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JUSTICE DOUGLAS AND THE *ROSENBERG* CASE: SETTING THE RECORD STRAIGHT

William Cohen†

In *Cold War Justice: The Supreme Court and the Rosenbergs*,¹ Professor Michael Parrish examines the Supreme Court's refusal to review the convictions of Julius and Ethel Rosenberg. A United States district court had sentenced the Rosenbergs to death in 1951 for giving American atomic secrets to the Soviet Union. For Parrish, the Court's refusal to act "suggested the terrible possibility of judicially sanctioned death through error, bias, or deceit that would return to haunt the Supreme Court and the American system of justice in the years ahead."² His unlikely candidate for the principal villain in these events is Justice William O. Douglas.

Justice Douglas is a surprising choice, because it was he who granted the last-minute stay of the Rosenbergs' execution.³ Furthermore, for many lawyers of the 1950s and 1960s, Hugo Black and William O. Douglas were special heroes. "Black and Douglas, dissenting" became a synonym for the lonely fight of the only two Justices on the Court who consistently had the courage and foresight to stand up for what was right during a period of national hysteria.⁴ Douglas's behav-

† C. Wendell and Edith M. Carlsmith Professor of Law, Stanford Law School. Professor Catherine Hancock of the Tulane University School of Law made extensive editorial suggestions. My colleagues, John Ely and Gerald Gunther, read and provided helpful comments on an earlier draft of this article. My experiences as a law clerk for Justice Douglas in 1956-57 provided the inspiration for writing this article, as well as evidence for some of my conclusions about his role in the *Rosenberg* case.

¹ Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805 (1977).

² *Id.* at 842.

³ The defendants presented their application for a stay of execution on June 15, 1953, the last day of the 1952 Term. The next day, a "next friend" petition was filed seeking habeas corpus and a stay. On June 17, Justice Douglas denied the stay requested by defendants on the ground that it raised no new issues, but granted the stay in the "next friend" petition. Chief Justice Vinson called the Court into special session to hear argument on vacating the stay. The argument on the Attorney General's motion to vacate the stay took place on June 18, and the decision vacating the stay was announced on June 19. The Rosenbergs were executed later that day. For a complete chronology of the *Rosenberg* case, see *infra* Appendix, The Chronology of the *Rosenberg* Case, p. 251. See also *Rosenberg v. United States*, 346 U.S. 273, 281-85 (1953); *Rosenberg v. United States*, 346 U.S. 313 (1953) (Douglas opinion granting stay of execution). These events are discussed *infra* text accompanying notes 173-204.

⁴ There are many examples of the Supreme Court's surrender to cold war hysteria. See, e.g., *Galvan v. Press*, 347 U.S. 522 (1954) (upholding federal statute providing for deportation of aliens who were former members of the Communist Party); *Adler v. Board of Educ.*, 342

ior in the *Rosenberg* case had always appeared to be one of the most vivid examples of his fortitude.⁵

Professor Parrish bases his case against Douglas on the five votes Douglas cast against hearing the case at different stages of the proceeding.⁶ He concludes that Douglas's behavior either "remains inexplicable in view of his own later apparent interest in the case,"⁷ or supports Justice Jackson's conclusion that Douglas was grandstanding—not wanting to review the case, but maintaining his liberal credentials through public dissent.⁸ Parrish's analysis of Justice Douglas's actions in the *Rosen-*

U.S. 485 (1952) (upholding state statute requiring dismissal of public school teachers associated with subversive organizations); *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951) (municipality may require employees to execute affidavits denying affiliation with the Communist Party); *Dennis v. United States*, 341 U.S. 494 (1951) (conviction of Communist Party leaders for advocating violent overthrow of government did not violate first amendment); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951) (upholding executive power to dismiss government employees suspected of disloyalty).

⁵ My own views of Douglas are identical to those of Justice Hans Linde, who clerked for him five years before I did. "Douglas and Black were the only Justices I would have wanted to clerk for at that moment I felt privileged to be on the side of a man of courage who was doing the right thing. . . ." J. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 298 (1980) (quoting Justice Linde). Douglas and Black dissented in all of the cases cited at *supra* note 4.

⁶ Only one of Douglas's negative votes could not have been deduced from the public record. Douglas's dissents from the denial of review in the *Rosenberg* cases were publicly noted. It appears that when Douglas did not dissent, he voted to deny review. He failed to dissent on three occasions: In *Rosenberg v. United States*, 344 U.S. 838 (1952), he joined the Court's denial of certiorari to review the court of appeals affirmation of the Rosenbergs' conviction. Justice Black noted his dissent. *See infra* text following note 47. In *Rosenberg v. United States*, 344 U.S. 889 (1952), he joined the Court's denial of rehearing. Black noted his dissent and Frankfurter filed a memorandum. *See infra* text following note 47. In *Rosenberg v. United States*, 345 U.S. 1003 (1953), Douglas did not dissent from the Court's denial of an original writ of habeas corpus. Black noted his dissent and Frankfurter filed a memorandum. *See infra* text at note 153. One other negative note was publicly recorded, but was coupled with a vote to hear another aspect of the case. In *Rosenberg v. United States*, 345 U.S. 989 (1953), Justice Douglas and four other Justices voted not to hear oral argument on an application for a stay of execution. Douglas's opinion explained that the Court's refusal to grant certiorari in another aspect of the case raising the same issues rendered oral argument on a stay pointless. *See infra* text accompanying note 141.

One negative vote discussed by Parrish is revealed solely by Justice Frankfurter's and Justice Burton's documents. That negative vote was withdrawn, and eventually became a recorded dissent from the Court's denial of certiorari on May 25, 1953. *Rosenberg v. United States*, 345 U.S. 965 (1953) (review of court of appeals affirmation of district court's refusal to vacate sentence and conviction). When this proceeding in the case was first discussed in conference on April 11, however, Douglas had voted to deny certiorari. Parrish, *supra* note 1, at 822 (citing F. Frankfurter, *Rosenberg memorandum 4* (June 4, 1953) (available in Frankfurter Papers, Harvard Law School Library, box 65, file 1)). Douglas announced his change of mind in a memorandum to the conference on May 22. At the conference on May 23, Justice Jackson changed his negative vote to provide the fourth vote to hear the case, but ultimately voted to deny review after Douglas decided to dissent without publishing his memorandum. Parrish, *supra* note 1, at 825. *See infra* text following note 105, and Appendix, *supra* note 3, p. 251.

⁷ Parrish, *supra* note 1, at 826.

⁸ *Id.* Douglas's autobiography supports the claim that Douglas wanted to be remembered as a dissenter in the *Rosenberg* case. In describing the events preceding his grant

berg cases is reflected in a sympathetic Douglas biography by James F. Simon,⁹ who labels Douglas's votes against hearing arguments "enigmatic"¹⁰ and "inconsistent with [Douglas's] whole judicial approach and philosophy."¹¹ Simon concludes that

there was something profoundly unsettling about Douglas's behavior. Douglas, the outspoken champion of the underdog, insisted on dealing with the Rosenberg case on his terms alone, seemingly oblivious to the desperate pleas of the Rosenberg attorneys and several of his colleagues. In doing so, Douglas forced the Rosenbergs into a [deadly] game of Russian roulette.¹²

Parrish and Simon raise two distinct questions. First, was it inconsistent with Douglas's normal philosophy concerning Supreme Court review of death penalty cases to have cast negative votes at certain stages of the *Rosenberg* cases? Second, was it inconsistent for Douglas to have voted to grant review at some stages of the *Rosenberg* cases while voting to deny review at others? Answers to both questions require a detailed examination of the issues that were raised at different stages in the Rosenbergs' attempts to obtain Supreme Court review of their convictions. It is also important to examine the reports available in the Justices' private records about the debates regarding the *Rosenberg* cases among the Justices. Both Parrish and Simon rely on the views of Justices Frankfurter and Jackson for their conclusions about Justice Douglas's voting pattern, despite the fact that both Justices were hostile witnesses to these events.¹³

In the end, these records show that Parrish and Simon are wrong about Douglas. His philosophy and actions were consistent throughout the Rosenberg saga. He believed that Supreme Court review should not be granted unless the Rosenbergs raised substantial questions of law, worthy of review on the merits. He was thus completely at odds with

of stay, Douglas said, "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. 965-966) voting to grant." W.O. DOUGLAS, *THE COURT YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 79 (1980). It is true that only Black and Douglas recorded dissents from denial of review on the merits at the various stages. *But see supra* note 6.

⁹ J. SIMON, *supra* note 5, at 298-313. The biography is sympathetic, but not idolatrous, with considerable detail concerning Douglas's troubled relationships with his first three wives, his children, his colleagues, and his law clerks. Moreover, it is a personal biography, with only limited attention to the details of individual decisions. Nevertheless, 15 pages in this 456 page book are devoted to the *Rosenberg* case. *Id.*

See also R. RADOSH & J. MILTON, *THE ROSENBERG FILE: A SEARCH FOR THE TRUTH* 398-401, 565 (1983) (describing Parrish's article as "an authoritative account of the Supreme Court's handling of the Rosenberg case and the personal views of the nine Justices, Frankfurter in particular").

¹⁰ J. SIMON, *supra* note 5, at 299.

¹¹ *Id.* at 312. Simon argues that Douglas was a "result-oriented libertarian" who "rarely based his judicial decisions on technical procedural grounds." *Id.*

¹² *Id.* at 313.

¹³ *See infra* note 120.

Frankfurter, who saw review as an opportunity for the Court to affirm the convictions and quiet the national controversy surrounding the case.¹⁴

Before plunging into the historical records, however, one caveat is in order. In evaluating the Supreme Court's role in the Rosenbergs' executions, two issues of continuing interest must remain secondary.¹⁵ The Rosenbergs' guilt or innocence, resting squarely on the credibility of the government's witnesses, was not an issue that could be resolved by an appellate court.¹⁶ Similarly, the wisdom of imposition of the death penalty by Judge Kaufman, the trial judge, was not an issue open to a federal appellate court under standards applied in the 1950s.¹⁷ Thus, these questions are not central to Parrish's study of the Supreme Court's several refusals to review the Rosenbergs' convictions.

I

SHOULD THE CASE HAVE BEEN REVIEWED BY THE SUPREME COURT WITHOUT REFERENCE TO THE SUBSTANTIALITY OF THE ISSUES?

For the Supreme Court, there was not one Rosenberg case, but many.¹⁸ Justices Black and Frankfurter voted to review *Rosenberg* cases at every opportunity; Douglas did not.¹⁹ Each of the *Rosenberg* cases involved different issues, however. Should the Supreme Court have granted review whether or not the legal arguments made were important or substantial?

¹⁴ See *infra* text accompanying note 23.

¹⁵ For differing evaluations of whether the Rosenbergs were innocent, compare W. SCHNEIR & M. SCHNEIR, *INVITATION TO AN INQUEST: REOPENING THE ROSENBERG "ATOM SPY" CASE* (1973), with R. RADOSH & J. MILTON, *supra* note 9.

¹⁶ See, e.g., *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1945) (holding that when an evidentiary basis for jury's finding exists, appellate court is not free to weigh conflicting evidence or to judge credibility of witnesses); W. SCHNEIR & M. SCHNEIR, *supra* note 15, at 177.

¹⁷ In affirming the Rosenbergs' convictions, Judge Jerome Frank's opinion for the court of appeals stated that "[u]nless we are to over-rule sixty years of undeviating federal precedents, we must hold that an appellate court has no power to modify a sentence." *United States v. Rosenberg*, 195 F.2d 583, 604 (2d Cir. 1952). Judge Frank did suggest in a footnote that the Rosenbergs "may ask the Supreme Court . . . to over-rule the decisions precluding federal appellate modification of a sentence not exceeding the maximum fixed by a valid statute, and to direct us accordingly to consider whether or not these sentences are excessive." *Id.* at 609 n.41. In a memorandum filed in connection with the denial to rehear the denial of certiorari, Justice Frankfurter noted that five new questions had been raised beyond those in the original petition for certiorari. "So far as these questions come within the power of this Court to adjudicate, I do not, of course, imply any opinion upon them. One of the questions, however, first raised in the petition for rehearing, is beyond the scope of the authority of this Court, and I deem it appropriate to say so. A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of this Court to revise." *Rosenberg*, 344 U.S. at 890. For further discussion of this issue, see *infra* notes 68-71 and accompanying text.

¹⁸ See *supra* note 6.

¹⁹ See *supra* note 6 and accompanying text.

In his published dissent from the Court's decision vacating Douglas's stay of the Rosenbergs' executions, Justice Black indicated that he had voted to grant certiorari to review affirmance of their convictions, in part because the case presented "important questions."²⁰ Beyond that, he argued:

I have long thought 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.

It is not amiss to point out 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.²¹

Justice Frankfurter also believed that automatic Supreme Court review was appropriate in those rare cases where a federal court imposed a death sentence.²² He was also convinced that the public controversy surrounding the *Rosenberg* case added to the Court's institutional responsibility to hear the case.²³

Douglas voted to deny the Rosenbergs' first certiorari petition. Initially he voted to deny the second petition as well.²⁴ For Parrish, the most "plausible, if still unflattering, explanation of [Douglas's] behavior is that Douglas, unlike Black and Frankfurter, believed the case then presented neither significant constitutional issues nor a threat to the Court's moral authority."²⁵ The question whether the issues raised were

²⁰ *Rosenberg*, 346 U.S. at 300.

²¹ *Id.* at 300-01.

²² See, e.g., Parrish, *supra* note 1, at 817 (quoting Frankfurter, who summarized his argument at the conference on the Rosenbergs' first certiorari petition by contending that "the rare cases in which federal courts imposed death sentences should generally . . . be reviewed by us."). Justice Frankfurter agonized over cases involving the death penalty, often torn between his opposition to capital punishment and his general theories of judicial restraint in constitutional adjudication. See generally Miller & Bowman, "Slow Dance on the Killing Ground": The Willie Francis Case Revisited, 32 DE PAUL L. REV. 1 (1982) (describing events during the Court's hearing of Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947)). In *Francis*, Justice Frankfurter persuaded Justice Burton to provide the fourth vote to grant certiorari, and ultimately voted to let execution proceed, but worked behind the scenes to secure executive clemency.

²³ Frankfurter's memorandum to the conference on the Rosenbergs' second certiorari petition referred to the doubts about the case that had been expressed by responsible people. The death sentences should not be carried out, he said, without putting behind the 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." Parrish, *supra* note 1, 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)).

²⁴ See *supra* note 6.

²⁵ Parrish, *supra* note 1, at 819. Parrish first raises, then dismisses the possibility that Douglas had lingering political ambition, and might have had hopes for the 1952 Democratic nomination. "If Douglas's ambitions for political office remained alive, a confrontation in the

substantial will be discussed below. Assuming that Douglas would vote to deny review if he concluded that the Rosenbergs' legal arguments were insubstantial, would it be "unflattering" to find that Douglas did not believe that a federal death sentence and loud public debate alone required Supreme Court review of the case?

The death sentence argument must be assessed from the vantage point of the 1950s rather than the 1970s. The constitutionality of the death penalty was not seriously doubted in 1952 and 1953.²⁶ If federal death sentences were rare, death sentences imposed and carried out in the states were not.²⁷ Douglas's ultimate position concerning the validity of the death penalty had not yet matured. The situation today, when hundreds of death sentences have been delayed for years by continuing litigation, had no parallel in the 1950s.²⁸ Thus, Douglas's disagreement with Frankfurter and Black over the death sentence argument does not demonstrate any surprising insensitivity to the death penalty issue on Douglas's part.

The argument that Supreme Court review would silence popular debate about the *Rosenberg* case overlooks the fact that two of the most important issues in that debate could not be settled by the Supreme Court. Whether the Rosenbergs were guilty and whether the death penalty was the appropriate punishment were never among the issues that were open for appellate review.²⁹ It is thus doubtful that the Court's affirmance of the convictions, after full consideration of legally insignificant arguments, would have given the death sentences "the moral authority that would come from a finding by [the] Court . . . that there was no flaw in the trial."³⁰ In any case, Douglas was not moved by the argument that the case should be reviewed because of the popular debate concerning the fairness of the Rosenbergs' trial. His ultimate decision to grant a last-minute stay in the case demonstrates that public

Court over domestic espionage amid the fetid atmosphere of 1952 would have presented a dilemma best avoided by refusing to hear the Rosenberg case." *Id.* He concludes that this explanation is implausible because Douglas made no effort to secure the 1952 nomination, did not possess a "coherent political organization," and voted to deny the Rosenbergs' petition for rehearing three days after Eisenhower's 1952 landslide victory. *Id.* See also J. SIMON, *supra* note 5, at 313 (dismissing possibility that Douglas's votes were motivated by political ambitions).

²⁶ See Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777-1806 (1970) (discussing development of the Court's treatment of cruel and unusual punishment). See generally H. BEDAU, *THE DEATH PENALTY IN AMERICA* 231-58 (1967) (describing change of public attitude toward death penalty from the 1950s).

²⁷ See, e.g., H. BEDAU, *supra* note 26, at 113-15 (reprinting table from U.S. Bureau of Prisons, National Prisoner Statistics 32 (Apr. 1963) (illustrating that from 1950-54, 413 executions took place, and only six of those were ordered by federal courts)).

²⁸ See Goldberg & Dershowitz, *supra* note 26, at 1791 (noting decline in executions is affected by "current stays of execution and postconviction proceedings").

²⁹ See *supra* notes 16-17 and accompanying text.

³⁰ See *supra* note 23.

opinion did not affect his votes. In Douglas's view, the mounting national and international campaign on behalf of the Rosenbergs³¹ did not provide a legitimate reason for Supreme Court action.

If there was nothing disreputable about Douglas's views concerning the death penalty or his disregard for public opinion, then Parrish's critique must rest on the assumption that Douglas's votes to deny review were inconsistent with his treatment of other cases. Parrish concludes that Douglas, "a paladin among American liberals, was the true anomaly,"³² because of his votes to deny review. Simon refers to the five votes to deny review cast by "the outspoken champion of the underdog" as "profoundly unsettling."³³ This implied charge of inconsistency calls for some explanation beyond the colorless conclusion that in Douglas's view the Rosenbergs' arguments were insubstantial. Neither Parrish nor Simon explicitly says so, but both clearly assume that Douglas normally would have voted to grant a hearing at all stages in a controversial death penalty case, whatever the merit of the legal arguments raised.

The public record of Douglas's actions in another death penalty case, *Chessman v. Teets*,³⁴ belies this assumption. Throughout the *Chessman* case, he maintained the consistent position that 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. The Court concluded that Chessman had not been given an adequate hearing concerning the accuracy of his trial transcript, reconstructed after the death of the court reporter.³⁵ Douglas dissented from the Court's reversal on these grounds of decisions denying federal habeas corpus relief.³⁶ He stated in his dissent that he agreed "with the

³¹ See generally W. SCHNEIR & M. SCHNEIR, *supra* note 15, at 175-95 (describing both national and international campaigns seeking to assist Rosenbergs).

³² Parrish, *supra* note 1, at 819.

³³ J. SIMON, *supra* note 5, at 313.

³⁴ 354 U.S. 156 (1957). Caryl Chessman's remarkable struggle to avoid execution in California's gas chamber generated international interest and protest. *Execution Stirs Anti-U.S. Rallies*, N.Y. Times, May 3, 1960, at 23, col. 2. In 1948, Chessman was convicted on 17 counts of kidnapping, robbery, and attempted rape and was sentenced to die although his crimes did not involve homicide. He conducted his own trial defense, studied law while living on death row, and did legal work on his own appeals. He also wrote four published books, using the proceeds to obtain the assistance of outside counsel on his appeals. Eight times during his nearly 12 year stay on death row, he successfully stayed execution dates. His execution was carried out on the ninth scheduled date, May 2, 1960. *Caryl Chessman Executed: Denies his Guilt to the End*, N.Y. Times, May 3, 1960, at 1, col. 2; *Twelve Year Court Fight Helped Stir Pleas to Save Chessman*, N.Y. Times, May 3, 1960, at 22, col. 3.

³⁵ *Chessman*, 354 U.S. at 161-66. The problem was that, in the trial court's hearing to settle the transcript, Chessman, who had consistently refused representation by an attorney, was not permitted to appear in person. The Court concluded that, despite Chessman's consistent refusal to be represented by an attorney at his trial, he should have been offered the opportunity to be represented by counsel at the hearing. *Id.* at 162-63.

³⁶ *Id.* at 166. The long post-conviction history of the case, which began with a trial ending in May, 1948, is detailed in an appendix to Douglas's dissent.

general principle announced" but concluded that its application had produced "a needless detour in a case already long-drawn-out by many appeals."³⁷ Douglas argued that Chessman never pointed to any omitted or inaccurate portion of the transcript that could have affected his appeal to the California Supreme Court. "To order, after this long delay, a new record seems to me a futility."³⁸

Douglas's announced philosophy of review in *Chessman* coincides completely with his approach in *Rosenberg*.³⁹ He believed that "in a case like this it matters not whether the petitioner is guilty or innocent, whether his complaint is timely or tardy. We should respect a man's constitutional right whenever or however it is presented to us."⁴⁰ Even in a case involving the death penalty, Douglas was convinced that the important question was whether "in substance, the requirements of due process have been fully satisfied" because "to require more is to exalt a technicality."⁴¹

³⁷ *Id.* at 166.

³⁸ *Id.* at 173.

³⁹ My first-hand experience as Douglas's clerk supports the public record of Douglas's philosophy concerning stays in death penalty cases. I worked on the *Chessman* case and on a less controversial death penalty case, *People v. Abbott*, 47 Cal. 2d 362, 303 P.2d 730 (1956). Following the affirmation of Burton Abbott's death sentence by the California Supreme Court, Abbott's counsel sought a stay from Douglas as Circuit Justice pending the filing of a petition for certiorari in the Supreme Court. On an application for a stay, the question of course was different from that raised on a vote to grant or deny review. A Justice might grant a stay if there were a reasonable possibility that four other Justices would find the issue substantial, whatever his own views. My memorandum to Douglas argued that no one should be put to death without a chance to petition for review in the Supreme Court. The Justice told me that he did "not work that way." He would deny a stay unless there was some issue in the case that, arguably, could provide the basis for review in the Supreme Court. When I reported that the petition for stay simply had a conclusory allegation that Abbott had been denied due process of law, I was informed that this was not sufficient. My own day-long study of the opinion of the California Supreme Court, and the record, could not unearth even a colorable federal claim. Douglas denied the stay in an unreported decision.

Ironically, Judge Denman, the Chief Judge of the Ninth Circuit, subsequently granted Abbott a stay. His reasoning was identical to that I had pressed on Douglas: that Abbott should not be executed until his time to petition the Supreme Court for review had expired. Douglas commented to me that he and Judge Denman applied different standards. Abbott was executed on March 15, 1957, although Governor Goodwin Knight had issued a temporary stay of execution that was not communicated to the prison in time.

⁴⁰ *Chessman*, 354 U.S. at 166.

⁴¹ *Id.* at 167. Douglas's approach in *Chessman* is fully consistent with his position on June 15, 1953, that oral argument on a stay of execution for the Rosenbergs was pointless because the Court had already decided not to review the Rosenbergs' case. See *supra* note 6. Douglas's prediction that Chessman's objections would inevitably be overruled proved to be true. Chessman did succeed in obtaining a writ of mandamus, requiring the Los Angeles Superior Court to change its procedures before hearing the motion to resettle the reporter's transcript. *Chessman v. Superior Court*, 50 Cal. 2d 835, 330 P.2d 225 (1958). In the following year, the California Supreme Court affirmed the Superior Court's decision to deny Chessman a new trial. *People v. Chessman*, 52 Cal. 2d 467, 341 P.2d 679 (1959). The day after Governor Edmund G. Brown, Sr., denied a petition for clemency, the United States Supreme Court stayed the execution pending filing of a timely certiorari petition. *Chessman v. California*, 361 U.S. 871 (1959). Two months later, the petition was denied. *Chessman v. California*, 361

It is easy to see how Parrish could have mistakenly assumed that Douglas normally would have voted to grant review in a case such as the Rosenbergs' in order to delay their executions or provide one last full hearing, whatever the outcome.⁴² In granting the stay of execution, Douglas did say that it was "important that before we allow human lives to be snuffed out we be sure—emphatically sure—that we act within the law. If we are not sure, there will be lingering doubts to plague the conscience after the event."⁴³ This was not, however, a statement that the Supreme Court should automatically review the Rosenbergs' death sentences, regardless of the nature of the issues raised on their behalf. The statement must be read in the context of an opinion arguing that there were substantial issues justifying review. Douglas believed that argument and deliberation were necessary if substantial questions were raised, no matter how heinous the Rosenbergs' crime or how loud the clamor for their speedy execution. That was his view in the *Rosenberg* cases and in all other capital cases.

Douglas has often been criticized as result-oriented and indifferent to legal issues. It is ironic that this caricature of Douglas led Parrish to criticize him for acting on his reasonable responses to the various legal issues raised at the different stages of the *Rosenberg* case. As will be seen, Douglas's votes to grant or deny review in the *Rosenberg* cases rested on the issues that had been raised. He consistently voted against plenary Supreme Court review, even in capital cases, when review would be pointless.⁴⁴ If there were no substantial legal arguments, he would not vote for review merely to delay imposition of capital punishment. He did not agree with the Black-Frankfurter position that all death sentences imposed by a federal court should be reviewed by the Supreme Court. He was not moved by Frankfurter's arguments that the Supreme Court should review the cases in order to affirm the convictions and silence the controversy surrounding the cases.⁴⁵ Whether or not one agrees with Douglas's position, the conclusion that this simple explanation of Douglas's votes is either "enigmatic"⁴⁶ or "unflatter-

U.S. 925 (1959). The Supreme Court denied rehearing in January 1960, *Chessman v. California*, 361 U.S. 941 (1960), and a month later the Court of Appeals for the Ninth Circuit denied a writ of habeas corpus. *Chessman v. Dickson*, 275 F.2d 604 (9th Cir. 1960), *cert. denied*, 361 U.S. 955 (1960). Two last minute applications for stay of execution presented to Justice Douglas were referred to the Court and denied. *Chessman v. Dickson*, 362 U.S. 966 (1960); *Chessman v. Teets*, 362 U.S. 965 (1960).

⁴² Such expectations concerning Douglas are common enough. When the opinions in *Chessman v. Teets* were delivered to the Supreme Court Clerk's office, a deputy clerk told me that, when he saw the names on the opinions (Harlan for the majority and Douglas in dissent), he naturally assumed that the decisions below, against *Chessman*, had been affirmed.

⁴³ *Rosenberg*, 346 U.S. at 321.

⁴⁴ See *supra* notes 35-41 and accompanying text.

⁴⁵ See *supra* notes 14, 23 and accompanying text.

⁴⁶ See *supra* note 10.

ing⁴⁷ lacks support.

The questions of whether Douglas was insensitive to substantial questions and whether he was inconsistent in voting to deny review at some stages of the case and then dissenting from denial of review and granting the stay of execution at another remains. These inquiries require an analysis of the different issues raised at those various stages.

II

DID THE ROSENBERGS' COUNSEL RAISE SUBSTANTIAL ISSUES IN THEIR ATTEMPTS TO SECURE SUPREME COURT REVIEW?

A. Appeal of the Initial Conviction

Douglas voted to deny petitions for certiorari and rehearing on the Rosenbergs' petition for Supreme Court review of the Second Circuit Court of Appeals decision affirming their convictions.⁴⁸ Among the votes he cast to deny argument in the *Rosenberg* case, these are the most significant. There were three Justices who voted to review the decision on both occasions,⁴⁹ and under the Court's rule of four, Douglas's negative votes were crucial. Those votes, however, rested on a proper conclusion that none of the issues raised by the Rosenbergs provided a substantial argument either for reversing the convictions or changing the sentences.

In their petition for certiorari to review the affirmance of their convictions, and in the petition for rehearing following the denial of certiorari, the Rosenbergs raised several issues, all of which had been unanimously rejected by the United States Court of Appeals for the Second Circuit.⁵⁰ Judge Jerome Frank's opinion for the court of appeals, however, suggested that some of the Rosenbergs' arguments might merit Supreme Court review.⁵¹ Justices Black and Burton considered some of

⁴⁷ See *supra* note 25.

⁴⁸ *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952).

⁴⁹ Justice Black noted his dissent to the denial of the petitions both times. 344 U.S. at 838; 344 U.S. at 889. The papers of Justice Frankfurter and Justice Burton indicate that they also voted to grant review. Parrish, *supra* note 1, at 816-17 (citing F. Frankfurter, *supra* note 6; and Burton, Conference Sheets, Certs, and Appeals for 1952 Term (available in Harold Burton Papers, Library of Congress, box 248)). Justice Frankfurter had foreclosed the possibility of publicly disclosing his dissent from the denial of certiorari by having consistently taken the position that it was inappropriate to note individual votes when a petition for certiorari was denied. See, e.g., *Chemical Bank & Trust Co. v. Group of Inst'l Investors*, 343 U.S. 982, 982 (1952) (Memorandum of Frankfurter, J.) (due regard for administration of certiorari jurisdiction precludes noting dissents). His published memorandum on the denial of rehearing purports neither to take a position nor to disclose his vote, but it suggests that he voted to grant review. A Frankfurter memorandum in a case, explaining that he could not disclose whether his vote had been to grant or deny review, was often a signal that he had voted to grant review.

⁵⁰ *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952).

⁵¹ Writing only for himself, Frank suggested that although federal decisions consistently

these issues worthy of review.⁵² We have no record of Douglas's reasons for voting to deny certiorari.⁵³ It is thus necessary to examine the issues that the Rosenbergs raised in order to determine whether any of them, particularly those identified as significant by Justice Black, Justice Burton, and Judge Frank, were sufficiently substantial that Douglas's votes to deny review can be criticized, in his own terms, for allowing "human lives to be snuffed out" when he was not "sure—emphatically sure—that we act within the law."⁵⁴

The Rosenbergs' most important arguments⁵⁵ on the appeal of their convictions centered on the provisions of article III, section 3, of the Constitution that define the crime of treason as "adhering to" the "enemies" of the United States, and that require the testimony of two

denied appellate judges the power to revise sentences: "[T]he Supreme Court alone is in a position to hold that [28 U.S.C.] Sec. 2106 confers authority to reduce a sentence which is not outside the bounds set by a valid statute." 195 F.2d at 606-07 (footnote omitted). Writing for the Second Circuit, Frank rejected the argument that a death sentence for an offense which is similar to, but less grave than treason, was cruel and unusual punishment. *Id.* at 611. Frank reasoned that, because "the *Quirin* case had the unavoidable consequence of permitting death sentences to be imposed upon the citizen—saboteurs for crimes other than treason, the Supreme Court must there have implicitly rejected the 'cruel and unusual' argument." *Id.* (citing *Ex parte Quirin*, 317 U.S. 1 (1942)). Frank added, however, that because the Supreme Court did not specifically discuss this issue, "that Court may well think it desirable to review that aspect of our decision." 195 F.2d at 611. On a third point, Frank disagreed with the other Second Circuit judges. The court of appeals rejected an argument that the statutory requirement that the prosecution supply a list of witnesses to the defense was applicable to a witness called in rebuttal. Frank, however, expressed "some doubt as to whether" the witness's testimony was rebuttal. *Id.* at 599 n.14. Nevertheless, Frank joined Judges Swan and Chase in concluding that, at most, the defendants were entitled to an adjournment. "It might well have been error to refuse a reasonable request for adjournment coupled with some showing of surprise. But defendants made no such request." *Id.* at 600 (footnote omitted). Parrish seems to include this as an issue where Frank had "virtually begged the Court to resolve his own doubts." Parrish, *supra* note 1, at 815.

⁵² Parrish, *supra* note 1, at 816-17 (citing F. Frankfurter, *supra* note 6, and Burton, *supra* note 49). Black believed that the ease should be reviewed because it involved a federal death sentence. See *supra* text accompanying note 21. Burton identified two issues meriting review in the Rosenbergs' ease, but he also indicated in his notes that he doubted the arguments would succeed on the merits. Parrish, *supra* note 1, at 816, 818. His vote to review the case was based on the strong feelings of two Justices. *Id.* at 818. It was not unusual for Burton to change his position on a case at the urgings of other Justices, despite his own doubts that the issues had merit. See *In Memoriam—Harold Hitz Burton*, 78 HARV. L. REV. 799, 800 (1965) (quoting Letter from Justice Frankfurter to *Harvard Law Review*). Justice Frankfurter did not discuss whether some issues were substantial enough to merit review. Parrish, *supra* note 1, at 816-17. Justice Frankfurter contended that the Court had an "institutional responsibility to hear the case" in order "to calm popular alarm over the legality of the convictions," without reference to the substantiality of any issue. *Id.* at 818; see also *supra* note 22 and accompanying text.

⁵³ Justice Frankfurter noted that Douglas gave no reasons or arguments for his votes, stating that this was Douglas's normal behavior on certiorari votes. Parrish, *supra* note 1, at 817 (citing F. Frankfurter, *supra* note 6).

⁵⁴ *Rosenberg v. United States*, 346 U.S. at 321; see also *supra* text at note 43.

⁵⁵ These arguments are important in the sense that they were singled out by two Justices and Judge Frank. See *infra* text accompanying notes 59-61.

witnesses to the same overt act for conviction. The Soviet Union was not an "enemy" at the time the Rosenbergs were alleged to have passed atomic secrets, making the crime of which the Rosenbergs were convicted espionage, rather than treason. The Rosenbergs argued on appeal that the constitutional safeguards applicable to the "greater" crime of treason should apply to the "lesser" offense of espionage. Thus, the Court should vacate their convictions because only one witness testified to any overt act on which their convictions rested.⁵⁶ A second argument, that the death penalty was cruel and unusual punishment, was also tied to the treason clause.⁵⁷ According to this argument, courts traditionally were authorized to impose the death penalty for treason, but imposition of the death penalty for the lesser offense of espionage was so disproportionate that it violated the eighth amendment.

The court of appeals addressed and rejected both contentions. The court found the "lesser offense" argument to be squarely foreclosed by the 1942 Supreme Court decision in *Ex parte Quirin*.⁵⁸ Judge Frank's opinion, however, stated that the death penalty argument had never been specifically discussed by the Supreme Court, which "may well think it desirable to review that aspect of our decision."⁵⁹ Parrish relies on Judge Frank's remark in arguing that these issues were substantial. He quotes Frankfurter's notes reporting that Black thought both treason clause issues serious,⁶⁰ and Burton's notes indicating that he felt the same way.⁶¹

Douglas's vote to deny review must have rested on his conclusion, shared by at least five other Justices, that both treason clause issues were insubstantial. Unless the Court was prepared to overrule *Ex parte Quirin*,⁶² that conclusion was correct. In *Quirin*, the Court had sustained death sentences against American citizens for violations of an article of war which made it a crime for enemy belligerents to be within the United States while out of uniform. The Court had rejected the argument that the procedural requirements of a treason trial must be satisfied, reasoning that this treason-like offense was distinct from article III treason. Applying this logic to the *Rosenberg* case, Judge Frank stated:

⁵⁶ *United States v. Rosenberg*, 195 F.2d 583, 610 (2d Cir. 1952).

⁵⁷ *Id.* at 611.

⁵⁸ *Id.* (citing *Ex parte Quirin*, 317 U.S. 1 (1942)); see *supra* note 52.

⁵⁹ *Rosenberg*, 195 F.2d at 611.

⁶⁰ Frankfurter states that Black "thought the fact that a death sentence had been imposed in time of peace for what was in effect a charge of treason . . . without observance of the constitutional requirement . . . presented a serious question." Parrish, *supra* note 1, at 816 (quoting Frankfurter, *supra* note 6).

⁶¹ Parrish, *supra* note 1, at 816 (citing Burton, *supra* note 49). There is some confusion as to which of the issues concerning the death penalty were thought substantial by Justice Burton. Nevertheless, Justice Burton doubted that any of the issues would warrant reversal. See *supra* note 52.

⁶² 317 U.S. 1 (1942).

In the *Quirin* case, the absence of uniform was an additional element, essential to Haupt's non-treason offense although irrelevant to his treason; in the Rosenbergs' case, an essential element of treason, giving aid to an "enemy," is irrelevant to the espionage offense.⁶³

The decision in *Quirin* that the procedural requirements of the treason clause did not apply to a defendant who committed violations beyond mere treason squarely refuted the Rosenbergs' argument that those procedural requirements were required in prosecutions for offenses less than treason.

As Judge Frank noted, *Quirin* did not necessarily resolve the Rosenbergs' eighth amendment argument although this second argument was "a variant of the first."⁶⁴ It was possible to argue that *Quirin* left open the question of whether those guilty of an offense less than treason could suffer a punishment as harsh as that provided for the greater crime of treason.⁶⁵ But that argument "would compel the strange conclusion" that the congressional punishment for treason put a ceiling on the punishments that could be imposed for all crimes less than treason, or perhaps for all other crimes.⁶⁶ Thus, although Judge Frank labeled the argument as one that might not be completely foreclosed by precedent, he concluded nonetheless that it had no merit.

Judge Frank identified a third issue that might provide the basis for Supreme Court review, derived from the Rosenbergs' argument that the death sentence was inappropriate because it had never before been imposed in an espionage case.⁶⁷ Writing for the court, Judge Frank concluded that federal courts lacked the power to review or modify any sentence that was within the limits allowed by a valid statute, noting that "for six decades federal decisions, including [those] of the Supreme Court . . . have denied the existence of such authority . . ."⁶⁸ At the same time, Judge Frank searched for some outlet for his own strong feelings that the death penalty for the Rosenbergs was wrong. In two

⁶³ 195 F.2d at 611. Frank noted that the *Quirin* holding had been criticized in Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 421 (1945), on the ground that it allowed Congress to punish treason without the constitutional safeguards, by adding additional elements to a crime that would otherwise be treason. While the *Quirin* reasoning also fits a case like *Rosenberg*, where the charged espionage crime differs from treason in not including one of its elements—that the foreign country aided be an "enemy"—Hurst's criticism does not apply to the Rosenbergs because the offense charged is not treason. The Rosenbergs' suggested distinction of *Quirin*, that the case "involved an appeal from a military tribunal of a conviction for an offense against the laws of war," was rejected by the court of appeals. 195 F.2d at 611 n.3 (citing Hurst, *supra*, at 442 n.135).

⁶⁴ 195 F.2d at 611.

⁶⁵ *Quirin*, as noted, involved a death sentence for "treason plus" while *Rosenberg* involved a death sentence for "treason minus." See *supra* text accompanying notes 63-64.

⁶⁶ 195 F.2d at 611. Parrish concedes that "Frank did not find much merit in [the] arguments" surrounding the treason clause. Parrish, *supra* note 1, at 816 n.34.

⁶⁷ 195 F.2d at 604.

⁶⁸ *Id.* at 605-06 (citation omitted).

paragraphs expressing "the views only of the writer of this opinion,"⁶⁹ he pointed out that some commentators had urged that appellate courts should have sentencing review powers, possessed by appellate courts in England, Canada, and some states.⁷⁰ He acknowledged, however, that "the Supreme Court alone is in a position" to decide that federal appellate judges had such power.⁷¹

Judge Frank's proposal has not been seriously considered by the Supreme Court in the more than thirty years that have passed since the *Rosenberg* cases.⁷² Even Justice Frankfurter, who carefully avoided confronting the possible merits of any other issue in the case,⁷³ wrote in his memorandum concerning the denial of rehearing that a sentence imposed by a trial court "even though it be a death sentence, is not within the power of this court to revise."⁷⁴

Jerome Frank often incorporated scholarly essays in his judicial opinions, some of them urging major reforms in the law.⁷⁵ He only partially resisted that temptation in his opinion in the *Rosenberg* case, where he referred in the text to the views of scholars and the law of other jurisdictions. Judge Frank tentatively explored his own views concerning appellate power to revise criminal sentences in three lengthy footnotes.⁷⁶ His invitation to the Supreme Court to consider involving federal appellate judges in the sentencing process was more an outlet for his strong feelings concerning the death penalty for the Rosenbergs than it was a serious effort to make the *Rosenberg* case the vehicle for that major revision in settled law.⁷⁷

A fourth argument, included among those presented in the original

⁶⁹ *Id.* at 605.

⁷⁰ *Id.* Judge Frank cited Hall, *Reduction of Criminal Sentences on Appeal* (pts 1 & 2), 37 COLUM. L. REV. 521, 762 (1937).

⁷¹ 195 F.2d at 606.

⁷² In administering its eighth amendment standards in capital cases, the Supreme Court has made much of the existence of appellate review of death sentences. *See, e.g., Zant v. Stephens*, 103 S. Ct. 2733, 2749-50 (1983) (mandatory appellate review an important procedural safeguard, avoiding arbitrariness and assuring proportionality). Review of mandatory life sentences has likewise been introduced. *See Solem v. Helm*, 103 S. Ct. 3001 (1983). The use of cruel and unusual punishment standards to review death sentences, however, was not to take place until 1972, decades after the *Rosenberg* case. *See Furman v. Georgia*, 408 U.S. 238 (1972). Judge Frank suggested Supreme Court review in *Rosenberg* through a possible interpretation of 28 U.S.C. § 2106 (1982), which gives appellate courts general power to "affirm, modify . . . or reverse" judgments on appeal. However, if that provision had provided the basis for appellate modifications of criminal sentences, it would have extended to all criminal sentences and not just death sentences. For modern arguments on this subject by another federal judge, see M. FRANKEL, *CRIMINAL SENTENCES* (1972).

⁷³ *See supra* notes 49, 52.

⁷⁴ 344 U.S. at 890; *see also supra* note 17.

⁷⁵ *See* W.O. Douglas, *Jerome N. Frank*, 10 J. LEGAL EDUC. 1, 4-6 (1957).

⁷⁶ 195 F.2d at 607-08 nn.29-31.

⁷⁷ The Rosenbergs did not make the argument in their original petition for certiorari, raising it for the first time in the petition for rehearing. 344 U.S. at 890.

petition for certiorari and petition for rehearing, is also identified by Parrish as "substantial" because of views expressed by Judge Frank. As part of its case-in-chief, the government introduced evidence that Julius Rosenberg had warned David Greenglass to leave the country, and had told him that the Rosenbergs planned to flee to Mexico.⁷⁸ In the defense case, the Rosenbergs' testimony on direct examination contradicted the government's evidence. Furthermore, on cross-examination, Julius Rosenberg denied having had passport pictures taken in May or June of 1950. The government subsequently called Schneider, a professional photographer, as a rebuttal witness. Schneider testified that he had taken photographs of the Rosenbergs and their children in May or June of 1950, and that Julius Rosenberg had told him the pictures were needed for travel abroad.⁷⁹ The defense objected that it had not been given Schneider's name on the list of government witnesses furnished pursuant to 18 U.S.C. § 3432.⁸⁰ Parrish noted that "[n]ot only did the name of the photographer . . . not appear on the list of witnesses for the prosecution, but the government called him to testify *after* the Rosenbergs rested their case."⁸¹ Judge Kaufman, however, overruled the objection on the ground that Schneider was a rebuttal witness whose name was not required to be furnished by the statute.

None of the court of appeals judges questioned the settled rule that the statute did not apply to government rebuttal witnesses.⁸² The Rosenbergs argued, however, that Schneider was not a "proper" rebuttal witness; he should have been called in the prosecution's case-in-chief, and thus should have been on the list of witnesses. Two of the three Second Circuit judges concluded that Schneider's testimony was proper to rebut Julius Rosenberg's denial, during his cross-examination, of having passport pictures made.⁸³ In a footnote, Judge Frank expressed doubt whether Schneider's testimony was proper rebuttal.⁸⁴ He nevertheless agreed with his colleagues that, at most, the Rosenbergs would

⁷⁸ David Greenglass was Ethel Rosenberg's brother and a former employee at the Los Alamos, New Mexico, research site for the Manhattan Project. Greenglass was indicted along with the Rosenbergs; he and his wife Ruth agreed to be the prosecution's chief witnesses at trial in return for his reduced sentence. 195 F.2d at 592.

⁷⁹ *Id.* at 599.

⁸⁰ *Id.* The statute requires that in cases of "treason or other capital offense" the defense must be furnished with "a list . . . of the witnesses to be produced on the trial for proving the indictment" three days before trial begins. 18 U.S.C. § 3432 (1982).

⁸¹ Parrish, *supra* note 1, at 813 (emphasis in original).

⁸² 195 F.2d at 599.

⁸³ *Id.* R. RADOSH & J. MILTON, *supra* note 9, at 265, suggest that the prosecution may not have discovered Schneider prior to trial. They surmise that the FBI might not have checked out the possibility that the Rosenbergs went to a private photographer, because there was photographic equipment in their apartment.

⁸⁴ 195 F.2d at 599 n.14. Parrish apparently considers the issue to be substantial for that reason alone. He seems to include this as an issue where Frank had "virtually begged the Court to resolve his own doubts." Parrish, *supra* note 1, at 815.

have been entitled to an adjournment on a showing of surprise.⁸⁵ The Rosenbergs' counsel did not request adjournment at trial and did not attempt to show surprise. Therefore, Judge Frank ruled that no error was committed.⁸⁶ It is thus difficult to see why the Supreme Court should have considered whether Schneider was a proper rebuttal witness.

Parrish identifies two remaining issues raised at this stage as "substantial."⁸⁷ The first issue involved a jury request, during deliberation, that the court read a portion of Ruth Greenglass's⁸⁸ direct testimony. The trial judge refused a defense request that her cross-examination be read as well, on the ground that the jury had not requested it. The defense had argued that Ruth Greenglass's testimony on direct and cross-examination had been nearly identical, word for word, suggesting that she had been coached. Because the defense counsel had made that very argument on summation to the jury, however, the trial judge was unmoved by the defense plea. The defense request was repeated in the presence of the jury, and the judge made it clear that he would read only what the jury requested. When the jury failed to ask to hear the cross-examination testimony, it became apparent that the jury did not wish to hear it. The court of appeals concluded that the trial judge's refusal to have the cross examination read to the jury was properly within his discretion.⁸⁹ Parrish's account does not indicate that Judge Frank, or any of the Justices who voted to grant certiorari, regarded this issue as substantial.

The final issue suggested by Parrish appears more substantial now that it was at the time, in light of disclosures made years later concerning both Judge Kaufman's *ex parte* discussions with the prosecution prior to imposing sentence, and his efforts after the trial to insure that the death sentences would be carried out without delay.⁹⁰ On appeal of their convictions, the Rosenbergs argued that Judge Kaufman had not been neutral, exhibiting hostility toward the defense. Whatever Judge Kaufman's role in the *Rosenberg* case was off the bench, the trial transcript did not portray a hanging judge, and the court of appeals concluded that Judge Kaufman had acted within the traditional latitude afforded federal judges to "bring out the facts of the case."⁹¹ This con-

⁸⁵ 195 F.2d at 600.

⁸⁶ *Id.*

⁸⁷ Parrish, *supra* note 1, at 813. In his analysis, Parrish considers these two issues together.

⁸⁸ *See supra* note 78.

⁸⁹ 195 F.2d at 599.

⁹⁰ R. RADOSH & J. MILTON, *supra* note 9, at 428-29; Parrish, *supra* note 1, at 811 n.21. *See also* Countryman, *Out, Damned Spot: Judge Kaufman and the Rosenberg Case*, THE NEW REPUBLIC, Oct. 8, 1977, at 15-17.

⁹¹ 195 F.2d at 594.

clusion was, no doubt, strongly influenced by statements that the Rosenbergs' counsel made during summation to the jury, that "we feel that the trial has been conducted . . . with that dignity and that decorum that befits an American trial" and that "the court conducted itself as an American judge."⁹² None of the participants appears to have regarded the complaint about Judge Kaufman's bias as a particularly strong argument for reversal. The remaining points raised by the Rosenbergs in their petition for certiorari and petition for rehearing were even weaker.⁹³

B. The First Motion for Post-Conviction Relief

The second *Rosenberg* case before the Supreme Court produced an entirely new set of issues. Following their failure to win rehearing of the denial of certiorari by the Supreme Court, the Rosenbergs quickly instituted new proceedings in the District Court for the Southern District of New York to vacate their convictions and sentences.⁹⁴ Judge Kaufman disqualified himself, and Judge Ryan rejected all of the new contentions.⁹⁵ The United States Court of Appeals for the Second Circuit⁹⁶

⁹² *Id.* at 593. The court of appeals also noted that, on making their motion for new trial on the basis of Judge Kaufman's behavior, defense counsel stated that the judge's fault had been "inadvertent" and that he had "been extremely courteous to us and afforded us . . . every privilege that a lawyer should expect in a criminal case." *Id.* Judge Frank's opinion, expressed in private correspondence, was that "the defendants received a fair trial. Indeed it was more fair than many in which convictions have been affirmed." Parrish, *supra* note 1, at 816 n.34 (citing letter from Judge Frank to Zachariah Chafee (Nov. 18, 1952)).

⁹³ These points are not included on Parrish's list of substantial issues. Parrish, *supra* note 1, at 812-14. The Rosenbergs claimed that the Espionage Act was unconstitutionally vague, an argument rejected in *Gorin v. United States*, 312 U.S. 19 (1941). With the vagueness contention resolved by *Gorin*, the related first amendment argument collapsed as well, because the free speech guarantee did not invalidate a statute that explicitly forbids the communication of state secrets related to national defense to a foreign government. The Rosenbergs also argued that the indictment was vague because it did not allege that the information allegedly passed to the Soviet Union was "not public," because *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), had interpreted the statute as inapplicable to information the government had consented to make public. This argument was frivolous, since rule 7(c) of the Federal Rules of Criminal Procedure permitted recitation of the criminal statute, and that recitation "necessarily imported its correct judicial interpretation." 195 F.2d at 591.

A number of arguments involved evidence alleged to have been improperly admitted. The evidence of the Rosenbergs' Communist Party membership, while obviously prejudicial, was just as obviously probative of their probable motives. 195 F.2d at 595-96. Other evidence attacked as hearsay had been admitted without objection, was not prejudicial, and fell within an exception to the hearsay rule regarding statements of a co-conspirator. *Id.* at 596-97. Finally, the Rosenbergs argued in the petition for rehearing that Judge Kaufman had relied on extra-record facts in deciding to impose the death penalty, a practice specifically permitted by *Williams v. New York*, 337 U.S. 241 (1946).

⁹⁴ These proceedings were brought pursuant to 28 U.S.C. § 2255 (1982) which provides for habeas corpus relief for federal prisoners. The Rosenbergs' second attempt to obtain § 2255 relief is recounted at *infra* Part II.C.

⁹⁵ *United States v. Rosenberg*, 108 F. Supp. 798 (S.D.N.Y. 1952).

⁹⁶ *United States v. Rosenberg*, 200 F.2d 666 (2d Cir. 1952). The court of appeals decision was announced on December 31, 1952. On January 2, 1953, Judge Kaufman denied a

affirmed Judge Ryan's decision in another unanimous decision. Eventually, the United States Supreme Court denied certiorari to review the court of appeals decision, and Justice Douglas publicly recorded his dissent.⁹⁷ Parrish's study of the papers of Justice Burton and Justice Frankfurter shows, however, that Justice Douglas had initially voted to deny certiorari in this case, as well, but had changed his mind.⁹⁸ Parrish is persuaded that Douglas's action was "inexplicable" at best,⁹⁹ and perhaps even "grandstanding" at worst.¹⁰⁰ Can Douglas's inconsistent votes be explained more simply?

The Rosenbergs' post-conviction motion presented four issues. The most substantial issue, and the center of attention in both the court of appeals and the Supreme Court, concerned the conduct of the prosecutor.¹⁰¹ During the trial, prosecutor Irving Saypol had indicted William

motion for reduction of sentence. 109 F. Supp. 108 (S.D.N.Y. 1953). On February 17, 1953, the court of appeals stayed execution pending Supreme Court review. Parrish, *supra* note 1, at 822; see also Appendix, *supra* note 3, p. 251.

⁹⁷ United States v. Rosenberg, 345 U.S. 965 (1953).

⁹⁸ Parrish, *supra* note 1, at 822-26.

⁹⁹ *Id.* at 826.

¹⁰⁰ *Id.*

¹⁰¹ The other three contentions were that there had been prejudicial publicity before and during the trial, that the prosecution had knowingly used perjured testimony of David Greenglass and Benjamin Schneider (the photographer who was a rebuttal witness at the trial), and that the government failed to prove that the information transmitted to the Soviet Union was not "generally known." *Rosenberg*, 200 F.2d at 671.

The publicity point was addressed many years later in Supreme Court decisions that focused on constitutional aspects of trials contaminated by prejudicial media coverage. *E.g.*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961). The *Sheppard* case involved trial in a "carnival atmosphere"; the trial judge denied motions for change of venue and to sequester the jury, and did not adequately direct the jury not to expose themselves to media coverage. 384 U.S. at 358, 352-53. The Rosenbergs' showing was much weaker, and no motions for relief were made during the trial. The trial began on March 6, 1951, and the newspaper clippings submitted as exhibits contained no items between the end of November 1950 and February 21, 1951. Prospective jurors were asked whether they had read about the case, and the defense did not use all its peremptory challenges. The court of appeals concluded that this point was an afterthought. Counsel's excuse for not raising the point earlier was that he was so busy with the trial, he read newspapers infrequently, and was unaware of the extent of the publicity. But if counsel was so unaware, "there is no reason to suppose that the jury was more seriously affected." *Rosenberg*, 200 F.2d at 669.

The prosecution's alleged knowing use of perjured testimony by David Greenglass was to be the focus of a later, last-minute, motion for post-conviction relief, on the basis of "newly discovered evidence." See *infra* note 138. In this earlier round, the Rosenbergs contended that Greenglass falsely testified that he had made full disclosure to the FBI on the night of his arrest. The court of appeals concluded that later statements by David and Ruth Greenglass, when "read in context," did not show this testimony to have been perjury, let alone perjury knowingly used by the prosecution. 200 F.2d at 670.

The Rosenbergs also contended that David Greenglass lied when he said he made drawings of lens molds from memory, because defense experts testified that Greenglass could not have done so because of his limited education. The issue of Greenglass's capacity to make the drawings had been explored in cross-examination at the trial. The affidavits of four scientists concerning their opinion of Greenglass's capacity added nothing, because none of them knew

Perl, a witness before the Rosenberg grand jury, for perjury for falsely denying that he knew Julius Rosenberg, co-defendant Morton Sobell, and others mentioned in the trial. The indictment was made public while Ruth Greenglass was on the stand. The *New York Times* published a story quoting Saypol that Perl's expected role as a witness would have been "to corroborate certain statements made by David Greenglass and the latter's wife, who are key Government witnesses at the trial."¹⁰² The Rosenbergs argued that the indictment and the statement to the press were deliberately timed to shore up the Greenglass's credibility at the trial. Judge Swan's opinion for the court of appeals declared that Saypol's statement, if it was as the *Times* reported it, "cannot be too severely condemned" and was "wholly reprehensible."¹⁰³ Still, the court concluded that the Rosenbergs were not entitled to a hearing to determine whether the statement was made, and whether it affected the jury. The difficulty was that although the Rosenbergs' attorneys had conferred with Judge Kaufman during the trial concerning the *New York Times* story, they had made no motion for a mistrial or other relief.¹⁰⁴ Further, the issue had not been raised in motions for a new trial or in the previous appeal. The court of appeals stated that by allowing the trial to continue, defense counsel had obviously concluded that the prosecutor's statement to the press had not prejudiced the jury against them. Having themselves so concluded, they may not, after an adverse verdict, ask the court to reach a contrary conclusion.¹⁰⁵

At the Supreme Court's conference of April 11, only Justices Black and Frankfurter voted to grant review of the Rosenbergs' new arguments.¹⁰⁶ Justice Burton, who had voted to grant review on the earlier

him and they could not give an opinion on whether the quality of his memory might have allowed him to make the sketches of drawings he had seen, no matter how inadequate his education. *Id.* at 670-71.

Another perjury argument concerned the photographer, Benjamin Schneider. Schneider testified that he had not seen Julius Rosenberg "before today" when in fact Schneider had been in the courtroom the previous day, and had observed Rosenberg on the stand. On cross-examination, defense counsel treated the answer as meaning that Schneider had not seen Rosenberg between the time he allegedly had taken the passport photos and the time the trial had begun, rather than as a statement that he had not seen Rosenberg prior to the time the question was put. Moreover, even if Schneider's testimony was classified as perjury, the issue was peripheral, because there was little controversy over whether the Rosenbergs had gone to Schneider's shop. *Id.* at 671.

The last point raised was that the government had failed to prove that the information conveyed to the Soviet Union was secret. Judge Ryan concluded that, although the theory of use of atomic energy for explosives was widely known, practical application of the theory was not common knowledge. 108 F. Supp. at 807-08. The court of appeals agreed. 200 F.2d at 671.

¹⁰² 200 F.2d at 669.

¹⁰³ *Id.* at 670.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Parrish, *supra* note 1, at 822.

certiorari petition, voted to deny this petition.¹⁰⁷ Justice Frankfurter's notes indicate that he again argued that the death sentences should not be carried out without the "moral authority that would come from a finding by this Court" that there were no errors.¹⁰⁸ At his request, the order denying the petition was held up for six weeks, while he debated whether to write a dissent that would describe "Saypol's inexcusable conduct."¹⁰⁹ Sometime prior to the Court's conference on May 23, however, Black and Frankfurter instead agreed to append to the order denying certiorari a bland statement that "Mr. Justice Black and Mr. Justice Frankfurter, referring to the positions they took when these cases were here last November, adhere to them."¹¹⁰

On Friday, May 22, Justice Douglas circulated a surprise memorandum, announcing that he had changed his position and would vote to review. The memorandum included a proposed dissent from the denial of certiorari, stating:

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.¹¹¹

Frankfurter used the Douglas memorandum to lobby Burton to change his vote, arguing in a letter to Burton that the Court would now be in a position of voting to deny review while Douglas, "who has created for himself the reputation of being especially sensitive to the claims of injustice," publicly announced a dissent on the merits.¹¹² At the same time, in conversation with Jackson, Frankfurter argued that the Douglas dissent would force public acknowledgment of his own dissent as well. Predictably,¹¹³ Jackson assessed Douglas's change of mind as grandstanding

¹⁰⁷ Burton, on the first certiorari petition, did not believe that any of the issues would ultimately require reversal, but that given the strong feelings of Justices Black and Frankfurter, the issues were sufficiently substantial to require review. *See supra* note 52. This time, he concluded that the new issues had less merit, and he voted to deny certiorari. *See Parrish, supra* note 1, at 822.

¹⁰⁸ Parrish, *supra* note 1, at 823 (quoting F. Frankfurter, *supra* note 6, file 7).

¹⁰⁹ *Id.*

¹¹⁰ Parrish, *supra* note 1, at 823 (quoting F. Frankfurter, *supra* note 23). The Black-Frankfurter statement was eventually published with the order denying certiorari on May 25, 1953. *United States v. Rosenberg*, 345 U.S. 965, 965-66 (1953). It will be recalled that on denial of the Rosenbergs' petition for rehearing, following the denial of their first petition for certiorari, Black had noted his dissent and Frankfurter published a memorandum that did not technically disclose that he had voted to grant review. 344 U.S. 838, 850, 889-90 (1952); *see supra* note 49.

¹¹¹ Parrish, *supra* note 1, at 823-24 (quoting W.O. Douglas, Memorandum to the Conference (May 22, 1953) (available in Harold Burton Papers, Library of Congress, box 248)).

¹¹² *Id.* at 824 (quoting Letter from Felix Frankfurter to Harold Burton (May 23, 1953) (available in Frankfurter Papers, Harvard Law School Library, box 65, file 2)).

¹¹³ *See infra* note 120.

in "the dirtiest, most shameful, most cynical performance that I think I have ever heard of in matters pertaining to law."¹¹⁴

Frankfurter's letter to Burton was ineffective; Burton again voted to deny review at the Court's conference the next day. But his conversation with Jackson bore fruit. At the Court's regular Saturday morning conference on May 23, Jackson attacked Douglas, declaring that he would now vote to grant review (making four) in order to quash publication of Douglas's dissent and to forestall possible leaks to the press that, at one time or another, four Justices had voted to hear the case. According to Frankfurter's notes, the conversation had turned to the scheduling of the case for argument, when Douglas announced he would withdraw his proposed dissenting memorandum, because it "was badly drawn" and "[h]e hadn't realized it would embarrass anyone."¹¹⁵ At this point, Jackson changed his vote again, stating that the reasons for his vote to review no longer applied once Douglas had withdrawn his controversial memorandum.¹¹⁶ There were now only three votes to grant review. The order denying certiorari, published the following Monday, contained only the statement that "Mr. Justice Douglas is of the opinion the petition for certiorari should be granted."¹¹⁷

The record shows that Douglas had two changes of heart. After voting to deny certiorari on April 11, he changed his vote and planned to publish what could be interpreted as a one sentence dissent on the merits. Then, when there were four votes to grant certiorari, he announced that he would not publish the offending sentence but would simply dissent. Parrish notes that the harshest interpretation of this inconsistency was the one shared by Justices Frankfurter and Jackson.

Douglas could dissent vigorously from the denial of certiorari, affirm his liberal credentials, yet not be required to vote on the case after full arguments. He withdrew the memorandum in the conference when it became clear that the Court, above all Jackson, preferred to hear the case rather than endure a provocative dissent. Sensing Jackson's motives, Douglas retreated, encouraged Jackson to switch his vote, and thereby killed the grant of certiorari.¹¹⁸

Thus the Frankfurter-Jackson view is that Douglas deliberately withdrew the offending sentence, knowing that this would provoke Jackson to change his vote. It is impossible, of course, to rebut conclusively an assertion about Douglas's state of mind. We have no contemporary record of Douglas's reasons for offering to withdraw the proposed dissent

¹¹⁴ Parrish, *supra* note 1, at 825 (quoting F. Frankfurter, *supra* note 6).

¹¹⁵ *Id.* at 825 (quoting F. Frankfurter, *supra* note 6, files 6 & 7).

¹¹⁶ *Id.* (quoting F. Frankfurter, *supra* note 6, files 8 & 9).

¹¹⁷ 345 U.S. 965, 966 (1953). As noted, the Black-Frankfurter statement also appeared. See *supra* note 110.

¹¹⁸ Parrish, *supra* note 1, at 826.

beyond his admission that it was "badly drawn." Those disposed to doubt his candor would not be disposed to accept that explanation at face value. There is other evidence, however, that makes it possible to conclude that the grandstanding charge has not been proved.

First, the charge attributes contradictory motives to Douglas: that he wanted to deny review in the case while simultaneously waving the liberal flag.¹¹⁹ If Douglas truly wanted only to indulge in a grandstand play, he could have predicted safely that the convictions would be affirmed after review on the merits, giving him an opportunity to write a dissent with even greater effect after the case was argued and full opinions were prepared. Second, it is important to remember the source of the charge. Although Parrish does not reject the grandstanding explanation, he properly notes that it must be viewed with skepticism, because it is set forth "in documents prepared by a justice . . . at odds, personally and ideologically, with Douglas."¹²⁰

Nonetheless, Parrish finds that the Frankfurter-Jackson explanation has some "credibility," because Douglas withdrew his opinion after it had become irrelevant; the required four votes for certiorari had been obtained, negating the opportunity for dissent.

Parrish emphasizes that both Frankfurter's and Burton's papers indicate that the Court had begun to discuss details of scheduling oral argument before Douglas began to speak of modifying his memorandum.¹²¹ This evidence is not conclusive, however; it is important that

¹¹⁹ See *infra* text accompanying note 157.

¹²⁰ Parrish, *supra* note 1, at 826. To say that Frankfurter was "at odds" with Douglas considerably understates the depth of Frankfurter's antipathy. Frankfurter wrote Learned Hand in 1954 that Douglas "is the most cynical, shamelessly immoral character I've ever known." H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 182 (1981) (quoting Letter from Felix Frankfurter to Learned Hand (Nov. 7, 1954) (available in Learned Hand Papers, Harvard Law School Library)). Justice Jackson's feelings toward Douglas were even more extreme than Frankfurter's. A clear indication of Jackson's attitude toward Douglas is his statement prior to the conference, see *infra* text accompanying note 114, and his statement after the conference that "That S.O.B.'s bluff was called." Parrish, *supra* note 1, at 825 (quoting F. Frankfurter, *supra* note 6, files 8 & 9).

¹²¹ Parrish, *supra* note 1, at 825.

Parrish notes that Frankfurter "may have embellished his account." *Id.* at 826. One embellishment contained in the account is a confused explanation, attributed to Douglas, of Douglas's reason for withdrawal of the memorandum. Frankfurter reported that Black told him that Douglas had told Black that he withdrew the dissent when it became clear that the Court was only prepared to grant a hearing on the question whether or not to grant certiorari. (Black had not been present at the May 23 conference, although he had left a vote to grant certiorari in the *Rosenberg* case). Frankfurter then reported discussing this with Jackson, who is said to have responded "that is wholly false It wasn't that at all. We voted to grant until Douglas withdrew his memorandum." *Id.* (quoting F. Frankfurter, *supra* note 6, file 6). I am not aware that there has ever been a hearing in the Supreme Court on the question of granting or denying certiorari. There was, however, a later stage of the *Rosenberg* case where Douglas was willing to vote to grant certiorari, but not to hold argument on the question whether to grant a stay. See *infra* text accompanying note 144. If the Douglas comment to Black was made, it may have been made with reference to that vote, and not as an

the May 23 conference was not devoted solely to the *Rosenberg* case. There were forty-three cases on the agenda for consideration of grant or denial of review, and in six cases certiorari was granted.¹²² In addition, three cases were cleared for delivery with full scale opinions the following Monday.¹²³ During a busy conference, the Justices' comments are often quick, informal, and not fully thought out.¹²⁴ Even if a stenographic record were available to corroborate one Justice's recollection of what had been said, isolated comments by any Justice would not provide reliable clues to his motives.

Even ignoring the context of a busy conference, the corroboration is thin. The Justices discuss cases in conference in order of seniority, so that when Jackson began to talk, three senior Justices (Black, who was absent but had left his vote, Frankfurter, and Douglas) had already indicated that they would vote to grant. When Jackson supplied the fourth vote, discussion could have turned immediately to the date for argument. If Douglas wanted to respond to Jackson's attack on his proposed opinion by offering to withdraw it, he probably would not have had the opportunity to do so before a discussion of scheduling had begun. Moreover, Jackson had given two reasons for his vote, including his concern about a possible leak of the fact that four Justices had voted to grant certiorari on different occasions.¹²⁵ Thus, Douglas could not have

explanation for his withdrawal of the memorandum. If Douglas did make the statement with reference to his vote in the conference of May 23, it may show that he confused the two votes. In all of this multiple hearsay, there is no report of the dates of the alleged conversations. The date of Frankfurter's conversation with Jackson is particularly important. See *infra* text following note 202.

Parrish also finds some confirmation of the grandstanding hypothesis in Justice Douglas's reply to a letter Parrish sent him in 1974 which asked the Justice to comment on the May 22 memorandum. "He declined to do so. Instead he provided copies of the Court's official reports for the case and concluded, 'I am puzzled by your inquiry as the Journal entry makes everything clear.' In my [Parrish's] opinion, the official reports do nothing of the kind." Parrish, *supra* note 1, at 826-27 n.66 (quoting Letter from William O. Douglas to Michael Parrish (Dec. 19, 1974)). Even if Douglas, who usually kept no notes of the details of conference discussions, remembered what happened in a conference held 20 years before, it would be unthinkable for a sitting Justice to discuss the details of a court conference with a scholar or to justify his position.

¹²² See 345 U.S. 962-68 (1952) for citations of cases in which the Court made brief dispositions on May 25, 1953.

¹²³ *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

¹²⁴ That events moved fast in this conference is underlined by Parrish's characterization of Frankfurter's notes as concluding that "[t]he conference dissolved in confusion, with no one, save perhaps Douglas, certain whether he had rejoined those voting to deny review or whether he remained in dissent." Parrish, *supra* note 1, at 825. Obviously, if there was confusion, it was straightened out by the time the order was published the following Monday, containing Douglas's explicit dissent, but without opinion.

¹²⁵ Jackson's concern about leaking of votes if certiorari were denied, which I do not believe to be a serious reason for Jackson's initial vote to grant, may also have been intended as a rebuke of Douglas. Jackson was accusing one or more of his colleagues of indiscretion or worse. In his autobiography, Douglas recalls that Drew Pearson, a newspaper reporter, pre-

been sure that withdrawal of his "badly drawn" opinion would cause Jackson to change his vote again.

The most likely explanation for Douglas's two changes of heart is quite unremarkable. Douglas took a fresh look at the briefs in the *Rosenberg* case¹²⁶ a few days before the scheduled May 23 conference, and came to a different conclusion about the substantiality of the issue.¹²⁷

dicted the decision in *Bridges v. Wixon*, 326 U.S. 135 (1945), on the day before the case was to come down. At the conference, where it was decided to put off decision for a week or two, Frankfurter charged Douglas, Black, and Murphy with leaking the story to Pearson. Douglas was convinced that Frankfurter persuaded Justice Roberts that his charges were accurate "to such an extent that Roberts refused to shake hands or speak to Black, Murphy and me, and that condition continued until he resigned from the Court." W.O. DOUGLAS, *supra* note 8, at 32-33. Douglas told the same story to me in 1956, and the charge of leaking Court secrets still rankled.

The Frankfurter papers confirm that Frankfurter did have extensive conversations with Roberts about Douglas's alleged misbehavior. B. SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* (1983) quotes a letter from Roberts to Frankfurter in 1954, nine years after Roberts resigned, stressing the need "to keep people like Douglas from making the Court the stepping stone to the presidency." *Id.* at 55 (quoting Letter from Owen Roberts to Felix Frankfurter (Feb. 2, 1954) (available in Frankfurter Papers, Library of Congress)).

¹²⁶ In preparing for conference, Douglas normally would have the cart containing the briefs of all cases scheduled for discussion wheeled into his office two days before the conference. He would also have the law clerk's memorandum in every case in which the Court was to decide whether to schedule the case for argument. Professor Charles Ares, who clerked for Justice Douglas in the 1952-1953 Term, informed me that he did not prepare a new memorandum for Douglas on the *Rosenberg* case for the May 23 conference, and was unaware that Douglas had prepared and circulated his May 22 memorandum. Douglas might well have reread the *Rosenberg* briefs because the case was on the conference schedule. Discussions at the conference six weeks earlier may have led him to concentrate on the impact of Saypol's press conference, and to form a different opinion about the importance of this particular issue.

¹²⁷ The court of appeals had relied on the fact that the Rosenbergs' lawyers had made a conscious decision not to object to Saypol's statements to the press. Douglas did not believe that the blunders of counsel should foreclose appellate correction of errors seriously prejudicing criminal defendants. *See, e.g., Daniels v. Allen, decided sub nom. Brown v. Allen*, 344 U.S. 443, 548-54 (1953) (federal habeas corpus not available to challenge allegedly coerced confession when appeal to state court was filed one day later); *Michel v. Louisiana*, 350 U.S. 91 (1955) (late attack on grand jury composition in state court forecloses Supreme Court review). Douglas dissented in both *Daniels*, 344 U.S. at 513 (Black, J., dissenting, joined by Douglas, J.); and *Michel*, 350 U.S. at 104 (Douglas, J., dissenting, joined by Black, J., and Warren, C.J.).

In *Rosenberg*, however, the defense counsel consciously decided not to object. The court of appeals opinion relied on the failure to object as demonstrating counsel's judgment that Saypol's remarks had not prejudiced their clients' trial. Douglas's proposed dissent focused on whether the Rosenbergs' trial had been prejudiced, and not on whether their lawyers had waived the point. On the prejudice issue, Douglas may have had reason to suspect the capacity of the Rosenberg lawyers to make the judgment that their clients had not been prejudiced. In his autobiography, Douglas opines that Emanuel Bloch's strategy in the case went beyond incompetence, resting on "the Communist consensus of that day . . . that it was best for the cause that the Rosenbergs pay the extreme price." W.O. DOUGLAS, *supra* note 8, at 79.

In the court of appeals, the lame explanation offered for failure to object or move for mistrial was that Saypol had explained in the in camera session that he had not deliberately timed the indictment to buttress Greenglass's credibility at the trial. But, as the court of appeals explained, the issue was not whether Saypol's motives were suspect in the timing of

He immediately wrote and circulated the memorandum of May 22, but it did not say precisely what he meant to say. He probably meant only to say that the publicity issue was substantial and merited review, but his proposed dissent was poorly drafted and could have been read as a dissent on the merits. He could not have spent sufficient time on the case to justify taking a position on the merits and recommending reversal of the decision below. Even if it were established that Saypol's conduct had adversely affected the Rosenbergs' trial, defense counsel's failure to raise the issue at trial had not been inadvertent. A serious question remained: whether the Rosenbergs' trial lawyers should be allowed to play the issue both ways by gambling on acquittal and allowing the trial to continue, then seeking to resurrect the buried error to get the resulting conviction set aside. A snap dissent on the merits was unjustifiable, and as soon as his proposed dissent was attacked, Douglas realized that the dissent, as worded, was inappropriate. He responded by offering to withdraw it.¹²⁸

Parrish concedes that, "possibly," this prosaic explanation of events is a "reasonable interpretation," and that Douglas might have acted "without devious motives."¹²⁹ He argues, however, that this explanation leaves Douglas's conduct "inexplicable in view of his own later apparent interest in the case."

[R]egardless of the presence or absence of a formal vote to hear the case (assuming he cared about the Rosenbergs' petition), Douglas becomes a timid poker player whose bluff had been called. His

Perl's indictment, but whether Saypol's press release had prejudiced the trial. R. RADOSH & J. MILTON, *supra* note 9, at 206, state:

The failure of any of the defense attorneys to make a formal objection over this incident is striking. . . . Manny Bloch and the rest of the defense team had certainly not been hesitant to make objections and even motions for mistrial over relatively minor points, One can only wonder whether Saypol mollified the opposition lawyers by promising that Perl would not be called to testify at the trial. In reality this was hardly a concession, since Perl had shown no indication of admitting any involvement with Rosenberg or Sobell, but of course the defense could not have known this. Whatever Saypol may have said off the record, the defense made a serious blunder in accepting his assurances.

Whatever the reason for failing to move for a mistrial, serious difficulties arise when defense counsel ask to have a conviction set aside after consciously choosing to let the trial proceed to judgment. The difficulties are most serious when the failure to object is made for tactical reasons, even if those reasons are not an attempt to "sandbag" by saving an objection for a later appeal. *Cf.* Henry v. Mississippi, 379 U.S. 443, 450 (1965) (noting that deliberate choice to waive an objection may foreclose federal relief of state court judgments).

¹²⁸ Frankfurter's decision not to publish a dissent criticizing Saypol, he explained, was motivated by his desire not to let what he wrote in dissent become grist for the propaganda mills of the Communist Party, or to create the impression that the Rosenbergs "were convicted though innocent." Parrish, *supra* note 1, at 823 (quoting F. Frankfurter, *supra* note 23). It is doubtful that similar reasoning would have persuaded Douglas not to publish his proposed dissent.

¹²⁹ Parrish, *supra* note 1, at 826.

threatened dissent had forced the Court to reconsider its denial of review. He thus entered the conference with a strong hand. And, from all we know of his behavior in other cases, Douglas thrived on tough intellectual combat, enjoyed the role of dissenter, and was not easily intimidated by his colleagues' wrath. Certainly Douglas was no stranger to the rough-and-tumble of Court politics, and he knew how to round up votes. Franklin Roosevelt believed him to be one of the best poker players in Washington.¹³⁰

For the second time, Parrish makes an unfounded assumption concerning the way Douglas usually behaved.¹³¹ Here, Parrish assumes that Douglas played Machiavellian games to round up votes in conference for positions he favored. Douglas was a superb poker player, but on the Court he stated and voted his honest convictions and left the business of winning converts and votes to others. Felix Frankfurter could argue with Burton to change his vote to protect the integrity of the Court on the same day that he talked to Jackson about changing his vote to block Douglas from grandstanding. But Douglas did not "work that way."¹³² As Frankfurter himself remarked in his Rosenberg memorandum, on the vote to grant or deny certiorari Douglas usually cast his vote without extended explanation.¹³³ If Douglas was convinced by the discussion that his proposed dissent was flawed, he withdrew it because it ought not be published; he was not "intimidated"¹³⁴ into doing so.

In short, in this second round of the *Rosenberg* case, Douglas did make 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. If he can be criticized for making these mistakes, there should be no basis for surprise or criticism that he corrected them. Parrish's unfavorable judgment ultimately rests on Frankfurter's and Jackson's attribution of devious methods to Douglas. The opinions of these Justices, who were "at odds, personally and ideologically, with Douglas,"¹³⁵ are insufficient to support Parrish's critical appraisal of Justice Douglas.

C. The Second Motion for Post-Conviction Relief

When the Supreme Court denied the Rosenbergs' second petition for certiorari on May 25, 1953, only three weeks remained until the Court's adjournment for the 1952 term. In those weeks, the district court and the court of appeals denied two additional motions to vacate

¹³⁰ *Id.*

¹³¹ Parrish's first unfounded assumption was that Douglas could be expected to vote to grant review in all death penalty cases. *See supra* text accompanying notes 27-43.

¹³² *See supra* note 39.

¹³³ *See supra* note 53.

¹³⁴ Parrish, *supra* note 1, at 826.

¹³⁵ *Id.*; *see also supra* note 120.

judgment and sentence and a mandamus petition to require Judge Kaufman to resentence the defendants.¹³⁶ The crux of the new motions was a renewal of the claim that David Greenglass had committed perjury and that the government must have known of it.¹³⁷ In support of this claim, the Rosenbergs made three contentions regarding newly discovered evidence.¹³⁸ Both lower courts concluded that the alleged perjury affected only peripheral issues at trial, and held that the affidavits of newly discovered evidence did not justify a hearing because they demonstrated neither deliberate falsehood by Greenglass nor prosecutorial knowledge of any falsehoods.¹³⁹

On June 12, the Rosenbergs' counsel sought a stay of execution in order to obtain Supreme Court review of the unfavorable lower court decisions.¹⁴⁰ Douglas voted against hearing oral argument on the stay application. Parrish describes this vote as "intransigence" that "clearly doomed the application."¹⁴¹ At a June 13 conference, four Justices had voted to set the application for a stay for oral argument on June 15. Douglas's negative vote prevented oral argument on the stay, and the stay was denied.¹⁴² At the same June 13 conference, however, the Court

¹³⁶ The Rosenbergs' second attempt for post-conviction relief, as well as their first motion, was brought under 28 U.S.C. § 2255 (1982). The mandamus action was filed pursuant to 28 U.S.C. § 1651 (1982).

¹³⁷ The issues raised are described in detail in W. SCHNEIR & M. SCHNEIR, *supra* note 15, at 196-212. These issues were also raised in the Rosenbergs' first motion for post-conviction relief. *See supra* note 101.

¹³⁸ David Greenglass had testified at trial concerning gifts given to the Rosenbergs by the Soviets for espionage activities, including a console table that had been hollowed out for a lamp to fit underneath. The Rosenbergs denied the table had been hollowed out, and testified that it had been bought at Macy's for about \$21 in 1944 or 1945. The defense claimed to have located the actual table, and supplied an affidavit of a Macy's employee who, on the basis of a photograph, identified the table as of a kind sold by Macy's during 1944 and 1945 for about \$20.

Additional new evidence involved purloined memoranda from the files of Greenglass's lawyer submitted to demonstrate that Greenglass had told his lawyers that he had made deliberately confusing statements to the Federal Bureau of Investigation (FBI) to protect his wife. The memoranda contradicted his trial testimony that he had made full disclosure to the FBI on the night of his arrest. *See supra* note 101.

The third item of new evidence was an affidavit from Greenglass's brother stating that David Greenglass had told him that he had taken a sample of uranium from Los Alamos without permission of the authorities. The defense theory was that this provided a motive for perjury: in order to escape detection for his own separate act of espionage, David Greenglass implicated the innocent Rosenbergs.

¹³⁹ *United States v. Rosenberg*, 204 F.2d 688 (2d Cir. 1953).

¹⁴⁰ The chronology of events appears in *Rosenberg v. United States*, 346 U.S. 273, 279-80 (1953). Justice Jackson recommended that the application for stay be set for hearing on June 15 before the entire Court. *Rosenberg v. United States*, 345 U.S. 989 (1953). John Finerty, a longtime civil rights lawyer, and Professor Malcolm Sharp joined the defense team for these motions and for the later motions filed by the Rosenberg lawyers. R. RADOSH & J. MILTON, *supra* note 9, at 372; *see also* M. SHARP, *WAS JUSTICE DONE?* 106-07 (1956) (describing merits of three denied motions and subsequent motion for new trial).

¹⁴¹ Parrish, *supra* note 1, at 832; *see also* J. SIMON, *supra* note 5, at 305.

¹⁴² 345 U.S. at 989.

also considered and rejected the Rosenbergs' petition for rehearing of the second denial of certiorari.¹⁴³ Douglas's opinion disclosed that he had voted to grant the petition for rehearing and certiorari, but voted against hearing argument on the stay.¹⁴⁴

Douglas voted to grant the second certiorari petition because he believed it presented substantial legal questions; once the petition was denied, Douglas saw no further substantial questions and, therefore, no reason to stay the execution. Douglas's supposed "intransigence" was, in fact, one more example of his consistent pattern: he would vote to review only if there were issues of substance to be decided. Douglas believed that the portion of the second petition for certiorari based on Saypol's alleged misconduct in publicizing Perl's indictment presented substantial issues.¹⁴⁵ Douglas had not been impressed, however, with the other claim in the second certiorari petition that the prosecution knowingly used Greenglass's perjured testimony. The stay application was based on the use of the perjured testimony, an issue that Douglas believed insubstantial. Douglas was not prepared to vote for a stay of execution to allow further consideration of an issue he judged insubstantial, and the Court was not willing to entertain the issue of Saypol's publicizing the indictment. Accordingly, Douglas voted against the new applications.

Parrish's judgment about Douglas's behavior is apparently based on a misapprehension that Douglas's votes on June 13 were inconsistent: a vote to review the latest petition on the merits, coupled with a vote not to hold an oral argument which might have convinced other Justices to cast their votes for review. "Douglas would grant a stay but dismissed the necessity for any argument."¹⁴⁶ This misapprehension rests on confusion of Douglas's position in the two cases that were treated together in the June 13 conference.¹⁴⁷ The first case was the petition for rehear-

¹⁴³ *Rosenberg v. United States*, 345 U.S. 1003 (1953). Justice Black again noted his dissent, and Justice Frankfurter appended another memo referring to his "unbroken practice" not to note dissent from denial, asserting that "[p]artial disclosure of votes on successive stages of a certiorari proceeding does not present an accurate picture of what took place." *Id.* at 1004. Justice Douglas's opinion on the denial of the stay was also a recorded dissent from the denial of rehearing.

¹⁴⁴ Mr. Justice Douglas would grant a stay and hear the case on the merits, as he thinks the petition for certiorari and the petition for rehearing present substantial questions. But since the Court has decided not to take the case [i.e., the second petition for certiorari], there would be no end served by hearing oral argument on the motion for a stay. For the motion presents no new substantial question not presented by the petition for certiorari and by the petition for rehearing.

Id. at 989.

¹⁴⁵ See *supra* text accompanying note 111.

¹⁴⁶ Parrish, *supra* note 1, at 832.

¹⁴⁷ The confusion is partially a result of the fact that the two decisions were announced the same day and are reported 14 pages apart in *United States Reports*. The decision denying rehearing is reported at 345 U.S. 1003 (1953). The decision denying the application for a stay

ing of the denial of certiorari on May 25, in which Douglas's ultimate position had been to grant certiorari.¹⁴⁸ He adhered to this position in the June 13 conference by voting to grant rehearing and to grant a stay pending argument in the October Term. In the second case the defense sought a stay, pending the filing of briefs to review the latest court of appeals decisions denying the motions based on newly discovered evidence. For this case, the issue before the Supreme Court did not concern whether the merits of the lower court decisions would be orally argued.¹⁴⁹ Rather, the question was whether the stay application would be decided solely on the basis of the papers filed with the Court and the lower court opinions. Defense counsel proposed, in effect, an extraordinary oral argument on the question whether or not to grant certiorari.¹⁵⁰

When Douglas concluded that a stay of execution based solely on the new motion was not justified by any new "substantial question," he naturally voted against holding oral argument on the question whether the stay should be granted to allow further consideration of the perjury issue.¹⁵¹ He was willing to stay the execution to allow review of the earlier petition for certiorari, because he believed the alleged

is reported at 345 U.S. 989 (1953). (The Supreme Court's Journal commonly places denials of rehearing at the end of the list of a day's decisions.) Douglas's opinion on the denial of the stay was an opinion addressed to both cases, and was a recorded dissent from the denial of rehearing. *See supra* note 144.

¹⁴⁸ *See supra* text accompanying note 111.

¹⁴⁹ Simon states that Douglas's vote against the stay "guaranteed that the Rosenbergs would not be heard in the Supreme Court on the new point of law raised by their attorneys." J. SIMON, *supra* note 5, at 305. The proposed hearing on June 15 would have focused solely on the question whether a stay should be issued pending filing of briefs on the merits. Although Douglas's vote was to deny the stay and not to hold a hearing for this purpose, an affirmative vote would not have guaranteed a hearing in the Court on the merits.

¹⁵⁰ *See supra* note 121.

¹⁵¹ The gist of the claim was that the prosecution had used Greenglass's testimony, knowing that the witness was lying. To convene a hearing that would delay the execution, the affidavits had to do more than raise a triable issue of fact as to the veracity of Greenglass's testimony. The Rosenbergs' counsel needed to show a tenable basis for a conclusion that the testimony was knowingly false, that the prosecution was aware of it, and that the false testimony was significant. At two points, Parrish glosses over these requirements. He concedes that the mere proof that the Macy's table referred to in Greenglass's testimony had not been hollowed out could not demonstrate that "the Greenglasses had lied, or more crucially, that the prosecution had known of their perjury." Parrish, *supra* note 1, at 829-30. Nevertheless, he says that "[t]he fact that Macy's sold the table in 1944 or 1945 did not resolve the issue of who had purchased it—the Rosenbergs, a friend, or the Russians? These were issues that could be settled only in the course of a formal hearing . . ." *Id.* at 830. He also states that the memoranda of Greenglass's counsel "did not present a prima facie case of perjury but did raise serious questions about the Greenglasses' credibility." *Id.* Of course, all of the "newly discovered evidence" might well have been admitted at the original trial. But, even if one accepts the proposition that the failure to discover this evidence earlier was not the result of lack of diligence, and that the evidence would have bolstered the defense case at the original trial, that would not require a hearing on the Rosenbergs' § 2255 motion, nor would it justify a stay to require that hearing.

prosecutorial misconduct raised a substantial issue. These positions are not inconsistent. They are, instead, part of Douglas's consistent pattern of voting to review or deny review in the *Rosenberg* cases depending on his assessment of the substantiality of the issues raised.

D. The Original Writ of Habeas Corpus

Douglas's last vote against Supreme Court review in the *Rosenberg* cases occurred in a conference held on the afternoon of June 14, after the Court's regular term had adjourned. On that day, defense counsel applied for permission to file an original writ of habeas corpus based on two grounds: the Saypol press conference and the knowing use of Greenglass's perjured testimony. This was, of course, a rerun of the two battles that had been lost that morning when the Court denied the petition for rehearing and the application for a stay.

The results were predictable. Justices Black and Frankfurter, who had voted to grant review at every stage in the cases, voted to grant permission to file the writ of habeas corpus. Black, who had noted his dissent at every previous stage, did so again. Frankfurter wrote a memorandum, stating that he would set the application for oral argument the next day because "[o]ral argument frequently has a force beyond what the written word conveys."¹⁵² Douglas, who that morning had issued an opinion explaining that there was no point in hearing a motion that presented no new substantial question, voted to deny permission to file the writ.¹⁵³ Douglas had earlier voted to review the case solely on the basis of the Saypol incident,¹⁵⁴ but had refused to vote for oral argument on the question of whether the lower court opinions denying the second motion for post-conviction relief should be reviewed.¹⁵⁵ He had consistently found no merit in the claim that the prosecution knowingly used Greenglass's perjured testimony,¹⁵⁶ and he probably reached the same conclusion again.

All of this is quite unremarkable, but Parrish sees it as confirmation for the judgments of Frankfurter and Jackson that

Douglas had contradictory motives in the *Rosenberg* litigation. On the one hand, he worked to retain his image as a liberal tribune who, when necessary, fought alone on behalf of the oppressed. On the other, he thwarted collective efforts to review the case. "Every time a vote could have been had for a hearing," Jackson complained, according to Frankfurter, "Douglas opposed a hearing in open Court, and only when it was perfectly clear that a particular application would

152 346 U.S. at 272.

153 *Id.* at 271.

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

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

156 See *supra* text accompanying note 145.

not be granted, did he take a position for granting it."¹⁵⁷

It is hard to see how this last vote sustains such a conclusion. There were, apparently, only two votes to set the original habeas corpus application for hearing. If Douglas had conformed to Jackson's caricatures, he would once again have dissented, as he had on May 25, without providing a fourth vote for hearing.

Parrish says that Justice Douglas's predictable vote on the petition "surprised Frankfurter" and he greeted it with "amazement."¹⁵⁸ One source of Frankfurter's surprise concerns a reported debate between Douglas and Frankfurter over the interpretation of the 1935 decision in *Mooney v. Holohan*.¹⁵⁹ In *Mooney*, the Court held that a state conviction obtained through the prosecution's knowing use of perjured testimony could be reviewed by a federal writ of habeas corpus.

Frankfurter became so agitated by this dialogue with Douglas that he made a longhand transcript on the back of an envelope:

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

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

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

Douglas's resistance to Finerty's application no doubt surprised Frankfurter because only a year before Douglas and Black had rested a dissent upon the principles of the *Mooney* case.¹⁶⁰

The most significant point to be made about this reported exchange is that its outcome did not control the question of whether the Court should transfer the application to a lower court for a hearing, or whether the Court should hear further argument on whether or not to transfer the application. That morning, the Court had denied a stay that, if granted, would have allowed the Supreme Court to consider reviewing the denial of substantially identical petitions by the lower federal courts. It would be quite extraordinary for the Court now to entertain an original writ of habeas corpus and require that the lower

¹⁵⁷ Parrish, *supra* note 1, at 833 (quoting F. Frankfurter, *supra* note 6).

¹⁵⁸ Parrish, *supra* note 1, at 833.

¹⁵⁹ 294 U.S. 103 (1935).

¹⁶⁰ Parrish, *supra* note 1, at 833 (citing F. Frankfurter, *supra* note 6; and F. Frankfurter, Notes of meeting with W.O.D. (June 19, 1953) (available in Frankfurter Papers, Harvard Law School Library, box 65, file 2)).

courts hold hearings on the allegations concerning Greenglass's alleged perjury.¹⁶¹ Regardless of *Mooney*, the Rosenbergs' problem was that their affidavits of newly discovered evidence went to collateral issues, failed to make out a prima facie case of deliberate perjury, and contained only conclusory allegations of prosecutorial misconduct.¹⁶²

If the debate about *Mooney* did occur as described, it has to be conceded that Frankfurter was correct on the law. Still, it is easy to make sense of Douglas's argument because there was room for legitimate debate as to whether all procedural due process violations could be the basis of collateral attack through a writ of habeas corpus.¹⁶³ In the 1950s, Douglas continued to use the earlier habeas corpus idiom of "jurisdiction," which carries implications that not all constitutional violations occurring at trial can be remedied through habeas corpus.¹⁶⁴ In short, it was not uncharacteristic for Douglas to be arguing for a narrow construction of the writ of habeas corpus.¹⁶⁵ In any event, Douglas's

¹⁶¹ Justice Frankfurter said as much in his dissent from the summary denial of the application:

The disposition of an application to this Court for habeas corpus is so rarely to be made by this Court directly that Congress has given the Court authority to transfer such an application to an appropriate district court. [citation omitted] I do not favor such a disposition of this application because the substance of the allegations now made has already been considered by the District Court for the Southern District of New York and on review by the Court of Appeals for the Second Circuit. Neither can I join the Court in denying the application without more.

346 U.S. at 271-72.

¹⁶² See *supra* note 151.

¹⁶³ There also may have been room for argument concerning whether mere passive prosecutorial knowledge of perjury was sufficient to establish a due process violation. In 1953, the *Mooney* principle had not been elaborated by the Supreme Court since it had been announced in 1935. The Court's brief opinion in that case had talked about "depriving a defendant of liberty through a *deliberate deception* of court and jury by the presentation of testimony known to be perjured." 294 U.S. at 112 (emphasis added).

¹⁶⁴ The decision in *Brown v. Allen*, 344 U.S. 443 (1953) was handed down less than two months earlier. In terms of later developments concerning the scope of habeas corpus, *Brown v. Allen*'s most significant holding was that introduction of a coerced confession at a criminal trial was an issue open in habeas corpus; earlier cases had all involved due process issues that could not have been raised at trial and on appeal. Later cases read the decision as making habeas corpus available for all issues of constitutional dimension. See *Fay v. Noia*, 372 U.S. 391, 414 (1963). But Justice Reed's opinion for the Court, despite its length, did not even mention that it was expanding the grounds available to invoke the writ. The opinion dealt with whether procedural defaults in the state courts would bar habeas corpus, and whether the asserted claims established violations of due process. Justice Black's dissent, joined by Justice Douglas, 344 U.S. at 548, and Justice Frankfurter's dissent, joined by Justices Black and Douglas, 345 U.S. at 570, focused on the procedural default issue. If the opinions of the Justices are any guide, few members of the Court focused on the decision's most important point: that all constitutional violations provide a basis for granting habeas corpus. *But see* 345 U.S. at 546-47 (Jackson, J., dissenting).

Whatever the scope of habeas corpus relief for state prisoners under 28 U.S.C. § 2254, debate continued over whether the remedy for federal prisoners under 28 U.S.C. § 2255 was as broad. See, e.g., *Kaufman v. United States*, 394 U.S. 217 (1969).

¹⁶⁵ In *P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S*

quarrel with Frankfurter concerned a point that was not central to the question of whether the latest petition for review should be granted.

Parrish believes that Douglas's interpretation of *Mooney* carries special significance because Douglas had joined a Black dissent the previous year which "rested . . . upon the principles of the *Mooney* case."¹⁶⁶ That case, *Remington v. United States*,¹⁶⁷ was not a collateral attack on a conviction. The court of appeals there had reversed the defendant's conviction, but also had rejected an argument that the indictment should be dismissed. Defendants petitioned for certiorari to review the court's refusal to order the indictment dismissed. Their claims had nothing to do with knowing use of perjured testimony. Rather, the defense alleged that the foreman of the indicting grand jury was engaged in a book-publishing venture with the chief prosecuting witness, and that the United States attorney had deliberately withheld and sought to suppress evidence of that fact. These two sentences of Black's dissent from the denial of certiorari contained the reference to *Mooney*. "Governmental conduct here charged is abhorrent to a fair administration of justice. It approaches the type of practices unanimously condemned by this Court as a violation of due process of law in *Mooney v. Holohan* . . ." ¹⁶⁸

The *Remington* dissent thus dealt neither with the extent of prosecutorial involvement in perjured testimony necessary to establish a due process violation, nor with the scope of habeas corpus. Even if Douglas remembered these two sentences in a dissent from a denial of certiorari he had joined fifteen months before,¹⁶⁹ they would not be in-

THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1471 (2d ed. 1973), the authors conclude that the Court "abandoned the kissing of the jurisdictional book" in *Waley v. Johnston*, 316 U.S. 101 (1942), where the Court stated that habeas corpus was not limited to those cases in which a judgment of conviction is void for want of jurisdiction. In *Whelchel v. McDonald*, 340 U.S. 122 (1950), however, the Court held that habeas corpus was not available to try a claim that a court-martial proceeding had improperly rejected an insanity defense. Justice Douglas, writing for the Court, stated:

We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of *jurisdiction*.

Id. at 124 (emphasis added). Douglas's continued use of the language of jurisdiction in habeas corpus cases was not limited to petitions for review of military service court martial convictions. In his dissent in *Chessman v. Teets*, 354 U.S. 156 (1957), Douglas concluded that the failure to allow Chessman to participate in the hearing to settle the record did not go "to jurisdiction (as it must for habeas corpus to issue)." 354 U.S. at 172 (footnote omitted).

¹⁶⁶ Parrish, *supra* note 1, at 833

¹⁶⁷ 343 U.S. 907 (1952).

¹⁶⁸ *Id.* at 908.

¹⁶⁹ Parrish's full statement, which is excerpted *supra* text accompanying note 158, is that Douglas's position "no doubt surprised Frankfurter because only a year before Douglas and Black had rested a dissent upon the principles of the *Mooney* case." Parrish, *supra* note 1, at 833. This was only a brief dissent to a denial of certiorari, and not a dissent in a case that had been argued on the merits. Moreover, the dissent was written by Black, although Douglas

consistent with his stated views on *Mooney* or on the scope of the writ of habeas corpus. In judging the significance of the fact that Frankfurter had the better of the argument over a peripheral point of law, we are left with Frankfurter's characterization that Douglas expressed his position "quite vehemently," and Parrish's conclusion that the debate was "acrimonious."¹⁷⁰ If Frankfurter's characterization of Douglas's vehemence is accurate,¹⁷¹ it is a commentary on the relationship between Justices Frankfurter and Douglas, which, in turn, helps to explain the character of some of their debates in conference. It does not lend support to the hypothesis that Douglas was not dealing with the *Rosenberg* cases on their merits. Once again, the habeas corpus vote demonstrates that Douglas consistently approached the *Rosenberg* cases according to the issues raised. He was prepared to vote for Supreme Court review if an issue was substantial, but not to vote for review merely to delay the execution or put the Court's imprimatur on the conviction and sentence.

E. The Douglas Stay

The last acts of the Rosenberg tragedy are recounted in the *United States Reports*.¹⁷² Only a brief account is necessary here. On Sunday, June 14, Judge Kaufman received a next friend habeas corpus petition. Fyke Farmer, a Nashville, Tennessee, lawyer, filed the petition on behalf of one Irwin Edelman.¹⁷³ The petition raised a new issue on behalf of

joined it. Frankfurter may have had more reason to remember *Remington* than Douglas did, because he appended a memorandum in that case referring to his practice of not noting dissent from denial of certiorari. If, as in the *Rosenberg* cases, this was a signal that he had voted to grant certiorari, he would have been the third vote in favor of granting certiorari in *Remington* and therefore it is likely that he had strong feelings about the case.

¹⁷⁰ Parrish, *supra* note 1, at 833 (citing F. Frankfurter, *supra* note 6).

¹⁷¹ Frankfurter noted Douglas's "vehemence" on other occasions. In describing the Court's conference on the Rosenbergs' first petition for certiorari, Parrish highlights Douglas's negative votes with Frankfurter's observation that Douglas cast his vote to deny certiorari with "startling vehemence" and his vote to deny rehearing "with unwonted vehemence." Parrish, *supra* note 1, at 817. When a vote was taken on the second certiorari petition, Frankfurter again reported that Douglas's vote to deny review was delivered "in the same harsh tone." *Id.* at 822. Simon also credits the report that Douglas's tone of voice, as described by Frankfurter, has some importance. J. SIMON, *supra* note 5, at 300. If a speaker's tone of voice is significant, it is not clear that Justice Frankfurter is a reliable witness to the nuance of that tone, especially when the speaker is Justice Douglas. Parrish notes that Burton's diary "confirm[s] much of Frankfurter's account," of the first certiorari vote, but according to Parrish, what Burton's diary states is simply that he voted to grant and "at that time Douglas voted to deny." Parrish, *supra* note 1, at 817. Burton's diary does not confirm what Douglas said, or what his tone of voice was.

¹⁷² *United States v. Rosenberg*, 346 U.S. 273 (1953).

¹⁷³ The story of Edelman's and Farmer's involvement in the Rosenbergs' defense is best told in R. RADOSH & J. MILTON, *supra* note 9, at 381-402. Edelman was a former Communist, who had been expelled from the Party. He had circulated a pamphlet at his own expense, focusing on another issue that the defense team had not raised: that Emanuel Bloch had blundered by calling for impoundment of David Greenglass's lens mold sketch when it was introduced by the prosecution, causing it to be omitted from the transcript. Edelman was rebuffed by the Rosenberg defense committee for his criticism of the defense strategy, but

the Rosenbergs, one the regular defense team had refused to make.¹⁷⁴ The Atomic Energy Act of 1946 provided the death penalty for transmission of atomic secrets to other nations, but only when recommended by the jury and in cases where the offense was committed with intent to injure the United States.¹⁷⁵ Because the prosecution alleged that the Rosenbergs' conspiracy continued beyond the date of passage of that Act, Farmer argued that the lesser penalties therein provided were applicable to the Rosenbergs. Judge Kaufman denied the petition the next day, without hearing argument.¹⁷⁶

On Tuesday morning, June 16, Farmer went to Washington, hoping to obtain a stay of execution from a Supreme Court Justice. Learning that the Rosenberg defense team had presented a petition for a stay to Douglas the day before, Farmer also presented Douglas with a stay application. Douglas worked around the clock, studying the new application; and he prepared an opinion that was to fill eight pages in the *United States Reports*.¹⁷⁷ The next morning, he granted Farmer's application for a stay, although he denied the stay application presented by the Rosenbergs' counsel.¹⁷⁸ Douglas then left Washington on a cross-country automobile trip. Late that same day, however, the Chief Justice convened the Court in Special Term to consider vacating Douglas's stay.¹⁷⁹ The case was argued on Thursday, June 18, with the argument limited to whether Edelman had standing to petition as next friend and whether the penalty provisions of the Atomic Energy Act were applicable.¹⁸⁰

his pamphlet came to Farmer's attention, and Farmer was impressed by the argument. Farmer did some research, and formulated the argument concerning the Atomic Energy Act that was later to convince Douglas to issue a stay. *Id.*

¹⁷⁴ Farmer brought the issues concerning the lens mold omission and the Atomic Energy Act to the attention of the Rosenberg defense team, but Emanuel Bloch replied that it would be inadvisable to press those issues until there was a ruling by the Supreme Court on petitions pending before it. Bloch formally presented the substance of the two issues to Judge Kaufman, but in a manner suggesting that the issues were not substantial and were being raised only so the defense team would leave no stone unturned. Bloch objected to Farmer's plan to file the next friend petition, and sent a telegram to Judge Kaufman denouncing the petition and asking the judge not to consider it. *Id.*

¹⁷⁵ Atomic Energy Act of 1946, Pub. L. No. 585, § 10(b)(2)-(3), 60 Stat. 755, 766-67 (amended 1954).

¹⁷⁶ R. RADOSH & J. MILTON, *supra* note 9, at 394.

¹⁷⁷ *Rosenberg*, 346 U.S. at 313-21 (Douglas, J., dissenting).

¹⁷⁸ *See infra* note 194.

¹⁷⁹ 346 U.S. at 282-83; R. RADOSH & J. MILTON, *supra* note 10, at 400-03.

¹⁸⁰ Farmer had only 17 minutes of the argument time given to the Rosenbergs' side. R. RADOSH & J. MILTON, *supra* note 9, at 406. Douglas states in his autobiography that after he had granted the stay, Bloch's brief against vacating the stay "did not even then rest on the key point made by Fyke Farmer." W.O. DOUGLAS, *supra* note 8, at 79. Douglas's statement is confirmed by Radosh and Milton, who relate that Bloch still argued with Farmer on the morning of the argument that it "would be a fatal mistake to insist upon the applicability of the Atomic Energy Act" because the point had no merit. R. RADOSH & J. MILTON, *supra* note 9, at 404. The defense was instructed by the Court to limit itself to two issues, Edelman's

The Court announced its decision vacating Justice Douglas's stay at noon the next day, Friday, June 19.¹⁸¹ The Court resolved the Atomic Energy Act issue against the Rosenbergs.¹⁸² Later that day, the Court denied a final application for a stay pending further petitions for executive clemency.¹⁸³ Defense counsel requested that the Rosenbergs not be executed on the Jewish Sabbath. The Attorney General announced that the request would be honored by moving their execution *forward* from 11:00 P.M. to 8:00 P.M. that evening, minutes before sundown.¹⁸⁴ Two opinions in the case were not even filed until after the executions.¹⁸⁵

standing and the Atomic Energy Act point, but John H. Finerty spent his time denouncing Judge Kaufman and prosecutor Irving Saypol; Daniel Marshall continued in the same vein; and Bloch pleaded for more time to study the Atomic Energy Act issue. Justice Black asked Bloch from the bench: "[D]on't you think you ought to espouse [these issues] rather than denigrate them?" *Id.* at 404-06.

Douglas concluded that "Bloch never raised the point because the Communist consensus of that day was that it was best for the cause that the Rosenbergs pay the extreme price." W.O. DOUGLAS, *supra* note 8, at 79. Radosh and Milton conclude that it is plausible that Bloch would rather "see his clients dead . . . than have them saved by the likes of [Edelman and Farmer]." R. RADOSH & J. MILTON, *supra* note 9, at 407. They also suggest another possible motive. If Farmer's petition succeeded, it would be impossible to deny Farmer access to the Rosenbergs, who were on the brink of despair despite their outward show of defiance. Farmer, who was not convinced of their innocence, might have suggested cooperating with the government to save their lives.

For Bloch, any influence that might lead the Rosenbergs to consider confessing was unthinkable, and for reasons that went deeper than any abstract demands of the Party line. Confession would have meant naming others—most likely many others, individuals who would then provide the fodder for a new round to atom-spy trials—and, perhaps, provide also the excuse for the wholesale roundup of leftists that so many in Bloch's circle believed was imminent. From this point of view, cooperation with the government could not possibly "save" Julius and Ethel Rosenberg. Rather, it would destroy them and everything they had suffered for, in a sense that not even the electric chair could.

Id. at 409.

¹⁸¹ *Rosenberg v. United States*, 346 U.S. 273 (1953).

¹⁸² The Court "discountenance[d]" the practice of next friend petitions as "more likely to prejudice than to help the representation of accused persons in highly publicized cases." *Id.* at 292 (opinion of Jackson, J., joined by Vinson, C.J., and Reed, Burton, Clark, and Minton, JJ.). It would hardly do, however, to let the Rosenbergs be executed on the ground the Edelman lacked standing to raise a telling substantive issue. Thus, the decision formally rested only on the ground that the Atomic Energy Act was irrelevant, and not on whether Edelman had the necessary standing to raise the issue. *Id.* at 294-96 (opinion of Clark, J., joined by Vinson, C.J., and Reed, Jackson, Burton, and Minton, JJ.).

¹⁸³ *Rosenberg v. United States*, 346 U.S. 322 (1953) (per curiam). A motion to reconsider the question of the Court's power to vacate the stay was also denied. *Rosenberg v. United States*, 346 U.S. 324 (1953) (per curiam).

¹⁸⁴ R. RADOSH & J. MILTON, *supra* note 9, at 414.

¹⁸⁵ Chief Justice Vinson's opinion for the Court was largely devoted to a chronology of the proceedings of the case. On the merits, it merely adopted by reference the previously filed opinions of Justices Jackson and Clark. It was not filed, however, until July 16. 346 U.S. at 277. Justice Frankfurter's dissenting opinion was filed June 22, 346 U.S. at 301, commenting that "writing an opinion in a case affecting two lives after the curtain has been rung down upon them has the appearance of pathetic futility. But history also has its claims." *Id.* at 310. A per curiam opinion, 346 U.S. at 288, the concurring opinion of Justice Jackson, 346 U.S. at

The Court's major institutional failure in the *Rosenberg* cases occurred in these few days. Earlier Court decisions refusing to review the case turned on whether the case should be reviewed without reference to the issues, or whether particular issues were sufficiently substantial. Farmer's petition, however, raised an issue more substantial than any previously presented on the Rosenbergs' behalf. Although the Court did dispose of that issue on the merits after argument, the hasty processes employed did not permit the Justices to weigh the argument on its merits. The Court quickly rejected the argument not because it lacked merit, but because further inquiry would have delayed the Rosenbergs' scheduled execution.

Parrish's study, with its supporting documentation providing new corroboration, underlines this conclusion. Although Justice Burton eventually voted with the Court's majority, in the June 17 conference he voted initially to schedule further argument on the Atomic Energy Act issue. (Burton joined the Court's majority after only four Justices, including Black, Frankfurter, and Douglas, voted for further argument.)¹⁸⁶ At no other time in the various *Rosenberg* cases had there been four votes to identify any issue as sufficiently substantial to require argument. Although the Court disposed of the issue on the merits, Parrish presents solid evidence to support Frankfurter's view that the Court's majority had decided to let the execution proceed, no matter what issue had been raised.

Chief Justice Vinson's opinion for the Court stated that the Atomic Energy Act question had been "deliberated in conference for several hours"¹⁸⁷ but Frankfurter's comment scribbled on the page proof of that opinion angrily notes that there had been no discussion of the merits; the entire discussion concerned the question whether the issue had been waived.¹⁸⁸ More telling are FBI documents, based on conversations with Judge Kaufman, which report that Justice Jackson arranged a conference with the Chief Justice and Attorney General Brownell to plan a strategy to have Douglas's stay overturned.¹⁸⁹ Even more striking than

289, the concurring opinion of Justice Clark, 346 U.S. at 293, the dissenting opinion of Justice Black, 346 U.S. at 296, the dissenting opinion of Justice Douglas, 346 U.S. at 310, and a brief dissenting memorandum by Justice Frankfurter, 346 U.S. at 289, were all delivered on the decision day, June 19.

¹⁸⁶ Parrish, *supra* note 1, at 836. Douglas also confirms that Burton voted to keep the stay in force pending further argument. W.O. DOUGLAS, *supra* note 8, at 81.

¹⁸⁷ *Rosenberg*, 346 U.S. at 283.

¹⁸⁸ Parrish, *supra* note 1, at 837. It will be recalled, too, that Farmer, the only attorney arguing the merits of the Atomic Energy Act question in the Court's argument, had just 17 minutes of the defense time. See *supra* note 180.

¹⁸⁹ Parrish, *supra* note 1, at 835 (citing Memorandum from A.H. Belmont to D.M. Ladd (June 17, 1953) (available in *The Kaufman Papers*, distributed by the National Committee to Re-Open the *Rosenberg* Case)).

the fact that this extraordinary meeting took place,¹⁹⁰ is that it occurred on June 16, the day before Douglas granted the stay! At that meeting, Jackson told the Attorney General that "the whole theory of listening to Farmer's motion was ridiculous and Douglas should have turned it down."¹⁹¹ Vinson promised that if Douglas granted a stay, he would call the Court into session to overturn the stay.¹⁹²

Parrish also suggests that in the Rosenbergs' last days, Frankfurter's antipathy toward Douglas affected his crusade to have their convictions reviewed.¹⁹³ Despite the fact that less than twenty-four hours separated his receipt of Farmer's application and his issuance of the stay, Douglas did not work in isolation. As Circuit Justice, his responsibility was to decide whether the issue raised by Farmer at this late date would attract the votes of enough Justices to schedule further hearings in the case.¹⁹⁴ If he were sure that it would not, he could not responsibly grant the stay, regardless of his own views.¹⁹⁵ Frankfurter's own memorandum shows that Douglas talked to Chief Justice Vinson, and reported to Frankfurter that Vinson thought that the Atomic Energy Act issue had been disposed of in the appeal of the Rosenbergs' original conviction.¹⁹⁶ Douglas also talked to Black, showed him his draft opinion issuing the stay, and received strong support. Douglas approached Frankfurter because he knew that Frankfurter had previously attempted to influence the positions of Justices Burton and Jackson.¹⁹⁷ Douglas asked whether

¹⁹⁰ Surprisingly, Parrish does not comment on the judicial ethics of this *ex parte* meeting. In a footnote, he does indicate that there were ethical problems in Judge Kaufman's unilateral discussions with the prosecution concerning the sentence. Parrish, *supra* note 1, at 811-12 n.21.

¹⁹¹ *Id.* at 835 (citing Memorandum from A.H. Belmont, *supra* note 189).

¹⁹² *Id.*

¹⁹³ *See supra* note 120.

¹⁹⁴ Accordingly, he denied the stay application presented by the Rosenberg defense team on the ground that it "docs not present points substantially different from those which the Court has already considered in its several decisions. . . . Although I have the power to grant a stay, I could not do so responsibly on grounds the Court has already rejected." 346 U.S. at 314.

¹⁹⁵ Parrish concludes that Douglas acted responsibly in granting the stay, but states that "Douglas . . . knew before he issued the stay that his performance did not have the support of either the chief justice or a majority of the Court." Parrish, *supra* note 1, at 834. The statement is unexceptionable only if interpreted to mean that Douglas knew on the basis of conversations that he did not have a clear commitment from a majority to uphold his action. Parrish also asserts that "[l]egally, his position was strong; politically and morally, however, Douglas now functioned in a vacuum without the support of most of his colleagues." *Id.* Taken in context, that sentence should be read not to say that Douglas's own behavior lacked moral support but to say that he did not receive moral support from any of the Justices, with the exception of Justice Black.

¹⁹⁶ *Id.* Vinson is said to have believed that the death penalty issue was the same as the question whether federal appellate judges had the power to revise a sentence, which had been before the Court on the Rosenbergs' first petition for certiorari. *See supra* text accompanying notes 68-77.

¹⁹⁷ R. RADOSH & J. MILTON, *supra* note 9, at 401; Parrish, *supra* note 1, at 834.

Frankfurter knew how Jackson stood on the matter, and whether Jackson and Burton should be consulted.¹⁹⁸

Parrish characterizes Frankfurter's reply as showing "icy neutrality."¹⁹⁹ Frankfurter reported that he refused to read a draft of the Douglas opinion, and told him that "Tete-a-tete conversation cannot settle this." His only reassurance to Douglas was the admonition to "Do . . . what your conscience tells you, not what the Chief Justice tells you."²⁰⁰ On earlier occasions Frankfurter had not hesitated to work the corridors in an effort to garner the votes needed to provide Supreme Court review for the Rosenbergs, but he refused to do so now.²⁰¹

Sometime following the Court's June 15 conference, Frankfurter reported a conversation, in which he and Jackson agreed that Douglas had been grandstanding all along: voting to review only when he could be sure that a particular application ultimately would be denied.²⁰² Jackson and Frankfurter talked about the *Rosenberg* case on June 16, when Douglas was working on the stay petition, and Frankfurter reported that Jackson had no objection to Douglas's entertaining the Farmer motion.²⁰³ It is possible that Frankfurter and Jackson shared their mutual view of Douglas's behavior in this same conversation. If so, it is also possible that Frankfurter's views reinforced Jackson's view that Douglas would not behave responsibly, prompting Jackson to call the meeting with Vinson and Brownell to make sure that the stay would be overturned.

Thus, Frankfurter may have contributed to the forces that would ensure that Douglas's stay would be set aside without a fair hearing. His active dislike for Douglas pulled him in a direction that contradicted and defeated his desire for Supreme Court review of the Rosenbergs' cases. Frankfurter did not report that he took any action to sound out Justice Burton, and he clearly did not support Douglas's possible granting of the stay in conversations with Jackson. Joseph Rauh, Jr., with whom Frankfurter spent the night prior to the Court's argument on June 18, recalls that Frankfurter spent "a restless night and had harsh words for Douglas."²⁰⁴

CONCLUSION

Parrish's account of the Supreme Court's treatment of the *Rosenberg*

198 R. RADOSH & J. MILTON, *supra* note 9, at 401; Parrish, *supra* note 1, at 834.

199 Parrish, *supra* note 1, at 834.

200 *Id.* (quoting F. Frankfurter, *supra* note 6).

201 *See supra* text accompanying notes 112-13.

202 *See* Parrish, *supra* note 1, at 825 ("In the hallway outside the conference room, Jackson stopped Frankfurter and said triumphantly with reference to Justice Douglas, 'That S.O.B.'s bluff was called.'"); *see also supra* note 121 and *supra* text accompanying note 157.

203 Parrish, *supra* note 1, at 835.

204 *Id.* at 835 n.84.

cases is heavily influenced by Felix Frankfurter's view of events as expressed in his memorandum. That memorandum tells us more about Justice Frankfurter, however, than it does about the pattern of Justice Douglas's votes in the *Rosenberg* cases. Douglas's voting pattern was not erratic, mysterious, or self-serving. Quite simply, Douglas voted on the merits of the issues presented, without reference to the public clamor either to save the Rosenbergs, or to execute them. He followed that course to the end, when his vote to grant a stay of execution showed the courage and conviction for which he is best remembered.

APPENDIX

THE CHRONOLOGY OF THE *ROSENBERG* CASE

- Aug. 17, 1950: Rosenbergs indicted for violation of the Espionage Act of 1917, 50 U.S.C. §§ 32(a), 34 (1982).
- April 5, 1951: Rosenbergs convicted and sentenced to death.
- Feb. 25, 1952: Second Circuit Court of Appeals affirms the convictions.
- April 8, 1952: Second Circuit denies petition for rehearing.
- Oct. 13, 1952: United States Supreme Court denies certiorari; Douglas votes to deny certiorari.
- Nov. 17, 1952: Supreme Court denies petition for rehearing.
- Dec. 10, 1952: District court denies motion to vacate judgment and sentence pursuant to 28 U.S.C. § 2255 (1982).
- Dec. 31, 1952: Second Circuit affirms the district court's denial of the motion to vacate judgment and sentence.
- May 25, 1953: Supreme Court denies certiorari to review the motion. Douglas votes to grant certiorari and dissents from the denial of certiorari.
- May 26, 1953: Petition filed in Supreme Court for a stay of execution pending consideration of a petition for rehearing. Petition denied by the Chief Justice.
- June 1 and
June 8, 1953: Two further motions brought in district court pursuant to 28 U.S.C. § 2255 to vacate judgment and sentences. Motions denied.
- June 5 and
June 11, 1953: Denials affirmed by the court of appeals.
- June 2, 1953: Second Circuit denies petition for mandamus to direct sentencing judge to resentence the defendants.
- June 15, 1953: Supreme Court denies petition for rehearing of its May 25, 1953, denial of certiorari. Douglas dissents.
- June 15, 1953: Supreme Court denies an application for stay of execution pending review of the June 1 and June 8, 1953, lower court decisions. Douglas votes against the stay.
- June 15, 1953: Supreme Court denies petition for an original writ of habeas corpus with a request for a stay. Douglas votes against issuance of the writ.
- June 17, 1953: Douglas denies request for a stay.

- June 17, 1953: Douglas grants a second request for a stay based on new arguments. He denies an application for habeas corpus.
- June 18, 1953: Supreme Court special term vacates Douglas's stay.
- June 18, 1953: Supreme Court denies motion for a further stay in order to seek executive clemency.
- June 19, 1953: Rosenbergs executed.