



FATAL ERROR

THE MISCARRIAGE OF JUSTICE
THAT SEALED
THE ROSENBERGS' FATE



JOSEPH H. SHARLITT

FATAL ERROR

THE MISCARRIAGE
OF JUSTICE THAT SEALED
THE ROSENBERGS' FATE



Joseph H. Sharlitt

CHARLES SCRIBNER'S SONS New York

Copyright © 1989 by Joseph H. Sharlitt

All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the Publisher.

Quotations in chapter 9 from "Control of Information Relating to Atomic Energy," by James Newman, are reprinted by permission of The Yale Law Journal Company and Fred B. Rothman & Company from *The Yale Law Journal*, Vol. 56 (May 1947).

Charles Scribner's Sons
Macmillan Publishing Company
866 Third Avenue, New York, NY 10022
Collier Macmillan Canada, Inc.

Library of Congress Cataloging-in-Publication Data
Sharlitt, Joseph H.

Fatal error: the miscarriage of justice that sealed the Rosenbergs'
fate/Joseph H. Sharlitt.
p. cm.

Includes index.

ISBN 0-684-19059-1

1. Rosenberg, Julius, 1918-1953—Trials, litigation, etc.
2. Rosenberg, Ethel, 1915-1953—Trials, litigation, etc. 3. Trials (Espionage)—New York (N.Y.) 4. Trials (Conspiracy)—New York (N.Y.) 5. Capital punishment—United States. I. Title.

KF224.R6S53 1989

345.73'0773—dc19 89-4290 CIP

[347.305773]

Macmillan books are available at special discounts for bulk purchases for sales promotions, premiums, fund-raising, or educational use.

For details, contact:

Special Sales Director
Macmillan Publishing Company
866 Third Avenue
New York, NY 10022

10 9 8 7 6 5 4 3 2 1

Designed by Jack Meserole

PRINTED IN THE UNITED STATES OF AMERICA

ILLUSTRATIONS

(Following page 146)

The Supreme Court of the United States in 1953

Chief members of the prosecution team in the Rosenberg case

Co-defendant and witness for the prosecution David Greenglass

Daniel Marshall and Fyke Farmer, the lawyers who authored
the theory that resulted in a stay of execution

Rival sets of defense lawyers celebrating the stay, June 17, 1953

Lawyers who argued on behalf of the stay of execution
of the Rosenbergs

Judge Irving R. Kaufman, the trial judge who imposed the
death sentence on the Rosenbergs

Master atomic spy Klaus Fuchs, after his release from prison
in England, 1959

Demonstration in Paris, France, in support of the Rosenbergs
on June 18, 1953

French demonstrators, during Bastille Day Parade in Paris,
protesting the execution of Julius and Ethel Rosenberg

Crowd on East Seventeenth Street, New York City, before the
execution of the Rosenbergs

PREFACE

Why This Book Demanded to Be Written

The purpose of this book is to pose the question of whether the execution of Julius and Ethel Rosenberg was legal. It concludes that it was not. Since life or death was the ultimate issue in the Rosenberg case, the conduct of our legal system in that case, regardless of the guilt or innocence of the Rosenbergs, remains a matter of grave concern.

Unlike any other book written about the Rosenberg case, *Fatal Error* tells how the Supreme Court of the United States rushed the Rosenbergs to the electric chair in violation of their rights before that Court. The Supreme Court disregarded the law, its own traditions, and violated the rules that govern the conduct of the justices, in its dash to kill this couple. It is a day-by-day account of how our highest court became politicized while deciding the most controversial case in this century. It reveals to the American public for the first time how, in this case, its highest court failed in its responsibilities. The details are dramatic and appalling.

Fatal Error examines the death sentence given the Rosenbergs by Judge Irving Kaufman, probing his words and reasons for the sentence. The judge's own reasoning, expressed in April of 1951, was based on Judge Kaufman's belief that the Rosenbergs put the atomic bomb in Russian hands and ultimately caused the Communist aggression in Korea that resulted in fifty thousand casualties. The realities of what Julius and Ethel Rosenberg did and

did not do, and what other spies *did* do *before* Judge Kaufman imposed his sentence on the Rosenbergs, reveal that the judge's theories about the bomb and Korea were based on his own speculations, not on the record before him. Judge Kaufman also had become politicized.

Fatal Error examines, in layman's terms, the law used by Judge Kaufman and the Supreme Court to put the Rosenbergs in the electric chair. What *Fatal Error* discloses is that the government (which prosecuted the Rosenbergs), Judge Kaufman, who sentenced the Rosenbergs to death, and the Supreme Court, which let them die, all used the wrong law. *Fatal Error's* narrative focuses on the Supreme Court's activities in the last week of the case, in June of 1953, when it was made clear to this Court that the wrong law was about to result in two executions that the correct law forbade. Yet the majority of the Supreme Court disregarded this fact. The intrigues leading to this fatal error highlight the justices' relations with each other. Those intrigues and how they led to the majority's determination to rush to judgment—and two unlawful executions—have not been released from within the sacrosanct provinces of the Supreme Court until now. Those disclosures are extraordinary and disturbing in the highest degree.

All of this took place in the third week of June of 1953. That week may very well have been the high fever mark of an indigenous American disease, McCarthyism. What occurred in the Rosenberg case cannot be judged fairly without reference to the mass anti-Red feeling that had taken hold of this country in June of 1953. *Fatal Error* makes that reference. The reader can then judge the extent to which two courts became politicized and how this resulted in the executions of the Rosenbergs.

This book is not about the Rosenbergs' guilt or innocence. It is concerned with the administration of justice in our country. What it does say is that a gross miscarriage of justice occurred in the Rosenberg case regardless of whether the Rosenbergs were guilty or innocent. No one has ever before told the story of how this breakdown took place, the events and the people that perpetrated the fatal error.

ACKNOWLEDGMENTS

To Jerry Jacobson, Janet Perlman, Charlie and Cordie Puttkammer, Neal Krucoff, Marvin Teplitz, Gary Hesky, Rita Lennox, Kumar Shankardass, and Dan Fenn, without whom this book would never have been written;

to Mary Hesky, who made readable English out of a lawyer's prose,

to Peter and Amy Sharlitt, who helped but never knew it;

to Bernhard Bechhoefer for having faith in his colleague; and

to Fyke Farmer and Marshall Perlin for their extraordinary kindness and assistance.

Finally, I owe a special debt to Ted Perlman and Phil Elman, who bring pride to being a lawyer.

CONTENTS

PREFACE

ix

ACKNOWLEDGMENTS

xi

CHAPTER ONE

The Error Committed by the Court

1

CHAPTER TWO

The Trial

10

CHAPTER THREE

Saturday, June 13, 1953

20

CHAPTER FOUR

Monday, June 15, 1953

46

CHAPTER FIVE

Tuesday, June 16, 1953

62

C O N T E N T S

CHAPTER SIX

Wednesday, June 17, 1953

75

CHAPTER SEVEN

Thursday, June 18, 1953

96

CHAPTER EIGHT

Friday, June 19, 1953

126

CHAPTER NINE

Fatal Error

147

CHAPTER TEN

If the Rosenbergs Had Been Tried Under the Proper Act

196

CHAPTER ELEVEN

A Death Sentence Based on Ignorance of the Facts

202

NOTES

257

INDEX

269

CHAPTER ONE

1

THE ERROR COMMITTED BY THE COURT

THE CONCLUSION that the Rosenbergs' execution was illegal is based on an examination of what the law was on June 19, 1953, when the federal government executed the two convicted conspirators. The appropriate law on that date clearly required that the death penalty be specifically recommended by a jury before execution could be carried out in the Rosenberg case. Because the Rosenbergs were charged, tried, convicted, and executed under an inapplicable law that did not require this jury recommendation, no jury ever made such a recommendation in the Rosenberg case. The law used was a wrong one, and this was error—legal error. The absence of a jury recommendation made execution of the Rosenbergs a fatal error, in every sense of that phrase.

Every one of the numerous judges who reviewed the Rosenberg case before it reached the Supreme Court simply assumed that the law under which the two were charged, tried, and convicted was the proper law.¹ One very good reason for this assumption was that the lawyers for the Rosenbergs had themselves never questioned it.

Indeed, when the case reached the Supreme Court in its final doom-ridden week in June 1953, the Rosenberg lawyers still had never questioned the legal basis on which their clients were to be executed. Not until total outsiders, lawyers for a West Coast sympathizer who had never met the Rosenbergs,² raised the issue

and persuaded one justice of the Supreme Court that the imminent execution was illegal did the Rosenbergs and their lawyers belatedly take up this argument.

The argument was a relatively simple one. The Rosenbergs had been charged, tried, and convicted under the Espionage Act of 1917. That act permitted a judge to sentence certain violators of the act (such as the Rosenbergs) to death on the judge's own determination, without requiring any recommendation from the jury. But a new law (the Atomic Energy Act of 1946) had been passed just seven years before the Rosenbergs were executed;³ it required that spies who passed atomic secrets could be executed only on the recommendation of the jury sitting in the case. From the day that the Rosenbergs were indicted until three days before they were executed, the Atomic Energy Act of 1946, although applicable, was ignored by everyone connected with the case.

The points that went to the heart of the case in its last week and never did get full consideration by the Supreme Court (or any court) were: (1) whether the Atomic Energy Act of 1946 should have been applied to the Rosenbergs' spying, and (2) whether both statutes, the 1917 act⁴ and the 1946 act, applied to their conduct. If the answer to either question was yes, the Rosenbergs were executed illegally.

Astonishingly, for any observer who reads the history of this case in the eighties, the Supreme Court not only answered both questions in the negative but also went a good deal further and pronounced the questions themselves insubstantial and not worthy of any court's attention. The Supreme Court's extreme determination was the only way that the Rosenbergs could be put into the electric chair without further delay. And delay was, it seems, to be avoided at all costs.

However, one judge of the Supreme Court not only felt the questions *were* substantial but went further to rule that the later act *did* apply to the Rosenbergs and that the executions were, therefore, illegal.⁵ Two other justices of the nine sitting on the Court ruled that the questions were indeed quite substantial and asked for time to have them briefed and studied.⁶ But six justices ruled otherwise.⁷ The majority prevailed and within eight hours of their ruling, the Rosenbergs were dead. The controversy

engendered by this execution has reverberated through the decades as no other in this century.

To dispassionate followers of the case, the most disturbing aspect of this sudden conclusion was the government's rush during that week of June 1953 to execute the two convicted conspirators. Two human lives were at stake. Yet it seemed that the forces of federal justice were mesmerized by the passage of time here and abroad. The reason for this preoccupation with the passage of time was obvious: the case was being used as a vehicle for dissemination in the United States and elsewhere of publicity unfavorable to our government's role in it as prosecutor. International criticism—greater than any in history to that date—of the U.S. government for its handling of the Rosenbergs played a crucial part in the stampede to execution. By the thirteenth of June 1953, the Rosenberg case already had dragged through the courts for nearly thirty-four months.⁸ During that time, the Rosenbergs had been given every remedy known to the law, sometimes two or three times over. Moreover, their case had become highly politicized by zealots of the left wing whose goal was far more the discrediting of the United States than it was the freeing of the Rosenbergs.

But all of these considerations pale before a series of pressing facts. First, the immutable reality that two human lives were at stake and time is, by comparison, a paltry commodity when a government is directly dispensing life and death. Second, in the course of that fateful week in June 1953 (commencing on June 13 and ending on June 19, when the Rosenbergs were executed), an entirely new legal argument surfaced *for the first time*. This argument went to the heart of the case. Yet none of the legion of lawyers and judges who had participated in the case had ever made or heard the argument until the week before the Rosenbergs were to die.

Third, that very new argument was raised before Justice Douglas on June 16, 1953, just two days before the Rosenbergs were scheduled to die. Justice Douglas saw merit in it. The next day, on June 17, Douglas entered a stay of the execution of the Rosenbergs (scheduled for the eighteenth) and ordered that this new argument be sent back for consideration by trial judge

Kaufman, thence to the Court of Appeals and back to the Supreme Court, giving the Rosenbergs at least a year more of life. But because the new argument was made to Douglas, a maverick on the Court, and accepted by him, it was doomed before Douglas acted on it. Douglas's earlier conduct in the Rosenberg case—prior to his entry of the stay on June 17—had so isolated Douglas from his colleagues on the Court that even those who might have supported him on the law (and on his stay) were deeply involved in personal disputes with him. Vital votes during that last week were lost, not because Douglas was wrong on the law but because Douglas was making the argument. It is a damning comment on the High Court's conduct during that week that a legal point that had never before been raised, that should have spared the lives of the defendants, that was wholly correct even though scores of judges and lawyers had missed it entirely, was summarily brushed aside by the Supreme Court of the United States because of personal pique of judge against judge. The animus was present. The record demonstrates that it influenced what the Court did. It should not have. It is no wonder that Justice Frankfurter spoke of the Supreme Court's conduct in the Rosenberg case as the "most disturbing single experience I have had during my terms of service on the Court."⁹

Fourth, Attorney General Brownell of the United States, the adversary of the Rosenbergs in this case and a man committed to swift execution of the convicted spies, then engaged, together with Chief Justice Fred Vinson of the Supreme Court, in conduct that violated both the canons of judicial conduct governing all judges and the canons of lawyers' conduct that governed the attorney general. As the narrative for June 16 and 17 in this book sets forth (and as FBI records corroborate), both men met and plotted against Douglas and what he might do while the new argument was pending before Douglas.¹⁰

Fifth: that was not the full extent of the improprieties of the attorney general and the chief justice. The private notes of another justice indicate that other conduct by both the attorney general and the chief justice—wholly apart from that described above—was aimed directly at nullifying what Douglas might do with the

new argument that had surfaced.^{10a} As the events of June 16 and 17 reflect, the highest judge and the chief law enforcement officer of the land were engaged in a concerted effort to stop Douglas from acting alone. Douglas had become the target of a totally improper combination of judge and prosecutor (chief justice and attorney general) to prevent—at all costs—Douglas's act of conscience. All of this took place *before* Douglas acted.

Finally, there is substantial evidence that once the Supreme Court had disposed of the last formal attempt of the Rosenbergs' lawyers to sway the Court in the regular manner in which the Court functioned—in the Court's last conference on the afternoon of Monday, June 15, 1953—the justices had agreed that having finally disposed of this monster case that had tormented American justice here and abroad for thirty-four months, no one of them would thereafter reopen the case.¹¹ And when Justice Douglas, the same Justice Douglas, intervened just two days later, on June 17, to do precisely that on the day before the Rosenbergs were to die, it was no wonder that *Douglas*—and not the Rosenbergs—became the “defendant” before the Court. What Douglas then urged on the Court was not rejected for what it said but in very large part because *Douglas* urged it. It does honor to justices Black, Frankfurter, and Douglas that this final departure from judicial decorum wholly failed to deter those three dissenters when they came to vote their consciences two days later. No such honor applies to the majority of the Court.

One need not be a lawyer to recognize that none of these events was either proper or fair to the defendants, Julius and Ethel Rosenberg. There should have been no private meeting of any kind between the attorney general and the chief justice of the United States to discuss what to do in a case then pending before the Supreme Court in which the attorney general was the major adversary. The attorney general had no business privately urging the chief justice of the United States to influence the conduct of one of the justices in the disposition of a case under consideration by that justice. There should have been no private agreements among the justices *not* to entertain any further petitions in a case—any case—and especially one involving the death penalty.

Yet all of these things happened. As the next section states, the records of the FBI and the justices themselves confirm that they happened.

When Douglas entered a stay of execution of the Rosenbergs on Wednesday, June 17, 1953, the Department of Justice dutifully put in motion the attorney general's and the chief justice's plot: it made the request for a historic special session of the Court already in recess (the third special session in the Court's history). Within one hour—without any notice to the lawyers for the Rosenbergs, who had every right to such notice and to oppose the hasty gathering of the justices—Vinson ordered the Court to reconvene on the next day, Thursday, June 18.¹²

In the accumulation of improprieties that infected the last week of the Rosenberg case, the signal to reconvene the Court for its special session went *from* the Court *to* the Department of Justice. As is shown in the events of June 16 (in the next session), the attorney general and the chief justice had agreed to precisely this course of action on the day before. This was as explicit a signal from the Court that it wished to be reconvened (to undo the mischief that Douglas had done) as it could send forth. It came from the chief justice, who said it in a meeting with the attorney general.

Such signals traditionally are the prerogatives of the litigating adversaries, not of the Court. In all instances, especially the highly unusual one of reconvening the Court out of session, one party takes the initiative, files papers with the Court seeking the Court to act (in this case, to reconvene), and the Court either agrees to or denies the request. But that assumes an unbiased Court. In the case of the Supreme Court of the United States on June 16, 1953, it was not an unbiased court. It personally (in the message of the chief justice personally delivered to the attorney general) sent the signal to the attorney general that it wished to be reconvened. And the attorney general obviously was delighted to oblige now that Douglas had taken his dramatic and—to the Department of Justice—lamentable action. It was no accident that the Department of Justice's motion to reconvene was not served on the Rosenberg lawyers. It was no accident that it was agreed to by the chief justice within an hour of its filing. In the topsy-turvy world

of the Supreme Court of the United States on June 17, 1953, it was still another departure from the Court's—from any court's—rules; and it was aimed at putting the Rosenbergs into the electric chair without further delay, whether proper or not.

With Douglas the enemy, with the chief justice acting secretly and in concert with the attorney general to defeat the Douglas heresy, it is little wonder that the new legal argument that brought this all about had no chance. And Douglas himself knew it had no chance when he went public with it—but he could do nothing about it.

Justice Frankfurter was not alone in viewing the case as the most disturbing in his court career. Lawyers who followed the events in the Rosenberg case in its last week before the Supreme Court, both within the Supreme Court and the Department of Justice, consider that last week to be one of the saddest episodes in the recent history of American justice. Lawyers on both sides of the case felt a deep misgiving they have never forgotten. The guilt or innocence of the defendants had nothing to do with their distress over the Court's conduct and that of the Justice Department. Nor was the worldwide fire of partisan fervor on both sides the cause of their dismay. It was, rather, the spectacle of the Supreme Court of the United States becoming politicized before their eyes, with no one having the will or courage to stop it. Justice was rushed. Proper consideration of matters of the utmost importance was not allowed.

The consequences of that last week of the Rosenberg case before the Supreme Court were that the Rosenbergs were executed without ever having the chance to write or argue their brief on the key point of law that had just arisen and the validity of that point has never been tested.

In a sense, this book is the brief that the Rosenbergs were never allowed to write. However, it is written for laymen rather than for a court. Because so many of the elements that today too much disturb the soul about this case occurred during its final week, it begins with a narrative of the events of the week of June 12 to 19, 1953, the last week before the Rosenberg execution. Some of what occurred that week was a reflection of earlier events in the Rosenberg saga. Some of what happened was caused

indirectly by events in the Congress of the United States; those are recorded as well. But the human drama of what was said and done by the lowly and the mighty in the hallowed halls of the Supreme Court during those seven days is essential for understanding of the Supreme Court's fatal error.

My first contact with the Rosenberg case was the same as that of millions of Americans: news coverage before and during the trial and the appeals. The entire country lived through the ordeal of June 1953, when the seemingly inexhaustible concern of the courts to give the defendants every measure of justice prolonged its suspense; when the sentimental martyrdom orchestrated by the left wing press and the Communist party around the world had already turned the case into the *cause célèbre* of the decade; and when it seemed that the tragedy of the imminent execution of these two people had subsumed all interest in their apparent guilt. Like millions of Americans quite convinced of the Rosenbergs' guilt, I was nonetheless horrified at the death sentence.

For so many Americans and for me, the reasons for horror were not precise but nonetheless pressing. There was, to begin with, the visceral feeling that no matter what the legal purists might have told us, the Rosenbergs' crime was largely a political crime. Even among enthusiasts for capital punishment, a sentence of death seems appropriate only for crimes of extreme violence; the death sentence for crimes that are political—no matter what the statute says—is very unpopular in this country. Secondly, there was a very strong feeling that this sentence was a part of the times, the McCarthy times. The growing anxieties about what McCarthyism was doing to American life were focused on this case, the prosecution of which seemed to many to be an outcropping of that opprobrious public malady. The words of Judge Kaufman in pronouncing sentence aggravated rather than allayed these anxieties. He blamed the Korean War and its casualties on the Rosenbergs. Without knowing anything about the Rosenbergs or Judge Kaufman, I *had* read the newspapers and knew this to be wrong.

From June of 1953 until the middle of 1972, the Rosenberg