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JUSTICE DOUGLAS AND THE *ROSENBERG* CASE: A REJOINDER

Michael E. Parrish†

In *Justice Douglas and the Rosenberg Case: Setting the Record Straight*,¹ Professor William Cohen argues that my critical interpretation² of Justice Douglas's behavior in the celebrated "atom spy" case of 1953 is seriously flawed. This is so, he writes, because I failed to appreciate the fact that Justice Douglas only voted to review cases that raised "substantial" legal questions and because in reconstructing the Supreme Court's disposition of the *Rosenberg* case, I relied upon a key source written by a member of the Court (Justice Felix Frankfurter) known to be hostile to Douglas. The larger conclusion that Cohen hopes to establish by disputing my interpretation is quite simple: Douglas never deviated from deciding the issues on "the merits" and remained unaffected by the fierce political controversy surrounding the case.

Professor Cohen does not dispute that Justice Douglas voted against reviewing the *Rosenberg* case on numerous occasions prior to issuing his famous stay of execution on June 17, 1953.³ He did so, Cohen claims, because he always treated capital cases with great circumspection, insisting "there was no point in reviewing even a case in which a life was at stake unless the case presented some legal issue that could arguably provide a basis for action by the Court."⁴ Douglas believed that the initial appeals in the *Rosenberg* case lacked substance. At the last moment, when less frivolous claims were presented, he supported review. According to Cohen,⁵ Douglas's behavior in this case was consistent with his behavior in other significant capital cases, such as *Chessman v. Teets*.⁶

I am baffled by Cohen's reliance on Douglas's behavior in the *Chessman* case. Despite its notoriety, the case of California's "red light bandit" seems remote from the issues raised by the trial of the

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¹ Cohen, *Justice Douglas and the Rosenberg Case: Setting the Record Straight*, 70 CORNELL L. REV. 211 (1985).

² Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805 (1977).

³ *Rosenberg v. United States*, 346 U.S. 273, 313 (1953) (Douglas, J., dissenting) (appendix quoting stay opinion of June 17).

⁴ Cohen, *supra* note 1, at 217.

⁵ *Id.*

⁶ 354 U.S. 156 (1957).

Rosenbergs. The Rosenbergs had been tried and convicted in federal court and sentenced to die for the crime of conspiracy to commit espionage. During the trial, the issue of their ties to the Communist Party had been emphasized by the prosecution.⁷ This was, in short, a political trial, perhaps the most notorious one in the nation's history. I found Douglas's behavior in this case bizarre, not because I believed him to be unusually sensitive with respect to capital punishment, but because he had shown himself to be alert to the dangers of political repression in America during the height of the Cold War.⁸ Rather than comparing Justice Douglas's behavior in *Rosenberg* to his behavior in *Chessman*, I would compare it to his behavior in other politically charged cases, such as *United States v. Bethlehem Steel Co.*,⁹ *Screws v. United States*,¹⁰ and *Schneiderman v. United States*.¹¹ In those cases, as in *Rosenberg*, Justice Douglas attempted to straddle controversial issues.¹²

One might assume that a justice who had spoken out against the threat to civil liberties posed by loyalty oaths¹³ and the Smith Act¹⁴ would see the danger to fundamental rights raised by the trial of Julius and Ethel Rosenberg. At the very least one might have expected that such a Justice, one who, as Felix Frankfurter noted, "has created for himself the reputation of being especially sensitive to the claims of injustice,"¹⁵ would have been willing to give the Rosenbergs an early hearing.

I am willing to concede, however, that Douglas may have found the original petitions for certiorari, which focused upon the treason clause, cruel and unusual punishment, rebuttal witnesses, and the conduct of Judge Kaufman, to be without legal merit,¹⁶ despite the fact that his old Yale Law School-New Deal colleague, Jerome Frank, suggested that the Court review certain aspects of the court of appeals decision¹⁷ and despite the fact that three other members of the Court (Black, Frankfurter, and Burton) believed, for a variety of rea-

⁷ Record at 226-30, *Rosenberg v. United States*, 345 U.S. 965 (1953) (prosecutor's opening statement).

⁸ See *infra* notes 13-15 and accompanying text.

⁹ 315 U.S. 289 (1942).

¹⁰ 325 U.S. 91 (1945).

¹¹ 320 U.S. 118 (1943).

¹² See *infra* text accompanying notes 41-52.

¹³ *Garner v. Board of Pub. Works*, 341 U.S. 716, 731 (1951) (Douglas, J., dissenting).

¹⁴ *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting).

¹⁵ Parrish, *supra* note 2, at 824 (quoting F. Frankfurter, Frankfurter to Burton (May 23, 1953) (available in Harold Burton Papers, Library of Congress, box 248)).

¹⁶ See Cohen, *supra* note 1, at 220-27.

¹⁷ *United States v. Rosenberg*, 195 F.2d 583, 605-07, 611 (2d Cir. 1952) (suggesting need for Supreme Court review of scope of review of sentencing and of treason clause issue).

sons, that the case should be heard.¹⁸ But I am not convinced that Cohen has offered a convincing explanation of Douglas's behavior with respect to the second petition in the spring of 1953, conduct which led Justice Jackson to remark to Justice Frankfurter that it was "the dirtiest, most shameful, most cynical performance that I think I have ever heard of in matters pertaining to law."¹⁹

In this second petition, attorneys for the Rosenbergs argued that their clients had been denied due process of law because of misconduct by the prosecution, specifically the statements made to newspaper reporters by prosecutor Irving Saypol in connection with the indictment of one William Perl, a potential witness against the couple. The court of appeals rejected this claim on the grounds that the Rosenbergs' attorney failed to make a timely objection during the trial,²⁰ but Judge Swan condemned Saypol's conduct as "wholly reprehensible."²¹ At the time the Second Circuit stayed the execution order to permit an appeal of Swan's ruling, both Judge Frank and Judge Hand suggested that the Supreme Court might take the case. Frank stated that "for my part, I believe the Supreme Court should hear it."²² Judge Learned Hand stated that "I would be unwilling to foreclose the possibility of taking this question to the Supreme Court."²³

Douglas, however, refused to vote for certiorari in the conference on April 11, 1953, when Black and Frankfurter, now alone among the nine, urged the other justices to do so.²⁴ Over a month later, shortly before the Court order denying the petition was due to be published, Douglas suddenly found merit in the new claims. He circulated a memorandum, dated May 22, which asked that the denial carry his dissent: "Mr. Justice Douglas, agreeing with the Court of 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."²⁵

¹⁸ See *Rosenberg*, 346 U.S. at 300-01 ("I have long thought that . . . automatic review by the highest court . . . in cases which involve the death penalty was a good practice.") (Black, J., dissenting); Parrish, *supra* note 2, at 817 (quoting Frankfurter as stating in conference that "the rare cases in which federal courts imposed death sentences should generally . . . be reviewed by us"); *id.* at 818 (Burton favored reviewing case because of strong feelings of two other Justices).

¹⁹ F. Frankfurter, *Rosenberg Memorandum 6* (June 4, 1953) (available in Frankfurter Papers, Harvard Law School Library, box 65, file 1).

²⁰ *United States v. Rosenberg*, 200 F.2d 666, 669-70 (2d Cir. 1952).

²¹ *Id.* at 670.

²² *N.Y. Times*, Feb. 18, 1953, at 1, 12.

²³ *Id.* at 12.

²⁴ Parrish, *supra* note 2, at 822.

²⁵ *Id.* at 823-24 (quoting W.O. Douglas, Memorandum to the Conference (May 22, 1953) (available in Harold Burton Papers, Library of Congress, box 248)).

Douglas's bombshell, what Frankfurter called his "last-minute change of position,"²⁶ prompted reconsideration of the *Rosenberg* case in the conference on May 23. There, according to Frankfurter's account, Jackson cast the fourth vote to grant certiorari. Douglas withdrew his memorandum because "what he had written was badly drawn, he guessed," and Jackson then switched his vote to the negative, which killed the grant.²⁷ Frankfurter reported that shortly after the conference broke up, Jackson said, with reference to Douglas: "That S.O.B.'s bluff was called."²⁸ When the official order of the Court denying certiorari was published on May 25, it noted only that Justice Douglas "is of the opinion [it] should be granted."²⁹

Professor Cohen concedes that Douglas probably made "two mistakes" in this second round of the *Rosenberg* case:

At first, he failed to recognize that the issue concerning [Saypol] was substantial. Later, he proposed a dissent that, as worded, might be read as a dissent on the merits of that issue. If he can be criticized for making these mistakes, there should be no basis for surprise or criticism that he corrected them.³⁰

But is that all one can say about Douglas's behavior, that he made "two mistakes" and corrected them? Why was Frankfurter so agitated? What did Jackson mean by his remarks? What did they believe to be Douglas's motive? In this round of the case did Douglas play to the grandstand, placing his own image above other interests in the case?

Forty-one days elapsed between Douglas's refusal to vote for certiorari on April 11 and the circulation of his memorandum, three days before the official announcement of denial by the Court. During this interval, Justice Frankfurter, for one, brooded about the case frequently as he debated whether or not to write a dissent from the denial.³¹ Cohen would have us believe that Douglas waited until the last moment to reexamine the record, dashed off a carelessly worded memorandum which accused the other justices of ignoring conduct which "prejudiced the defendants seriously," and then withdrew the offending document forthrightly when this "mistake"

²⁶ *Id.* at 824 (quoting from F. Frankfurter, Frankfurter to Burton (May 23, 1953) (available in Harold Burton Papers, Library of Congress, box 248)).

²⁷ F. Frankfurter, *supra* note 19, at 8.

²⁸ *Id.* at 9.

²⁹ *Rosenberg v. United States*, 345 U.S. 965, 966 (Douglas, J., dissenting from denial of certiorari) (1953).

³⁰ Cohen, *supra* note 1, at 236.

³¹ Parrish, *supra* note 2, at 823 (quoting from F. Frankfurter, Memorandum for the Conference (May 20, 1953) (available in Frankfurter Papers, Harvard Law School Library, box 65, file 7)).

was called to his attention by Justice Jackson and others.³²

There is support for Professor Cohen's interpretation of these events. Admittedly, Justice Douglas often worked quickly.³³ However, there are two reasons why Professor Cohen's explanation is doubtful. First, accepting that the memorandum's strong language was unintentional,³⁴ why withdraw it once it had prompted Jackson to switch his vote? If Justice Douglas thought the issues merited review, standing by the strongly worded memorandum, even though the strength was not intended, to pressure acceptance of the case does not strike me as unseemly. Second, the granting of certiorari made the offending document irrelevant. It seems reasonable, therefore, to explore alternative explanations of the events.

Douglas knew perfectly well that his memorandum, declaring the circuit court wrong on the law, had forced a reconsideration of the certiorari decision in the May 23 conference. After seeing the memorandum, Jackson challenged Douglas by switching his position and voting to grant. Although he privately denounced Saypol's conduct to Frankfurter,³⁵ Jackson must have believed that the circuit court had not erred. Here is how Frankfurter described Jackson's motives in the conference:

Jackson . . . said he too would now grant, because the Court, it seemed to him was put in an impossible position by Douglas' memorandum. There were now, he said, four people who at different stages had voted to grant. . . . This, he continued was bound to leak. Furthermore, it was now to be publicly said by a member of the Court that the Rosenbergs had not had a fair trial. It was impossible to deny under those circumstances.³⁶

Frankfurter relates that the discussion then turned to scheduling argument of the case:

At about this point, the discussion having gone on for quite some little time, Douglas spoke up. He had been quiet since announcing that he would grant. He ought to say something, he started.

³² Cohen, *supra* note 1, at 234-36.

³³ Parrish, *supra* note 2, at 826.

³⁴ Professor Cohen believes that the strong language resulted from haste. My theory is that the language was intended to invoke liberal sympathies for Douglas. Neither of us embrace a third possibility that the memorandum was specifically intended to pressure the other Justices to accept the case and Douglas simply backed down in the face of Jackson's attack. See Cohen, *supra* note 1, at 236 (asserting that Douglas did not participate in lobbying within the Court); Parrish, *supra* note 2, at 826. Justice Jackson's law clerk at the time, William H. Rehnquist, asserted that Douglas's motive was indeed "to force the hand of the court and get the result he now so belatedly wants." J. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 302 (1980) (quoting Rehnquist Memorandum, *In re Rosenberg*, Robert Jackson Papers, University of Chicago Law School).

³⁵ F. Frankfurter, *supra* note 19, at 5-6.

³⁶ *Id.* at 7.

What he had written was badly drawn, he guessed. He hadn't realized it would embarrass anyone. He would just withdraw his memorandum if that would help matters.

If Douglas' memorandum was withdrawn, Jackson said, we were exactly where we had been before, and there was no longer any reason for him to change his vote. . . . The petition for certiorari was thus, again, denied, and we turned to other matters.³⁷

Assuming Frankfurter's account to be substantially correct, Douglas withdrew his memorandum after the grant of certiorari had been made. Jackson immediately switched back to voting against review as a consequence. Douglas cannot have been under any illusions that the principal reason for Jackson's vote had been the memorandum, which he read as stating that the circuit court had been wrong and that Saypol's conduct "probably prejudiced the defendants seriously." Therefore, contrary to Professor Cohen's belief that Justice Douglas could not have known that withdrawal of the memorandum would cause Jackson to switch back,³⁸ Douglas had reason to believe that withdrawal would prevent Court review of the case. Jackson, throwing down the gauntlet to Douglas, said, in effect, I think you are wrong on the law; we should have the issue fully briefed and argued before deciding it. Douglas then withdrew the offending document. He did so in order to kill the grant of certiorari. Neither Professor Cohen's nor any other explanation of Douglas's behavior is credible.

Douglas did not have to "withdraw" the document if he simply believed it had been poorly drafted. The vote to grant certiorari made that concern irrelevant because the denial order would not be published on Monday morning and, therefore, neither would his dissent. All Douglas had to do was sit tight and say nothing; his "badly drawn" memorandum would not be filed and the Rosenbergs would still have their day in court. Was this a mere tactical blunder on his part? I think not. When the order denying certiorari was finally published on Monday, Douglas remained in dissent, minus the provocative statement that the prosecutor's conduct had "probably prejudiced the defendants seriously."³⁹ Because this was the only issue raised by the petition, how could Douglas remain in dissent, unless he continued to believe there was merit to the argument and that the circuit court had "probably" erred?

If Douglas adhered to his publicly recorded view that these is-

³⁷ *Id.* at 8.

³⁸ Cohen, *supra* note 1, at 233-34.

³⁹ *Rosenberg v. United States*, 345 U.S. 965, 966 (Douglas, J., dissenting from denial of certiorari) (1953).

sues were substantial, it is curious that in private he would move to kill the petition; he should have desired to see substantial issues briefed and argued, as Justice Jackson was willing to do. It is incredible that Douglas, if he thought the issues substantial, would have backed down in conference merely to avoid "embarrassing" Jackson, especially when the grant of certiorari obviated the embarrassing memorandum. On the contrary, Justice Douglas's goal was to record a public dissent from the denial of certiorari; such a dissent would allow Douglas to stand up for the Rosenbergs against a Court that refused even to hear the case.

At the conference, Douglas realized that he would be unable to publish such a strong statement in his dissent from the denial of certiorari; Jackson would vote to grant certiorari rather than allow publication of Douglas's memorandum. Although Professor Cohen argues that a dissent on the merits after full consideration of the case might have bolstered Douglas's libertarian credentials even more than a simple notation of dissent from the denial of certiorari,⁴⁰ Douglas did not care for this option because he did not want the Court to hear the case. He did not want the case heard because although he treasured his libertarian credentials, he also loathed communism and did not wish to see the Court stand in the way of the quick execution of the Rosenbergs. Grandstanding may not be the appropriate word to describe Douglas's behavior. The reader may search for a better one.

Professor Cohen has argued that Douglas's behavior in the *Rosenberg* case was perfectly consistent with his behavior in comparable circumstances. In one respect this is true. The *Rosenberg* case is not the only occasion on which Justice Douglas shifted his vote in a controversial case and attempted to straddle the issues. At least three other cases come to mind.

In *United States v. Bethlehem Steel Co.*,⁴¹ the Justices enforced a series of World War I contracts made between the federal government and the steelmaker despite allegations that the agreements, which yielded Bethlehem extraordinary profits, had been made under "duress" and were "unconscionable" as a matter of law. Douglas voted in the majority and joined in Black's opinion for the Court.⁴² However, Douglas also filed a concurrence which, according to Frankfurter, appeared only at the last minute.⁴³ The concurrence argued that the agreements had contained an implied promise Bethlehem would achieve certain production efficiencies before

⁴⁰ Cohen, *supra* note 1, at 232.

⁴¹ 315 U.S. 289 (1942).

⁴² *Id.* at 338 (Douglas, J., concurring).

⁴³ J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 257 (1975).

reaping the profits. Without persuasive evidence on this point, he said, they could not collect. But since the lower court had resolved this issue the other way, he was compelled to swallow his doubts and uphold the agreements.⁴⁴ In other words, Douglas tried to straddle the dispute. Frankfurter relates that the Douglas opinion outraged Justice Murphy, who had earlier rejected this analysis of the contracts as unfounded, although he, too, believed the profits to be contrary to the public interest and destructive of the war effort. "The Bethlehem case," he later told Frankfurter, "first put me wise to Bill Douglas."⁴⁵

A year later, when a narrow majority on the Court overturned the government's efforts to strip Communist Party leader William Schneiderman of his citizenship and deport him,⁴⁶ Douglas again attempted to straddle a controversial question. The Court held that the government failed to demonstrate that Schneiderman did not adhere to the principles of the Constitution and obtained his citizenship fraudulently.⁴⁷ Douglas filed a concurring opinion, which agreed that the prosecution had failed to establish fraud in the case, but also pointed out that Congress could prevent naturalization of communists if it desired to do so.⁴⁸ Justice Murphy, who wrote the majority opinion, expressed to Frankfurter his shock at what he termed Douglas's "skulduggery" in seeking to appease the country's "anti-Communist sentiment" while at the same time helping to block Schneiderman's deportation.⁴⁹

Finally, in the landmark case of *Screws v. United States*,⁵⁰ Douglas wrote a fence-straddling opinion for the plurality which sustained the constitutionality of sections of the Civil Rights Act of 1870 but reversed the conviction of a white Georgia sheriff who had been convicted under that law after beating a black prisoner to death. The conviction could not stand, Douglas argued, because the judge had failed to instruct the jury that it had to find that the sheriff "willfully" intended to deprive his victim of rights secured by the United States Constitution.⁵¹ As Justice Murphy noted in his biting dissent, the finding of "willfulness" added nothing to the statute; law enforcement officials did not need a comprehensive law library to know that "the right to murder individuals in the course of their

⁴⁴ 315 U.S. at 340-42.

⁴⁵ J. LASH, *supra* note 43, at 330 (1975); S. FINE, FRANK MURPHY: THE WASHINGTON YEARS 348 (1984).

⁴⁶ *Schneiderman v. United States*, 320 U.S. 118 (1943).

⁴⁷ *Id.* at 135-36.

⁴⁸ *Id.* at 163 (Douglas, J., concurring).

⁴⁹ J. LASH, *supra* note 43, at 257-58; S. FINE, *supra* note 45, at 414-15.

⁵⁰ 325 U.S. 91 (1945) (4-1-4 decision).

⁵¹ *Id.* at 106-07.

duties is unrecognized in this nation."⁵² Douglas's stand threw a bone to civil rights groups, while at the same time appeasing southern racists.

I have again relied on Justice Frankfurter for the behind the scenes events in two of these cases. The United States Reports, however, speak for themselves; in these instances Justice Douglas attempted to play to both sides of a controversial issue.

In the *Rosenberg* case, I believe, Justice Douglas was emotionally divided between his own self-image as the judicial champion of the underdog and his equally powerful loathing for communism and those who betray their country. When Americans for Democratic Action, those tough-minded liberals, endorsed him for the presidency in 1948,⁵³ they did so because he had "correct" beliefs on civil liberties, industrial relations, the United Nations, and communism. Dorothy Bailey's defender⁵⁴ was also a strong supporter of Ngo Dinh Diem.⁵⁵ In his *Dennis* dissent, Douglas stated that "the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it,"⁵⁶ and described American communists as "miserable merchants of unwanted ideas."⁵⁷

Professor Cohen concludes that when Justice Douglas, acting as Second Circuit Justice, granted the stay of execution based on the Atomic Energy Act issue, he "showed the courage and conviction for which he is best remembered."⁵⁸ Admittedly, Justice Douglas stood on firm legal ground in granting the stay.⁵⁹ However, as Professor Cohen concedes, by the time he issued the stay, Justice Douglas was operating in a vacuum; he had no support from his colleagues on the Court.⁶⁰ Even before Douglas granted the stay, the Chief Justice had begun preparations to overturn it.⁶¹ Professor Cohen is correct that the other members of the Court are also responsible for the "institutional failure" of those final days.⁶² One can only speculate, however, as to whether Justice Douglas would have shown the courage to grant the stay had his fellow Justices not already been moving to strike it down with alarming speed.

Contrary to Professor Cohen's allegation, I have never argued

⁵² *Id.* at 136-37 (Murphy, J., dissenting).

⁵³ See J. SIMON, *supra* note 34, at 271 (1980).

⁵⁴ See W.O. DOUGLAS, *GO EAST YOUNG MAN* 313-14 (1974).

⁵⁵ See W.O. DOUGLAS, *THE COURT YEARS* 207-08 (1980).

⁵⁶ *Dennis v. United States*, 341 U.S. 494, 588 (1951) (Douglas, J., dissenting).

⁵⁷ *Id.* at 589; see also W.O. DOUGLAS, *supra* note 55, at 304-05; J. SIMON, *supra* note 34, at 271.

⁵⁸ Cohen, *supra* note 1, at 250.

⁵⁹ *Id.* at 247; Parrish, *supra* note 2, at 834.

⁶⁰ Cohen, *supra* note 1, at 248 n.195; Parrish, *supra* note 2, at 834-35.

⁶¹ Parrish, *supra* note 2, at 834-35.

⁶² Cohen, *supra* note 1, at 247.

that Justice Douglas was the “principal villain” in the *Rosenberg* case. I can think of other, more appropriate candidates for that title. But neither do I believe that Justice Douglas was the hero of the case, a point of view that his partisans continue to espouse despite a great deal of evidence to the contrary.