

They were convicted in a New York federal court and sentenced to death. 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.

In June 1953, as the Court was about to adjourn for the summer, new lawyers entered the case and applied to the Court for a stay of execution. Emanuel H. Bloch, counsel for the Rosenbergs, had never raised the question as to the impropriety of the death sentence because the conditions specified in the intervening Atomic Energy Act of 1946 had not been satisfied (see page 67). He apparently had refused to raise the point when it was urged upon him (346 U.S. 282). When it came to us in June 1953, it was a brand-new issue never once raised previously in the protracted litigation.

There is in the law the "next friend" doctrine, especially applicable to habeas corpus proceedings. This procedure serves to allow friends of prisoners who may not be able to reach a court to bring an action on account of the prisoners. One Edelman was the "next friend" who, through Fyke Farmer of Nashville, Tennessee, filed a writ of habeas corpus in the Rosenberg case, accompanied with a motion for a stay. I did not grant the writ, only the motion; and it was my motion that the entire Court considered when it met in Special Term on June 18 (*Id.* 273).

Bloch filed a brief against vacating my stay, though he did not even then rest on the key point made by Fyke Farmer. My own impression was 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. That is a harsh thought; but it must be remembered that Stalin was still in power.

I call the ambiguity in the act the "key" point as far as the death penalty was concerned because of what Judge Jerome Frank later told me. It was he who wrote for the Court of Appeals sustaining the convictions in 1952 (195 F 2d 583). He said that the "key" point had never been raised prior to the "next friend" application to me and that if my stay had not been vacated and my ruling had reached the Court of Appeals, as it would have, there was no doubt that the Court of Appeals would have held that the imposition of the death sentence was improper.

The practice in processing an application for a stay is to refer it to the Circuit Justice, who in this case was Jackson. But the lawyers, hearing that I was leaving the city for the Far West the next morning, presented



the application to me, as this was Tuesday and the Rosenbergs were to die on Thursday. This was, in other words, the last chance to present the application to me. I, however, referred it to Jackson, who instantly responded by saying that I should consider it in light of the lateness of time and my imminent departure for the Far West.

I accordingly set down the application for a hearing in my chambers. That was Tuesday, June 16, 1953. After hearing the oral argument, I was deeply troubled. The point presented had never been considered by any court that reviewed the case. It was briefly the following: the Rosenbergs were charged with a conspiracy that ran from 1944 to 1950. At the time the conspiracy started, the relevant statute, the Espionage Act of 1917, provided for the death penalty. In 1946, while the alleged conspiracy was still under way, Congress, to ameliorate the punishment, amended the law in the Atomic Energy Act so as to make the death penalty applicable *only in case the jury recommended it*. In the Rosenberg case the jury had made no such recommendation; and the trial court had proceeded on the ground that only the original act was applicable. So the question was analogous to the case in which, while a burglar was entering a house, the penalty for burglary was lightened. Which penalty should be applied, the heavier or the lesser one?

The Rosenberg case was an aggravated application of that principle, as human lives were at issue. (It is elemental law, in Continental Europe as well as in the Anglo-American world, that any ambiguity in a law should be resolved in favor of life, not against it.) The problem was, theoretically speaking, interesting, but what made it loom large was the fact that the incriminating evidence against the Rosenbergs, as revealed in the record, were events happening *after* the 1946 amendment that ameliorated the punishment.

Washington was a powder keg. Pro-Rosenberg pickets were picketing the White House; and anti-Rosenberg pickets were picketing the pickets. A crowd was milling around the Supreme Court building. Our police told me that two hundred newsmen and photographers were inside waiting for me. At one o'clock in the morning I went out a back door and drove my car to Fred Vinson's apartment. After I told him I had almost decided to issue the stay, we talked for an hour. He tried to dissuade me, and I finally decided to sleep on the matter and come to a decision in the morning.

I took a hotel room and slept late. Before noon the next day (Wednesday, June 17) I issued the stay and left town by car for the Far West.



Before I had left Washington, while I was still considering the stay application, I had received a telegram from my hometown of Yakima which stated the mood of the country: "If you grant the Rosenbergs a stay, there will be a lynching party waiting for you here." I had wired back: "If there is to be a Yakima lynching party you'll have to furnish your own whiskey."

My first stop was to be Collinsville, Illinois, where my friend Irving Dilliard lives. I had left the Chief Justice a memo telling him the route I was following and my destination. I was on that route when dusk overtook me not far south of Pittsburgh. I saw a motel, stopped and registered, and while I was moving my bags inside I had the car radio on, listening to a symphony. Suddenly the music stopped and a voice announced that the Chief Justice had called a Special Term of Court for noon the next day to review my stay of execution.

I called my secretary, Mrs. Edith Allen, at once to see if the news was correct. She told me it was, and on inquiry advised me that Vinson had never tried to reach me, as he easily could have by alerting the state police of Pennsylvania. An eight-man Court would sit the following day to review my action! I told Mrs. Allen to inform the Chief that I'd be there.

Chief Justice Vinson of course had no authority to convene a Special Term of Court. That could be done only by a vote of five out of nine Justices. Black raised the point and vigorously objected, but I decided to waive the point, as a majority of the Court was clearly of a mind to ratify the action of the Chief. So the Conference considered the first question on the merits: Should my stay be upheld? Upholding it would mean only that the District Court would consider the question and rule on it, before fall the Court of Appeals could pass on it, and it would then be ripe for decision by us in October. Black, Frankfurter, Burton and I urged that course. No harm would be done; the Rosenbergs were behind bars; they could be executed in October as well as in June. But we could not muster the fifth vote from Vinson, Reed, Clark, Jackson or Sherman Minton. So we put on our robes and went into the courtroom to hear oral argument on the merits of the stay.

The arguments lasted several hours before an audience more tense than any I have ever seen. We adjourned to a Conference in which the vote was six to three to vacate the stay, the dissenters being Black, Frankfurter and myself. Opinions were feverishly written that afternoon and evening and circulated in the morning. At noon on Friday,



June 19, we convened Court and announced the decision and the dissents (346 U.S. 273). The Rosenbergs were executed that night.

And when that happened the people of this country experienced a thrill. Mrs. Rosenberg was the first woman to be executed. She, like her husband, was electrocuted and her death received the greatest publicity. What does a woman who has received a lethal electric shock look like? The photographers were accommodating. The front pages the next day showed Mrs. Rosenberg's face as the electric charge hit her body. Her face at once became bloated. There were visible liquid excretions through the skin. It was as if one were an eyewitness to the suffering and torture that a sinner receives in hell. Many people in the nation felt a glow of sadistic satisfaction in viewing this picture.

What I lived through in the Rosenberg case reminded me of the saga of Raymond Swing, our greatest radio commentator in the thirties and forties. Fred Friendly, formerly with CBS, said Swing was "the closest thing broadcasting ever had to a Walter Lippmann." Ray put the sweep of the news into political essays for the listeners. He spoke to nearly forty million people for less than fifteen minutes Monday, Tuesday, Wednesday and Thursday nights. He not only related what had happened; he also placed in national or global perspective the growth and development of seemingly unrelated news items. I remember men and women saying, as a week of bad news filled the papers, "I can't wait to hear what gleam of hope Ray Swing may find in this mess."

On November 6, 1945, HUAC zeroed in on seven radio commentators, the most prominent of whom was Raymond Swing. They asked for copies of all broadcasts and said that they were making the request because of public complaints about the "communist views" expressed by Swing and others. A spokesman for HUAC said, "The time has come to determine how far you can go with free speech."

That summons was the start of the decline of Ray Swing. His sponsors got nervous and asked, "Who in the world would want to be known as the seller of communist cigars?" Down, down, down went Ray Swing. His "sin" was praising the Soviet army's fighting, labeling Chiang Kai-shek as a fascist, and calling Douglas MacArthur a reactionary. HUAC never held a hearing, but it issued a report (H.R. 2233, 79th Cong., 2d Sess.) in which it pilloried the commentators for promoting socialism and Communism. So sensitive was American business to having its products associated with anything "subversive" that Ray Swing went



from pillar to post looking for jobs that finally petered out. In 1953, after I issued the stay in the Rosenberg case, he saw me and said, "Bill, they will get you. For you have touched the most sensitive, the most emotional issue that has swept the nation in our time."

In 1913 Justice Holmes said, "When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law. Judges are apt to be naïve, simple-minded men, and they need something of Mephistopheles."

In my time the fear of Communism worked the same wrong on the law. Perhaps the Justices did not feel any immediate threat of Communism, but they certainly were aware of the hysteria that beset our people, and that hysteria touched off the Justices also. I have no other way of explaining why they ran pell-mell with the mob in the Rosenberg case and felt it was important that this couple die that very week—before the point of law on the legality of their sentence could be calmly considered and decided by the lower courts.

The Rosenberg affair had much in common with what I had seen years earlier in Afghanistan when a murderer would be put in a wire cage and hung from a tree at or near the site of the crime. He was of course given no food or drink. He would in time die of pneumonia. Meanwhile passers-by could throw rocks at him, shake their fists at him, denounce him. This form of capital punishment, I decided, best served the cause, as it gave the sadistic public the fullest possible participation in the execution. The only other method anywhere equal to it was the Middle Eastern custom of letting a whole community take up the hue and cry against a man accused of rape. Those who got there first could kill the accused in their chosen way. Another Middle Eastern custom gave the father or brother of a female member of the family who was raped or killed the pleasure of shooting the defendant after he had been convicted—a system that broke down when a man killed his wife, the execution falling to the eldest son. The mullahs balked at that and preserved the system by substituting an uncle for the eldest son.

What I had seen in the Rosenberg case brought home to me vividly that capital punishment is barbaric, that its only value is in the orgasm of delight that it produces in the public, that if we were truly civilized, we would find other ways to satisfy the animal urges of people. We know that capital punishment is no deterrent. We know it when we



compare the felony statistics in Minnesota and Michigan—two states that abolished capital punishment years ago—with the felony statistics in California and New York that led the way in executions. There was no major difference in the incidence of felony crimes in the two former states as compared with the latter two. Rehabilitation of criminals has seldom been attempted. Killing them or locking them up is the tried-and-true ancient method. Why not turn our faces toward rehabilitation? New techniques are evolving and some show promise. This was the train of thought that the aftermath of the Rosenberg case quickened in my mind.

After that case, as before, I allowed many people to be executed, as my role was not to fix the punishment but to make sure the trial had been free of constitutional errors. But in the dozens of executions that took place in my circuit after the Rosenberg case, I shared the agony of the family of the victim.

I know of no more serious danger to our legal system than occurs when *ideological* trials take place behind the façade of *legal* trials. Perhaps the most eloquent statement on this subject comes from Bartolomeo Vanzetti when he was asked if he had “anything to say why sentence of death should not be passed”:

This is what I say: I would not wish to a dog or to a snake, to the most low and misfortunate creature of the earth—I would not wish to any of them what I have had to suffer for things that I am not guilty of. But my conviction is that I have suffered for things that I am not guilty of. I am suffering because I am a radical and indeed I am a radical; I have suffered because I was an Italian, and indeed I am an Italian; I have suffered more for my family and for my beloved than for myself; but I am so convinced to be right that if you could execute me two times, and if I could be reborn two other times, I would live again to do what I have done already.

My brother Arthur told me an interesting aftermath to the Rosenberg case. In August 1953 he was at the Boston Statler on business. The American Bar Association was meeting there, and among its guests was Fred Vinson. Fred called Art and asked if he would come up to his suite.

The two sat and talked over glasses of “bourbon and branch water,”



as Fred always described his favorite drink. Finally Fred told Art that he was sorry about the Rosenberg case and the Court's treatment of me and the stay, that I had been right and he had been wrong and that he wanted a Douglas to know what the Chief Justice actually felt. Whether Fred had a premonition of his death I do not know. Within a month, however, he was dead of a heart attack, fulfilling Dr. George Draper's prediction. Fred had large bags under his eyes, he smoked cigarettes incessantly, he was paunchy and never took a bit of exercise. "The ideal candidate for a coronary" were Draper's words.

As a result of my action in the Rosenberg case I became temporarily a leper whom people avoided, just as later old friends avoided Judge J. Skelly Wright in Louisiana because of his court orders desegregating the public schools. I was dropped from social lists, which did not bother me, as I much preferred to spend winter days in the Potomac Valley looking for wild persimmon trees and their sweet fruit, or conversing with an old barred owl on a cold crisp morning, or walking the old C&O Canal towpath at night in a thickening fog when the Virginia deer were on the move.

One special dividend of my social isolation was in the form of the time I had for backpacking along the Appalachian Trail. Eventually I backpacked or hiked along the trail in all the states from Maine and Vermont to Georgia and participated in efforts to preserve it against "civilization," as when a power company planned to convert lovely Sunfish Pond on Kintaniny Ridge in New Jersey into a vast reservoir system. In 1953 and 1954 I hiked from October to June in the Virginia and Maryland sectors of the trail. One weekend I went by car, alone as usual, to Paris, Virginia, and picked up the trail at the point where the highway going west bisects it. I turned north to a shelter below which lies a moss-lined spring of cold water. It had been raining in the valley and even there it was cold, though there was no ice on the roads. On the ridge the drizzling rain had frozen on every twig and every branch of every tree. It was the most beautiful silver freeze I have ever seen in the woods—a condition of beauty that turned into danger the next day when the temperature rose and avalanches of ice dropped to the ground.

So much for the dividends of being ostracized. There was sadness too. It hurts when old friends cut one down. Lyndon Johnson, a dear friend whom I loved then, as I did until he died, was one of those who did just that. He was in politics and fearful that the aura of any left-wing person



would touch him. One day I was on the train going up to New York City. I spotted him in the same car. As he walked by I shouted, "Hi, Lyndon, my friend!" He did not stop, but looking through me and beyond me, went by in stony silence. That hurt.

It also hurt when Congressman W. M. Wheeler of Georgia introduced a resolution in the House (H.R. 290, June 14, 1953) to impeach me. When I had issued the stay, the press interviewed senators and congressmen, and with few exceptions everyone interviewed denounced me. I remember particularly the cutting remarks of George A. Smathers of Florida, who knew nothing of the legal point of the case, but who made political capital with the "crackers" of Florida by being anti-Communist. Congressman Wheeler took those sentiments literally by introducing his resolution.

In the long history of the Court an impeachment was brought only against one Justice, Samuel Chase. That was in 1802, and it was as politically inspired as was the resolution aimed at me. Chase was actually tried before the Senate and acquitted. His acquittal put an end, until my time, to political reprisals against federal judges. His counsel, Joseph Hopkinson, said to the Senate:

All governments require, in order to give them firmness, stability and character, some permanent principle, some settled establishment. The want of this is the great deficiency in republican institutions. Nothing can be relied upon—no faith can be given either at home or abroad to a people whose systems and operations and policy are constantly changing with popular opinion. If, however, the judiciary is stable and independent, if the rule of justice between men rests upon known and permanent principles, it gives a security and character to a country which is absolutely necessary in its intercourse with the world and in its own internal concerns. This independence is further requisite as a security from oppression. All history demonstrates from page to page, that tyranny and oppression have not been confined to despotisms, but have been freely exercised in republics both ancient and modern—With this difference: that in the latter the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while in the former it is systematically planned and pursued as an ingredient and principle of the government. The people destroy not deliberately and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue, but