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Taking Great Cases: Lessons from the "Rosenberg" Case

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I. INTRODUCTION

The most watched case of the 1952 Supreme Court Term was not *Brown v. Board of Education*, but the case of convicted atomic spies Julius and Ethel Rosenberg. Sentenced to death in April 1951 for passing atomic secrets to the Soviets, the Rosenbergs dominated the news and divided the country. Their case came at the height of Cold War America's obsession with Communism. Senator Joe McCarthy and the House Un-American Activities Committee were exposing alleged Communists in the federal government and Hollywood, and the U.S. military was fighting the Korean War to try to stop the

spread of Communism abroad. The thought that domestic spies had helped the Soviets manufacture an atomic bomb tapped into people's worst fears. More than 70 percent of Americans wanted the Rosenbergs to pay for their crimes with their lives,[1] but a vocal minority had serious questions about their guilt or innocence, the fairness of their trial, and/or the harshness of their death sentences.[2] The case was so controversial that outgoing President Harry Truman passed off the couple's clemency petition to his successor, Dwight Eisenhower. The Rosenbergs' executions sparked contentious rallies in major U.S. cities and violent protests abroad.[3]

Brown and *Rosenberg* demonstrate the Court's different approaches toward taking "great cases," of which Holmes declared, "like hard cases, make bad law."[4] The *Brown* Court is often criticized for having done too much; the *Rosenberg* Court is criticized for not having done enough.

In *Brown*, the Court heard multiple terms of oral argument and achieved one of its greatest institutional triumphs—declaring that *Plessy v. Ferguson*'s racially "separate-but-equal" doctrine "has no

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1. A February 1953 Gallup Poll asked 1,500 people: "Do you approve or disapprove of the sentence for Julius and Ethel Rosenberg who were convicted of spying against the United States?" 76 percent approved, 15 percent disapproved, and 9 percent had no opinion. *See* Survey by Gallup Organization, Feb. 22–27, 1953, *available at* iPOLL Databank, http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html. A Gallup Poll a month earlier asked: "Do you approve or disapprove of the death sentence for persons convicted of treason against this country?" 73 percent approved, 21 percent disapproved, and 6 percent had no opinion. George Gallup, *Public Approves of Death for Traitors*, ST. PETERSBURG TIMES, Jan. 30, 1953, at 6.

2. *See infra* note 3.

3. *See* MARQUIS CHILDS, WITNESS TO POWER 48 (1975) (describing a demonstration across from the White House as "the ugliest scene I ever witnessed"); Robert J. Donovan, *White House Pickets Sob and Cheer*, N.Y. HERALD TRIB., June 20, 1953, at 8; *5,000 Rally at Union Square for Spies*, N.Y. HERALD TRIB., June 20, 1953, at 5; *400 Arrested in Paris in Protest on Execution*, N.Y. HERALD TRIB., June 20, 1953, at 5; *Near-Riot Quickly Averted, Rosenberg Supporters Leave*, WASH. POST, June 20, 1953, at 1; *1 Shot, 400 Jailed in Paris Protests*, N.Y. TIMES, June 20, 1953, at 8; James E. Roper, *7,000 in Lafayette Park Boo 408*, WASH. EVENING STAR, June 20, 1953, at A2; *Rosenberg A-Spies Executed, Silent to End, after Stay is Vacated and Plea to President Fails; Police Save White House Pickets Booed By 7,000*, WASH. POST, June 20, 1953, at 1; *Their Death Penalty Carried Out; Eisenhower is Denounced to 5,000 in Union Square Rally*, N.Y. TIMES, June 20, 1953, at 1, 6; Letter from Paul Freund to Felix Frankfurter, at 3, Sept. 3, 1953, Felix Frankfurter Papers, Library of Congress [hereinafter FFLC], Box 56, Folder "Freund Paul A. 1953–56 #3" ("The emotional pitch which it aroused on the continent (in France especially) was staggering.").

4. Holmes wrote: "Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

place" in public education.[5] To some, *Brown* exposed the Court's limitations as an engine for social change by trying and failing to desegregate the nation's public schools.[6] To others, the *Brown* Court did not go far enough by not explicitly overruling *Plessy*, not articulating a clear constitutional principle, undermining any chance of enforcement with *Brown II's* "all deliberate speed"[7] language, and avoiding related hot-button racial issues.[8] Either way, *Brown* made an important contribution to the constitutional canon.[9]

In *Rosenberg*, the Court's repeated certiorari denials and last-minute oral argument resulted in one of its biggest institutional failures. Because of the climate of anti-Communism, weak leadership, and interpersonal conflict, the Court refused to hear the Rosenbergs' claims that they had not received a fair trial. Only Justices Hugo Black and Felix Frankfurter consistently voted to grant certiorari. After voting to deny certiorari on all but one occasion and after the Court had adjourned for the summer of 1953, Justice William O. Douglas granted a stay of execution in order to hear new claims that the Rosenbergs had been tried and sentenced under the wrong federal statute. Chief Justice Fred Vinson reconvened the Court for a special term. Less than twenty-four hours after oral argument, the Justices lifted the stay, and that night the Rosenbergs became the only American citizens ever executed for espionage.

Fifty-six years later, the Rosenbergs' two orphaned sons, Robert and Michael Meeropol, still blame the Court. On June 18, 2009, their letter to the *New York Times* singled out the wrong members of the Vinson Court for their alleged roles in overturning Douglas's last-minute stay.[10] The Meeropols should have focused

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5. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

6. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 49–54 (2d ed. 2008) (observing that the Court's decree in *Brown* was "flagrantly disobeyed" and that desegregation did not begin in earnest until Congress passed the 1964 Civil Rights Act).

7. *Brown*, 349 U.S. 294, 301 (1955).

8. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (overruling an anti-miscegenation law); Naim v. Naim, 350 U.S. 891, 891 (1955) (per curiam) (refusing to rule on an anti-miscegenation law).

9. *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 385 (2000) ("[The] conservative canonization of *Brown* has placed *Brown*'s validity and its inclusion in the constitutional canon beyond debate.").

10. *See* Michael Meeropol & Robert Meeropol, Letter to the Editor, *June '53: The Court and Our Parents, the Rosenbergs*, N.Y. TIMES, June 18, 2009. The Meeropols' letter incorrectly asserts that Jackson arranged the meeting between Vinson and Brownell, *see infra* note 171, blames Jackson for overturning Douglas's stay, and overlooks Douglas and other Justices' prior votes to deny certiorari or oral argument on Jackson's proposed stay to hear claims about the fairness of the trial.

instead on why Douglas and most of his fellow Justices repeatedly refused to hear earlier claims that their parents had not received a fair trial.

Questions about the fairness of the trial and Ethel's guilt continue to make headlines.[11] On September 12, 2008, one of the Rosenbergs' co-conspirators, ninety-one-year-old Morton Sobell, confessed to spying for the Soviets after a lifetime of maintaining his innocence.[12] Sobell confirmed that Julius was a spy, but Sobell insisted that Ethel was guilty of no more than "being Julius's wife."[13] Sobell's confession forced the Meeropols to admit their father's guilt, but they continue to maintain their mother's innocence.[14]

The court-ordered release of the case's grand-jury testimony[15] the day before Sobell's confession revealed that key witnesses had changed their stories at trial, changes that helped send Ethel to the

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11. *See* Martin Peretz, *Red Dusk: The Rosenberg Bombshell*, NEW REPUBLIC, Oct. 8, 2008, at 14; Ronald Radosh, *Case Closed on the Rosenbergs; A Startling Confession Again Proves Their Guilt*, L.A. TIMES, Sept. 17, 2008, at A23; Ronald Radosh, *How Rosenberg's* [sic] *In-Laws Helped Seal Their Fate*, N.Y. SUN, Sept. 12, 2008, at Opinion 1; Sam Roberts, *Rosenberg May Have Enlisted Two Spies*, N.Y. TIMES, Jan. 17, 2009, at A30; Sam Roberts, *A Spy Confesses, and Still Some Weep for the Rosenbergs*, N.Y. TIMES, Sept. 21, 2008, at WK6; Sam Roberts, *57 Years Later, Figure in Rosenberg Case Says He Spied for Soviets*, N.Y. TIMES, Sept. 12, 2008, at A1.

12. Roberts, *57 Years Later*, *supra* note 11, at A1.

13. *Id.* (Sobell said: "She knew what he was doing, but what was she guilty of? Of being Julius's wife.").

14. *Compare* Sam Roberts, *Father Was a Spy, Sons Conclude With Regret*, N.Y. TIMES, Sept. 17, 2008, at B1 (admitting Julius's guilt), *and* Robin Shulman, *Rosenberg Sons Say Father Was Guilty, Mother Was Framed*, WASH. POST, Sept. 23, 2008, at A7, *with* ROBERT & MICHAEL MEEROPOL, WE ARE YOUR SONS: THE LEGACY OF ETHEL AND JULIUS ROSENBERG xii (Univ. of Ill. Press 2d ed. 1986) (1975) (insisting on their parents' innocence).

Julius's guilt and Ethel's limited role are confirmed by the opening of KGB archives, details from former KGB agent and Rosenberg handler Alexander Feklisov, and the 1995 release of Operation Venona, the CIA's code breaking of messages between Soviet spies and Moscow. *See* ALEXANDER FEKLISOV, THE MAN BEHIND THE ROSENBERGS (2001); JOHN EARL HAYNES ET AL., SPIES (2009); NAT'L SEC. AGENCY & CENT. INTELLIGENCE AGENCY, VENONA: SOVIET ESPIONAGE AND THE AMERICAN RESPONSE 1939–1957 (Robert Louis Benson & Michael Warner eds., 1996).

According to KGB files, Julius Rosenberg (codenames: "Liberal," "King," or "Antenna") recruited David Greenglass (codename: "Caliber"), and Ruth Greenglass (codename: "Wasp") along with other Soviet spies. HAYNES ET AL., *supra*, at 106–07. Ethel, however, had no codename. KGB files reveal her to be a low-level accomplice, not a major spy like Julius or even minor ones like her brother and sister-in-law. *Compare id.* at 105, 136 (describing Ethel as instructing her brother to protect her husband's identity and serving as courier), *with id.* at 322 ("Occasionally, a wife like Ethel Rosenberg knew about her husband's activities and provided assistance."), *and id.* at 338 ("'[Ethel] could be used independently [as a spy], but she should not be overworked → poor health.'"). *But see* Geoffrey Wheatcroft, *Digging for Moles*, N.Y. REV. OF BOOKS, Oct. 22, 2009 ("Even the – unsatisfactory and partial – opening of the former Soviet archives leaves many gray areas . . . . [A]mbiguous documentation from Moscow obscures as well as clarifies.").

15. *See* National Archives, Rosenberg Grand Jury Transcripts, *available at* http://www.archives.gov/research/arc/topics/courts/rosenberg-jury.html (last visited May 8, 2010).

electric chair.[16] Ethel's sister-in-law, Ruth Greenglass, testified at trial that Ethel had typed notes about the physical layout at Los Alamos that Ruth had relayed from her husband and Ethel's brother, David Greenglass, a Los Alamos laborer/machinist.[17] This was the critical piece of evidence linking Ethel to the conspiracy to commit espionage. Indeed, lead prosecutor Irving Saypol said during his summation that Ethel had "struck the keys, blow by blow, against her own country in the interests of the Soviets."[18] Yet, before the grand jury, Ruth testified that Ruth herself had written the information for Julius "[i]n longhand."[19]

Inconsistencies between Ruth Greenglass's grand-jury and trial testimony do not, of course, prove that federal prosecutors knowingly used perjured testimony. Other evidence, however, is damning. The CIA's Operation Venona, which intercepted messages between Julius and his Soviet handler, confirmed Ruth's grand-jury testimony that the notes were handwritten.[20] Ruth supposedly recalled that Ethel had typed the notes in an FBI interview only ten days before trial.[21] And David Greenglass subsequently admitted that he had lied, with encouragement from prosecutor Roy Cohn, about Ethel typing the notes and about other key testimony. David said that he had sacrificed his sister to keep his wife out of jail.[22]

The Rosenbergs raised allegations of prosecutorial misconduct and knowing use of perjured testimony during the 1952 Term, but the

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16. *See infra* notes 17–19.

17. *See* Transcript of Record at 1010–11, Rosenberg v. United States, 108 F. Supp. 798 (S.D.N.Y. 1952) (direct examination of Ruth Greenglass), *available at* http://www.law.umkc.edu/faculty/projects/FTrials/Rosenberg/RosenbergTrial.pdf (describing Ethel "typing the notes").

18. Transcript of Record at 2291, *supra* note 17 (closing argument of Irving Saypol).

19. Grand Jury Testimony of Ruth Greenglass, Aug. 3, 1950, at 9142, *available at* http://www.archives.gov/research/arc/topics/courts/rosenberg-jury.html; Posting of Sam Roberts to N.Y. Times City Room Blog, *Rosenberg Witness Gave Varying Accounts*, http://cityroom.blogs.nytimes.com/2008/09/26/rosenberg-witness-gave-varying-accounts/?hp (Sept. 26, 2008, 15:37 EST). Today federal prosecutors would be required to turn over exculpatory grand jury transcripts under the Jencks Statute, 18 U.S.C. § 3500 (2006) and FED. R. CRIM. P. 26.2.

20. *See* Memorandum, Information about the Work of Camp-2, Jan. 8, 1945, *available at* http://www.nsa.gov/public_info/_files/venona/1945/8jan_victor.pdf (describing a "hand-written plan of the lay-out of Camp 2").

21. RONALD RADOSH & JOYCE MILTON, THE ROSENBERG FILE 162–67, 197–98 (Yale Univ. Press 2d ed. 1997) (1983); Radosh, *How Rosenberg's* [sic] *In-Laws Helped Seal Their Fate*, *supra* note 11.

22. SAM ROBERTS, THE BROTHER: THE UNTOLD STORY OF ATOMIC SPY DAVID GREENGLASS AND HOW HE SENT HIS SISTER, ETHEL ROSENBERG, TO THE ELECTRIC CHAIR 482–84 (2001); *The Traitor, David Greenglass Testified Against His Own Sister, 60 Minutes* (CBS television broadcast July 16, 2003), *available at* http://www.cbsnews.com/stories/2003/07/14/60II/main563126.shtml (stating that Roy Cohn had encouraged him to give false testimony). Of David Greenglass, Woody Allen said: "I love him like a brother – David Greenglass." CRIMES AND MISDEMEANORS (Metro-Goldwyn-Mayer 1989).

Court repeatedly denied certiorari. Instead, the Court held a last-minute oral argument and published hastily written opinions about a peripheral issue—whether they had been tried and sentenced under the wrong federal statute—and did not address the fairness of the trial. At the time, *Rosenberg* was considered a *Bush v. Gore* moment, a rush to judgment that alienated people who held the Court in high institutional regard.[23]

At first glance, as Mark Tushnet observed about *Bush v. Gore*,[24] *Rosenberg* seems to reinforce Holmes's great-cases-make-bad-law axiom. If the Vinson Court had granted certiorari and heard full briefing and oral argument on all the Rosenbergs' claims, the Court could have addressed troubling questions raised at the time about the fairness of the trial. This Article argues that, in certain circumstances, the Court should take great cases, which Holmes defined as "great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[25]

Rosenberg suggests that just because some great cases might make bad law does not mean the Court should refuse to take them. Taking great cases does not mean that the Court should take every high-profile case, even if the case presents no legal or constitutional issues or no case or controversy. It does not mean the Court should ignore federalism concerns. It does not mean that the judiciary is the best institution to resolve all legal disputes; the legislative and executive branches have important lawmaking and law enforcement functions, as well as important roles in interpreting and upholding the Constitution. Nor does it mean that once the Court agrees to hear a great case, it must rule on every single issue, or that it cannot decide the case on minimalist grounds. It means only that, especially in cases about separation of powers and minority rights, the Court should err on the side of granting certiorari in cases of great public interest.

Aided by newly discovered documents and recent interviews with key participants, this Article reexamines the Court's internal deliberations in *Rosenberg* to argue that this was a "great case" that the Court should have taken. Part II explains the divisions among the Justices and among *Rosenberg* scholars. Part III attempts to reorient the legal scholarship and to provide the definitive account about the

23. *See infra* text accompanying notes 222, 223, 299 (Black); 259 (Frankfurter, former Frankfurter clerk Philip Elman, Brandeis clerk Paul Freund, and Vinson clerk Jim Paul); 315 (Judge Learned Hand); 349 (Frankfurter clerk Alexander Bickel).

24. Mark Tushnet, *Renormalizing* Bush v. Gore: *An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 114–15 (2001).

25. *See supra* note 4.

Court's mishandling of the case. Part IV assesses blame among the Vinson Court's key players. Part V explains the theory of taking great cases and applies it to *Rosenberg* and *Bush v. Gore*.

II. DIVIDED JUSTICES, DIVIDED SCHOLARSHIP

The Court's response to *Rosenberg* stemmed partly from the Justices' staunch anti-Communism and Vinson's weak leadership but mostly from the clash of intellects, personalities, and ambitions among its four most dynamic Justices: Hugo Black, William Douglas, Felix Frankfurter, and Robert Jackson. All four Roosevelt appointees had disapproved of the Court's repeated attempts during the 1930s to strike down the administration's New Deal programs and state social reforms. Yet they learned different lessons from Roosevelt's court-packing fight and the Court's "switch-in-time": Black and Douglas preserved civil liberties based on an expansive reading of the Fourteenth Amendment that made them heroes to liberals everywhere; Frankfurter and Jackson often deferred to elected officials and believed in judicial restraint. Three of them (Black, Douglas, and Jackson) harbored frustrated presidential ambitions that boiled over in the spring of 1946 during a controversy over who should be the Court's new Chief Justice. From his post as chief U.S. prosecutor at the war-crimes tribunal in Nuremberg, Jackson publicly accused Black of ethical violations in *Jewell Ridge* and other cases; he privately believed that Black and Douglas had helped sabotage his chances to be Truman's nominee as Chief.[26] Black and Jackson eventually patched up their personal differences. The enmity between Douglas and Frankfurter and Jackson, however, continued to color their professional dealings and proved to be the *Rosenberg* Court's undoing. To Frankfurter and Jackson, Douglas—not Julius and Ethel Rosenberg—"became the accused."[27]

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26. *See* EDWIN M. YODER, JR., *Black v. Jackson: A Study in Judicial Enmity*, *in* THE UNMAKING OF A WHIG 3, 12–18 (1990); Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 203.

27. Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L REV. 817, 839 (1987) ("From where I sat in the Solicitor General's office, from what I heard from Frankfurter, the Justices were so livid, so furious with Douglas for granting a stay that he, not the Rosenbergs, became the accused, the defendant."); *see also* Interview by Norman Silber with Philip Elman 250 (1986) (Columbia Oral History Project, Interview 4) ("So Douglas at that point was in their eyes up to mischief, and he became the accused, the defendant, not the Rosenbergs."); Letter from Felix Frankfurter to Philip Elman, at 3, July 2, 1953, Philip Elman Papers, Harvard Law School, Box 2, Folder 57 (describing Douglas as " 'hero' of the hour").

Even the scholarship about the Court's handling of the case is divided between articles that seem to sympathize with Frankfurter/Jackson or Douglas/Black. Michael Parrish's *Cold War Justice*, the most cited and complete account to date, portrayed Frankfurter as the hero and Douglas as the villain.[28] Parrish based his initial article primarily on Frankfurter's contemporaneous private memo about the case,[29] in which Frankfurter and Jackson accused Douglas of voting to grant certiorari only when Douglas knew there were not enough votes, so he could look like a liberal hero.

William Cohen, a Douglas clerk during the 1956 Term, objected to Parrish's portrayal of Douglas as the "unlikely candidate for the principal villain."[30] Cohen described Parrish's Frankfurter-and-Jackson-based account as relying on "hostile witnesses."[31] Cohen defended Douglas's votes to deny certiorari as "consistent" based in part on Cohen's clerkship experiences working with Douglas on two death penalty cases.[32] Douglas, Cohen contended, did not believe in granting certiorari in all capital cases and evaluated all certiorari petitions on an issue-by-issue basis. "Douglas's votes to grant or deny review in the *Rosenberg* cases rested on the issues that had been raised," Cohen wrote, concluding that Douglas voted to deny certiorari because he deemed those issues to have been insubstantial.[33]

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28. Michael E. Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805 (1977) [hereinafter Parrish, *Cold War Justice*]; *see also* Michael E. Parrish, *Justice Douglas and the* Rosenberg *Case: A Rejoinder*, 70 CORNELL L. REV. 1048, 1056–57 (1985) [hereinafter Parrish, *Rejoinder*] (objecting to contention that he had portrayed Douglas as villain). By 2000, Parrish softened his pro-Frankfurter and anti-Douglas views. *See* Michael E. Parrish, *Revisited: The Rosenberg "Atomic Spy" Case*, 68 UMKC L. REV. 601, 613 (2000) [hereinafter Parrish, *Revisited*] ("At most, Justice Douglas can be faulted for over-zealousness.").

29. Memorandum: Re: Rosenberg v. United States, Nos. 111 and 687, October Term 1952, June 4, 1953, Felix Frankfurter Papers, Harvard Law School [hereinafter FFHLS], Pt. I, Reel 70, at 249 [hereinafter Memorandum, June 4, 1953]. Frankfurter's memorandum and addendum, *see* Addendum – June 19, 1953, *id.* at 263, are based on handwritten notes. *See id.* at 242–44, 311–12, 428. Frankfurter law clerk, Alexander Bickel, wrote the first draft, *see id.* at 258–95, based on those notes and with heavy editing from Frankfurter. *See id.* at 269–74. At the end of his clerkship, Bickel wrote: "I have finished the Rosenberg story, which is being typed by Lucy Fowler. You will doubtless have further corrections and additions. This however gets it into readable shape for you." Letter from Alex Bickel to Felix Frankfurter, at 4, Aug. 22, 1953, FFHLS, Box 205, Folder 4, Pt. III, Reel 31, at 752. Frankfurter shared his memorandum with Jackson. *See* Robert Houghwout Jackson Papers Library of Congress, Manuscript Division [hereinafter Jackson Papers], Box 183, Folder 6.

30. *See* William Cohen, *Justice Douglas and the* Rosenberg *Case: Setting the Record Straight*, 70 CORNELL L. REV. 211, 211 (1984).

31. *Id.* at 213.

32. *Id.* at 217–18 & n.39 (citing Chessman v. Teets, 354 U.S. 156 (1957) and People v. Abbott, 303 P.2d 730 (Cal. 1956)).

33. *Id.* at 219; *see id.* at 238, 240 ("[Douglas] would vote to review only if there were issues of substance to be decided.").

But both Parrish's and Cohen's arguments about why Douglas voted to deny certiorari lacked an important source—any explanation from Douglas. Douglas's reminiscences, besides containing exaggerations debated by scholars,[34] discuss only the Court's decision to overturn his stay. In his autobiographies and oral histories, Douglas never explains or even mentions his prior certiorari denials.[35] In late 1974, Parrish asked Douglas to comment on the version of events in Frankfurter's memo, but Douglas declined.[36] Cohen complained ten years later: "We have no record of Douglas's reason for voting to deny certiorari."[37]

This Article relies on Douglas's draft letters that respond to Frankfurter's memo and attempt to explain why Douglas voted to deny certiorari. Douglas drafted the responses to Parrish in December 1974 but did not send them before he suffered a debilitating stroke on December 31.[38] Douglas's draft letters, recently discovered in his

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34. *See* BRUCE ALLEN MURPHY, WILD BILL 281–86 (2003) (exposing Douglas's embellishments of his personal history). *But see* William Alsup, *Accurately Remembering Justice Douglas: A Reply to Wild Bill and Recent Critics*, 50 FED. LAW. 21, Nov./Dec. 2003, at 21 (criticizing reviewers for accepting Murphy's facts as true regarding Arlington Cemetery and Douglas's childhood); Marshall L. Small, *William O. Douglas Remembered: A Collective Memory by WOD's Clerks*, 32 J. SUP. CT. HIST. 297 (2007) (contesting the claim that Douglas mistreated most of his law clerks); Charles Lane, *On Further Review, It's Hard to Bury Douglas's Arlington Claim*, WASH. POST, Feb. 14, 2003, at A29 (casting doubt as to whether Douglas lied about military service in order to be buried at Arlington Cemetery); Daniel J. Danelski, An Open Letter Concerning Wild Bill: The Legend and Life of William O. Douglas by Bruce Allen Murphy (Apr. 10, 2003) (unpublished memorandum, on file with author) (questioning Murphy's claims).

35. *See* Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, at 5, Apr. 5, 1963, Mudd Manuscript Library, Princeton University, Cassette No. 15, at 308–28 (discussing stay in detail yet not mentioning prior votes to deny certiorari); WILLIAM O. DOUGLAS, THE COURT YEARS, 1939–1975, at 79 (1980) ("Their convictions were sustained by the Court of Appeals, and the Supreme Court denied certiorari, Mr. Justice Black (344 U.S. 889) and I (345 U.S. 965–66) voting to grant."); Telephone Interview with Charles Reich (Apr. 4, 2008) (Reich, law clerk to Justice Hugo Black and friend of Douglas, said of Douglas' last-minute stay: "He wanted to talk about that. He didn't talk about his previous votes on cert.").

36. Parrish, *Cold War Justice*, *supra* note 28, at 826–27 n.66 ("I asked him to comment upon the memorandum of May 22. He declined to do so.").

37. Cohen, *supra* note 30, at 221.

38. Parrish wrote Douglas inquiring about Frankfurter's version of events. *See* Letter from Michael Parrish to William O. Douglas, Nov. 26, 1974, William O. Douglas Papers, Library of Congress, Manuscript Division [hereinafter Douglas Papers], Box 572, Folder "Frankfurter Papers, 1968–1975". Douglas responded: "The episodes you discuss are very vague in my memory and I will have to find the time to go into the files." Draft letter from Douglas to Michael Parrish, Dec. 3, 1974, Douglas Papers, Box 572, Folder "Frankfurter Papers, 1968–1975".

Douglas composed responses after reviewing his *Rosenberg* files. Draft letter from Douglas to Parrish, at 2, Dec. 13, 1974, Douglas Papers, Box 572, Folder "Frankfurter Papers, 1968–1975". Before he had seen Frankfurter's memo, Douglas believed that Frankfurter's documents were "forged" or "incorrectly read" because some Frankfurter papers had been stolen from the Library of Congress. *Id.* Douglas, however, never sent the letter. Instead, he sent Parrish a truncated

voluminous papers at the Library of Congress, are cited for the first time here. They confirm some aspects of Cohen's argument and provide an important counterpoint to Frankfurter's memo.

Douglas's draft letters, however, tell only a small part of the story. This Article also explains the internal conflict among Black, Douglas, Frankfurter, and Jackson that prevented the Court from granting the Rosenbergs' certiorari petitions. It corroborates important aspects of Frankfurter's memo yet ultimately sides neither with Frankfurter and Jackson, nor with Douglas and Black. Rather, it takes a pox-on-all-their-houses approach and suggests an unsung judicial hero in Justice Harold Burton.

III. REORIENTING THE *ROSENBERG* SCHOLARSHIP

This Article also reorients the scholarship about *Rosenberg* in another significant respect. Many scholars have focused on whether the Rosenbergs were tried and sentenced under the wrong federal statute.[39] This focus is understandable given the drama of Douglas's stay, overturned by the Court during the third special term in its history, followed by the Rosenbergs' executions the next day. But the

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version without the vehement denials. Douglas concluded: "I am puzzled by your inquiry as the Journal entry makes everything clear." Letter from Douglas to Parrish, Dec. 19, 1974, Douglas Papers, Box 572, Folder "Frankfurter Papers, 1968–1975". After permission from Paul Freund, executor of Frankfurter's Harvard Law School Papers, Parrish sent Douglas Frankfurter's memo. *See* Letter from Douglas to Paul Freund, at 2, Dec. 27, 1974, Douglas Papers, Box 572, Folder "Frankfurter Papers, 1968–1975"; Letter from Freund to Douglas, Jan. 6, 1975, Douglas Papers, Box 572, Folder "Frankfurter Papers, 1968–1975"; Letter from Parrish to Douglas, Apr. 4, 1975, Douglas Papers, Box 572, Folder "Frankfurter Papers, 1968–1975". Douglas, however, suffered a massive stroke in the Bahamas on December 31, 1974, and the correspondence stopped. *See* Warren Weaver Jr., *Justice Douglas Suffers Stroke*, N.Y. TIMES, Jan. 2, 1975, at 31. Douglas's unsent draft letters remain his only attempt to explain his prior votes to deny certiorari, his May 22 memo dissenting from the denial of certiorari, and Jackson's vote switch.

39. *See* Cohen, *supra* note 30, at 242, 247 (describing alleged prosecutorial misconduct and perjured testimony as "collateral issues" and arguing "the Court's major institutional failure . . . occurred in these [last] few days"); Parrish, *Rejoinder*, *supra* note 28, at 1048 (responding to Cohen's points but not the relative merits of Rosenbergs' claims); Parrish, *Revisited*, *supra* note 28, at 606–07 (mentioning some but not all allegations of perjured testimony and prosecutorial misconduct); MURPHY, *supra* note 34, at 319 (mentioning conference vote but not substantive argument or new evidence); ROGER NEWMAN, HUGO BLACK 421–24 (2d ed. 1997) (not mentioning it); JOSEPH H. SHARLITT, FATAL ERROR 23–25, 33–38, 147–95 (1989) (addressing prior claims but concluding that "fatal error" was not hearing statutory claim); JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 298–313 (1980) (mentioning vote but not arguments or new evidence); WILLIAM M. WIECEK, 12 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 614–15 (2006) (mentioning the Atomic Energy Act in two paragraphs in a lengthy recitation of the case). *But see* RADOSH & MILTON, *supra* note 21, at 361–72 (providing the most thorough explanation of new evidence); Parrish, *Cold War Justice*, *supra* note 28, at 827–33 (presenting arguments but mostly citing a single secondary source).

grand-jury testimony and David Greenglass's admissions about his perjured testimony suggest that legal scholars ought to refocus their attention on the Rosenbergs' contemporaneous allegations of prosecutorial misconduct and knowing use of perjured testimony. This Article does not view these allegations through hindsight. Rather, it analyzes the evidence available to the Court at the time.

A. The First Rejection

On June 7, 1952, Julius and Ethel Rosenberg filed their first certiorari petition with the Supreme Court. On March 29, 1951, a jury had convicted them of conspiring to commit espionage under the Espionage Act. After ex parte communications with the Justice Department, federal prosecutors, and several federal judges, Judge Irving Kaufman sentenced the Rosenbergs to death.[40] Kaufman declared their crimes "worse than murder" and held them responsible for fifty thousand deaths in the Korean War.[41]

On February 25, 1952, the Second Circuit affirmed the Rosenbergs' convictions on direct appeal.[42] Judge Jerome Frank's opinion rejected their contentions that (1) Judge Kaufman had improperly questioned witnesses, (2) they could not be sentenced to death under the Espionage Act because the United States and Russia had been allies at the time, and (3) their death sentences violated the Eighth Amendment's prohibition against cruel and unusual punishment because the Rosenbergs were portrayed as traitors yet not afforded the constitutional protection for treason prosecutions. Judge Frank also rejected their argument that the Second Circuit could reduce Kaufman's death sentence. "Unless we are to over-rule sixty years of undeviating federal precedents," he wrote, "we must hold that an appellate court has no power to modify a sentence."[43] Frank invited the Court to review its decisions on this point: "[I]t is clear that the Supreme Court alone is in a position to hold that [the statute] confers

40. *See* Letter from A.H. Belmont to D.M. Ladd, Mar. 16, 1951, *in* THE KAUFMAN PAPERS (National Committee to Reopen the Rosenberg Case 1976) (indicating Justice Department knowledge of Kaufman's views on sentencing); Letter from Ladd to FBI Dir., Apr. 3, 1951, *in* THE KAUFMAN PAPERS, *supra* (discussing Kaufman's communications with Judge Frank, Judge Weinfeld, and Roy Cohn); ROY M. COHN & SIDNEY ZION, THE AUTOBIOGRAPHY OF ROY COHN 65–70 (1988) (detailing ex parte communications with Kaufman regarding sentencing).

41. United States v. Rosenberg, 195 F.2d 583, 605 n.28 (2d Cir. 1952).

42. *Id.* at 609.

43. *Id.* at 604.

authority to reduce a sentence which is not outside the bounds set by a valid statute."[44]

The Court rejected Judge Frank's invitation. On October 7, 1952, only three Justices voted to grant certiorari at their private conference. Justice Black wanted to determine whether this was in effect a peacetime prosecution for treason that had failed to adhere to the constitutional requirements under the Treason Clause of either two witnesses per overt act or a confession.[45] As a literal reader of the Constitution, Black believed the government had not complied with the Treason Clause. "Daddy's mind was pretty simple about the Constitution," his daughter Josephine Black Pesaresi recalled of her father's outrage about the treason issue.[46] Nor did he believe this was a treasonous act because the Soviets were allies at the time of the offenses, and the Cold War was not a war. Yet the Rosenbergs were tried and sentenced as if they had committed treason without any of the requisite constitutional protections. The Treason Clause, according to his daughter, fueled Black's consistent votes to grant certiorari in this case.[47]

Frankfurter argued that the Court should review all cases in which federal courts impose the death penalty. He believed in "the desirability of placing the sanction of the highest court in the land on a death sentence," especially since this was "a case which had raised conscientious doubts in the minds of men of good will whose hostility to communism was beyond doubts. It was in the public interest to put such doubts to rest, and we alone could do it."[48]

Only one other Justice agreed with Black and Frankfurter: Harold Burton. Of the nine Justices on the Court, Burton was regarded by many as the fairest.[49] At the end of the 1953 Term, the law clerks voted on who would be the best choice if the Court were composed of nine clones of the same Justice—Burton was the

44. *Id.* at 606–07. On April 8, 1952, the Second Circuit rejected the Rosenbergs' petition for rehearing that initially raised the Treason Clause argument. *Id.* at 609–11.

45. Memorandum June 4, 1953, *supra* note 29, at 249; *see* CONST. art III, § 3.

46. Telephone Interview with Josephine Black Pesaresi (May 14, 2008).

47. *See id.*

48. Memorandum, June 4, 1953, *supra* note 29, at 250.

49. Letter from Felix Frankfurter to Max Lerner, at 2, May 17, 1952, Douglas Papers, Box 323, Folder "Dilliard, Irving File #4 1963–1976" & Max Lerner Papers, Sterling Memorial Library, Yale University, Box 3, Folder 117–37 ("With intimate knowledge of more than a score of the Justices of the Supreme Court, there is not one, not one, whom I hold in higher esteem on the score of judicial character."); Letter from Learned Hand to Frankfurter, at 2, June 5, 1953, FFHLS, Pt. III, Reel 27, at 322 (remarking that he "greatly value[d] the stainless integrity of Burton"); Letter from Frankfurter to Hand, June 15, 1953, Learned Hand Papers, Harvard Law School Library [hereinafter Learned Hand Papers], Box 105C, Folder 105C-19 (agreeing with Hand); *infra* note 341.

"overwhelming choice."[50] He voted to hear *Rosenberg* only because Black and Frankfurter had "strong feelings" about it.[51]

Jackson, however, voted to deny certiorari. After his experience as the U.S. prosecutor at the Nazi war-crime trials in Nuremberg, Jackson had a much harsher attitude toward criminals and perceived political threats to the U.S. government. Jackson's law clerk, William Rehnquist, agreed. "It is too bad that drawing and quartering has been abolished," Rehnquist wrote in his certiorari memo.[52] Vinson, Stanley Reed, Sherman Minton, and Tom Clark[53] also voted to deny.

The big surprise, however, was Douglas, who, in Frankfurter's words, voted to deny "with startling vehemence."[54] Douglas did not explain his vote at that time but in his newly discovered draft letter wrote: "I didn't think the questions presented were cert worthy."[55] Douglas's denial did not surprise his clerk that term, Charles Ares. Ares had heard from former Douglas clerks about the Justice's unsympathetic views toward people charged with treason or disloyalty:

> Douglas had very strong views with respect to treason, anything that appears to be treasonous, or anything that showed real disloyalty and an intention to injure the United States. The other side of the thing for Douglas was [the Rosenbergs'] individual liberties, the due process side of things, but it did not overcome his antipathy to people shown to be disloyal.[56]

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50. Letter from E. Barrett Prettyman Jr. to Harold Burton, at 1, Oct. 7, 1958, Harold Hitz Burton Papers, Library of Congress, Manuscript Division [hereinafter Burton Papers], Box 399, Folder 10; *see also* RICHARD KLUGER, SIMPLE JUSTICE 612 (rev. ed. 2004) (quoting Prettyman Jr., a Jackson clerk during 1953 Term and Frankfurter/Harlan clerk during 1954 Term: "If I had my life at stake, and wanted to come before the fairest judge in the world, Burton would have been my choice.").

51. Memorandum, June 4, 1953, *supra* note 29, at 250.

52. Responding to the Rosenbergs' cruel and unusual punishment argument, Rehnquist wrote:

> I just don't get it. Apparently ptr's idea is that although the death sentence may be imposed for some crimes, it should not be for others. In my opinion, if they are going to have a death sentence for any crime, the acts of these ptrs in giving A-bomb secrets to Russia years before it would otherwise have had them are fitting candidates for that punishment. It is too bad that drawing and quartering has been abolished.

Rehnquist Cert Memo, No. 111 Rosenberg v. United States, Jackson Papers, Box 183, Folder 6.

53. Clark Cert Memo, No. 111 Rosenberg v. United States, Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin [hereinafter Clark Papers], Box 149, Folder 4. Clark's law clerk, Frederick Rowe, recommended "grant?" to decide whether the Court had the authority to modify a sentence. Clark disagreed: "mitigation is for the executive where sentence is within limit of statute. . . ." *Id.*

54. Memorandum, June 4, 1953, *supra* note 29, at 250.

55. Letter from William O. Douglas to Michael Parrish, Dec. 3, 1974, *supra* note 38, at 4.

56. Telephone Interview with Charles Ares (July 8, 2008).

Ares, whose first certiorari memo recommended "grant?", disagreed with his boss's decision. "I thought they should take it, not so much because of the legal implications, it had a lot of political implications," Ares recalled. "I thought it would serve the country. The Court owed it to the country to settle things down."[57]

With Douglas's denial, the Court was one vote shy of the four needed to grant certiorari. On October 13, the Court announced its decision not to hear the case. Only Black publicly recorded his opposition.

The Rosenbergs filed a petition for rehearing that contained five additional arguments. At their November 6 conference, Frankfurter made another impassioned plea that the Court should take the case because of "heightened public feeling, not the irrational passions aroused in and by the Communists, which, I said, should not influence us, but the disquietude of impartial men of good will."[58] No Justice, however, changed his vote.[59] Two weeks later, when the Court published its denial of the petition for rehearing, Frankfurter wrote separately to emphasize that it was not within the Court's power to reduce a sentence, death penalty or otherwise, imposed by a district judge.[60] Frankfurter, though consistent with his practice of not disclosing his certiorari votes,[61] wrote the opinion to shift the focus to the President's clemency powers.[62]

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57. *Id.* Ares recommended "grant?" to decide whether: (1) the Espionage Act was "so dangerously vague and sweeping that this Court should settle the question of its scope"; and (2) 28 U.S.C. § 2106 permitted the Court to modify the death sentences. Ares Cert Memo, No. 111 Rosenberg v. United States, at 2–3, July 29, 1952, Douglas Papers, Box 224, Folder "Nos. 100–449 Cert (Office) Memos O.T. 1952". Ares included the question mark because he was "too chicken," and because, despite the case's "political implications," "in terms of criminal practice there was not much there." Telephone Interviews with Charles Ares (Sept. 7, 2006 & July 8, 2008).

58. Memorandum, June 4, 1953, *supra* note 29, at 250.

59. Ares recommended that Douglas deny the petition for rehearing because Ares was not persuaded that the Espionage Act violated the Treason Clause. *See* Ares Cert Memo, at 1, Nov. 7, 1952, Douglas Papers, Box 224, Folder "Nos. 100–449 Cert (Office) Memos O.T. 1952".

60. *See* Rosenberg v. United States, 344 U.S. 889, 890 (1952).

61. Frankfurter never disclosed his certiorari votes, but he allowed himself to write about issues that arose in certiorari petitions. *See* Chem. & Trust Bank Co. v. Group of Int'l Investors, 343 U.S. 982, 982 (1952) (noting his "unbroken practice not to note dissent from the Court's disposition of petitions for certiorari. But it has seemed to me appropriate to indicate from time to time the issues that are involved in a litigation for which review has been sought and denied.").

62. *See* Memorandum, June 4, 1953, *supra* note 29, at 251 ("The implication was that the death sentence was a matter for the new President to consider in the exercise of his clemency functions.").

Douglas, as Cohen correctly observed,[63] may have been justified in denying the Rosenbergs' first certiorari petition because the legal arguments were weak. Two recent Supreme Court decisions had rejected the Treason Clause argument.[64] Frankfurter had dismissed Judge Frank's suggestion that the Court reconsider its lack of power to reduce the death sentence. The Rosenbergs either needed better legal arguments or better attorneys. They would soon get both.

B. The Second Cert Petition

The Rosenbergs raised the issue of prosecutorial misconduct for the first time in a federal habeas petition. The Rosenbergs alleged that U.S. Attorney Irving Saypol had committed misconduct by unsealing a perjury indictment of a potential witness, William Perl, in the middle of their trial. Saypol told the *New York Times* that the witness, who had been indicted for denying that he knew Julius Rosenberg and codefendant Morton Sobell, was expected to corroborate the testimony of David and Ruth Greenglass.[65] Perl never testified and was later revealed to be Julius's friend and fellow spy,[66] but the timing of the unsealing of his indictment and Saypol's public comments made it seem as if Saypol had been trying to influence the jury. Judge Sylvester Ryan refused to hold a hearing about the issue. On December 10, 1952, he rejected this argument and several others.[67]

The Second Circuit, even in the absence of a factual investigation by the trial court, found the prosecutorial misconduct allegations disturbing. Judge Swan's Second Circuit opinion regarded Saypol's statement to the press as "wholly reprehensible."[68] But there was no evidence that any of the jurors had read the *New York Times*

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63. Cohen, *supra* note 30, at 221–27.

64. *See* Cramer v. United States, 325 U.S. 1, 30–35 (1945) (making it more difficult to try someone for treason but allowing Congress to avoid Treason Clause under Espionage Act and other legislation); *Ex Parte* Quirin, 317 U.S. 1, 38 (1942) (casting doubt on Treason Clause argument); Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing* Cramer v. United States *and its Significance*, 36 FLA. ST. U. L. REV. 635, 635–37 (2009) (examining the link between *Cramer* and the lack of treason prosecutions since 1954).

65. *See Columbia Teacher Arrest, Linked to 2 on Trial as Spies*, N.Y. TIMES, Mar. 15, 1951, at 1.

66. KGB files revealed that Perl (codenames: "Yakov" and "Gnome"), an aviation and jet propulsion expert, "was the single most valuable agent in the Rosenberg apparatus." HAYNES ET AL., *supra* note 14, at 340; *see also id.* at 120, 135, 339. Perl, refusing KGB assistance to escape, was sentenced to five years in prison for perjury. *Id.* at 347.

67. *See* United States v. Rosenberg, 108 F. Supp. 798, 799 (S.D.N.Y. 1952) ("I find no relevant or material issue of fact raised by the petitions . . . ."). Judge Kaufman recused himself from the habeas hearing.

68. United States v. Rosenberg, 200 F.2d 666, 670 (2d Cir. 1952).

story. Nor had the Rosenbergs' trial attorneys, Emanuel Bloch and his father Alexander, moved for a mistrial or objected.[69]

On February 11, 1953, President Eisenhower rejected the Rosenbergs' clemency petition because their crime "could very well result in the death of many, many thousands of innocent citizens," and because the Rosenbergs "betrayed the cause of freedom for which free men are fighting and dying at this very hour."[70] Five days later, Judge Kaufman set their executions for the week of March 9. He rejected their application for a longer stay to appeal the prosecutorial misconduct allegations to the Supreme Court.[71] Over the objections of federal prosecutors, the Second Circuit granted a stay until March 30 so the Rosenbergs could file a second certiorari petition. Learned Hand told the Blochs: "I would be unwilling to foreclose the possibility of taking this question to the Supreme Court." [72] Jerome Frank added: "There is substance to this argument, and for my part, I believe the Supreme Court should hear it."[73]

On March 30, the Rosenbergs filed their second certiorari petition. Rehnquist, Jackson's law clerk, was not impressed. "I think I would recommend a deny if the trial judge had refused them a hearing on allegations that they had been put on the rack before trial," he wrote in his certiorari memo to Jackson.[74] Some Justices took a more sympathetic view. At their April 11 conference, Black not only wanted to grant certiorari but also a new trial. Frankfurter was Black's lone ally. "I charge your conscience," Frankfurter told his colleagues, "how this sentence, and this Court, will stand in the light of history if you leave the cloud of these allegations hanging over the trial."[75] No one agreed. Even Burton thought the issues "were without merit."[76]

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69. *See id.* ("Indeed, the petitioners did not mention the prosecutor's statement in their motions for a new trial nor on their previous appeal.").

70. *President Denies Clemency Request to Rosenbergs in Spy Case*, N.Y. TIMES, Feb. 12, 1953, at 1.

71. William R. Conklin, *Rosenberg to Die Week of March 9*, N.Y. TIMES, Feb. 17, 1953, at 1; William R. Conklin, *Pressure Growing to Save Atom Spies*, N.Y. TIMES, Feb. 14, 1953, at 4.

72. William R. Conklin, *Rosenbergs Obtain Stay of Execution*, N.Y. TIMES, Feb. 18, 1953, at 1.

73. *Id.* After the Second Circuit's stay, Kaufman encouraged the Justice Department "to push the matter vigorously to get it before the Supreme Court" so the case would not be held until the fall. Letter from A.H. Belmont to FBI Dir., Feb. 19, 1953, *in* THE KAUFMAN PAPERS, *supra* note 40.

74. Cert Memo, No. 687 Rosenberg v. United States, Jackson Papers, Box 183, Folder 6.

75. Memorandum, June 4, 1953, *supra* note 29, at 252.

76. *Id.*

Douglas, according to Frankfurter, "said, DENY, in the same harsh tone."[77]

Frankfurter asked his colleagues to delay an announcement of the Court's second denial of certiorari until he decided whether he would write a separate opinion. Conferences passed on April 25 and May 2 as Frankfurter engaged in "a real struggle with [his] conscience."[78] At the May 16 conference, Vinson urged his fellow Justices to announce their decision to deny certiorari and allow Frankfurter to write later. Five Justices (Black, Douglas, Frankfurter, Jackson, and Burton) voted to give Frankfurter another week. The next day, Jackson confided to Frankfurter that he might join an opinion that focuses on Saypol's misconduct. "I cannot imagine," Jackson told Frankfurter, "that you can be too severe on him to suit me."[79]

Ultimately, Frankfurter chose not to write. On May 20, he wrote a memo to his colleagues that "the Court's failure to take the case of the Rosenbergs has presented for me the most anguishing situation since I have been on the Court."[80] Frankfurter's primary concern was the Court's institutional role in calming public unrest:

> This is a case, if ever there was one, in which the Court's better wisdom should not allow these sentences of death, for what in effect are convictions for treason in times of quasi-peace, to be carried out without putting behind these sentences the moral authority that would come from a finding by this Court, after an examination of the record and hearing argument, that there was no flaw in the trial that calls for reversal.[81]

Frankfurter decided not to write a dissent because he did not want to "run[] the risk of feeding those flames of disquietude and passion and disunity."[82] If he had, Frankfurter would have focused on Saypol's alleged misconduct. After conferring with Black, they agreed not to write. Instead, the denial of certiorari indicated that Black and Frankfurter, "referring to the positions they took when the cases were here last November, adhere to them."[83] But before the Court could issue the denial, all hell broke loose.

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77. *Id.*; *see also* Docket Sheet, No. 687 Rosenberg v. United States, FFHLS, Box 67, Folder 15, Pt. I, Reel 72, at 990 ("WOD – deny, without a word.").

78. Memorandum, June 4, 1953, *supra* note 29, at 253.

79. *Id.* at 253–54.

80. Frankfurter Memorandum for the Conference, at 1, May 20, 1953, Jackson Papers, Box 183, Folder 6.

81. *Id.*

82. *Id.*

83. *Id.* Frankfurter did not disclose his vote to grant certiorari. *See supra* text accompanying notes 61–62.

C. Douglas's Change of Heart

Two days after Frankfurter's May 20 memo, Douglas started the first of two firestorms about the case. Frankfurter and his fellow Justices were attending a luncheon in the Supreme Court building for the National Conference of Judicial Councils.[84] Around 1:00 p.m., he received a memo to the conference from Douglas:

> I have done further work on these cases and given the problems more study. I do not believe the conduct of the prosecutor can be as easily disposed of as the Court of Appeals thinks. I therefore have reluctantly concluded that certiorari should be granted.
>
> Accordingly, I will ask that the order of denial carry the following notation:
>
> "Mr. Justice Douglas, agreeing with the Court of the Appeals that some of the conduct of the United States Attorney was 'wholly reprehensible' but believing, in disagreement with the Court of Appeals, that it probably prejudiced the defendants seriously, votes to grant certiorari."[85]

Douglas did not ask his law clerk, Charles Ares, for research or input about the memo. Ares said Douglas's memo was "not very powerful" and did not explain the extra work Douglas had done on the case. "If it was terribly serious," Ares said, "and he thought it was going to change things he would have picked out more support in the record."[86]

Upon reading Douglas's memo, Frankfurter left the luncheon, dictated a memo indicating that Douglas's memo "creates a new situation," and put his colleagues on notice that he wanted to reopen discussion of the case.[87] Later that afternoon, Frankfurter circulated another short memo to his colleagues. Thinking that his struggle with the case was "the end of a long and laborious intellectual journey," he reacted to Douglas's memo by promising to "to sleep over it so as to bring the coolest and most responsible judgment to bear of which I am capable."[88]

Douglas's memo should have been a blessing. Frankfurter and Black now had three solid votes to hear the case and two other possible votes. Jackson had confided to Frankfurter his displeasure with Saypol's conduct, and Burton had voted to grant the Rosenbergs'

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84. Memorandum, June 4, 1953, *supra* note 29, at 254; Burton Diaries, May 22, 1953, Burton Papers, Reel 3, Box 2.

85. Douglas Memorandum to Conference, May 22, 1953, Douglas Papers, Box 234, Folder "Rosenberg v. United States: Motion to Vacate Stay".

86. Telephone Interview with Charles Ares, *supra* note 56; Cohen, *supra* note 30, at 234 n.126.

87. Frankfurter Memorandum to Conference, May 22, 1953, Jackson Papers, Box 183, Folder 6.

88. *Id.*

first certiorari petition because two other Justices had felt strongly about it. Instead, Douglas's memo reawakened animosities between Douglas and Frankfurter/Jackson and raised Frankfurter's fears that the memo would incite public unrest. Frankfurter confided those fears to Burton, the likeliest fourth vote, and to Jackson, his closest friend and ally.

The afternoon that Douglas released his memo, Frankfurter went to see Burton in his chambers.[89] A note Frankfurter wrote Burton the next morning reflects what may have been said during their meeting. Douglas's memo, Frankfurter predicted, "if allowed to stand without more puts the whole Court in a hole [and] surely does not relieve the Court from examining the hole in order to see whether it is for the good of the Court complacently to remain in the hole."[90] Frankfurter recalled the ill effects of the *Mooney* case on the reputation of the Supreme Court of California and of the Sacco-Vanzetti case on the Supreme Judicial Court of Massachusetts.[91] Were Douglas's memo published, *Rosenberg* would cast a similar "cloud" on the U.S. Supreme Court. Frankfurter wrote:

> The Court would place itself in the position of being heedless to the pronouncement of a member of the Court that the pair were sentenced to death after a trial that violated the requisites of a fair trial, and that too by a member of the Court who has created for himself the reputation of being especially sensitive to the claims of injustice.
>
> Do you really think that that is a position in which the Court should be left under the condemnation that this would involve? Will you not please consider with the conscientious detachment of which you are capable and which this new situation requires, whether the Court should not save itself from another "self-inflicted wound"?[92]

Frankfurter's note to Burton revealed his frustration with Douglas.

While his memo to Burton was being typed, Frankfurter visited Jackson and confessed his fears and concerns. Jackson then read Frankfurter's typed memo to Burton before Frankfurter sent it. "Don't worry," Jackson told Frankfurter. "Douglas' memorandum isn't going down Monday."[93] Rehnquist urged Jackson not to grant certiorari

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89. *See* Burton Diaries, May 22, 1953, *supra* note 84.

90. Memorandum from Felix Frankfurter to Harold Burton, May 23, 1953, FFHLS, Pt. 1, Reel 70, at 296.

91. *See id.* Frankfurter, while working for the federal government during World War I, had written a report for President Woodrow Wilson about the case of Tom Mooney, a left-wing labor leader convicted of San Francisco's 1916 Preparedness Day bombing based on knowingly perjured testimony. Ten years later, Frankfurter and his wife, Marion, joined the unsuccessful fight to overturn the capital murder convictions of two Italian immigrants, Nicola Sacco and Bartolomeo Vanzetti, so they could receive a new trial. *See* FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 130–35, 202–17 (1960); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES 97–101, 176–96 (1982).

92. Memorandum from Frankfurter to Burton, May 23, 1953, *supra* note 90.

93. Memorandum, June 4, 1953, *supra* note 29, at 254.

because "it would be allowing one Justice—WOD—to force the hand of the court and get the result which he now so belatedly wants."[94] Without his clerk's prompting, Jackson was even angrier with Douglas than Frankfurter. " 'Douglas' memorandum is the dirtiest, most shameful, most cynical performance that I think I have ever heard of in matters pertaining to law,' " Frankfurter, "from memory" but "with substantial accuracy," quoted Jackson.[95]

At the May 23 conference, Jackson called what he regarded as Douglas's "bluff."[96] Black, hospitalized with a severe case of shingles and thus absent from conference,[97] still voted to grant. So did Frankfurter. Douglas said Frankfurter's May 20 memo "had 'alerted' him to the prejudicial error in the case," and Douglas now voted to grant.[98] Jackson provided the fourth vote because he said Douglas's memo had put the Court "in an impossible position." It would leak that four Justices at various times wanted to hear the case, and now a member of the Court was publicly saying that the Rosenbergs had not received a fair trial. "It was impossible to deny under those circumstances," Jackson said according to Frankfurter.[99]

Vinson declared the case granted and discussed scheduling full briefing and oral argument. It was near the end of the term. Vinson wanted an expedited briefing schedule so the executions could proceed as soon as possible. The other Justices objected. Burton agreed to

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94. SIMON, *supra* note 39, at 302. Rehnquist's three-page memo has disappeared from Jackson's Papers, which have moved from the University of Chicago to the Library of Congress. Rehnquist, as quoted by Simon, wrote:

> I would conclude that this proposal, or any proposal to change the court's views, would serve no purpose that has not been previously considered and rejected by the court. In addition, it would be allowing one justice—WOD—to force the hand of the court and get the result which he now so belatedly wants. . . .
>
> . . . . the public opinion which has voiced itself in favor of the Rosenbergs is not even properly called 'left-wing' in the sense that the respectable liberal group in this country is behind it. It is a tiny minority of lunatic fringers and erratic scientist-sentimentalists.

Id. at 302–03.

95. Memorandum, June 4, 1953, *supra* note 29, at 254.

96. *See infra* text accompanying note 104.

97. *See* Letter from Hugo Black to Fred Vinson, May 19, 1953, Hugo Lafayette Black Papers, Library of Congress, Manuscript Division [hereinafter Black Papers], Box 314, Folder "Oct. Term 1952 – Conference Memoranda" (informing Vinson that Black might miss conference so doctors could "determine whether any ailment except shingles is contributing to my foot discomfort"); Letter from Black's secretary to Jerome Frank, May 21, 1953, Black Papers, Box 28, Folder "Frank, Jerome, 1936–57"; Letter from Black's secretary to John Frank, June 1, 1953, Black Papers, Box 461, Folder "Frank, John 1954"; Burton Diaries, May 23, 1953, *supra* note 84.

98. Memorandum, June 4, 1953, *supra* note 29, at 255.

99. *Id.*

postpone an overseas trip scheduled for July 11.[100] Vinson suggested that the Court hold argument July 6, quickly announce its decision, and then publish subsequent opinions. The Justices, remembering their unhappy experiences in *Ex Parte Quirin*,[101] in which they had announced their decision in a short per curiam opinion before the executions of Nazi saboteurs and then published a full opinion later, rejected that suggestion as well.

Then Douglas spoke. "What he had written was badly drawn," he said according to Frankfurter. "He hadn't realized it would embarrass anyone. He would just withdraw his memorandum if that would help matters."[102] After Douglas withdrew his memo, Jackson withdrew his fourth vote for certiorari. On May 25, the Court denied certiorari for the second time. Frankfurter and Black referred to their previous positions; Douglas merely noted that he was "of the opinion the petition of certiorari should be granted" rather than publishing his full dissent.[103] "That S.O.B.'s bluff was called," Jackson told Frankfurter.[104]

On June 3, Frankfurter visited Black, who was recuperating at his Alexandria home. After the May 23 conference that Black had missed, Douglas had apparently told Black a completely different version of events—that Douglas had withdrawn his memorandum because they were only voting on whether to hold oral argument on whether to grant certiorari, not on the merits of the case. Frankfurter told Black that was "untrue."[105] Jackson described this as "wholly false . . . . We voted to grant until Douglas withdrew his memorandum."[106]

Douglas's inconsistent responses—his April 11 vote to deny, his May 22 memo, and his removal of the inflammatory language from his

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100. Burton Diaries, July 11, 1953, *supra* note 84 (indicating Burton left Hoboken, New Jersey, at noon that day).

101. 317 U.S. 1 (1942); *see* Jack Goldsmith, *Justice Jackson's Unpublished Opinion in* Ex Parte Quirin, 9 GREEN BAG 2D 223 (2006); G. Edward White, *Felix Frankfurter's "Soliloquy" in* Ex Parte Quirin: *Nazi Sabotage and Constitutional Conundrums*, 5 GREEN BAG 2D 423 (2002); David Danelski, *The Saboteurs' Case*, 1996 J. SUP. CT. HIST. 61.

102. Memorandum, June 4, 1953, *supra* note 29, at 256.

103. Rosenberg v. United States, 345 U.S. 965, 966 (1953).

104. Memorandum, June 4, 1953, *supra* note 29, at 257.

105. *Id. But see* Cohen, *supra* note 30, at 232 n.121 (suggesting Frankfurter conflated this conference with another conference on whether to vacate Douglas's stay). Frankfurter may have confused Douglas's vote to grant Jackson's proposed stay but not to hear oral argument. *See* text accompanying *infra* note 135. During the 1952 Term, Frankfurter frequently visited Black at his Alexandria home. *See* Interview by Richard Kluger with Alexander Bickel, at 1, Aug. 20, 1971, *Brown v. Board of Education* Papers, Sterling Memorial Library, Yale University, Box 1, Folder 4.

106. Memorandum, June 4, 1953, *supra* note 29, at 257.

dissent from the denial—have puzzled scholars. Parrish's article gave Douglas the benefit of the doubt. Douglas, Parrish wrote, "may have composed the dissent of May 22 in haste, encountered withering criticism in the meeting, and retreated without devious motives."[107] The fact that Charles Ares, Douglas's law clerk, was not consulted and did not find the memo "very powerful" would seem to confirm this.[108] But Jackson's initial vote to grant must have influenced Douglas's behavior. Parrish concluded: "If Jackson's conduct did not exhibit the highest level of judicial integrity, Douglas's remains inexplicable in view of his own later apparent interest in the case."[109]

Responding to Parrish, Cohen struggled to explain how Douglas could have voted consistently.[110] Cohen conceded that Douglas had made "two mistakes. At first, he failed to recognize that the issue concerning Saypol's press release was substantial. Later, he proposed a dissent that, as worded, might be read as a dissent on the merits of that issue."[111] Douglas, Cohen contended, should not be denigrated for correcting those mistakes. Cohen, however, did not discover a single error in Frankfurter's and Jackson's account—that Douglas withdrew his dissent after Jackson voted to grant—other than to say that "the corroboration is thin."[112] Neither Cohen nor Parrish had access to Douglas's explanation.

Douglas, when confronted with Frankfurter's account twenty-one years later, denied having withdrawn his May 22 memo "at any time" even though he never published the paragraph in the memo as a dissent from the denial of certiorari as he had intended.[113] Douglas also denied that Jackson had switched his vote at conference.

Douglas's explanation about his May 22 memo does not pass muster. On his own docket sheet from the case, Douglas initially marked Jackson as voting to grant certiorari at the May 23 conference and then crossed it out and marked Jackson as having denied.[114] Burton did the same thing on his docket sheet.[115] These docket entries

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107. Parrish, *Cold War Justice*, *supra* note 28, at 826; *see also* Parrish, *Revisited*, *supra* note 28, at 613 ("At most, Justice Douglas can be faulted for over-zealousness.").

108. *See* text accompanying *supra* note 86.

109. Parrish, *Cold War Justice*, *supra* note 28, at 826.

110. Cohen, *supra* note 30, at 228–36.

111. *Id.* at 236.

112. *Id.* at 233.

113. Draft letter from William O. Douglas to Michael Parrish, Dec. 13, 1974, *supra* note 38, at 2.

114. Douglas wrote this in his light blue marker. Docket Sheet No. 687, Douglas Papers, Box 222, Folder "Administrative Docket Book #501–701".

115. Docket Sheet No. 687, Burton Papers, Box 222, Folder "Dockets: Appellate Nos. 601–700".

confirm important aspects of Frankfurter's story. Yet Douglas nonetheless claimed in an early draft of his letter that Frankfurter's version was "made up of whole cloth."[116]

The debates between Justices Douglas and Frankfurter and historians Parrish and Cohen obscure an important point: the Rosenbergs had presented evidence of prosecutorial misconduct, albeit without any objection at trial or any proof that defendants had been prejudiced. New evidence and more serious allegations of knowing use of perjured testimony soon made its way to the divided Court.

D. New Evidence of Perjury

The drama between Douglas and his colleagues was far from over. The Court's denial of certiorari lifted the Second Circuit's stay of Julius's and Ethel's executions. Judge Kaufman rescheduled their executions for the week of June 15; the race to save them was on, a race that ran back to the Supreme Court.

Two top-notch lawyers joined the hapless Blochs on the Rosenbergs' defense team. John Finerty, an experienced civil-liberties lawyer who had represented Sacco and Vanzetti and helped free Tom Mooney, had begun helping before the filing of the second certiorari petition.[117] University of Chicago law professor Malcolm Sharp also signed on because of the discovery of compelling new evidence.[118]

David and Ruth Greenglass had testified at trial that the Soviets had given the Rosenbergs a hollowed-out wooden table with a lamp underneath to microfilm Ethel's typewritten notes.[119] The table could not be found before trial, but a reporter for the *New Guardian* later discovered it in the apartment of Ethel's illiterate mother. The table was not hollow, and there was no lamp. A Macy's official submitted an affidavit that it was the type of console table sold there in 1944 or 1945 for $21, just as the Rosenbergs had testified at trial.[120]

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116. Draft letter from William O. Douglas to Michael Parrish, Dec. 13, 1974, *supra* note 38, at 3. This line was crossed out and not included in subsequent drafts.

117. Conklin, *Rosenbergs Obtain Stay of Execution*, *supra* note 72, at 12.

118. *See* MALCOLM P. SHARP, WAS JUSTICE DONE? 11–15 (1956) (describing the circumstances surrounding Sharp's decision to get involved with the case after the discovery of new evidence); Abe Krash, *Malcolm Sharp and the* Rosenberg *Case: Remembrance of Things Past*, 33 U. CHI. L. REV. 202, 204 (1966) (detailing how Sharp was "moved to make a public statement" urging careful consideration of the new evidence, and a few weeks later was invited by the Rosenbergs' counsel to assist them).

119. Transcript of Record at 739, *supra* note 17 (direct examination of David Greenglass); Trial Transcript at 900–01, *supra* note 17 (cross examination of David Greenglass); Trial Transcript at 1013–14, *supra* note 17 (direct examination of Ruth Greenglass).

120. Trial Transcript at 1564, 1689–90, *supra* note 17 (direct examination of Julius Rosenberg); Trial Transcript at 1791–1802, *supra* note 17 (cross examination of Julius

The console table may seem like a minor point, but it arose several times at trial and during closing argument.[121] Sharp explained that the console table

> was important at the trial as a vivid item of testimony which may well have caught the jury's mind in the course of the long and sometimes tedious proceeding. It became, however, more important in another respect: it served as a test of the dependability of the Greenglasses' testimony.[122]

The discovery of a table that confirmed the Rosenbergs' testimony suggested that the Greenglasses were lying. It did not prove that the prosecution knew the Greenglasses were lying, but other new evidence revealed what the government had known and when.

The Rosenbergs' lawyers also discovered a handwritten pretrial statement that David Greenglass had given to his lawyer about what he had told the FBI in his initial interview, a copy of which somehow wound up in France.[123] The Rosenbergs argued in their brief that David's "pre-trial story to authorities . . . was a very different tale from the trial testimony of the Greenglasses—as different as 'Hamlet' without Hamlet."[124]

On June 6, based on this and other new evidence, the Rosenbergs filed a motion for new trial and stay of execution with Judge Kaufman. Two days later, Kaufman heard nearly three hours of oral argument. After a fifteen-minute recess, he returned and read for thirty minutes from a written opinion denying the motion and denouncing the evidence as frivolous.[125] Kaufman's only comment about the console table was that, since it had been in Ethel's mother's apartment all along, the government could not be held accountable.[126] Kaufman refused to see the table and never ventured an opinion on what the discovery of the nonhollow table said about the Greenglasses' credibility.[127]

Rosenberg); Trial Transcript at 1930–31, 1933–34A, *supra* note 17 (direct examination of Ethel Rosenberg); Trial Transcript at 2025–27, *supra* note 17 (cross examination of Ethel Rosenberg); RADOSH & MILTON, *supra* note 21, at 361–66; SHARP, *supra* note 118, at 11–14, 48–60, 111–20; *New Trial Sought by 2 Rosenbergs*, N.Y. TIMES, June 7, 1953, at 19.

121. *See supra* notes 17 and 119–120; Trial Transcript at 2221–24, *supra* note 17 (Emanuel Bloch's summation); Trial Transcript at 2298–99, *supra* note 17 (Irving Saypol's summation).

122. SHARP, *supra* note 118, at 111. David Greenglass later admitted to lying about seeing a hollow console table, but claimed that Julius had asked him to attach a spy camera to the table. ROBERTS, *supra* note 22, at 482.

123. SHARP, *supra* note 118, at 121–33, 193–94.

124. Petition for Stay to Justice Jackson, at 4–5, June 12, 1953, National Archives, Washington, D.C., RG 267, Box 607–687 O.T. 1952 4 of 5, Folder 687 O.T. 1952 [hereinafter Jackson Stay Petition].

125. *Id.* at 3; *Rosenbergs Denied A New Trial or Stay*, N.Y. TIMES, June 9, 1953, at 13.

126. SHARP, *supra* note 118, at 158–59.

127. *Id.* at 12–13 n.4.

The day after Kaufman's ruling, the Rosenbergs' lawyers appeared before the Second Circuit to ask for a stay. Instead, the panel forced the lawyers to address the merits of their argument without any briefing or additional discovery.[128] On June 11, the Second Circuit affirmed the decision without a written opinion.[129]

1. June 12: Jackson Recommends Oral Argument on Stay

On Friday June 12, the Rosenbergs' lawyers traveled to Washington, D.C. to apply for a stay to appeal these and other rulings with the Circuit Justice for the Second Circuit, Justice Jackson.[130] Jackson, upon learning of the new evidence and allegations, agreed to hear argument in his chambers the next morning. After listening to both sides for forty-five minutes,[131] Jackson wrote in the left front margin of the Rosenbergs' brief: "Referred to conference of the full court with recommendation that it be set for oral hearing on Monday June 16th at which time the parties have agreed to be ready for argument."[132] He signed it, "Robert H. Jackson, Circuit Justice."[133]

2. June 13: Court Rejects Jackson's Recommendation

At their Saturday-morning conference, Jackson's fellow Justices had other ideas. By 1:30 p.m., Bloch was informed that he would not need to come to Washington for oral argument on Monday.[134] The Justices had voted five (Vinson, Douglas, Reed, Minton, and Clark) to four (Black, Frankfurter, Jackson, and Burton) not to hear oral argument about whether to grant the stay and five (Vinson, Reed, Burton, Minton, and Clark) to four (Black, Douglas, Frankfurter, and Jackson) not to grant the stay. Burton was willing to hear oral argument but not grant the stay. Douglas was willing to grant the stay but not hear oral argument.[135]

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128. *Id.* at 15.

129. Jackson Stay Petition, *supra* note 124, at 4; *2 Rosenbergs Lose in Appeals Court*, N.Y. TIMES, June 12, 1953, at 9.

130. Rosenberg v. United States, 346 U.S. 273, 279–80 (1953).

131. SHARP, *supra* note 118, at 15; Paul R. Kennedy, *Rosenberg Ruling Likely Tomorrow*, N.Y. TIMES, June 14, 1953, at 1.

132. Jackson Stay Petition, *supra* note 124, at 1 (handwritten note).

133. *Id.*

134. SHARP, *supra* note 118, at 16; Kennedy, *supra* note 131, at 30.

135. *Rosenberg*, 346 U.S. at 280–81 n.7; Rosenberg v. United States, 345 U.S. 989 (1953); *see also* Appendix VIII, FFHLS, Pt. I, Reel 70 at 573; Addendum – June 19, 1953, *supra* note 29, at 263.

Jackson's anger with Douglas for refusing to hear oral argument on Jackson's proposed stay grew to near-fury as the case continued and Douglas granted a stay on his own. Jackson remarked that "every time a vote could have been had for a hearing Douglas opposed a hearing in open Court, and only when it was perfectly clear that a particular application would not be granted, did he take a position for granting it."[136]

Jackson was so eager to expose what he perceived as Douglas's hypocrisy that, after the case was over, he invited *St. Louis Post-Dispatch* columnist Marquis Childs into his chambers and showed him Douglas's June 13 conference votes.[137] Childs's column about Douglas's prior vote to deny oral argument on Jackson's stay infuriated Douglas so much that it prompted Douglas's only comments about this stage of the case. Douglas accused Childs of making a "grievous error" for insinuating that Douglas's subsequent stay was related to the issues in Jackson's proposed stay.[138] Childs correctly asserted that if Douglas had voted for a hearing on Jackson's stay request there would have been no need for Douglas's stay.[139] Douglas ignored Childs's point and insisted he had granted a stay on a "wholly new" issue.[140] Childs wrote *St. Louis Post-Dispatch* colleague and friend of Douglas Irving Dilliard:

> Frankly, I do not think that Justice Douglas's explanation for his conduct holds water. It is especially weak on the score that it would inevitably have been a six-to-three decision against the [subsequent Douglas] stay. . . . The personal story has begun to get into the news, and it will increasingly do so.[141]

The personal story was the antipathy between Douglas and Jackson.

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136. Addendum – June 19, 1953, *supra* note 29, at 266.

137. Interview by Donald Shaughnessy with Marquis W. Childs (Nov. 6, 1957), Columbia Oral History Project, Microfiche 5107, Interview 5, at 83–84; Marquis Childs, *Supreme Court Burden*, WASH. POST, June 20, 1953, at 9; Marquis Childs, *Inside the Quiet Storm Center*, ST. LOUIS POST-DISPATCH, June 19, 1953, at 3B.

138. Letter from William Douglas to Marquis Childs, July 6, 1953, Douglas Papers, Box 234, Folder "Rosenberg v. United States: Motion to Vacate a Stay" & Marquis Childs Papers, Wisconsin Historical Society [hereinafter Childs Papers], Box 3, Folder "Correspondence, 1953, July– Aug.".

139. Letter from Marquis Childs to William Douglas, Sept. 18, 1953, Douglas Papers, Box 234, Folder "Rosenberg v. United States: Motion to Vacate a Stay" & Childs Papers, Box 3, Folder "Correspondence, 1953, Sept.–Oct.".

140. Letter from William Douglas to Marquis Childs, Oct. 6, 1953, Douglas Papers, Box 234, Folder "Rosenberg v. United States: Motion to Vacate a Stay" & Childs Papers, Box 3, Folder "Correspondence, 1953, Sept.–Oct.".

141. Letter from Marquis Childs to Irving Dilliard, July 30, 1953, Childs Papers, Box 3, Folder "Correspondence, 1953, June".

3. June 15: Finerty Petitions the Court

On Monday June 15, 1953, the last day of the 1952 Term, the Court denied the Rosenbergs' request for a stay and their request to reconsider the Court's May 25 denial of certiorari.[142] As the Court was about to adjourn for the Term, John Finerty requested leave to file an original writ of habeas corpus. Finerty modeled his claim after his work on the *Mooney* case, alleging that prosecutors had knowingly used perjured testimony.

Finerty forced the Justices to confront the newly discovered evidence and allegations that prosecutors had knowingly used the Greenglasses' perjured testimony. That afternoon, the Justices reconvened in a special conference session. The tension was palpable. Douglas voted with the majority to deny Finerty's application and claimed: "[You've] got to do more than use perjured testimony, [you've] got to manufacture it." [143] Frankfurter vehemently disagreed: "Oh! no! Oh! no! [The] knowing use of perjured testimony is enough. I know a good deal about *Mooney*."[144] Jackson, though he voted to deny, agreed with Frankfurter. Frankfurter and Jackson were correct that under *Mooney* knowing use of perjured testimony was sufficient.[145]

Parrish recounted the Douglas/Frankfurter-Jackson debate about *Mooney* and pointed out that Douglas and Black had invoked *Mooney* in a dissent from the denial of certiorari the previous term.[146] Cohen described the argument over *Mooney* as irrelevant because the newly discovered evidence "went to collateral issues."[147] Douglas believed that the *Mooney* claim, based his reading of the law at the time, could not be raised in a habeas petition.

But if Douglas adopted a consistent issue-by-issue approach, as Cohen argued, it is hard to imagine that Saypol's misconduct could raise due process concerns, but new evidence and claims of knowing use of perjured testimony did not. On June 13, Douglas adopted an unusual all (grant the stay) or nothing (no oral argument about

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142. Rosenberg v. United States, 345 U.S. 1003 (1953).

143. Addendum – June 19, 1953, *supra* note 29, at 263; FFHLS, *supra* note 29, Pt. I, Reel 70, at 243–44 (Frankfurter's handwritten notes).

144. *Supra* note 143.

145. *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam) (declaring due process violation "if a deliberate deception of court and jury by the presentation of testimony known to be perjured").

146. *See* Parrish, *Cold War Justice*, *supra* note 28, at 832–33 (citing Remington v. United States, 343 U.S. 907 (Mar. 24, 1952) (Black, with whom Douglas concurs, dissenting from denial of certiorari)).

147. Cohen, *supra* note 30, at 242; *see id.* at 241–44 (describing *Mooney* disagreement as "not central" and discussing Douglas's jurisdictional concerns regarding habeas).

granting the stay) approach. Two days later, he adopted an extremely restrictive view of habeas corpus, a view at odds with his reputation as a civil libertarian.

With only Black and Frankfurter in the minority on June 15, the Court denied the application for an original writ.[148] The executions were to go forward the next day.

The result was that the Court never heard oral argument on the most compelling allegations, prosecutorial misconduct and knowing use of perjured testimony. The Court could have heard argument, reviewed the record, written opinions, and been satisfied that it had addressed the primary concerns about the fairness of the trial. If Douglas had voted for oral argument on June 13, or if he and another Justice had voted to hear Finerty's original habeas petition, the Court's involvement in the case would have ended on much sounder footing.

Legal historians have devoted insufficient attention to what happened in *Rosenberg* from June 6 to June 15. Given what we now know about inconsistencies between Ruth Greenglass's grand-jury and trial testimony and David Greenglass's confession of having perjured himself to protect his wife, this time period is worthy of further study. Admittedly the paper trail is thin: the briefs are difficult to find; there was no Supreme Court oral argument on this issue; there are almost no conference notes and no written opinions. The bigger problem, however, is that most historians of the case have become swept up in the high drama of what happened next.

E. Douglas's Stay

The Rosenbergs' lawyers did not give up. The afternoon that the Court had adjourned for the Term, they approached Douglas for a stay. Somehow they knew that Douglas was leaving early the next morning to visit his friend, *St. Louis Post-Dispatch* editorial-page editor Irving Dilliard, in Collinsville, Illinois, on his way home to Yakima, Washington. Even though Jackson was the Circuit Justice for the Second Circuit, they approached Douglas first.[149] Unaware of

148. *See* Rosenberg v. Denno, 356 U.S. 271, 271–72 (June 15, 1953) (Black dissented, Frankfurter voting to hear oral argument); Rosenberg v. United States, 345 U.S. 1003, 1003–04 (1953) (petition for rehearing denied) (Frankfurter refused to state vote, Black said petition should be granted).

149. Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, *supra* note 35, at 3–4; DOUGLAS, *supra* note 35, at 79–81. Douglas's correspondence confirms the trip to see Dilliard. *See* Telegram from Douglas to Irving Dilliard, June 18, 1953, Douglas Papers, Box 322, Folder "Dilliard, Irving File #2 1951–1958" ("BACK IN WASHINGTON. HOPE TO SEE YOU IN FEW DAYS. W.O. DOUGLAS"); Telegram from Edith

Douglas's prior votes to deny cert but familiar with his reputation as a civil libertarian, they viewed him as "the perfect target."[150] After an hour and a half of argument without the government present, Douglas informed them that he would not grant their application unless they raised a new argument. He offered to see them the next morning at 10:00.[151]

1. June 16: Argument in Douglas's Chambers

The next day, the Rosenbergs' lawyers submitted additional material to Douglas. Intending to leave at 7:00 a.m. for the West, he tried to steer them to other Justices. Frankfurter and Jackson, however, refused to entertain any stay applications until Douglas ruled.[152] According to Jackson, the Justices had agreed at their final conference to deny further stay applications.[153] Douglas entertained a new stay application on the morning of Tuesday, June 16 from Fyke Farmer of Nashville and Daniel Marshall of Los Angeles, lawyers who

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Allen [Douglas's secretary] to Dilliard, June 19, 1953, Douglas Papers, Box 322, Folder "Dilliard, Irving File #2 1951–1958 & Irving Dilliard Papers, Western Historical Manuscript Collection, University of Missouri-St. Louis [hereinafter "Dilliard Papers"], Box 12, Folder 380 ("JUSTICE DOUGLAS WILL PROBABLY ARRIVE COLLINSVILLE SOMETIME TOMORROW NIGHT SATURDAY."); Letter from Douglas to Dilliard, June 21, 1953, Dillard Papers, Box 12, Folder 380 (postmarked from Ottumwa, Iowa).

150. Philip Dodd, *Supreme Court Bars Stay of Execution for Rosenbergs*, CHI. TRIB., June 16, 1953, at 1 (quoting Bloch on Douglas: "He did not deny [the plea] and he did not grant it. The judge was very polite. He was the perfect target."); Jack Steele, *Rosenberg Stay Denied, Douglas Gets Last Plea*, N.Y. HERALD TRIB., June 16, 1953, at 1 (same).

151. *See* Addendum – June 19, 1953, *supra* note 29, at 264 (Clerk of Court estimating argument lasted about an hour and a half); *cf.* Steele, *supra* note 150 (describing argument as "more than an hour"); Dodd, *supra* note 150 (describing argument as nearly an hour); Harold Willey Memorandum to File, undated, National Archives, Washington, D.C., Record Group 267, Box 305, Folder "1 Misc. June 1953 term (Rosenberg case): 4 of 4" (noting that Bloch, Finerty, and Sharp met with Douglas and "Govt. was not present").

152. *See* Addendum – June 19, 1953, *supra* note 29, at 264–66 ("Douglas had planned to leave for the West that morning at 7, but he told counsel that he would stay here as long as was required for him fully to consider and dispose of the case.").

153. With Willey and Frankfurter that morning, Jackson said: "it was perfectly understood yesterday at conference that in view of the Court's denial of habeas corpus no individual justice to whom application had been made would overrule the Court's determination." Addendum – June 19, 1953, *supra* note 29, at 266. Jackson's "perfectly understood" language, according to one account, indicated a conspiracy among the Justices to deny any further claims and that, by granting them a stay, Douglas had broken the pact. SHARLITT, *supra* note 39, at 70–74, 180–84. Sharlitt believed that Philip Elman confirmed this interpretation. *Id.* at 72–74; Reminisces of Philip Elman, Vol. 4, *supra* note 27, at 249 ("After all the successive petitions were denied, they all understood this was it, that every conceivable argument for the Rosenbergs had been presented, considered, and rejected, and they were not going to entertain further applications raising the same issues.").

were not even officially representing the Rosenbergs.[154] Farmer and Marshall, over the opposition of federal prosecutors, requested a stay based on a novel argument that the Rosenbergs had been tried and sentenced under the wrong statute, the Espionage Act of 1917, instead of the Atomic Energy Act of 1946. The Atomic Energy Act required proof of intent to injure the United States and permitted the death penalty only upon the recommendation of the jury; otherwise, the maximum sentence was twenty years. Douglas was intrigued. He recognized that this argument had not been raised before. Later that afternoon, he took the argument to Frankfurter, who offered no advice other than it "should be looked into."[155] Douglas also expressed concern about usurping Jackson's role as Circuit Justice, but Jackson instructed Douglas to finish deciding the stay application.[156]

Douglas worked into the night of June 16. His law clerk, Charles Ares, had left Washington to take the Arizona bar examination, so Douglas corralled Black's clerk, Melford "Buddy" Cleveland.[157] Douglas and Cleveland stayed at the Court until 11:00 p.m. combing the record for dates of key events in the alleged conspiracy to figure out if the Rosenbergs had been tried under the wrong statute.[158] Although the government alleged that they had passed atomic secrets in 1944 and 1945 prior to the passage of the Atomic Energy Act in 1946, the government also alleged that the conspiracy had lasted until 1950. "We found that the essence of the

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154. Judge Kaufman had rejected their arguments and their legal standing to make them, describing the two lawyers as "intruders . . . interlopers . . . reckless in . . . charges as to verge on contemptuousness . . . ." *The Last Appeal*, TIME, June 29, 1953; Jay Walz, *High Court Denies a Rosenberg Stay, New Plea Up Today*, N.Y. TIMES, June 16, 1953, at 1. At their May 2 conference, the Justices, except for Black and Frankfurter, had rejected their application to file "next friend" briefs with the Court. Burton's Docket Sheet, Burton Papers, Box 222, Folder "Dockets: Appellate Nos. 601–700"; *see* Harold Willey Memorandum, *supra* note 151 (indicating presence of three federal prosecutors, Bloch, Finerty, and Sharp, at Farmer and Marshall's oral argument in Douglas' chambers).

155. Addendum – June 19, 1953, *supra* note 29, at 267.

156. Memorandum from Robert H. Jackson to Justice Douglas, June 17, 1953, Douglas Papers, Box 234, Folder "Rosenberg v. United States: Motion to Vacate Stay".

157. Melford Cleveland's Notes, Douglas Papers, Box 234, Folder "Rosenberg v. United States Motion to Vacate Stay: Melford Cleveland's Notes"; Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 4.

Before leaving to take the Arizona bar, Ares asked Douglas "if the term was really over. [Douglas] said, 'I don't think anything else is going to happen.' " When Ares landed in Tucson, he saw newspaper headlines announcing Douglas's stay. Ares called Douglas from the airport and offered to skip the bar and take the next flight back to Washington. Douglas told him that one of Black's clerks was helping him. After the special term was over and Douglas left town, Ares returned to Washington to finish his clerkship. Douglas never discussed the case with him. Telephone Interview with Charles Ares, *supra* note 56.

158. *See* Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 4.

case, the guts of the case against the Rosenbergs was made up of episodes that occurred after this law had been amended, the most incriminating evidence against them," Douglas recalled fourteen years later.[159] Douglas believed that the Rosenbergs were guilty and did not want to grant the stay.[160] Yet he drafted an opinion based on the Atomic Energy Act argument doing just that.

With the executions two days away, Douglas felt the world's eyes upon him. "There were pickets around the White House and there were pickets around the pickets," Douglas recalled. "There were masses of people milling around the Courthouse. There were about two hundred cameramen and newspapermen in the hall waiting for me to make a ruling."[161] That night, Douglas departed the back entrance of the Court through the garage and drove with his book researcher and future wife Mercedes Davidson to Chief Justice Vinson's apartment at the Sheraton (Wardman) Park Hotel.[162] While Davidson waited in the car, Douglas revealed his intentions to the Chief Justice. Vinson spent about two hours trying to talk him out of it.[163] He said that Frankfurter had already dealt with this point in denying the Court's power to reduce a death sentence.[164] Douglas left Vinson's apartment, and, to avoid the limelight, had Davidson drop him off at the Hotel Statler.[165]

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159. *Id.*

160. *See id.* ("I had always felt from reading the record that the Rosenbergs certainly were guilty of some federal crime in connection with the attempt, at least, to transmit secrets to Soviet Russia . . . I did not want to grant the stay.").

161. *Id.* For a similar quote, *see* DOUGLAS, *supra* note 35, at 80.

162. On May 24, 1953, Sheraton purchased the Wardman Park Hotel, and two days later renamed it the Sheraton Park Hotel. *See Sheraton Co. Gets Control of Wardman and Carlton*, WASH. POST, May 25, 1953, at 1; *Wardman Park and Carlton Lose Names Under New Owner*, WASH. POST, May 27, 1953, at 25.

163. Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35. This meeting is not on Vinson's log, which lists a dinner at the Portuguese embassy at 8:00 p.m. on July 16, 1953, but the dinner would not have prevented Vinson from meeting with Douglas before or after his 11:00 p.m. meeting with Attorney General Brownell and Acting Solicitor General Robert Stern. Chief Justice's Log, May–Sept. 1953, July 16, 1953, Fred M. Vinson Collection, University of Kentucky, Margaret I. King Library [hereinafter "Vinson Collection"], Box, 299, Folder 13; *infra* note 166.

164. *See* Addendum – June 19, 1953, *supra* note 29, at 267; *see supra* text accompanying notes 60–62.

165. *See* Telephone Interview with Mercedes Eichholz (Apr. 2, 2008); DOUGLAS, *supra* note 35, at 80 ("I took a hotel and slept late."). Douglas's brother, Arthur, was president of the Statler Hotel chain, so Douglas frequently stayed there.

2. June 17: Douglas Grants Stay, Leaves for West

On Wednesday, June 17, at the Court, Vinson again tried to discourage Douglas from granting the stay because the new lawyers had no standing and the argument had been waived.[166] Black disagreed after reading Douglas's draft opinion, commenting that "[t]his point is very substantial" and "this opinion is sound."[167] Vinson encouraged Douglas to present the issue to the entire Court. Frankfurter was noncommittal. "Do, I said, what your conscience tells you, not what the Chief Justice tells you," he told Douglas. "Further, I said, I cannot advise you. Tete-a-tete conversation cannot settle this matter."[168] Douglas wanted to talk to Jackson and Burton, but Frankfurter insisted "this was a matter for [Douglas's] conscience."[169]

At noon, Douglas granted the stay. He assumed, as when any Justice granted a stay, that the other Justices would wait for lower courts to address the underlying legal issue before the Court reviewed it. By the time the district court and the Second Circuit addressed the Atomic Energy Act argument, Douglas thought, the Court would be back in session in October.[170] After granting the stay, Douglas immediately left by car to visit Dilliard in Illinois. Frankfurter, thinking the same thing, drove to former Justice Owen Roberts's farm in Chester County, Pennsylvania.

3. June 16-17: Vinson's Machinations

Vinson was having none of it. The previous night, he had already begun making arrangements that would keep the Rosenbergs' executions on schedule in case Douglas granted a stay. On Tuesday June 16, Vinson had met secretly with Brownell and Acting Solicitor General Robert L. Stern at 11:00 p.m. at Vinson's apartment. Brownell had asked to recall the Court and hold the third special term in its history.[171] On Wednesday, June 17, Vinson and Brownell met

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166. This June 17 Douglas-Vinson meeting is not recorded on Vinson's log. Vinson did not arrive at the Court until 11:50 a.m. on Wednesday, June 17, 1953, consistent with late night meetings with Brownell/Stern and Douglas. Chief Justice's Log, May–Sept. 1953, June 17, 1953, *supra* note 163.

167. Letter from Hugo Black to William Douglas, June 17, 1953, Douglas Papers, Box 234, Folder "Rosenberg v. United States: Motion to Vacate Stay"; *cf.* Addendum – June 19, 1953, *supra* note 29, at 5 (quoting Black as describing Douglas's opinion as an "enduring document").

168. Addendum – June 19, 1953, *supra* note 29, at 268.

169. *Id.*

170. Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 4.

171. *See* Robert L. Stern, *The Rosenberg Case in Perspective – Its Present Significance*, 1990 J. SUP. CT. HIST. 79, 82–83 (recalling Brownell and Vinson at Vinson's apartment to ask Vinson

again from 12:25 p.m. to 1:10 p.m. in Vinson's chambers.[172] At 2:00 p.m., the Justice Department filed a motion requesting a special term so the Justices could vacate Douglas's stay. Fifteen minutes later, Vinson began conferring with three Justices in the building, Burton, Clark, and Jackson. Their conversation lasted much of the afternoon.[173] Vinson's chief law clerk, Jim Paul, recalled being summoned to Vinson's office after Douglas's stay. "I went in and

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to reconvene Court, but not remembering if meeting was before or after Douglas's stay). The Brownell-Vinson meeting is memorialized in a fourth-hand account in an FBI memo based on what Assistant U.S. Attorney (AUSA) James B. Kilsheimer III told Judge Irving Kaufman, who told the FBI's New York supervisor Tom McAndrews that "last night on the recommendation of Justice Jackson, the Attorney General and Chief Justice Vinson met at 11:00 P.M. to determine whether to call the complete Court into session . . . ." FBI Memorandum from Belmont to Ladd, June 17, 1953, *in* THE KAUFMAN PAPERS, *supra* note 40. Years later, Brownell recalled: "Vinson was hot under the collar. He was mad and said that what Douglas was doing was wrong, that he should not have even considered a stay. I asked Vinson to convene a special session of the Court." NEWMAN, *supra* note 39, at 422.

There is no evidence, implied by prior accounts, that Jackson "arranged," much less attended, the Vinson-Brownell meeting. *Compare* Parrish, *Cold War Justice*, *supra* note 28, at 835 (claiming Jackson "arranged" the meeting based on FBI documents but citing only the June 17, 1953 FBI memo), *and* Parrish, *Revisited*, *supra* note 28, at 616 (placing Jackson at the meeting), *and* Cohen, *supra* note 30, at 247–48 (alleging Jackson "arranged" meeting and placing him there), *and* SIMON, *supra* note 39, at 308 (alleging Jackson "arranged" meeting according to FBI documents), *with* JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY 250 (2002) (stating that "contrary to what many scholarly sources have reported, Jackson was definitely not present when they met with the chief justice" (citing Stern, *supra*, at 83)). Stern does not recall Jackson's presence or involvement. *See* Stern, *supra*, at 83 ("I have no recollection that Justice Jackson had previously spoken to the Attorney General or to the Chief Justice on the subject, but I am skeptical. I might not have known about that. I am quite sure Jackson was not at the meeting."). Neither the FBI's fourth-hand account, FBI Memorandum from Belmont to Ladd, June 17, 1953, *in* THE KAUFMAN PAPERS, *supra* note 40, nor Brownell's interview with Roger Newman indicates that Jackson was there. Brownell did not list the meeting in his appointment book. Brownell 1953 Appointment Book, June 16–18, 1953, Brownell Papers, Eisenhower Presidential Library, Box 253. Nor does Jackson's appointment calendar, both in his secretary's shorthand and in plain English. Jackson Appointment Calendar, June 16–17, 1953, Jackson Papers, Box 207, Folder 3 "Appointment Calendars 1953, Jan.–June".

The FBI memo, according to an interview with its original source, contains at least four levels of hearsay and is of dubious validity. It was based on "some hearsay" AUSA Kilsheimer heard when he saw Jackson in the Court building. Telephone Interview with James B. Kilsheimer III (Oct. 3, 2008). "I did see Justice Jackson while I was down there," he recalled. Kilsheimer said that the memo "does not" reflect his recollection of what Jackson said. When asked what Jackson said, however, Kilsheimer "declined to answer." "I have no knowledge of who had any meeting with Vinson," he said, but declined to elaborate. *Id.*

Despite the difficulty of unraveling multiple layers of hearsay, the comment that Jackson "was very upset about the indecision of Douglas" and "felt that the whole theory of listening to Farmer's motion was ridiculous and Douglas should have turned it down" probably came from Kilsheimer's encounter with Jackson in the Court building, not at the meeting between Vinson and Brownell. FBI Memorandum from Belmont to Ladd, June 17, 1953, *supra*.

172. Chief Justice's Log, May–Sept. 1953, June 17, 1953, *supra* note 163.

173. *Id.* (recording meeting with Jackson, Burton, and Clark from 2:15 to 3:30 p.m. and 4:45 to 5:50 p.m.); Burton Diaries, June 17, 1953, *supra* note 84; Jackson Appointment Calendar, June 17, 1953, *supra* note 171 (mentioning Vinson, Jackson, and Burton but not Clark).

Jackson was with him," Paul said. "It was obvious that both were furious at this development."[174] Vinson called Black at his Alexandria, Virginia, home, spoke twice with Reed in Durham, North Carolina, and three times with Minton in New Albany, Indiana.[175] Only Black objected to a special term. At 6:00 p.m., Vinson ordered the special term and scheduled three hours of oral argument for the next day.[176]

Back at his apartment around 7:00 p.m., Vinson called Roberts's farm and asked Frankfurter to return to D.C. immediately.[177] Frankfurter and his wife Marion had already closed their Washington home for the summer. Upon returning, Frankfurter stayed Wednesday night at the home of his first law clerk, Joseph Rauh. Sitting on Rauh's porch that evening, Frankfurter lamented every aspect of *Rosenberg*: Irving Kaufman, "unjudicious in both the manner and the substance of the sentencing"; "Brownell and Vinson's haste"; and Douglas's repeated refusals to hear oral argument followed by his eleventh-hour "grandstand play."[178]

Vinson was unable to contact Douglas.[179] At dusk, Douglas had reached Uniontown, Pennsylvania, about fifty miles south of Pittsburgh. After pulling into a motel, he heard about the special term on the car radio. He called his office to confirm the news and instructed his secretary to inform Vinson that he would return in time for Thursday's argument.[180] Douglas returned to the motel to collect his bags. In an improbable tale,[181] Douglas claimed that a crowd of Eastern European coal miners and their families greeted him by putting him on their shoulders and regaling him for staying the

174. Telephone Interview with James C.N. Paul (Nov. 25, 2008).

175. Chief Justice's Log, May–Sept. 1953, June 17, 1953, *supra* note 163.

176. Stay Announcement, June 17, 1953, Vinson Collection, Box 284, Folder 6; Record Group 267, Box 305, Folder "1 Misc. June 1953 Term (Rosenberg case): 4 of 4".

177. Chief Justice's Log, May–Sept. 1953, June 17, 1953, *supra* note 163 (indicating that Vinson left the office at 6:15); Addendum – June 19, 1953, *supra* note 29, at 268.

178. Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 225 (1990); Joseph L. Rauh, Jr., *Felix Frankfurter: Civil Libertarian*, 11 HARV. C.R.-C.L. 496, 514 (1976); Parrish, *Cold War Justice*, *supra* note 28, at 835 n.84.

179. *See* Burton Diaries, June 17, 1953, *supra* note 84.

180. Letter from William O. Douglas to Fred Rodell, at 1, June 25, 1953, Fred Rodell Papers, Haverford College Library, Box 1, Folder 48) ("just happened to hear about the Special Term by car radio!!!"); Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 4–5; DOUGLAS, *supra* note 35, at 81. The Uniontown motel manager confirmed that Douglas heard about the special term on the radio. *Douglas, in Pennsylvania, is Returning for Session*, N.Y. TIMES, June 18, 1953, at 16; Bert Andrews, *Court to Act On Spy Stay By Douglas*, N.Y. HERALD TRIB., June 18, 1953, at 1.

181. *See supra* note 34.

executions.[182] After an hour, he drove to Pittsburgh, spent Wednesday night at the William Penn Hotel,[183] and boarded an early morning flight to Washington.[184]

Douglas was outraged that Vinson had not tried to reach him or contact the Pennsylvania police "though my route and destination were known," he wrote his friend and former student, Yale law professor Fred Rodell. "The plan was to hold court without me!!"[185] Nor did Douglas understand the rush to hear argument on Thursday June 18, rather than a few days later. "Did the Rosenbergs have to die that fast?" Douglas asked.[186]

Privately, Vinson apparently answered Douglas's rhetorical question—either in a late-night phone call on Wednesday, June 17 or in a four-minute meeting on Thursday, June 18 in Vinson's chambers before the Court's conference at 11:45 a.m.[187] No record exists of what

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182. Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 5.

183. *See* MURPHY, *supra* note 34, at 324.

184. Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 5; *see also* James E. Warner, *Douglas, Calm Amid Furor, Calls Stay a Legal Routine*, N.Y. HERALD TRIB., June 19, 1953, at 10 (reporting Douglas arrived in Washington at 9:15 a.m.).

185. Letter from William O. Douglas to Fred Rodell, at 1, June 25, 1953, *supra* note 180. Douglas insists he gave his route west to Vinson. *See* DOUGLAS, *supra* note 35, at 81; *cf.* Burton Diaries, June 17, 1953, *supra* note 84 (Vinson "is unable to locate Douglas – who left by auto – not leaving even what route he was taking").

According to *St. Louis Post-Dispatch* columnist Marquis Childs, Douglas was with his book researcher and future wife, Mercedes Davidson. Vinson had contacted the Pennsylvania state police but worried they would catch Douglas with his "mistress" in "most disturbing circumstances." Interview by Donald Shaughnessy with Marquis W. Childs, at 84, *supra* note 137; CHILDS, *supra* note 3, at 49 (describing Douglas as "with a friend"). Mercedes Eichholz (formerly Davidson) does not remember being in Pennsylvania with Douglas. Telephone Interview with Mercedes Eichholz, *supra* note 165. The Uniontown motel owner also said Douglas was "traveling alone" and "signed the motel register as 'William Douglas.' " *Douglas, in Pennsylvania, is Returning for Session*, *supra* note 180, at 16; *see also* Warner, *supra* note 184, at 10 (describing Douglas as "[t]raveling alone by car" and showing him departing the airplane alone); *Douglas Returns to Capital*, ST. LOUIS POST-DISPATCH, June 18, 1953, at 6A (depicting Douglas departing airplane alone). Douglas's expense reports indicate that he sought reimbursement for a single airplane ticket from Pittsburgh to Washington and then back to Pittsburgh to retrieve his car. *See* Douglas' Expense Report Douglas Papers, Box 234, Folder "Rosenberg v. United States: Motion to Vacate a Stay".

Childs and Douglas clashed over Childs's column on Douglas's vote to deny oral argument about Jackson's June 13 stay. *See supra* text accompanying notes 138–141. Five years later, Douglas still held a grudge. Douglas saw him at an event and boasted to nearby patrons that he was going to sue Childs for libel over a Childs column about *Rosenberg*. Interview by Donald Shaughnessy with Marquis W. Childs, *supra* note 137, at 85–86.

186. Letter from William O. Douglas to Fred Rodell, June 25, 1953, *supra* note 180, at 1.

187. *See* Chief Justice's Log, May–Sept. 1953, June 17–18, 1953, *supra* note 163 (indicating June 17 phone call from Vinson's apartment to Douglas and June 18 Douglas-Vinson meeting for four minutes from 11:41–11:45 a.m.).

was said in those meetings. But according to Mercedes (Davidson) Eichholz, Vinson privately told Douglas: "I'm sorry, but the White House has sent word that they have to fry."[188] Eichholz recalled Douglas as "crestfallen."[189] During his Wednesday-night phone call with Vinson, Douglas may have even cried.[190]

F. A Special Term for a Special Case

At 11:45 a.m. on Thursday June 18, the Justices met for twenty-five minutes in a pre-argument conference. Hugo Black raised the issue that the Chief Justice had no authority to convene a special term. He was not the manager of a baseball team, but merely one of nine votes. A majority of the Justices, as they had done in *Ex Parte Quirin*, had to vote to call a special term. When pressed by Black, Vinson knew from his law clerks' memo that his actions were unprecedented.[191] In conference, Vinson justified his decision based on conversations the previous day with Clerk of the Court Harold Willey.[192] "Well," Vinson apparently told the Justices, "Willey said I could."[193] Douglas agreed with Black but did not object to oral argument because the Chief Justice had the power to call the Court together and put the special term to a vote.[194] Over Black's objection, the Justices proceeded twelve minutes late to oral argument.[195]

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188. Telephone Interview with Mercedes Eichholz, *supra* note 165. Eichholz recalls the Vinson-Douglas conversation at Vinson's apartment *after* Douglas had granted the stay. *Id.* More likely, it occurred on the phone on Wednesday night or during their four-minute meeting late Thursday morning. *See supra* text accompanying note 187. Eichholz was working in Douglas's chambers at the time while researching Douglas's books.

189. Telephone Interview with Mercedes Eichholz, *supra* note 165.

190. SIMON, *supra* note 39, at 308 (quoting Eichholz that Vinson informed Douglas of the special session "in the middle of the night" and that Douglas "wept"). *Id.* ("He was deeply hurt when Vinson pulled this conference on him," Eichholz said. "He was convinced he was right.").

191. *See* Application of the Attorney General, at 1, Vinson Collection, Box 284, Folder 6 (writing Vinson memo about *Quirin* procedure).

192. Chief Justice's Log, May–Sept. 1953, June 17, 1953, *supra* note 163 (meeting with Willey from 12:00–12:10 p.m., from 1:15–2:15 p.m., and from 5:30–5:50 p.m.).

193. Telephone Interview with James C.N. Paul, *supra* note 174 (recalling comments from Frankfurter clerk Alex Bickel, who probably heard it from Frankfurter). "Bickel thought this was hilarious," Paul recalled. "He kept drilling it in my ear. He would imitate the chief's voice and everything." *Id.*

194. *See* Letter from William O. Douglas to Fred Rodell, June 25, 1953, *supra* note 180, at 1; Transcript of Conversations between William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 5.

195. Rosenberg v. United States, 346 U.S. 273, 296 (1953); *infra* note 199.

1. Noon June 18: Oral Argument

Oral argument was a hurried sideshow—five lawyers (one for the government, two for the Rosenbergs' "next friend," two for the Rosenbergs), an Atomic Energy Act expert sitting in the gallery in a borrowed sport jacket, nearly three hours of argument, one day of preparation, and no real briefs.[196] Acting Solicitor General Robert L. Stern, coauthor of the authoritative treatise *Supreme Court Practice* and arguing on the government's behalf, recalled Black commenting that Stern "did not appear to be as thoroughly prepared as [Stern] normally was."[197] Speaking "in a low voice,"[198] Stern argued that all the overt acts of atomic espionage occurred in 1944 and 1945, and if the government had tried the Rosenbergs under the Atomic Energy Act of 1946 it would have been "laughed out of court."[199] Stern urged the Justices to vacate Douglas's stay.

Then the real fireworks began. Daniel Marshall, one of two lawyers representing Irwin Edelman, an expelled Communist, professional soapbox orator, pamphleteer, and "next friend" of the Rosenbergs,[200] argued that the Court was acting in "unseemly haste"[201] and that a justice of the peace would not call "the meanest

196. *See* Interview by Norman Silber with Philip Elman, *supra* note 27, at 251 (describing oral argument as "circus, an absolute circus"); NORMAN I. SILBER, WITH ALL DELIBERATE SPEED 217 (2004) (same). There are no audio recordings or transcripts of the argument. For Elman's recollections about the expert and sport jacket, *see infra* text accompanying note 209.

197. Stern, *supra* note 171, at 85 (recalling Black's comment and admitting "[t]hat, of course, was correct, since no one had known until the day before that there would be an argument held."). "Poor Bob Stern," Elman recalled. "As Acting Solicitor, he had to get up and argue this point, even though the government hadn't had a chance to research it fully." Interview by Norman Silber with Philip Elman, *supra* note 27, at 250; SILBER, *supra* note 196, at 217. With one day's notice, the Rosenbergs' lawyers also lacked time to research the Atomic Energy Act argument. *See infra* text accompanying note 206. Black described oral argument as "wholly unsatisfactory." *Rosenberg*, 346 U.S. at 296 (Black, J., dissenting).

198. George H. Hall, *Supreme Court Meets on Pleas By U.S. To Vacate Rosenberg Stay*, ST. LOUIS POST-DISPATCH, June 18, 1953, at 1. Before the Term, Jackson described Stern as "a sincere, if uninspired, advocate." Letter from Robert Jackson to Felix Frankfurter, Aug. 16, 1952, FFHLS, Pt. III, Reel 2, at 253.

199. Bert Andrews, *Court Meets Again on Spies Today*, N.Y. HERALD TRIB., June 19, 1953, at 1 ("[T]he Justice Department would have been the laughing stock of the legal profession. It would have been laughed out of court."); Philip Dodd, *Highest Court Defers Ruling Until Today*, CHI. TRIB., June 19, 1953, at 1; *cf. Rosenberg*, 346 U.S. at 311 (Douglas, J., dissenting) ("laughed out of court"); Luther A. Huston, *Court Hears Spy Debate; Rules Today*, N.Y. TIMES, June 19, 1953, at 1 ("laughing stock"); Joseph Paull, *Rosenbergs Get Respite As Justices Weigh Fate*, WASH. POST, June 19, 1953, at 1 ("laughed us out of court").

200. *Spy Case Limelight Shines on Pershing Square Orator*, L.A. TIMES, June 18, 1953, at 2; *The Last Appeal*, *supra* note 154.

201. Dodd, *supra* note 199.

pimp" into court on such short notice.[202] Jackson asked if Edelman had brought a vagrancy case that the Court had decided six months earlier.[203] "Let's get this straight," Marshall said, banging his fist on the podium. "It was a free-speech case."[204] Vinson admonished him: "Don't let your temperature rise . . . ."[205] Burton privately described Marshall's argument as "inadequate."[206] Fyke Farmer disagreed with his co-counsel Marshall, said he was ready to argue, and contended that the Atomic Energy Act voided judge-imposed death sentences in this case.

Emanuel Bloch, one of two Rosenberg lawyers arguing that day, encouraged the Court to allow the Atomic Energy Act argument to be heard by lower courts. Bloch said full briefing and argument on this complex issue would require another month of research.[207] Bloch was so ill-prepared to answer one of the Justices' questions about the Atomic Energy Act on such short notice that he pointed into the gallery and suggested that they ask James R. Newman. Newman was one of the Senate counsel who had drafted the Atomic Energy Act and had written a 1947 *Yale Law Journal* article about the statute.[208] He had rushed from Cape Cod for the argument and was sitting in the gallery in a sport jacket borrowed from Assistant Solicitor General Philip Elman.[209]

Had Newman been allowed to testify, he would have told the Justices that the Atomic Energy Act argument was more complicated than who did what when. On its face, the Atomic Energy Act rejects any conflict with the Espionage Act: "This section shall not exclude the applicable provisions of any other laws, except that no government agency shall take any action under such other laws inconsistent with the provisions of this section."[210] But, as Newman wrote:

> It is reasonable to suppose that Congress did not intend to give the prosecuting attorney the option of moving under the Espionage Act instead of the Atomic Energy Act where

202. *The Last Appeal*, *supra* note 154.

203. Jackson was referring to *Edelman v. California*, 344 U.S. 357 (1953).

204. *The Last Appeal*, *supra* note 154.

205. *Id.*; Huston, *supra* note 199; *cf.* Andrews, *supra* note 199 (describing Jackson as smiling and asking Marshall: "How did you get into the act?").

206. Burton Diaries, June 18, 1953, *supra* note 84.

207. Dodd, *supra* note 199; Paull, *supra* note 199.

208. James R. Newman, *Control of Information Relating to Atomic Energy*, 56 YALE L.J. 769 (1947).

209. Interview by Norman Silber with Philip Elman, *supra* note 27, at 250–51; SILBER, *supra* note 196, at 21.

210. Atomic Energy Act of 1946, ch, 724, 60 Stat. 755, 768 (1946) (current version at 42 U.S.C.A. § 2011 et seq. (2006)).

> an offense involving information relating to atomic energy is specifically described in the latter and only broadly and generically encompassed by the former.[211]

The Atomic Energy Act, Newman wrote, did not "wholly supplant" the Espionage Act, but it did not "merely supplement[]" it either.[212] Newman recognized that the Court had looked with disfavor upon the idea of repeals by implication.[213] But the "differing penalty provisions," he had concluded in 1947, "can only be resolved by judicial decision."[214] At oral argument, however, Newman never said a word. The Rosenbergs' fate remained in the hands of their lawyers.

John Finerty, the Rosenbergs' other counsel, took a more direct and less legalistic approach; he argued that the Rosenbergs were innocent and attacked the prosecution as "crooked."[215] Finerty's argument that federal prosecutors had knowingly used perjured testimony had gotten lost in the morass of an unsatisfying debate about federal statutory interpretation. He raised the perjury argument again and then tried to shame the Justices into voting his way. "If you lift the stay," Finerty warned them, "then . . . God save the U.S. and this honorable court . . . ."[216]

During a half-hour lunch break, Vinson ate with Black, Reed, Douglas, Burton, Clark, and Minton. Only Frankfurter and Jackson did not join them.[217] Court resumed for another hour. Stern once again encouraged the Justices to vacate the stay. At 3:32 p.m., the Justices adjourned to conference.[218]

Douglas knew that the lifting of his stay was a fait accompli. Vinson's comment about the White House believing that the Rosenbergs "had to fry" surely tipped him off. Douglas also suspected that Vinson had lined up five votes to vacate the stay "in advance of argument and in advance of any exposure or explication of the point!!"[219] This was no small feat. The Court had never voted to vacate the stay of a single Justice. It had always waited for lower courts to hear argument and rule on the merits of the underlying legal issue. Frankfurter agreed with Douglas: "The fact is that all minds were

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211. Newman, *supra* note 208, at 797.

212. *Id.* at 798.

213. *Id.* at 798–99 n.48 (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).

214. *Id.* at 799.

215. Huston, *supra* note 199; Paull, *supra* note 199; *The Last Appeal*, *supra* note 154; *see also* Andrews, *supra* note 199 (noting Finerty denounced the federal attorney who prosecuted the case).

216. *The Last Appeal*, *supra* note 154.

217. Burton Diaries, June 18, 1953, *supra* note 84.

218. Andrews, *supra* note 199.

219. Letter from William O. Douglas to Fred Rodell, June 25, 1953, *supra* note 180, at 1–2.

made up as soon as we left the Bench—indeed, I have no doubt from some remarks made to me, before we met on it!"[220]

Douglas and Frankfurter were right: Vinson had five votes. At conference, Vinson spoke first. He said the Atomic Energy Act argument could have been raised earlier in the case, the Court should not set a precedent of allowing someone like Edelman to inject himself into a case, and the overt acts preceded the passage of the Atomic Energy Act.

Black believed that further discussion was "futile."[221] He needed more information to make a decision, and he cautioned that the Court was engaged in a "race with death."[222] "This will be a black day for the Court," Black said. "I plead that it not be decided today."[223] Black believed that the Court should apply the statute with a lesser penalty because the Rosenbergs were charged with a conspiracy from 1944 to 1950, before and after the Atomic Energy Act was passed.[224] Reed incorrectly claimed the Court had overruled a single Justice in the past, and he argued that the Rosenbergs' attorneys had failed to object to the indictment under the Espionage Act. "I see no occasion to delay if [the] majority [is] satisfied," Reed said.[225]

Frankfurter disagreed with Black and Reed, said further discussion was "not futile," and then launched into a lengthy diatribe about the case.[226] Frankfurter's voice was so loud at one of the final conferences that Vinson's law clerks could hear him "screaming" on the other side of the wall in Vinson's chambers.[227] The Court, Frankfurter believed, had no authority to overrule Douglas's stay, and an indictment under the wrong statute cannot be waived. "It is never

220. Frankfurter wrote this on Vinson's draft claiming that the Justices "deliberated in conference for several hours." FFHLS, Pt. I, Reel 70, at 413.

221. Burton Conference Notes, at 1, June 18, 1953, Burton Papers, *supra* note 50, Box 238, Folder 4 [hereinafter Burton Conference Notes].

222. *Id.*; *cf.* Clark Conference Notes, at 2, June 18, 1953, Clark Papers, Box A26, Folder 9 (describing as "race for death") [hereinafter Clark Conference Notes]; *accord* THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 606–09 (Del Dickson ed., 2001) (recreating June 18 conference from Clark's notes).

223. Clark Conferences Notes, *supra* note 222, at 3.

224. *Id.*

225. *Id.* at 4; *see* Burton Conference Notes, *supra* note 221, at 2. For Reed's incorrect assertion that the Court had overruled the stay of a single Justice, see *infra* note 249.

226. Burton Conferences Notes, *supra* note 221, at 3; *see* Clark Conference Notes, *supra* note 222, at 5.

227. Interview by Terry L. Birdwhistell with William Oliver, at 9, Feb. 26, 1975, Fred Vinson Oral History Project, Margaret I. King Library, University of Kentucky.

too late to [dis]allow a sentence to be carried out where there is no consent in law for it," Frankfurter said.[228]

Douglas said if the Court thought that he had "acted for insubstantial reasons," then the stay should be set aside and there was no reason for delay.[229] Jackson said there was "no substantial question."[230] Burton said the Court "should go along with Bill [Douglas] —perhaps we should"—but he believed the government was right.[231] Minton argued that there was "no conflict," and that Bloch and Finerty, the Rosenbergs' own lawyers, did not think the issue was "substantial."[232] Clark said it would be "wrong to hold up [the case] any longer."[233]

After each Justice had spoken, the Court cast votes on three issues. The Justices voted five (Vinson, Reed, Jackson, Clark, and Minton) to three (Black, Douglas, and Burton) (with Frankfurter passing) against allowing the stay to stand so lower courts could consider the issue. They voted five (Vinson, Reed, Jackson, Clark, and Minton) to four (Black, Frankfurter, Douglas, and Burton) against a hearing on the merits. And they voted six (Vinson, Reed, Jackson, Burton, Clark, and Minton) to three (Black, Frankfurter, Douglas) to vacate the stay.[234] After nearly three hours, the conference adjourned. Justice Burton returned to the courtroom at 6:29 p.m. and announced that the Court would recess until noon the following day.[235]

2. Noon June 19: Court Rules Against the Rosenbergs

At 10:00 a.m. on Friday, June 19, Vinson met in his chambers with Reed, Jackson, Burton, Clark, and Minton to discuss the majority and concurring opinions vacating Douglas's stay. Forty-five minutes later, all the Justices met in conference to discuss the protocol for

228. Clark Conference Notes, *supra* note 222, at 6; *see* Burton Conference Notes, *supra* note 221, at 2–3.

229. Clark Conference Notes, *supra* note 222, at 6; *see* Burton Conference Notes, *supra* note 221, at 4.

230. Clark Conference Notes, *supra* note 222, at 7; *see* Burton Conference Notes, *supra* note 221, at 4–5.

231. Clark Conference Notes, *supra* note 222, at 7.

232. *Id.* at 7–8; *see also* Burton Conference Notes, *supra* note 221, at 5 ("not a hasty act").

233. Burton Conference Notes, *supra* note 221, at 5.

234. *Id.* at 7; Handwritten Notes and Docket Sheet, June 18, 1953, Douglas Papers, Box 222, Folder "Administrative Docket Book #501–701"; Handwritten Notes, FFHLS, Pt. I, Reel 70, at 245–48. After voting with the minority to allow the stay to stand and for a hearing on the merits, Burton voted with the majority to vacate the stay because, although he wanted to give the Rosenbergs an opportunity to be heard, he agreed with the government on the merits.

235. Burton Diaries, June 19, 1953, *supra* note 84; Andrews, *supra* note 199, at 10; Huston, *supra* note 199, at 1; Paull, *supra* note 199, at 2.

announcing their opinions.[236] The Court convened at noon. Vinson, putting on his glasses, read "in a low voice"[237] a short per curiam opinion announcing the Court's decision, vacating the stay, and ruling that the Atomic Energy Act did not supersede the Espionage Act. Vinson's majority opinion would not come out for nearly another month.[238]

Jackson and Clark released their concurring opinions later that day. Jackson's opinion said the overt acts of espionage preceded the Atomic Energy Act and could not be charged under the act because of the Constitution's Ex Post Facto Clause. Nor did he believe that the Atomic Energy Act superseded the Espionage Act.[239] Jackson, as he had done at oral argument, denigrated the "next friend" counsel, Marshall and Farmer, and complimented the Rosenbergs' counsel, Emanuel Bloch.[240] Clark's opinion emphasized that "[s]even times now have the defendants been before this Court" and described the Court's "most painstaking consideration" of the case.[241] For Clark, two years of litigation were long enough: "To permit our judicial processes to be used to obstruct the course of justice destroys our freedom."[242]

After a nod from Vinson, Douglas spoke next. With "his voice emotion-filled and cracking,"[243] Douglas read from his dissent that since the prosecution proved a conspiracy to disclose atomic secrets that occurred before and after the passage of the Atomic Energy Act,

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236. *Compare* Burton Diaries, June 19, 1953, *supra* note 84 (listing five Justices and saying the conference began at 10:45 a.m.), *with* Chief Justice's Log, May–Sept. 1953, June 19, 1953, *supra* note 163 (listing same five Justices and saying the conference began at 11:00 a.m.).

237. *Last-Minute Appeals Fail Happy Couple*, L.A. TIMES, June 20, 1953, at 4; *cf.* Bert Andrews, *Court and Eisenhower Ended Spies' Last Hope*, N.Y. HERALD TRIB., June 20, 1953, at 4 (describing Vinson as speaking in "an even tone"). *See* Luther A. Huston, *Six Justices Agree*, N.Y. TIMES, June 20, 1953, at 1; Joseph Paull, *Fate of 2 Sealed in Final Hour; Justice Disclaim 'Indorsing' Doom*, WASH. POST, June 20, 1953, at 1; *Rosenbergs Die for Spying*, CHI. TRIB., June 20, 1953, at 1.

238. *See* Rosenberg v. United States, 346 U.S. 273, 276–77 (1953) (indicating the date of the majority opinion as July 16, 1953); *infra* note 290 (noting Vinson did not often write his own opinions and was likely influenced by Jackson).

239. *See* 346 U.S. at 290 (Jackson, J., concurring).

240. Jackson referred to the Rosenbergs' counsel as "responsible and authorized" and "able and zealous." *Id.* at 290, 292. He referred to Edelman's counsel as "unauthorized" and their intervention created a precedent that "presents a threat to orderly and responsible representation of accused persons and the right of themselves and their counsel to control their own cases." *Id.* at 291–92; *see also* Andrews, *supra* note 199 (quoting Jackson at oral argument praising Bloch and denigrating Marshall).

241. *Rosenberg*, 346 U.S. at 293 (Clark, J., concurring).

242. *Id.* at 296.

243. Paull, *supra* note 237; *cf.* Andrews, *supra* note 237 (describing Douglas as speaking "with considerable emotion").

the Rosenbergs could have been sentenced to death only by a jury.[244] And when two criminal statutes conflict, the lesser sentence prevails.[245] "Before the present argument I knew only that the question was serious and substantial. Now I am sure of the answer," Douglas said. "I know deep in my heart that I am right on the law."[246]

Black spoke next, reading from his dissent in a "high-pitched drawl."[247] Black's opinion described oral argument as "wholly unsatisfactory" and said "the time has been too short for me to give this question the study it deserves."[248] Black said the Court lacked the power to vacate Douglas's stay and correctly described its actions as "unprecedented."[249] Black agreed with Douglas that there were "substantial grounds" that the defendants had been sentenced under the wrong statute because the alleged conspiracy took place from 1944 to 1950.[250] Black noted his earlier questions about the fairness and constitutionality of the trial and that "the practice of some of the states to require an automatic review by the highest court of the state in cases which involve the death penalty was a good practice."[251] He observed that "this Court has never reviewed this record and has never affirmed the fairness of the trial below. Without an affirmance of the fairness of the trial by the highest court of the land there may always be questions as to whether these executions were legally and rightfully carried out."[252]

Frankfurter, who had instructed Vinson to read a short paragraph describing the statutory issues as "complicated and

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244. *Rosenberg*, 346 U.S. at 311 (Douglas, J., dissenting).

245. *Id.* at 312. The rule of lenity interprets ambiguous criminal statutes in favor of the accused. *See* Dan M. Kahan, *Federal Common Law Crimes*, 1994 SUP. CT. REV. 345; Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004).

246. *Rosenberg*, 346 U.S. at 313 (Douglas, J., dissenting).

247. Paull, *supra* note 237.

248. *Rosenberg*, 346 U.S. at 296 (Black, J., dissenting).

249. *Id.* at 297 (arguing that government's statutory authority does not support overturning Douglas's stay). Black was right. Reed's authority, *Johnson v. Stevenson*, 335 U.S. 801 (1948), was not on point. In *Johnson*, the Court reviewed Black's order stopping a federal hearing to examine ballots in Lyndon Johnson's 1948 senatorial primary victory over Coke Stevenson, but the Court declined to modify the order. The *Rosenberg* majority conceded as much: "It is true that the full Court has made no practice of vacating stays issued by single Justices, although it has entertained motions for such relief." *Rosenberg*, 346 U.S. at 286. Vinson's law clerks, Jim Paul and Bill Oliver, had written him a memo concluding that full Court review of Douglas's stay "will set a bad precedent." Application of the Attorney General, *supra* note 191, at 3.

250. *Rosenberg*, 346 U.S. at 298 (Black, J., dissenting).

251. *Id.* at 300–01.

252. *Id.* at 301.

novel,"[253] was still working on his dissent when the Court announced its decision. Released three days later, Frankfurter's dissent contended that, according to Judge Kaufman's jury instructions, the government had alleged a conspiracy to steal atomic secrets, which, under the indictment, had lasted from 1944 to 1950.[254] The government, Frankfurter argued, could have charged a conspiracy ending before the Atomic Energy Act had been passed.[255] He referred to Newman's 1947 *Yale Law Journal* article that the conflict over the penalty provisions must be "resolved by judicial decision."[256] The Court, Frankfurter believed, needed more time to review the record and legislative materials in order to make the proper statutory interpretation. Frankfurter did not say he agreed with the Atomic Energy Act argument, but he wrote: "I am clear that the claim had substance and that the opportunity for adequate exercise of the judicial judgment was wanting."[257]

Frankfurter acknowledged the "pathetic futility" of writing about the case three days after the fact. "But history also has its claims. . . . Only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain. . . . Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism."[258] Frankfurter's former clerk Philip Elman, disillusioned with the Court because of the way it had handled *Rosenberg*, believed that Frankfurter wrote those final words for former clerks like him. Frankfurter was telling them: "This isn't the end" and "[D]on't lose faith in the process of law"; there will be another day.[259]

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253. Announcement made by C.J. on behalf of FF, June 19, 1953, Vinson Collection, Box 284, Folder 6; *Rosenberg*, 346 U.S. at 289, 302 (Frankfurter, J., dissenting); Andrews, *supra* note 237 (describing Vinson as reading on Frankfurter's behalf).

254. *Rosenberg*, 346 U.S. at 303–04 (Frankfurter, J., dissenting).

255. *Id.* at 304.

256. *Id.* at 307–09 (quoting Newman, *supra* note 208, at 799).

257. *Id.* at 310.

258. *Id.*

259. Elman recalled:

> Frankfurter wrote a little dissent in which he was writing really to me and to other friends of his, former law clerks, whose whole faith in the Supreme Court had been shaken. We knew the Supreme Court was one institution that worked the way it was supposed to work, where people got a fair shake, where equal justice under law was more than a slogan. This was our Court, the Supreme Court of the United States, for which we had feelings of admiration and closeness. And here the whole thing was falling down and we

As Vinson was about to adjourn the Court, Fyke Farmer yelled, "[M]ay it please the court."[260] The Court deferred to the Rosenbergs' designated counsel, Emanuel Bloch, who moved for another stay so that clemency could be pursued with President Eisenhower.[261] Farmer, acting as the Rosenbergs' next friend, moved for a stay to question the Court's power to vacate Douglas's stay. Vinson asked for the motions in writing, and the lawyers wrote them "in longhand, sitting at the tables in front of the bench."[262] At 12:30 p.m., the Justices returned to conference.[263] Nearly an hour later, they returned to the bench "grim faced"[264] and denied both motions.[265] Twelve minutes later, the special term was adjourned as the Justices "silently" left the bench through the Court's red velvet curtains.[266] Vinson, Black, Reed, Burton, Clark, and Minton ate lunch at the

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were shattered. And Frankfurter wrote for us: "This isn't the end, errors are inevitably made but you go on, you don't lose faith in the process of law."

Interview by Norman Silber with Philip Elman, *supra* note 27, at 251; SILBER, *supra* note 196, at 218. A month after the decision, Elman wrote:

> I needed, for the sake of my soul, the last two paragraphs of your opinion—maybe you needed them, too. I had to put it in proper perspective, as only an incident in the long never-ending pursuit of justice through law, etc. Because, in itself, it made me ashamed of being a lawyer. If lawyers and judges can't do any better than they did in the case, they shouldn't be entrusted with the awful responsibilities that our system of law places on them. As you say, it's now history & it should teach us something. But it's left its mark on me, and I'm not the same.

Letter from Philip Elman to Felix Frankfurter, July 15, 1953, FFLC, Box 53, Folder "Elman, Philip," Reel 32, at 223.

Former Brandeis clerk Paul Freund wrote Frankfurter: "your opinion was very helpful in its tone of measured anxiety." Letter from Paul Freund to Felix Frankfurter, Sept. 3, 1953, *supra* note 3, at 4.

James C.N. Paul, a Vinson clerk, recalled: "My whole impression of that whole day was very unsettling." Interview with James C.N. Paul, in Trappe, Md. (Aug. 31, 2006).

260. Paull, *supra* note 237.

261. Letter from Robert L. Stern to Fred Vinson, June 19, 1953, Vinson Collection, Box 284, Folder 6 (informing Vinson that, according to Brownell, clemency petition had been "under active consideration by the President for about 48 hours" and timing of executions depended on when Eisenhower made decision).

262. *Last-Minute Appeals Fail Happy Couple*, *supra* note 237; *see* Farmer Handwritten Motion, June 19, 1953, National Archives, Washington, D.C., Record Group 267, Box 305, Folder "1 Misc. June 1953 Term (Rosenberg case): 3 of 4"; Bloch's Handwritten Motion, June 19, 1953, National Archives, Washington, D.C., Record Group 267, Box 305, Folder "4 of 4".

263. Chief Justice's Log, May–Sept. 1953, June 19, 1953, *supra* note 163.

264. Huston, *supra* note 237.

265. *Id.*; *see* Rosenberg v. United States, 346 U.S. 322, 322 (1953) (per curiam); Rosenberg v. United States, 346 U.S. 324, 324 (1953) (per curiam).

266. *See* Chief Justice's Log, May–Sept. 1953, June 19, 1953, *supra* note 163 (noting the special term lasted twelve minutes); Huston, *supra* note 237 (discussing the silent departure of the justices); *Rosenbergs Die for Spying*, *supra* note 237.

Justices' private dining room.[267] At 2:30 p.m., while the Justices were eating lunch, Eisenhower denied clemency for the second time.[268] Though "not unmindful of the fact that this case has aroused grave concern both here and abroad in the minds of serious people," Eisenhower said that "by immeasurably increasing the chances of atomic war, the Rosenbergs may have condemned to death tens of millions of innocent people all over the world."[269] Twenty minutes after Eisenhower's announcement, Vinson, Reed, Jackson, Burton, Clark, and Minton met for an hour in the Chief Justice's chambers.[270]

At 4 p.m., Bloch and Sharp asked Burton for another stay pending a motion for reconsideration; Stern, representing the government, opposed it. Burton denied the request.[271] Frankfurter and Jackson also denied stay requests, as did several lower-court judges.[272]

Black had left the Court that afternoon in a "windowless laundry van" to avoid FBI surveillance,[273] but he could not avoid the Rosenberg lawyers. They drove to Black's Alexandria home in a last-ditch effort to save their clients' lives. Black and his daughter Josephine were playing tennis out back. He sent Josephine to the front door to say he could not and would not see them.

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267. Chief Justice's Log, May–Sept. 1953, June 19, 1953, *supra* note 163; Burton Diaries, June 19, 1953, *supra* note 84.

268. *Rosenbergs Die for Spying*, *supra* note 237.

269. *Ike's Statement on Rosenbergs*, WASH. POST, June 20, 1953, at 3.

270. Chief Justice's Log, May–Sept. 1953, June 19, 1953, *supra* note 163.

271. Burton Diaries, June 19, 1953, *supra* note 84. One of Burton's 1952 Term clerks, John Leahy, recalled "a hearing in chambers, after hours, when they were up for execution. It was a very emotional situation." Telephone Interview with John Leahy (Nov. 2, 2006).

272. Frankfurter's Denial of Stay, FFHLS, Pt. I, Reel 70, at 478; Jackson Appointment Calendar, June 19, 1953, *supra* note 157 (showing Jackson's hearing request); Andrews, *supra* note 237, at 4 (describing last-minute requests to Black, Burton, Jackson, and Frankfurter); Paull, *supra* note 237 (Frankfurter declined a final request at 6:05 p.m.). The Rosenbergs' lawyers and others made last-minute stay requests to Judge Kaufman and Second Circuit judges Jerome Frank and Thomas Swan. *Kaufman Rejects 11th- Hour Appeal*, N.Y. TIMES, June 20, 1953, at 6; *Kaufman Turns Down Appeal at Final Hour*, N.Y. HERALD TRIB., June 20, 1953, at 5; *Swan and Frank Say No*, N.Y. TIMES, June 20, 1953, at 6.

273. *See* NEWMAN, *supra* note 39, at 424. The FBI, with cooperation from employees at the Court, stationed undercover FBI agents in the building and courtroom during oral argument in Rosenberg. *See* FBI Memorandum from Belmont to Ladd, June 17, 1953, *in* THE KAUFMAN PAPERS, *supra* note 40 ("The Agent who was in the Court building advised that Justice Douglas and Justice Jackson went to their respective offices at 9:40 A.M. today and have not come out."); HOWARD BALL & PHILLIP J. COOPER, OF POWER & RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 146 n.60 (1992) (quoting thank you letters in Supreme Court's FBI file from FBI Director J. Edgar Hoover to Court employees); ALEXANDER CHARNS, CLOAK & GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT 2 (1992) (citing cooperation between Court employees and FBI during *Rosenberg*).

"Why can't you see them?" Josephine, home from her second year at Swarthmore College, asked her father. "They're going to be killed."[274]

"Josephine," Black replied, "[I]t has been decided by the Court."[275]

Josephine followed her father's instructions. The Rosenberg lawyers left, but the pain of the ordeal lingered. "I went back to the [tennis] court, and it still brings tears to my eyes," Josephine recalled, "because tears were streaming down his face."[276] Josephine often hung around the Supreme Court as a child, but that incident was "the most drama I ever had in terms of my father . . . . It just broke his heart."[277] Black's respect for the Court as an institution outweighed his outrage over its mishandling of *Rosenberg*—even if it cost two people their lives.

3. Sundown, June 19: Rosenbergs Executed

Before Douglas's stay, Julius and Ethel Rosenberg were supposed to have been executed at 11 p.m. on Thursday, June 18, their fourteenth wedding anniversary.[278] The next day, when the Court overturned Douglas's stay, the government agreed that the Rosenbergs could not die during the Jewish Sabbath beginning Friday at sundown (8:31 p.m.).[279] Instead of delaying their executions, the government moved them up three hours. At 8:04 p.m., Julius was strapped into Sing Sing Prison's big wooden electric chair. After three shocks of two thousand volts, he was pronounced dead at 8:06. Five minutes later, Ethel walked into the room—not knowing her husband was already dead—and was strapped into the same chair. Three electric shocks later, her heart was still beating. After two more shocks, she was dead.[280] Until the very end, federal officials thought that Ethel might provide useful information about Soviet espionage.

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274. Telephone Interview with Josephine Black Pesaresi (May 13, 2008); *see* NEWMAN, *supra* note 39, at 424 (describing Black as crying and telling Josephine before she could say anything: "I can't do it. Josephine, tell them I can't do it."). *But see* RADOSH & MILTON, *supra* note 21, at 415 (citing Interview with Fyke Farmer (June 14, 1978)) (describing lawyer Fyke Farmer and his associate arriving at Black's house around 7:00 p.m. only to find that Black had already gone to the hospital); *Fate of 2 Sealed in Final Hour*, *supra* note 237, at 1–2 (reporting that Black refused to hear subsequent request because of "ill health").

275. Telephone Interview with Josephine Black Pesaresi (May 13, 2008).

276. *Id.*

277. *Id.*

278. *See* Arthur Everett, *Spies' Death Sentence Stirred Furor*, WASH. POST, June 18, 1953, at 19; Luther Huston, *Rosenbergs Gain A Stay*, N.Y. TIMES, June 18, 1953, at 1.

279. *See* N.Y. TIMES, June 19, 1953, at 45 (listing sunset at 8:31 p.m.).

280. *See* William R. Conklin, *Pair Silent To End*, N.Y. TIMES, June 20, 1953, at 1, 6.

The Justice Department knew that it had a weak case against her, but was using it as "leverage" so she would inform on her husband and other Communist spies.[281] Instead, Ethel went to her grave in silence, remaining true to her husband and orphaning her two children.

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Rosenberg represents one of the biggest institutional failures and one of the saddest episodes in the Supreme Court's history. Julius and Ethel Rosenberg died without full briefing, oral argument, and a well-reasoned decision on the merits afforded even the most mundane Supreme Court case. Only in their final hours did the Court hold a hastily scheduled oral argument on their statutory claim.

This Article has altered our understanding of when, and thus of how and why, the Court's institutional failure occurred. Cohen represents the conventional wisdom among scholars that "[t]he Court's major institutional failure in the *Rosenberg* cases occurred in these [last] few days" and that the Atomic Energy Act argument was "more substantial than any previously presented on the Rosenbergs' behalf."[282] As a matter of statutory interpretation, the Atomic Energy Act argument, though not a slam dunk, had real merit. It is also true that the Rosenbergs could not have been executed if they had been tried under the Atomic Energy Act as opposed to the Espionage Act. But that argument only addressed their sentencing, not the fairness of their trial.

The major institutional failure took place *not* from June 16 to 18 when the Court overturned Douglas's stay, but from June 6 to 15 when the Court rejected Justice Jackson's recommendation of oral argument about a stay and denied Finerty's original habeas petition about the newly discovered console table and David Greenglass's report of what he had told the FBI. The Court missed two opportunities to hear oral argument and write opinions about issues central to a debate that continues today—whether prosecutors knowingly used perjured testimony from the Rosenbergs' accomplices, Ruth and David Greenglass.

IV. WHO'S TO BLAME?

Another lingering historical question, besides when the Court's institutional failure occurred, is who or what to blame. This Article

281. Posting of Sam Roberts to N.Y. Times City Room Blog, *Podcast: Spies & Secrecy*, http://cityroom.blogs.nytimes.com/2008/06/26/podcast-spies-and-secrecy/ (June 26, 2008, 18:01 EST).

282. Cohen, *supra* note 30, at 247.

takes no side in the Frankfurter/Jackson versus Douglas debate and accepts neither side's version of events as gospel. Douglas's newly discovered draft letters and other archival sources have revealed some explanations for his prior votes to deny certiorari. This new material corroborates Douglas's issue-by-issue approach to the Rosenbergs' certiorari petitions but also sustains important aspects of Frankfurter and Jackson's story. Were historians charged with assigning blame, there would be plenty to go around.

A. Anti-Communism

Implicit in the Court's repeated certiorari denials was the Justices' anti-Communism. During the Cold War, passing atomic secrets to the Soviet Union was an unpardonable sin. All nine Justices were staunch anti-Communists. This was the same Court that in 1950 had affirmed the convictions of Smith Act defendants in *Dennis* as well as their attorneys' contempt convictions in *Sacher* two years later.[283] The closest *Rosenberg* analogue may have been the Court's repeated refusals during the 1953 and 1954 Terms to hear the perjury convictions of William W. Remington, a Commerce Department official accused of lying about passing information to the Soviet Union and his Communist Party membership.[284] As Truman's Attorney General from

283. *See* Sacher v. United States, 343 U.S. 1, 14 (1952); Dennis v. United States, 339 U.S. 162, 172 (1950); Michal R. Belknap, *Why* Dennis v. United States *is a Landmark Case*, 34 J. SUP. CT. HIST. 289 (2009); William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375.

284. Remington was tried by the same Saypol and Cohn-led prosecution team for perjury. The Second Circuit reversed Remington's first conviction because of erroneous jury instructions. *See* United States v. Remington, 191 F.2d 246, 248 (2d Cir. 1951). The three-judge panel, however, refused to dismiss Remington's indictment. Like in *Rosenberg*, the Supreme Court denied certiorari with Black, Douglas, and Frankfurter voting to grant. *See* Remington Docket Sheet, FFHLS, Pt. I, Reel 60, at 537, Box 54; Remington v. United States, 343 U.S. 907 (1952) (Black and Douglas, JJ., dissenting from denial of certiorari). Remington was retried and convicted of a new perjury allegation. The Second Circuit affirmed Remington's second conviction over Learned Hand's dissent about the grand jury's questioning of Remington's wife. The grand jury foreman, moreover, was the literary collaborator of Elizabeth Bentley, the chief witness against Remington. *See* United States v. Remington, 208 F.2d 567, 571 (1953) (Hand, L., J., dissenting); GERALD GUNTHER, LEARNED HAND 615–16 (1994). Once again, the Supreme Court fell one vote shy of granting cert. Frankfurter confided to the disappointed Hand that "three of us voted to hear the case—and the fourth didn't because extreme views expressed by the essentially lawless Black indicated the hopelessness of agreement even among those who were outraged by the Government's behavior." Letter from Felix Frankfurter to Learned Hand, Mar. 3, 1954, Learned Hand Papers, Box 105C, Folder 105C-20. The fourth vote, presumably, was Jackson. Once again, the Court's internal conflicts got in the way of Supreme Court review. Remington's fate was similar to that of the Rosenbergs'; fellow inmates at Lewisburg prison murdered him eight months shy of his release. *See* GARY MAY, UN-AMERICAN ACTIVITIES: THE TRIALS OF WILLIAM REMINGTON 275–76, 307–10 (1994). According to KGB files, Remington (codename: "Fedya") worked as a Soviet spy. HAYNES, *supra* note 14, at 270–71.

1945 to 1949, Tom Clark had initiated these prosecutions and helped root out suspected Communists from the federal government.[285] None of the Justices expressed sympathy for the two Communists on trial for their lives. At the Court's final *Rosenberg* conference, Black had described the Court's handling of the case as a "race with death."[286] Douglas described it years later in even starker terms:

> The country was out for blood. The Court was blind to any reason. Vinson was filled with passion to such an extent that he could hardly utter a calm word. . . . [T]his is the only time I had ever seen the spirit of a mob, the spirit of the streets, dominate a court. The Rosenbergs died Friday night and the whole country exulted in some strange orgasm of hate.[287]

B. Vinson's Lack of Leadership

Vinson's ineffectual leadership as Chief Justice contributed to the Court's dysfunctional response. He tried to run the Court like the director of one of several federal agencies he had once led, instead of as a coalition-building Chief Justice who casts one of nine votes. The other Justices did not respect his intellect.[288] Vinson violated judicial ethics by holding a secret, ex parte meeting with Attorney General Herbert Brownell in an effort to stop Douglas.[289] Vinson also flouted the Court's internal procedures, calling a special term without a vote of all nine Justices and vacating a single Justice's stay order without sending the issue to the lower courts. He was determined to keep the executions on schedule and disregarded the ramifications on the Court as an institution or on the public's perception of the case. He was the last Justice to issue his formal opinion (which was drafted by his law clerks),[290] did not circulate it among his fellow Justices until early

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285. MIMI CLARK GRONLUND, SUPREME COURT JUSTICE TOM C. CLARK Ch. 11 (2010). Clark recused himself from *Dennis*, *Remington*, and other Communist cases that he played a role in prosecuting as attorney general. *See, e.g.*, *Remington*, 343 U.S. at 907.

286. Burton Conference Notes, *supra* note 221, at 1.

287. Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 5.

288. See NEWMAN, *supra* note 39, at 419 (revealing Black's opinion that "[t]he job [of chief justice] should be rotated among the justices . . . ."); Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, June 9, 1962, *supra* note 35, at 6 (alleging Jackson took out his resentment on not being Chief Justice on Vinson); Letter from Robert Jackson to Felix Frankfurter, Aug. 16, 1952, *supra* note 198, at 4 ("I suppose the C.J. is studying diligently at home ready to make the positive and carefully thought out recommendations on which his leadership is based.").

289. *See supra* note 171.

290. "He didn't write any of his opinions," Vinson's chief law clerk, Jim Paul, recalled. "He didn't write anything [referring to Vinson's opinions and speeches]." Telephone Interview with James C. N. Paul (Nov. 25, 2008). Even though he personally disagreed on the merits, Paul drafted two Rosenberg opinions with input from Vinson's other clerks. *Id.* The other Justices

July, and did not release it until July 15.[291] It turned out to be one of the last judicial acts of Vinson's life (he died of a heart attack in September), and an act he supposedly regretted. A few weeks before his death, Vinson attended an American Bar Association meeting in Boston and discovered that Douglas's brother Arthur, the president of the Statler Hotel chain, was staying in the same hotel.[292] He called Arthur into his suite and, over glasses of bourbon and water, began discussing *Rosenberg*. Vinson, according to an unverifiable and implausible Douglas anecdote,

> was a sad man. He was sorry at what had happened. He had, he looked back upon this last judicial act in his life with sorrow and misgivings, regret. And he told my brother that I had been right. He had been wrong. And he wanted to do everything he could in the rest of his life to try to clear my name of any wrongdoing and to make up for this great injustice that had been done. It was rather sad. Nobody knew at that time that Fred had only a month to live but perhaps he had some premonition.[293]

Vinson, however, should not shoulder all the responsibility for the Court's institutional failure.[294] Much of it rests on an ongoing feud among four Justices as well as on Douglas himself.

C. Four Intellectual Leaders

Despite what Vinson, Brownell, Eisenhower, or anyone else did or said about the case, it only took four votes for the Court to grant

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knew Vinson did not write those opinions. "What was the big idea of the C.J.'s opinion, what was aimed at by that that pseudonymous prose?" Frankfurter wrote Philip Elman. Letter from Felix Frankfurter to Philip Elman, July 18, 1953, Philip Elman Papers, Harvard Law School, Box 2, Folder 58. Frankfurter, in suggesting a factual change in Vinson's opinion, unsuccessfully tried to track down its author, Jim Paul. Letter from Frankfurter to Fred Vinson, at 1–2, July 6, 1953, Vinson Collection, Box 284, Folder 6; Frankfurter's handwritten note to file, July 3, 1953, FFHLS, Pt. I, Reel 70, at 406. It is well known that Vinson did not write his own opinions. TODD PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 136 (2006); WIECEK, *supra* note 39, at 425–28.

The New York Times speculated that Jackson had written Vinson's initial per curiam opinion. *See* Luther A. Huston, *Six Justices Agree*, N.Y. TIMES, June 20, 1953, at 8. Jackson influenced both opinions. "The larger opinion had a lot of Jackson input via the chief," Paul recalled. "Jackson had given him the arguments to make." Telephone Interview with James C. N. Paul (Nov. 25, 2008).

291. *See* Rosenberg v. United States, 346 U.S. 273, 277–79 (1953).

292. Vinson introduced Lord Simonds, the Lord High Chancellor of Great Britain, at 8:00 p.m. on Aug. 27, 1953 at the ABA Annual Dinner. *See* Introduction of the Right Honourable Lord Simonds, Lord High Chancellor of Great Britain, Aug. 27, 1953, 1–4, Vinson Collection, Box 396, Folder 6.

293. Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, Apr. 5, 1963, *supra* note 35, at 6; *see also* DOUGLAS, *supra* note 35, 84–85 (recounting story about Vinson's regret and describing Vinson's favorite drink as "bourbon and branch water").

294. Vinson was not on the Court during the 1954 Term when the Court denied cert in the *Remington* case for the second time. *See supra* note 284.

certiorari. At one time or another, Black, Douglas, Frankfurter, Jackson, and Burton all voted to grant. In some ways, their goals were the same. Frankfurter wrote:

> Surely we could spare the two hours that argument would consume in order to satisfy those who were troubled by this case. What we needed was a moral validation of this trial and capital sentence, and only we could supply it by saying that, after full consideration, we find no taint of prejudicial error.[295]

A week after the special term, Douglas wrote: "In a simple tax case we take briefs and hear arguments. Where I felt the stay was justified, why not at least oral argument and briefs? None was had here."[296] Instead of letting their true feelings guide their conference votes, the Court's four intellectual leaders (Black, Douglas, Frankfurter, and Jackson) allowed their egos, mutual mistrust, and even hatred to run wild. Each of them is partly responsible for the Court's failure to take the case.

1. Black

Hugo Black was so angry about *Rosenberg* in August and early September 1953 that he refused to eat lunch with his colleagues in the Justices' private dining room. Instead he ate with his law clerks in the Court's public cafeteria. "He'd poke his head in [to our offices] and say, 'I don't want to have lunch with *them*,' " Black clerk Charles Reich recently recalled.[297] Black's wounds began to heal after Earl Warren replaced Vinson as Chief Justice. But Black was dismayed at the damage that *Rosenberg* had done to the Court as an institution and made sure his incoming law clerks knew it. "He loved the Court. The Court was everything in his eyes," Reich said. "He couldn't stand this stain on the Court."[298] Black did not think the Rosenbergs were innocent, but he thought they had been tried without the protection of the Treason Clause and under the wrong statute.[299] He deserves credit for making his views about granting certiorari consistently clear[300] and for chastising his colleagues for engaging in a "race with death,"

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295. Memorandum, June 4, 1953, *supra* note 29, at 4.

296. Letter from William O. Douglas to Fred Rodell, June 25, 1953, *supra* note 180, at 2.

297. Telephone Interview with Charles Reich (Apr. 4, 2008) (emphasis in original).

298. *Id.*

299. Black said: "Re the Rosenbergs: I believe them to have been guilty, but the prosecution wasn't conducted under the right law." GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 294 (1977) (quoting 1956 interview with Black).

300. *Cf.* NEWMAN, *supra* note 39, at 423 ("[O]nly Black voted to hear the Rosenbergs' case every time it came before the Court." (emphasis in original)). Frankfurter "passed" on one minor vote when he was clearly in the minority, *see supra* text accompanying note 234, but voted to grant certiorari or hear oral argument at every major juncture in the case.

but he failed to rally support for his position. Douglas described Black as a "forceful pleader" at conference, yet in *Rosenberg* he seemed content to dissent and to encourage Douglas, but no more.[301]

During the 1952 Term, Black was in no condition to plead his case. He was suffering from a severe case of shingles; his wife, Josephine, had died in 1951 after years of clinical depression; and his messenger and aide de camp, Spencer Campbell, had to be institutionalized.[302] Black lacked the energy or spirit to heal the Court's old wounds. By 1953, he and Jackson were on friendlier terms.[303] Yet Black's dispute with Jackson and his role in denying Jackson the position of Chief Justice left an ideological rift between the two men and further poisoned Jackson's relationship with Douglas.[304] Nothing Black wrote or said in conference would persuade Jackson to change his vote.[305] And Black did not possess the physical or mental energy to deal with Douglas.

2. Douglas

Douglas's problem, besides the enmity he engendered in Frankfurter and Jackson, was his hero complex. In every story Douglas told (the country waiting for him to decide the stay application, the Eastern European miners carrying him on their shoulders in Uniontown, Vinson's admission that he had been wrong and that Douglas had been right), he cast himself in the role of liberal hero. Frankfurter and Jackson lacked objectivity about Douglas, but, when they accused him of grandstanding, they had a point. "As for that strange *mommser*,[306] I can't make him out, apart from his central cynicism," Frankfurter wrote a few weeks after the case. "I do believe at the end he caught something he never expected and it was too much even for his corkscrewery."[307] Jackson took his grievances with

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301. Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, June 9, 1962, *supra* note 35, at 3. Black said further discussion was "futile." *See supra* text accompanying note 221.

302. NEWMAN, *supra* note 39, at 420–21.

303. Interview with Donald Cronson, in Palm Beach, Fla. (Feb. 10, 2007); NEWMAN, *supra* note 39, at 419–20. Black and Frankfurter were also close during this period. Interview by Richard Kluger with Alexander Bickel, *supra* note 105, at 1.

304. *Supra* note 26 and accompanying text.

305. *See* NEWMAN, *supra* note 39, at 420 (Black's nephew Hugh Rozell recalled Black telling his clerks: "If Bob and I could just get together, back to back, we could break down what is happening to the country. . . . But Bob can't go with me because of what he said at Nuremberg." (internal quotation marks omitted)).

306. A Yiddish word for bastard.

307. Elman, *supra* note 27, at 839; *see also* Letter from Felix Frankfurter to Harold Laski, at 2, July 27, 1949, FFLC, Box 75, Folder "Laski, Harold 1949–150," Reel 46, at 95 (referring to

Douglas public, tipping off *St. Louis Post-Dispatch* columnist Marquis Childs about Douglas's refusal to hear oral argument on Jackson's proposed stay.[308] Douglas lamely insisted in 1974 that their differences were "intellectual," not "personal,"[309] but the weight of historical evidence in *Rosenberg* suggests otherwise.

Douglas confirmed his defenders' contentions that he did not believe in granting certiorari in every capital case; he only voted to grant certiorari "depending on his assessment of the substantiality of the issues raised."[310] As Douglas wrote in a recently discovered draft letter:

> The reason why I voted to deny [the first certiorari petition] was because I didn't think the questions presented were cert worthy. The reason I voted to grant [the second certiorari petition] was because at least one new question presented seemed important to the conduct of federal trials. My impression throughout the time was that the Rosenbergs were probably very guilty but the questions presented were related to the indictment, statutes, and so called trial errors and even though an accused is clearly guilty he deserves, under our regime, a fair trial. By the time [the second petition] reached us I was doubtful if the Rosenbergs had had one.[311]

Douglas's actions were anything but consistent. Why did it take him so long to find Saypol's alleged prosecutorial misconduct to be a substantial claim, and why did he raise it only at the eleventh hour? If he did not withdraw his May 22 memo, why didn't he publish the

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Douglas as "mommser"); Letter from Felix Frankfurter to Learned Hand, Nov. 4, 1954, Learned Hand Papers, Harvard Law School, Box 105C-20 ("Bill is the most cynical, shamelessly immoral character I've ever known."). The invective went both ways. *See* MURPHY, *supra* note 34, at 300–01 (quoting Douglas as calling Frankfurter "the Little Giant," "little bastard," or "Der Fuehrer"). *See generally* WILLIAM DOMNARSKI, THE GREAT JUSTICES, 1941–54: BLACK, DOUGLAS, FRANKFURTER, AND JACKSON IN CHAMBERS (2006) (describing ideological split between Douglas and Black and Frankfurter and Jackson); Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71 (discussing interpersonal conflicts among Black, Douglas, Frankfurter, and Jackson).

308. Childs, *Inside the Quiet Storm Center*, *supra* 137, at 3B (discussing the circumstances and background of Douglas' vote); *see also supra* text accompanying note 137.

309. Draft letter from William O. Douglas to Michael Parrish, Dec. 13, 1974, *supra* note 38, at 2. Douglas wrote Parrish:

> You mentioned my relationship with Jackson and Frankfurter and you suggested it was not cordial; but that is not true. I enjoyed their company very much. We clashed but only at an intellectual level and there was nothing personal about it.

Id.; *see also* Letter from William O. Douglas to Professor David Atkinson, Dec. 16, 1974, ("One would err greatly to conclude that Frankfurter and I were at war. We clashed often at the ideological level but our personal relations were excellent and I always enjoyed being with him."); Urofsky, *supra* note 307, at 110–11 (documenting Douglas's downplaying of his clashes with Frankfurter).

310. Cohen, *supra* note 30, at 240.

311. Draft Letter from William O. Douglas to Michael Parrish, Dec. 13, 1974, *supra* note 38, at 1–2.

dissenting paragraph as he had intended?[312] Why did he deny that Jackson had switched his certiorari vote when both Douglas's and Burton's docket sheets indicate otherwise? If after finally voting to grant the second certiorari petition Douglas believed that the Rosenbergs had not received a fair trial, why did he treat the discovery of new evidence and arguments about perjured testimony so dismissively? Why did he vote to grant the June 12 stay application submitted to Jackson and then oppose hearing oral argument on it? Not even Douglas's correspondence with Childs provides an adequate explanation. Why did Douglas vote to deny certiorari on Finerty's argument that prosecutors knowingly used perjured testimony based on a misreading of the Court's precedents? Why didn't Douglas immediately refer the lawyers for the Rosenbergs to Jackson, the Circuit Justice for the Second Circuit? Douglas was caught between his anti-Communism and his image as a heroic defender of civil liberties.[313] Thus, he wanted to side with the Rosenbergs, but, since he thought they were "very guilty," he did not want to take their side if it meant a new trial. After the case was over, he often tried to rewrite history by forgetting about his certiorari denials and inconsistent votes; he preferred to discuss his last-minute stay.[314]

Douglas deserves some credit for granting the stay, which thwarted the will of the Chief Justice and provided the Rosenbergs with their only hearing before the Court. As Learned Hand recognized, sympathizing with Communists would not revive Douglas's fading presidential ambitions. "I must aver to a better opinion of Douglas," Hand wrote Frankfurter, "because, little as I liked the way he did what he did, I cannot see how he could have thought it served his ambition."[315] Immediately after Douglas granted the stay, Representative William M. Wheeler, a Georgia Democrat, introduced a House resolution to impeach Douglas.[316] The

312. Douglas sometimes wrote draft opinions dissenting from the denial of certiorari to fish for another certiorari vote. *See* BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS 245–48 (2006) (recounting how Douglas's draft dissent from the denial of certiorari produced a fourth vote in the *Flood v. Kuhn* case). No scholar has contended that is the case here. Parrish, *Rejoinder*, *supra* note 28, at 1052 n.34.

313. *See* Parrish, *Rejoinder*, *supra* note 28, at 1049, 1054–56 (recounting Douglas's inconsistent votes in United States v. Bethlehem Steel Co., 315 U.S. 289 (1942), Screws v. United States, 325 U.S. 91 (1945), and Schneiderman v. United States, 320 U.S. 118 (1943)).

314. *Supra* note 35 and accompanying text.

315. Letter from Learned Hand to Felix Frankfurter, at 2, July 6, 1953, FFHLS, Pt. III, Reel 27, at 328.

316. *See* Luther A. Huston, *Rosenbergs Gain A Stay; Review Set*, N.Y. TIMES, June 18, 1953, at 16; Murrey Marder, *Motion to Impeach Douglas Brings Applause in House*, WASH. POST, June 18, 1953, at 1; *see also '1 Way' Visa Urged for Douglas*, N.Y. HERALD TRIB., June 20, 1953, at 5

impeachment resolution went nowhere.[317] Douglas was not the prime presidential candidate he had been four years earlier. His divorce from his first wife and Eisenhower's victory had ended his once-realistic presidential hopes.[318] *Rosenberg* marked a new period in Douglas's life, in which he burnished his already-considerable reputation as a civil-libertarian hero.

3. Frankfurter

Rosenberg haunted Felix Frankfurter, who described it as "the most disturbing single experience I have had during my term on the Court thus far."[319] Former clerks and fellow Justices, based on unfounded newspaper speculation,[320] worried that he might retire.[321]

(reacting to Douglas's visa application to Soviet Union, Wheeler said, "[T]hat's perfectly all right with me if they grant him a visa to Russia – make it one-way and permanent.").

317. *See* Memorandum from William D. Rogers to Abe Fortas, at 2, June 30, 1953, Douglas Papers, Box 1145, Folder "Miscellaneous re: Rosenberg Case" (reporting House hearing on impeachment resolution had "fizzled").

318. Telephone Interview with Charles Ares (July 8, 2008) ("By the time I got there, it was over for Douglas."); SIMON, *supra* note 39, at 286, 313.

319. Memorandum, June 4, 1953, *supra* note 29, at 1. Frankfurter remained troubled by the case. *See* Letter from Felix Frankfurter to C.C. Burlingham, at 1, June 24, 1953, FFLC, Box 37, Reel 21 (describing the case as "trying and unedifying"); Letter from Frankfurter to Herbert Feis, at 2, June 29, 1953, Herbert Feis Papers, Library of Congress, Manuscript Division, Box 34, Folder "Letters Received 1953" (describing it as "not edifying" and concluding that "[m]en's devotion to law is not profoundly rooted"); Letter from Frankfurter to Philip Elman, July 2, 1953, *supra* note 27, at 3; Elman, *supra* note 27, at 839; Reminiscences of Philip Elman, *supra* note 27, at 251–52; SILBER, *supra* note 196, at 218 (describing it as "unedifying" and concluding "the softest spoken were perhaps the blindest and thereby the most ruthless."); *see also* SILBER, *supra* note 196, at 216 ("The Rosenberg case is the most disgusting, saddest, despicable episode in the Court's history in my lifetime."); Letter from Felix Frankfurter to John Marshall Harlan, Oct. 23, 1956, FFHLS, Box 169, Folder 15, Pt. III, Reel 1, at 2 ("[T]he manner in which the Court disposed of that case is one of the least edifying episodes in its modern history.").

320. Syndicated columnist Drew Pearson, a Black/Douglas confidant, began the speculation in mid-November 1952 when Frankfurter was about to turn seventy and, with more than ten years of service time on the Court, would be eligible to retire yet retain his full salary. Pearson and others tied Frankfurter to Roosevelt's court-packing plan fifteen years earlier. *See* Drew Pearson, *Frankfurter May Leave Supreme Court Vacancy*, OAKLAND TRIB., Nov. 13, 1952, at 44 (writing that Frankfurter likely will remain on the Court until after Eisenhower takes office on January 20, 1953); Walter Winchell, *Man About Town*, WASH. POST, June 15, 1953, at 23 ("The Prez is irged [sic] because Mr. Justice Frankfurter refuses to retire."); Clint Mosher, *Frankfurter Says He Might Quit to Give Warren Seat*, S.F. EXAMINER, July 30, 1953, at 1 (reporting based on a telephone interview with Frankfurter that, when asked if he was going to retire, Frankfurter responded that he would not keep Earl Warren from joining the Court); *Frankfurter Is Silent on Quitting Post for Warren*, FRESNO BEE, July 30, 1953, at 3A (denying that he had announced his retirement). *But see Justice Sees Age 70 No Bar to High Court*, CHRISTIAN SCI. MONITOR, Dec. 6, 1952, at 5 (discussing Justice Holmes's stay on the Court past his ninetieth birthday).

321. Former Frankfurter clerk William T. Coleman, Jr. wrote Frankfurter:

> I heard through John [sic] Marsh the reply you made to Mr. Justice Jackson when he called you about the newspaper remarks suggesting that you

The Court's rush to judgment troubled Frankfurter. He did not believe that the Rosenbergs were innocent, as in the case of Sacco and Vanzetti, but he thought that the Court should have heard allegations that the Rosenbergs' trial had been unfair and unconstitutional, particularly with regard to the allegations of Saypol's prosecutorial misconduct.[322]

Frankfurter understood that more was at stake than the lives of the Rosenbergs. The Court's institutional role in defining what amounts to a constitutionally fair trial and its ability to calm the public's hysteria about the case warranted full briefing and argument. He took seriously the allegations of prosecutorial misconduct. He also believed that the Court should review all death penalty cases, especially a federal espionage case during peacetime (and when the Soviet Union had been an ally). Above all, Frankfurter wanted the Court to avoid another "self-inflicted wound."[323]

Frankfurter, however, was not blameless. He tried hard to find a fourth vote for certiorari, but often tried too hard. His grating personality undermined his best efforts. He so irritated his fellow Justices with pedantic speeches and professorial memos that a few conferences almost turned violent.[324] Instead of courting Jackson as a

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> intended to retire. Therefore, there is no particular need for me to tell you that your friends feel you have at least another twenty-three years before you think of retiring. You can be confident that those who love and admire you, and others also, agree that at present your work on the Court is at its very best. Everyone who read your opinion in the Roseberg [sic] case, for example, remarks that not only is it a fine piece of writing but that it represents a first-rate performance in its legal aspect, demonstrating the high degree of objective reason required in a good judge's work.

Letter from William T. Coleman, Jr. to Felix Frankfurter, Sept. 4, 1953, FFHLS, Reel 70, at 236.

322. Letter from Felix Frankfurter to C.C. Burlingham, June 24, 1953, *supra* note 319, at 2 ("This is not for me a Sacco-Vanzetti affair. Those two, I felt reasonably sure, were innocent."). Frankfurter, conceding he had not read the record, was troubled by the allegations against Saypol. *Id.* at 2–3; *see also* Letter from Felix Frankfurter to Philip Elman, July 2, 1953, *supra* note 27, at 2 (distinguishing *Rosenberg* from Sacco-Vanzetti); Reminiscences of Philip Elman, *supra* note 27, at 252 (same); SILBER, *supra* note 196, at 218 (same); Elman, *supra* note 27, at 839 (same).

323. Memorandum from Felix Frankfurter to Harold Burton, May 23, 1953, *supra* note 90, at 2.

324. At the end of the 1953 Term, Frankfurter refused "rather insolently" to answer Douglas's question at conference. Douglas wrote Frankfurter: "This was so far as I recall the first time one member of the Conference refused to answer another member on a matter of Court business. We all know what a great burden your long discourses are. So I am not complaining. But I do register a protest at your degradation of the Conference and its deliberations." Letter from William O. Douglas to Felix Frankfurter, May 29, 1954, Douglas Papers, Box 330, Folder "Frankfurter, Felix, 1935–1963."

Frankfurter once made Vinson so angry at conference that Vinson "got out of his chair and came around to physically beat up Brother Frankfurter. And a fist fight was averted only by the intervention of some of the other Justices." Transcript of Conversations between Justice William

potential fourth vote to grant certiorari, Frankfurter often egged on Jackson's antipathy toward Douglas.

In some ways, Frankfurter was no more committed to discovering whether the Rosenbergs had received a fair trial than Douglas. An Austrian immigrant who loved his adopted country above all else, Frankfurter sometimes substituted intense patriotism for sound constitutional judgment.[325] And as the Court's lone Jewish Justice in an era of rampant anti-Semitism,[326] he must have been eager to show that, like many other successful Jews, he did not support what the Rosenbergs had done. He certainly did not want them to receive a new trial. He wanted the Supreme Court to act as a rubber stamp. The Court's role, however, is not to serve as a Good Housekeeping seal of approval. Frankfurter recognized that the Court had missed an opportunity to calm public hysteria and to educate the country about what constitutes a constitutionally fair trial. His means, however, were too heavy handed and his ends were too results oriented.

O. Douglas and Professor Walter Murphy, June 9, 1962, *supra* note 288, at 3; *cf.* DOUGLAS, *supra* note 35, at 226 ("At last Vinson left his chair at the head of the Conference Table, raised his clenched fist and started around the room at Frankfurter, shouting, 'No son of a bitch can ever say that to Fred Vinson!' ").

During a 1953 Term conference, Frankfurter reportedly tore up one of Clark's opinions. Black told his clerks immediately after conference that he thought Clark was going to punch Frankfurter in the face. Telephone Interview with Charles Reich (Apr. 4, 2008); Charles Reich, *Deciding the Fate of* Brown, 7 GREEN BAG 2D 137, 138 (2004).

325. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646–47 (1943) (Frankfurter, J., dissenting) (protesting reversal of his flag salute opinion three years earlier in *Minersville School District v. Gobitis* despite his status as "[o]ne who belongs to the most vilified and persecuted minority in history"); ROBERT A. BURT, TWO JEWISH JUSTICES 39, 37–61 (1988) (describing Frankfurter's psychological struggle to "separate himself from his immigrant past" and describing cases affected by his Jewishness and patriotism); JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 211 (1975) (describing a 1942 conference discussion of *Schneiderman v. United States* in which Frankfurter said, "It is well known that a convert is more zealous that one born to the faith. None of you has had the experience that I have had with reference to American citizenship."); Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 695–97 (1984) (describing Frankfurter's formative assimilationist experiences in American public schools as influencing the flag salute decisions).

326. Even Frankfurter's friends on the Court recognized that his Jewish heritage made him suspect in the eyes of the American people. After a 1944 conference about the all-white primary case of *Smith v. Allwright*, Jackson asked Chief Justice Harlan Fiske Stone to reassign the majority opinion because the South would have resented it coming from a New England Jew. *See* Letter from Robert Jackson to Harlan Fiske Stone, at 1–2, Jan. 17, 1944, Harlan Fiske Stone Papers, Library of Congress, Manuscript Division, Box 75, Folder "Jackson, Robert H. 1943–44." Stone reassigned the opinion to Kentuckian Stanley Reed.

4. Jackson

Some of Robert Jackson's worst qualities came out in *Rosenberg*. "Bob Jackson had at least primitive, elemental anger—anger that the 'hero' of the hour was the cause of the basic fault . . . ," Frankfurter wrote referring to Douglas.[327] Jackson had been outraged by prosecutor Saypol's conduct,[328] yet he only voted to grant that certiorari petition to prevent Douglas from publishing his May 22 memo and looking like a liberal hero. After Douglas withdrew his memo, Jackson withdrew his vote to grant certiorari. Jackson deserves credit for recognizing the importance of the new evidence and the allegations of perjured testimony: hearing the case in chambers on June 13, referring the stay request to the whole Court, and recommending the Court grant oral argument on the stay. At the most important juncture in the case, Jackson voted both to hear oral argument and to grant the stay. Douglas's refusal to hear oral argument on Jackson's stay, in light of Douglas's subsequent decision to grant a stay on his own, enraged Jackson.[329]

One of Jackson's biggest flaws was that he sometimes allowed personal grievances with Black and Douglas to affect his votes.[330] He still resented them (particularly Douglas) for sending emissaries to President Truman to foil his last chance at being Chief Justice.[331] Jackson also allowed his staunch anti-Communism to override his sound judgment.[332] He encouraged Vinson's behind-the-scenes machinations and wanted to stack the deck against Douglas's stay.

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327. Letter from Felix Frankfurter to Philip Elman, July 2, 1953, *supra* note 27, at 3; Reminiscences of Philip Elman, Vol. 4, *supra* note 27, at 252; SILBER, *supra* note 196, at 218; Elman, *supra* note 27, at 839.

328. Prosecutorial and police misconduct were issues of concern for Jackson. *See* Irvine v. California, 347 U.S. 128, 137–38 (1954) (refusing to overturn defendant's conviction because of illegally obtained evidence but referring case to Attorney General for potential criminal prosecution).

329. *See* Rosenberg v. United States, 346 U.S. 273, 291 (1953) (Jackson, J., concurring) (mentioning that Douglas failed to provide fifth vote for oral argument).

330. E. Barrett Prettyman Jr., who succeeded Rehnquist as Jackson's law clerk, wrote, "I think how he felt about Justice Douglas had some effect on some of his votes." Letter from E. Barrett Prettyman Jr. to Felix Frankfurter, at 4, Oct. 13, 1955, FFHLS, Pt. III, Reel 2, at 330.

331. After a private meeting with Jackson about *Rosenberg*, *St. Louis Post-Dispatch* columnist Marquis Childs wrote: "The feeling between Jackson and Douglas has been bitter ever since Jackson failed to be appointed chief justice." Childs, *supra* note 137, at 3B; *see* Transcript of Conversations between Justice William O. Douglas and Professor Walter Murphy, June 9, 1962, *supra* note 288, at 6 (discussing Jackson's anger at not being Chief Justice).

332. Jackson concurred with the *Dennis* majority and wrote the majority opinion in *Sacher*. *See* Dennis v. United States, 339 U.S. 162, 173 (1950) (Jackson, J., concurring); Sacher v. United States, 343 U.S. 1, 3 (1952).

For the Justice who wrote some of the Court's finest opinions—such as the flag-salute decision in *West Virginia State Board of Education v. Barnette*,[333] the concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[334] and the dissent in *Korematsu v. United States*[335]—Jackson's *Rosenberg* opinion was fueled not by reason but by his hatred for Douglas. One of the few fans of Jackson's *Rosenberg* opinion was his outgoing law clerk William Rehnquist, who had finished his clerkship immediately before the special term.[336] Rehnquist wrote Jackson that his opinion "took some guts," for the case "does not mean that the highest court in the nation must behave like a bunch of old women every time they encounter the death penalty."[337] Learned Hand disagreed. "I was somewhat disappointed re: Jackson, whom I am getting to like more and more . . . ," Hand wrote Frankfurter. "He is however curiously unreliable, what you expect of him does not come about."[338] Frankfurter replied "that the key to Jackson is 'Goddammit is his major premise.' "[339] Jackson showed why; as much as he once aspired to be Chief Justice, he lacked the temperament for the job.

5. Unsung Hero

The only person who acted like a Chief Justice was Harold Burton. A former U.S. senator and the lone Republican on the Vinson

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333. 319 U.S. 624 (1943).

334. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

335. 323 U.S. 214, 242 (1944) (Jackson, J., dissenting); *see* John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's* Korematsu *Dissent*, 68 LAW & CONTEMP. PROBS. 57 (2005); Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455.

336. A handwritten note in Jackson's file, most likely by his secretary Elsie Douglas, lists Rehnquist's departure date as June 15, 1953. Jackson Papers, Box 177, Folder 3.

337. Letter from William Rehnquist to Robert Jackson, approx. July 1953, Jackson Papers, Box 19, Folder 3. Rehnquist received Jackson's permission to write a Stanford Law Review article about the publicly recorded events in *Rosenberg*, though Rehnquist never wrote it. *Id.*; Letter from Robert Jackson to William Rehnquist, July 13, 1953, Jackson Papers, Box 19, Folder 3.

As he often did, Rehnquist may have misread Jackson's views. In his concurring opinion, Jackson distinguished between vacating Douglas's stay and "indorsing the wisdom or appropriateness to this case of a death sentence." Rosenberg v. United States, 346 U.S. 273, 289–93 (1953) (Jackson, J., concurring). Shortly before his death in October 1954, Jackson told Herbert Wechsler "he opposed capital punishment because of its deleterious effects on the judicial process and stated that he would appear and urge the Institute to favor abolition." MODEL PENAL CODE AND COMMENTARIES (Official Draft and Revised Comments), pt. II (Definition of Specific Crimes) §§ 210.0-213.6 at 114 (1980).

338. Letter from Learned Hand to Felix Frankfurter, July 6, 1953, *supra* note 315, at 1–2.

339. Letter from Felix Frankfurter to Philip Elman, July 18, 1953, *supra* note 290, at 1; Elman, *supra* note 27, at 840. Frankfurter's reply is not in Hand's correspondence.

Court, Burton was no more sympathetic to the Rosenbergs than Vinson, Black, Douglas, Frankfurter, or Jackson. Burton, however, cast multiple votes to hear the case. He initially voted to grant certiorari when two other Justices voiced strong opinions. Although he did not vote to grant the second certiorari petition on Saypol's alleged prosecutorial misconduct, he voted to hold oral argument on Jackson's proposed stay even though Burton did not feel the stay was justified. With the discovery of the console table and additional evidence of perjury, Burton believed in giving the Rosenbergs the benefit of oral argument. He also voted initially to uphold Douglas's stay and to hear argument on the merits, until Burton realized that Vinson had the votes to vacate it. It did not matter if Burton disagreed with the merits of the arguments made by the Rosenbergs' lawyers. "I was ready to vote against their proposals if a vote was necessary, yet I would prefer to give them a chance for argument before the Court instead," he wrote on June 19.[340] Responding to Learned Hand's praise of Burton after the case, Frankfurter wrote:

> I must add a word, to my comments on my colleagues, about my brother Burton. You are wholly right in speaking of his "stainless integrity." There isn't the slightest speck even of ego-alloy. It doesn't bother him in the slightest to change his mind on issues that stir up emotional biases. (*Per contra*, the most reasonable-sounding and least judicial as well as stupidest Reed, thinks "it's weakness to change one's position"!!!) Poor Harold's limitation is purely intellectual, but that's very serious. In his case, the Harvard L.S. marking-system is vindicated: he is a low-C man! The poor lad often does not appreciate the significance, the implications of what he sees. That was true in Rosenberg. He was for leaving the Douglas stay in force, as was—but when 5 went for immediate lifting he was for joining the majority! But/and he is a pure character and deeply honored by me.[341]

Burton may not have possessed the intellect of a Black, Douglas, Frankfurter, or Jackson, but he put his personal biases aside and acted like a much more impartial judge. A tribunal composed of a majority of Harold Burtons might have accomplished what the Court as an institution, the American people, and especially Julius and Ethel Rosenberg needed most—full Supreme Court briefing and oral argument.

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340. Memorandum from Harold Burton, at 1, June 19, 1953, Burton Papers, Box 687, Folder 1. Douglas may have been perturbed by Burton's moderate approach, leaking Burton's votes to *St. Louis Post-Dispatch* editorial page editor Irving Dilliard. *See* Letter from William O. Douglas to Irving Dilliard, June 21, 1953, Dilliard Papers, Box 12, Folder 380 ("Perhaps you should not use the Burton vote for a few weeks. Why not ask your Wash. man to check it? You can use it – but it may be best to wait awhile.").

341. Letter from Felix Frankfurter to Learned Hand, June 15, 1953, *supra* note 49.

D. Institutional Failure

It is too easy, as the Meeropols wrote in their letter to the *New York Times*,[342] to blame only Black, Douglas, Frankfurter, or Jackson for the Court's repeated refusals to grant certiorari. Clark, Minton, and Reed also consistently voted to deny certiorari.[343] Vinson's weak leadership and all nine Justices' anti-Communism must be taken into account. The failure is not just a failure of the Court's four intellectual leaders or the other five Justices. The failure is a failure of the Court as an institution charged with interpreting the Constitution, ruling on separation-of-powers disputes, and safeguarding minority rights. The Court failed because it refused to take a great case.

V. GREAT CASES, THEORY AND PRACTICE

As badly as the Court missed an opportunity in *Rosenberg* and as fractured as it seemed under Vinson, the Warren Court made history less than a year later and remade the Court's image beginning with its unanimous decision in *Brown v. Board of the Education*. *Brown* is, in many ways, the antithesis of *Rosenberg*. The Justices repeatedly took a great case, put their personal and ideological conflicts aside (in part because of Warren's leadership), and thought about the Court as an institution. One of the enduring lessons about the Court is that it receives frequent opportunities to redeem itself. There will always be another case. After the Court's 5-4 decision in

342. *See supra* note 10 (blaming Jackson for overturning Rosenbergs' stay of execution).

343. We know less about the motivations of Clark, Reed, and Minton than the other Justices. Clark prosecuted suspected Communists as Truman's attorney general, *see supra* note 285 and accompanying text, and as a justice tended to side with the government's national security concerns over civil liberties. *See* GRONLUND, *supra* note 285, ch. 16; Yates v. United States, 354 U.S. 298, 344 (1957) (Clark, J., dissenting). Fred Rowe, Clark's law clerk during the 1952 Term, believed that Clark followed Vinson's lead in *Rosenberg*. Telephone Interview with Fred Rowe, (Oct. 19, 2008). *But cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 660 (1952) (Clark, J., concurring in the judgment). Reed, a Kentuckian like Vinson, was a former Solicitor General and Roosevelt administration official viewed as siding with authority and "conservative" on national security and criminal defense issues. *See* Interview by William J. Marshall with Paul A. Freund, Reed's clerk when Reed worked for the Reconstruction Finance Corp. (Oct. 18, 1982), Stanley F. Reed Oral History Project, University of Kentucky. Neither Reed's Papers nor his biographer shed any light on his repeated certiorari denials and conference statements in *Rosenberg*. *See* JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY (1994). *But see supra* text accompanying note 341 (Frankfurter's comments about Reed). Minton lacks a biographer or any preserved papers, but he often deferred to other federal and state branches and sided with national security interests over individual rights. *See* Linda C. Gugin, *Sherman Minton: Restraint Against a Tide of Activism*, 62 VAND. L. REV. 757, 776–81 (2009). Minton, like Reed, joined Vinson's dissent in *Youngstown*. 343 U.S. at 667 (Vinson, C.J., dissenting).

Bush v. Gore, Justice Stephen Breyer offered the 2000 Term clerks the same advice that Frankfurter had given Philip Elman and other former clerks after *Rosenberg*. Breyer told disillusioned law clerks: "This, too, will pass."[344] The Court can and does learn from its mistakes.

The lesson of *Rosenberg* is that, when in doubt, the Court should take "great cases." Holmes defined great cases as "great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[345] Put more simply, a great case is an issue that has repeatedly made front-page news before reaching the Court, an issue or case that the American people clamor for the Court to resolve. This Article does not suggest that the Court should take a public-opinion poll about every case to determine its certworthiness. Nor does it mean the Court should ignore concerns about case-or-controversy requirements, federalism, or the Court's institutional competence. Rather, it argues that great public interest should be one of many factors in the Court's assessment whether a case raises an "important question of federal law" for certiorari purposes.

A. Rosenberg *Redux*

Rosenberg raised none of the traditional red flags that militate against taking a great case, such as concerns about jurisdiction, federalism, and institutional competence. On the contrary, *Rosenberg* highlighted issues about separation of powers (or at least engaging in an interbranch dialogue), minority rights, and lingering questions about guilt or innocence that warranted taking a great case.

1. No Passive Virtues

Rosenberg presented no jurisdictional problems and was not a case that should have been dismissed on procedural grounds. Inspired

344. Jeffrey Toobin, *Breyer's Big Idea*, NEW YORKER, Oct. 31, 2005, at 36 ("I spent a long time going to lunch with quite a few of them, to calm them down," Breyer told Toobin. "I told them, 'This, too, will pass.' "); JEFFREY TOOBIN, THE NINE 207 (2008) (describing Breyer as encouraging "young lawyers to maintain their faith in the Court and believe that their views might someday return to favor").

345. *See supra* note 4; Frederick Schauer, *Is It Important To Be Important?: Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77 (2009), *available at* http://yalelawjournal.org/2009/12/09/schauer.html (distinguishing "publicly important from legally important cases" and observing that "the Court rarely takes on the former, nor has it done so to any appreciable extent since the 1930s").

by Brandeis's quote that "the most important thing we do is *not* doing,"[346] Bickel believed in invoking "passive virtues"[347] such as lack of jurisdiction, judicial restraint, mootness, ripeness, standing, and the political-question doctrine to avoid deciding certain cases. Bickel came of age as a legal scholar at the height of the Warren Court's perceived excesses, and his countermajoritarian difficulty reflected anxieties about judicial review. But Bickel, who as a law clerk had helped draft Frankfurter's private history of *Rosenberg*,[348] believed throughout his career that the Vinson Court had no choice but to grant certiorari. "It was a mistake for the Court not to have entered, much earlier, upon a full-scale review of the entire case," Bickel wrote.[349] "The Court's pliant cooperation, at the last, in rushing the case to a conclusion in the death chamber—that was not a mistake, but a denial of its own function, a sin against its very reason for being."[350]

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346. Brandeis-Frankfurter Conversations at 15, June 28, 1923, Brandeis Papers, Library of Congress, Manuscript Division, Pt. II, Reel 33, Page 464 (emphasis in original); Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 313; *see also* ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 17 (1957); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–56 (1936) (Brandeis, J., concurring) (outlining rules when Supreme Court should avoid deciding constitutional questions).

347. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111–98 (2d ed. 1986).

348. *See supra* note 29 (describing Bickel's role in drafting the *Rosenberg* memorandum).

349. Alexander M. Bickel, *The Rosenberg Affair*, 41 COMMENTARY, Jan. 1966, at 76 (reviewing WALTER SCHNEIR & MIRIAM SCHNEIR, INVITATION TO AN INQUEST (1965)).

350. *Id.* Immediately after his clerkship, Bickel wrote Frankfurter:

> [Y]our opinion is the only one in Rosenberg which walks firmly on the path of reason, looking neither right nor left. And even after a year in the turgid, quiet center of irrational storms, I must still believe that men and their law return from their shoddy excursions to that path. It is a tiresome, climber's path, but uphill means upward.

Letter from Alexander Bickel to Felix Frankfurter, July 10, 1953, FFHLS, Pt. III, Reel 14, at 788. Five years after his clerkship, Bickel wrote about *Rosenberg* in an unsigned editorial. *See The Rosenberg Case*, NEW REPUBLIC, June 30, 1958, at 7 (criticizing the government's treatment of the case). Later in his much-too-short career, he wrote:

> The authentic Vinson Court manifested itself in its last act, the hurried special session at which it sealed the fates of Julius and Ethel Rosenberg, the so-called atom spies. The question that faced the Justices was whether meeting the latest schedule set for the Rosenbergs' execution was a more important objective than allowing time for the deliberate resolution of difficult legal problems of first impression. The Vinson Court met the schedule with a few hours to spare, although not without dissent.

ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 5 (1970); *see also id.* at 31, 70–71, 84 (discussing Vinson Court's failure in *Rosenberg*).

2. Federalism

The animating concern behind Brandeis's statement that "most important thing we do is not doing" was federalism. Brandeis privately complained that Holmes and other Justices often ignored federalism and "like[d] to decide cases where interesting questions are raised."[351] *Rosenberg*, however, raised no federalism concerns because it was a federal criminal trial.

3. Institutional Competence

Nor was *Rosenberg* outside the Court's institutional competence. Sometimes this is not a question of whether the Court should take a great case but whether the Court should adopt a more minimalist approach in deciding it. In *Brown*, Justice Jackson privately favored overruling *Plessy* and leaving school desegregation to Congress under Section Five of the Fourteenth Amendment.[352] Jackson took a similar approach in his *Korematsu* dissent, which recognized the Court's inherent limits in policymaking and enforcement.[353] Justice Ruth Bader Ginsburg remarked that the Court "bit off more than it could chew" in *Roe v. Wade*, wishing the decision had addressed only the Texas statute at issue and allowed state legislatures to address subsequent issues.[354] *Rosenberg* presented none of Jackson's or Ginsburg's concerns. The Court was the most competent branch to protect the integrity of the federal courts from allegations of prosecutorial misconduct and perjured testimony and to interpret the meaning of conflicting federal statutes.

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351. Brandeis-Frankfurter Conversations, *supra* note 346, at 15.

352. Clark 1952 *Brown* Conference Notes, at 3, Dec. 13, 1952, Clark Papers, Box A27, Folder 4; Burton 1952 *Brown* Conference Notes, at 7, Dec. 13, 1952, Burton Papers, Box 251, Folder 10; *see also* Brad Snyder, *What Would Justice Holmes Do (WWJHD): Rehnquist's* Plessy *Memo, Majoritarianism, and* Parents Involved, 69 OHIO ST. L.J. 873, 887–89 (2008) (comparing Jackson's statements at conference with his unpublished draft *Brown* concurrence).

353. *See supra* note 335; ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57–58, 61, 82 (1955) (explaining the Court's limited institutional role in protecting civil liberties); Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and* Brown, 72 TEMP. L. REV. 51, 51–53 (1999) (describing Jackson's "institutional pragmatism").

354. Adam Liptak, *Gay Vows, Repeated from State to State*, N.Y. TIMES, Apr. 12, 2009, at WK1 (quoting Ginsburg's 2008 remarks).

4. Separation of Powers

The Court should take a great case as part of its historic role in deciding separation-of-powers cases.[355] The Vinson Court's finest hour may have been its opinions (over Vinson's dissent) preventing President Truman from seizing the steel mills.[356] *Youngstown*, particularly Jackson's concurring opinion, not only remains a classic statement about the scope of executive power but also demonstrates that the Justices can read briefs, hear oral argument, and issue opinions about an issue of national importance within a short time frame.

Even in the absence of a separation-of-powers problem of these proportions, the Court may want to engage other federal branches in a constitutional dialogue. By taking a great case, the Court can urge the President and Congress to take action. In the detainee cases,[357] the Court debated separation-of-powers concerns and engaged in a constitutional dialogue. Like *Rosenberg*, the detainee cases reflect the tension between protecting national-security interests and preserving the constitutional right to a fair trial. And like *Rosenberg*, the detainee cases reinforce the importance of Supreme Court review.

Although separation of powers was not at issue in *Rosenberg*, the Vinson Court still could have engaged in an important dialogue with the executive and legislative branches. It could have informed the Justice Department that the Court would not tolerate the failure to turn over potentially exculpatory evidence, nor would the Court allow the encouragement or knowing use of perjured testimony. By reviewing the conflicting penalty provisions of the Espionage Act and Atomic Energy Act, the Court also could have encouraged Congress to fix statutory inconsistencies with corrective legislation.

5. Minority Rights

The Court also should take a great case to protect minority rights. *Carolene Products*'s famous footnote four charted the Court's course of heightened scrutiny to compensate for defects in the political process and to protect the rights of "discrete and insular minorities."[358]

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355. *But see* Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 UCLA L. REV. 30, 31 (1974) (arguing that the Court should have let impeachment process play out before hearing executive privilege claims).

356. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

357. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

358. United States v. Carolene Prods., 304 U.S. 144, 152–53 n.4 (1938).

John Hart Ely, responding to Bickel's countermajoritarian difficulty, described it as the Court's "representation-reinforcing" function.[359] The Court has protected the powerless from the tyranny of majority rule and overheated passions of the mob. That is why it twice took the cases of nine Scottsboro boys falsely accused of raping two white women[360] and why it effectively overruled *Plessy* in *Brown v. Board of Education*—blacks were unrepresented on jury pools and voting rolls.

Rosenberg was an instance in which the Court should have protected minority rights from mob rule. At the height of McCarthyist excesses of the 1950s, there was no more despised group than members of the American Communist Party. More than 70 percent of Americans wanted the Rosenbergs to die[361] and did not care whether they had received a fair trial, whether Ethel may have been innocent, or whether they were sentenced under the wrong statute.

Protecting minority rights can not only present a countermajoritarian difficulty but also, as Mark Graber describes it, a "non-majoritarian difficulty."[362] Historically, hot-button issues such as slavery and abortion have been too hot for elected officials, so they pass the buck to the courts. In *Dred Scott* and *Roe v. Wade*, however, the Court mistakenly tried to resolve every single issue rather than just the cases before the Court.[363] Even in a non-majoritarian dilemma, the Court should promote rather than squelch ongoing constitutional dialogue with the political branches.

Rosenberg presented a classic "non-majoritarian difficulty" that was too politically charged for federal officials. Being labeled soft on Communism at that time was the third rail of American politics. Truman, though he was a lame duck, passed the buck on clemency to Eisenhower; Eisenhower twice rejected the Rosenbergs' clemency petitions. The Truman and Eisenhower Justice Departments, the J. Edgar Hoover-led FBI, and Judge Kaufman gave the people what they wanted by sending the Rosenbergs to their deaths. By repeatedly denying certiorari, the Vinson Court succumbed to the same anti-

359. JOHN HART ELY, DEMOCRACY AND DISTRUST 181 (1980); *see also id.* at 7–9 (discussing problems with majority rule); *id.* at 75–77 (discussing *Carolene Products*).

360. Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932).

361. *See supra* note 1.

362. *See* Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35, 41–46 (1993) (recognizing legislative deference to judiciary on slavery, scope of Sherman Act, and abortion).

363. *See supra* text accompanying note 352 (discussing *Roe*). In *Dred Scott*, the Court could have stopped at declaring that it lacked jurisdiction because blacks were not citizens for diversity purposes. Instead, the Court also declared the Missouri Compromise unconstitutional. *But see* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 28–30 (2006) (arguing decision was legally defensible at the time).

Communist impulses as everyone else. Four years after *Rosenberg*, Robert Dahl recognized that the Court traditionally follows public opinion.[364] But the Court could have followed public opinion and still heard the case on the merits.

6. Guilt or Innocence

In the criminal context, the Court should take a great case if there are lingering questions about guilt or innocence. It is a mistake to focus solely on Julius's guilt as a post hoc justification for the Court's repeated denials of certiorari. Factually, the focus should have been on Ethel. Ethel may have known about the conspiracy, but the trial evidence against her was almost nonexistent. The subsequent release of American and Russian intelligence files reveals her to be a low-level accomplice at best, not a Soviet spy like her husband, brother, and sister-in-law.[365] Ethel's punishment certainly did not fit her crime. The Justice Department tried to use her as "leverage"[366] to get Julius to inform on other Communist spies. Her biggest crime may have been her loyalty to her husband. We will never know her exact role because the Rosenbergs' trial was fraught with perjured testimony from Ruth and David Greenglass. Exculpatory evidence (such as the Greenglasses' prior statements before the grand jury and to federal prosecutors) was never turned over to the defense, and the jury never saw potentially damaging evidence to the Greenglasses' credibility (such as the belatedly discovered console table). The Rosenbergs also may have been tried and sentenced under the wrong federal statute.

Guilt or innocence does matter, as a majority of the Court recently suggested in granting Georgia death-row inmate Troy Davis a stay of execution and ordering an evidentiary hearing on his innocence claims.[367] Davis filed an original writ of habeas corpus, much like the one John Finerty had filed in *Rosenberg* alleging prosecutorial misconduct and perjured testimony. Unlike in *Rosenberg*, the Court

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364. Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); *see also* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 15 (2009) (taking historical look at public opinion's influence on the Court).

365. *See supra* note 14.

366. *See* Roberts, *supra* note 281 ("The strategy was to leverage the death sentence imposed on Ethel to wring a full confession from Julius . . . .").

367. *See In re* Davis, 130 S. Ct. 1, 1 (2009) ("The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."). *But see* Grant v. Abu-Jamal, 08-652 (Jan. 19, 2010) (granting cert in case of convicted cop killer on death row Mumia Abu-Jamal, vacating Third Circuit decision affirming new sentencing hearing, and remanding case in light of Smith v. Spisak, 558 U.S. __ (2010)).

permitted Davis the opportunity to have his innocence claims heard in the lower courts. Although Julius's guilt is beyond doubt, Ethel's culpability is low, and her guilty verdict may have been the product of perjured testimony.

B. Bush v. Gore

The Court's decision to grant certiorari twice during the 2000 election crisis was the opposite response to its repeated certiorari denials in *Rosenberg*. Yet, in the end, the Court made many of the same mistakes and wrote opinions that many people viewed as political rather than legal. Although only a minority of scholars agreed with the outcome and reasoning of *Bush v. Gore*,[368] the Court was right to intervene initially in the 2000 election. First, there was a real case or controversy. Bush and Gore had filed dueling lawsuits in state and federal court about the Florida recount. Second, the country was in an uproar about the outcome of the 2000 presidential election. Third, the election involved complex issues of constitutional and statutory interpretation. Article II of the Constitution says: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."[369] The Court was concerned that the Florida Supreme Court, based on its interpretation of Florida election law, was usurping the constitutionally prescribed role of the state legislature. There was also confusion about whether the Florida legislature intended to comply with the "safe harbor" provision in Title III of the U.S. Code. Florida state and federal courts needed guidance about the meaning of Article II and interrelated federal and state

368. *See* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 98, 102 (Cass R. Sunstein & Richard A. Epstein eds., 2001) [hereinafter THE VOTE] ("The Fourteenth Amendment holding . . . was both sensible and persuasive."); RICHARD A. POSNER, BREAKING THE DEADLOCK 145–49 (2001) (arguing decision saved us from larger constitutional crisis of competing slates of electors); Peter Berkowitz & Benjamin Wittes, *The Lawfulness of the Election Decision: A Reply to Professor Tribe*, 49 VILL. L. REV. 429, 432 (2004) (arguing case "presented a valid legal question ripe for Supreme Court resolution, not a political question" and Equal Protection Clause and Article II were "reasonable ground[s]" for decision); Nelson Lund, *"Equal Protection, My Ass!"?:* Bush v. Gore *and Laurence Tribe's Hall of Mirrors*, 19 CONST. COMMENT. 543, 545 (2002) (rebutting criticisms that the Court's equal protection analysis in *Bush v. Gore* is legally untenable and raised only nonjusticiable political questions); Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1219 (2002) ("*Bush v. Gore* was a straightforward and legally correct decision."); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 50 ("Had the Supreme Court not intervened, the interbranch dispute might not have been resolved until January, when Congress would . . . have been faced with two slates . . . . [T]his would have been a miserable denouement, one unprovided for in the Constitution . . . .").

369. U.S. CONST. art. II, § 1.

statutes. Fourth, the Court had some institutional competence, having decided election disputes, such as legislative redistricting and other voting rights cases. Finally, if the Court had stopped at interpreting the relevant constitutional and statutory provisions and remanding the case to the Florida Supreme Court to clarify the basis of its decision,[370] *Bush v. Gore* would not have interfered with purely state issues or disrupted established case law.

Like *Rosenberg*, a stay proved to be the Rehnquist Court's undoing. The Court's stay of the Florida Supreme Court's December 8 order of a statewide recount of sixty thousand undervotes short-circuited established legal processes—much like Vinson's decision to call the Court into a special session and vacate Douglas's stay before lower courts could explore the underlying statutory issue. Florida counties had until December 12 to recount the undervotes and satisfy the federal "safe harbor" provision. At that point, the Florida legislature could have asked the governor to certify its slate of electors—either based on the statewide recount or, if the recount were not finished, on a prior vote total. If the Court had waited for the recount of the undervotes, Bush still would have won the election according to subsequent vote-counting efforts (in part because Gore's lawyers had not asked for a statewide recount of the overvotes).[371] The Court may have handed Bush the election in the short run, but by intervening the second time it undermined Bush's legitimacy in the long run. Just as the Vinson Court did in *Rosenberg*, the Rehnquist Court was a victim of its own impatience.

Bush v. Gore, like *Rosenberg*, was one of the Court's darker days. The Court could have granted certiorari once and helped the Florida Supreme Court through the 2000 election crisis by interpreting Article II of the Constitution, Title 3 of the U.S. Code, and even the Fourteenth Amendment. But as bad as the Court's second decision was, little has been lost. *Bush v. Gore* is proof that the Court's

370. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (vacating and remanding the Florida Supreme Court's decision because of uncertainty as to the grounds of its decision, including whether it had considered the federal statute and federal constitutional provision governing appointment of electors).

371. *See* Ford Fessenden & John M. Broder, *Examining the Vote: Study of Disputed Florida Ballots Find Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1 ("A close examination of the ballots found that Mr. Bush would have retained a slender margin over Mr. Gore if the Florida court's order to recount more than 43,000 ballots had not been reversed by the United States Supreme Court. . . . But the consortium, looking at a broader group of rejected ballots than those covered in the court decisions, 175,010 in all, found that Mr. Gore might have won if the courts had ordered a full statewide recount of all the rejected ballots."); Linda Greenhouse, *The Nation; The Vote Count Omits a Verdict on the Court*, N.Y. TIMES, Nov. 18, 2001, at 4 (citing findings suggesting that Gore would have won Florida had all of the disputed ballots been counted rather than just the "undervotes" at issue in the final court case).

institutional reputation can recover even from its biggest mistakes. The case did not hurt the Court's public-approval rating.[372] Just because the Court overplayed its hand during the 2000 election does not mean it should stop taking great cases.

VI. CONCLUSION

Rosenberg teaches us that Supreme Court review matters, especially as we continue to struggle to find the proper balance between protecting national security and preserving the constitutional right to a fair trial. Had the Vinson Court taken the case, the outcome probably would have been the same, a 7-2 or 6-3 decision affirming the Rosenbergs' convictions and death sentences. But the Justices could have debated the fundamental fairness of the trial based on the evidence presented at the time—rather than leave it to the blogosphere or letters to the *New York Times* fifty-six years later.[373] Majority and dissenting opinions could have been vindicated or vanquished by history. Black, Douglas, and Frankfurter could have written canonical dissents; Jackson could have written a canonical concurrence. If the Court had taken the time to address allegations of prosecutorial misconduct and knowing use of perjured testimony, we might be teaching *Rosenberg* in our constitutional law classes alongside the detainee cases.

The problem with the opinions in *Rosenberg* was that the Court never reviewed the record, never read merits briefs, and never heard well-prepared oral argument based on those briefs. The Court should have decided the case on its own schedule, irrespective of a trial judge's execution date, and in whatever way it saw fit. It was important for the Court to have the last word about the fairness of one of the twentieth century's most notorious federal espionage trials. *Rosenberg* is one of the great cases that the Court should have taken.

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372. The Court's 61 percent approval rating in September 2009 is nearly identical to its 59 percent rating in 2001. *See* Lydia Saad, *High Court to Start Term with Near Decade-High Approval Rating*, GALLUP, Sept. 9, 2009, http://www.gallup.com/poll/122858/High-Court-Start-Term-Near-Decade-High-Approval.aspx; *see also* John C. Yoo, *In Defense of the Court's Legitimacy*, *in* THE VOTE, *supra* note 368, at 223–40 (arguing that if Court can intervene in abortion debate and survive with its legitimacy intact, it can do same in 2000 election); Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1721 (2001) (arguing *Bush v. Gore* would have little effect on Court's legitimacy because about half agree with outcome).

373. *See* Mark Edwards, *Killing for Leverage*, CONCURRING OPINIONS, Nov. 9, 2008, http://www.concurringopinions.com/archives/2008/11/dying_for_lever_1.html; *supra* note 10.