction are very minimal.<sup>200</sup> Not only is hearsay testimony of fellow conspirators admissible, but each conspirator may be held liable for the acts of all others, *whether or not he had specific knowledge of them*. Lastly, it was not necessary to prove that the conspirators

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<sup>194</sup> As late as 1975, the holdout juror felt that if he had held out successfully, Ethel Rosenberg's life could have been saved and that this was a "burden" he still carried. Morgan, *supra* note 12, at 109.

<sup>195</sup> *Id.* at 131.

<sup>196</sup> See, e.g. Parrish, *supra* note 53, at 816. Parrish quotes Justice Frankfurter's notes reporting that Justice Black thought the treason clause issues were serious, and that "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." *Id.* Parrish also quotes Justice Burton's notes indicating that he felt the same way. *Id.*

<sup>197</sup> See NEVILLE, *supra* note 59, at 35-51 (discussing the agenda setting role of Saypol's tactics and news coverage of the trial).

<sup>198</sup> See *supra* note 150.

<sup>199</sup> "Treason against the United States, shall consist only in levying War against them, or in adhering to the 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." U.S. CONST. art. III, cl. 1.

<sup>200</sup> So much so that a charge of conspiracy had been called "the last resort of the people" or "the prosecutor's friend." RADOSH & MILTON, *supra* note 16, at 173.

had actually succeeded in their plans,<sup>201</sup> only that they had conspired together towards a common end.<sup>202</sup>

### VIII. THE APPELLATE REVIEWS AND SUPREME COURT JUSTICES

After the sentence, the Rosenbergs' execution was stayed pending appeals. In February 1952, the Second Circuit Court of Appeals affirmed the conviction.<sup>203</sup> In June 1952, the U.S. Supreme Court refused for the first time to review the case,<sup>204</sup> and in November 1952, it denied a petition for rehearing.<sup>205</sup> In December 1952, Bloch's motion for a new trial based on Schneider's perjury and Saypol's conduct<sup>206</sup> was denied without formal hearing or oral testimony<sup>207</sup> and was affirmed by the Second Circuit Court of Appeals.<sup>208</sup> Bloch's motion for reduction of the sentence as "cruel and unusual punishment" was also denied. In January 1953, the execution was stayed pending review by President Truman. Truman left office on January 20, and incoming President Eisenhower refused clemency.

During this time, the National Committee to Secure Justice in the Rosenberg Case had gained momentum. Appeals for clemency included ones from Albert Einstein and the Pope.<sup>209</sup> Three million letters and telegrams flooded the White House. The third execution date was stayed pending Supreme Court action. The Supreme Court for a second time refused to grant *certiorari*.<sup>210</sup>

In April 1953, two pieces of "new evidence" were found: the missing console table and several documents stolen from David Greenglass's lawyer's file hinting at various inconsistencies in Greenglass's testimony.<sup>211</sup> On June 6, 1953, Bloch made a motion for a new trial based on the new evidence. On June 8, Kaufman denied the motion. The Rosenbergs' execution was scheduled for June 18th. On June 11, the Second Circuit Court of Appeals an-

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<sup>201</sup> The court had properly ruled that "the crime was transmitting classified data to a foreign government, and whether such material was highly useful or not did not matter." *NIZER*, *supra* note 14, at 163. However, the usefulness of the information certainly affected the degree of punishment. The court, in this case, attributed fifty thousand deaths in Korea to Russia's knowledge of the atom bomb and held the Rosenbergs directly responsible for that knowledge. *Id.*

<sup>202</sup> *RADOSH & MILTON*, *supra* note 16, at 173-74.

<sup>203</sup> *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952).

<sup>204</sup> *Rosenberg v. United States*, 344 U.S. 838 (1952).

<sup>205</sup> *Rosenberg v. United States*, 344 U.S. 889 (1952).

<sup>206</sup> In particular, Saypol's statement to the press at the time of William Perl's arrest.

<sup>207</sup> *United States v. Rosenberg*, 108 F. Supp. 798 (S.D.N.Y. 1952).

<sup>208</sup> *United States v. Rosenberg*, 200 F.2d 666 (2d Cir. 1952).

<sup>209</sup> *RADOSH & MILTON*, *supra* note 16, at 377.

<sup>210</sup> *Rosenberg v. United States*, 345 U.S. 965 (1953).

<sup>211</sup> See *RADOSH & MILTON*, *supra* note 16, at 361-72.

nounced that it would affirm Kaufman's decision without hearing oral arguments on the motion itself or on Bloch's application for a stay of execution. On June 12, an application for stay of execution was presented to Justice Jackson. That weekend Jackson failed to persuade Justice Douglas to provide the crucial vote, and on June 15, the last session of the 1952 Term, five justices of the Supreme Court (including Douglas) voted against a stay of execution that would have given the defense time to prepare a formal argument on the "new evidence" issue.<sup>212</sup>

On June 15, the day before they were scheduled to disperse for the summer, the Supreme Court justices heard a last minute but powerful oral argument based on a writ of *habeas corpus* by John H. Finerty, and it denied *certiorari* for a third time.<sup>213</sup> The same day, Judge Kaufman rejected Irwin Edelman's "next friend" petition for a stay of execution. The next morning, the "next friend" team, in a desperate attempt to find a higher court judge, managed to secure an appointment with Justice Douglas and argued that the Rosenbergs had been convicted under the wrong act.<sup>214</sup> On the morning of June 17, Douglas stayed the execution.<sup>215</sup> The next day, Chief Justice Vinson called the Court back into an unprecedented special session and with Black, Douglas, and Frankfurter dissenting, vacated the Douglas stay.<sup>216</sup> In order to avoid the Jewish Sabbath, the time of execution was brought forward from 11:00 p.m. on Friday, June 19, and the Rosenbergs were executed at 8:00 p.m. just before sundown.

Public support for the Rosenbergs was largely organized by the National Committee to Secure Justice in the Rosenberg Case, founded by Emily Alman and her husband, two residents of the housing complex where the Rosenbergs lived.<sup>217</sup> Alman did not

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<sup>212</sup> *Rosenberg v. United States*, 345 U.S. 989 (1953). The Court also denied a pending petition for a rehearing as to the May 25, 1953, denial of *certiorari*. *Rosenberg v. United States*, 345 U.S. 1003 (1953).

<sup>213</sup> *Rosenberg v. United States*, 346 U.S. 271 (1953). Finerty was already famous for his role, albeit unsuccessful, in petitioning the Supreme Court to overthrow the convictions of Sacco and Vinzetti, and for his role in the landmark case of *Mooney v. Holahan*, 294 U.S. 103 (1935), where the Supreme Court held that knowing use of perjured testimony by the prosecution constitutes a violation of the defendant's due process rights. RADOSH & MILTON, *supra* note 16, at 397.

<sup>214</sup> See *supra* Part VII for a discussion of this point.

<sup>215</sup> *Rosenberg v. United States*, 346 U.S. 273, 313-20 (1953).

<sup>216</sup> *Id.* at 288-89. For a full discussion of Douglas's key role in the Supreme Court's refusal to review the Rosenberg's case, see Michael E. Parrish, *Revisited: The Rosenberg "Atom Spy" Case*, 68 UMKC L. REV. 601 (2000). Parrish also makes the point that if the Rosenberg case had remained before the courts until 1954, they would probably have been spared. By then the Korean War was over, McCarthy had been censured by the Senate, and Earl Warren had replaced Fred Vinson as Chief Justice of the Supreme Court.

<sup>217</sup> See RADOSH & MILTON, *supra* note 16, at 322.



know the Rosenbergs but became interested when reading a series of articles printed in the *National Guardian* focusing on their plight. These articles started the suspicion that the Rosenbergs were victims of American "fascism" and were framed by the government.<sup>218</sup> By November 1952, the effort had gone international with Committee branches in Britain, France, Austria, Belgium, Denmark, Italy, Sweden, Switzerland, Germany, Ireland, Israel, and Eastern Europe.<sup>219</sup> The Committee's success made government officials all the more determined to press for a hasty resolution.

Interestingly, the ACLU and American Jewish Committee (AJC) gave no support to the Committee's activities, partly because they were eager to score points with the U.S. government and to dissociate themselves from "any taint of Red."<sup>220</sup> In fact, the AJC not only declined to join in the call for clemency, but also became an open advocate of the death penalty because of fears that the Jewishness of so many of the atom spies would provoke an anti-Semitic reaction.<sup>221</sup> Similarly, the ACLU "strengthened itself against attacks from the Right by placing itself on the record as staunchly anti-communist."<sup>222</sup> It was revealed in 1977 that ACLU leaders gave the FBI names of pro-Communist members in local affiliates and even passed on reports of ACLU meetings.<sup>223</sup> More distressing was evidence that Morris Ernst, the ACLU co-counsel, hoped to use his reputation as a civil libertarian to join the Rosenberg defense camp where he could covertly serve the interest of the FBI by getting Rosenberg to confess.<sup>224</sup> Ernst later declared that he had conducted a "psychological study of the Rosenbergs" and had concluded that "Julius is the slave and his wife, Ethel, the master" despite the fact that he had never spoken to the Rosen-

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<sup>218</sup> *Id.* at 322-23.

<sup>219</sup> *Id.* at 347. Radosh & Milton attribute the rise in pro-Rosenberg sentiment, both in the US and abroad, to a sudden reversal in the Communist party's "silence" or "blackout" on the Rosenberg issue. *Id.* at 348-49 ("[A]fter ignoring the Rosenbergs for more than two years . . . the Party suddenly [made] their case the focus of a major international propaganda campaign" in order to deflect attention from the Slansky purge trial (and execution) of fourteen former leaders of the Czechoslovakian Communist Party which threatened to "tear apart the Communist parties of Western Europe"). *Id.* at 352.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* Rabbi S. Andhill Fineberg went through considerable efforts to expose the Communist infiltration of the Committee to Secure Justice and published his findings in the book *THE ROSENBERG CASE: FACT AND FICTION* (1953). Kilsheimer reviewed prepublication copies of the manuscript, and the President's cabinet decided to promote Fineberg's book. See RADOSH & MILTON, *supra* note 16, at 553-55.

<sup>222</sup> RADOSH & MILTON, *supra* note 16, at 355 (citing MARY SPERLING MCAULIFFE, *CRISIS ON THE LEFT: COLD WAR POLITICS AND AMERICAN LIBERALS* 89-107 (1978)).

<sup>223</sup> *Id.* at 356.

<sup>224</sup> *Id.* at 357-58.

bergs.<sup>225</sup> This view of the couple took hold; the “psychological study” found its way into official reports, statements by the attorney general, and Eisenhower’s personal correspondence and provided justification for the execution of Ethel.<sup>226</sup>

Released FBI and Department of Justice confidential documents showed that Judge Kaufman had participated in highly irregular *ex parte* communications with the prosecution before passing sentence.<sup>227</sup> Even before the start of trial, there is an entry in the AEC chairman’s diary stating that “McInerney [chief of Justice’s criminal division] said there is no indication [of confession] at this point[,] and he doesn’t think there will be unless we get a death sentence. *He talked to the judge[,] and he is prepared to impose one if the evidence warrants.*”<sup>228</sup> Other sources include FBI documents, indicating that Kaufman consulted with various individuals including Roy Cohn, assistant prosecutor, and Saypol after the jury’s verdict.<sup>229</sup> He had also considered evidence, not produced at trial, about the existence of the Rosenberg spy-ring before passing on a motion for a reduction of sentence.<sup>230</sup>

More incredibly, the FBI files show that Chief Justice Vinson had met with Jackson and Attorney General Herbert Bromwell on June 16 and agreed ahead of time to call the special session should Douglas stay the execution.<sup>231</sup>

### CONCLUSION

After the release of government files in the United States and the former Soviet Union, there is compelling evidence that Julius Rosenberg was a spy. Although he was an amateur, Julius managed to become the coordinator of an extensive espionage operation with contacts well placed to pass on information on top-secret military projects in the fields of radar and aeronautics. Ethel probably knew of, and supported, her husband’s activities. But the Rosenberg spy ring was not the source of atomic information to Soviet Russia, and the government was aware of this fact at the time of their trial. As commentators have pointed out, the Rosen-

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<sup>225</sup> *Id.* at 358.

<sup>226</sup> *Id.*

<sup>227</sup> See *supra* notes 173-79 and accompanying text.

<sup>228</sup> RADOSH & MILTON, *supra* note 16, at 277 (quoting Gordon Dean Diary, Feb. 7, 1951, AEC files) (emphasis added).

<sup>229</sup> *Id.* at 277-79.

<sup>230</sup> This “evidence” was incorporated in a secret Justice Department memorandum and was based mainly on the reports of a jail-house informant of Rosenberg to the FBI. *Id.* at 317 (quoting “Top Secret” memorandum with cover letter from U.S. Attorney Myles Lane to Daniel M. Lyons, Esq., Pardons Attorney, the President’s Office (Jan. 14, 1953)).

<sup>231</sup> *Id.* at 403.

bergs served as “scapegoats, condemned to death less because of the nature and seriousness of their crime than because, at a particular moment in time, their deaths served a cathartic function – for Communists and anti-Communists alike.”<sup>232</sup>

Many may find that the government’s tactics were justified given the final proof that Julius Rosenberg was a spy. But the Rosenbergs’ guilt or innocence should have no bearing on the due process they were entitled to. Similarly, we must strive to prevent the current atmosphere from providing justification for the government’s departure from the constitutional rights of defendants.

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<sup>232</sup> *Id.* at 448.

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