Rosenberg Trial Judge Criticized

7-28-76

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The U.S. trial judge in the Rosenberg atom spy case of the early 1950s was accused yesterday of violating judicial ethics for having allegedly talked privately to the prosecutor shortly before sentencing the Rosenbergs to death.

The charge was made by Marshall Perlin, attorney for the sond of Julius and Ethel Rosenberg, and was based on an FBI document obtained under a freedom of information suit.

The document, according to Perlin, also indicates that the judge, Irving R. Kaufman, was inaccurate when he stated in court that he had not sought the prosecutor's views on how to punish the convicted spies.

The latest epsiode in the revival of the 25-year-old spy case took place here with the release of 30 documents obtained from the FBI. They are the first records released so far that touch on the behavior of the trial judge, who has refused to discuss the case since it was concluded with the Rosenbergs' convictions in 1951. They were executed in the electric chair in 1953.

One of the documents was a 1975 letter from Irving H. Saypol, prosecutor of the Rosenbergs, to FBI Director Clarence M. Kelley.

Saypol, now a New York State Supreme Court justice, wrote to clarify the record on the Rosenbergs' sentence. He denied a published report that he had opposd the death sentence, and went on to recall a private conversation with Judge Kaufman the day before the sentence was pronounced.

Saypol said Kaufman asked for his views and the Justice Department's position on the sentence. He reported back that day, Saypol recalled, that there were divisions within Justice on the sentencing. ". . . I was then asked by the judge to refrain from making any recommendation for punishment the next day in the cause of my closing statement at sentence," he said.

Perlin asserted yesterday that the private contact between judge and prosecutor, not revealed to the defense, violated the judicial code of ethics. Canon 3 of the American Bar Association's Code of Judicial Conduct, written in 1972, says that a judge should "neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." The code in effect in 1951, when the trial occurred, said that judges should "discourage" applications from lawyers for any ex parte, or private, contacts and hear them only in emergencies.

Saypol could not be reached yesterday for comment on his letter. An aide to Kaufman, now chief judge of the Second U.S. Circuit Court of Appeals, said the judge never discusses prior cases.

Kaufman's conduct was defended by Simon H. Rifkind, a former federal judge in New York who is chairman of a new American Bar Association subcommittee established to counter attacks on Kaufman.

Rifkind said that during the period between rendering a verdict and imposing a sentence it is "quite customary" for a judge to consult privately with anyone, including a prosecutor, on the sentence to be handed down. There would be no obligation to advise the defense, Rifkind said.

JUDGE IRVING KAUFMAN
. . . sentenced Rosenbergs

Perlin also asserted yesterday that Saypol's account of the private conversation was inconsistent with what Kaufman told the court the following day just before he sentenced the Rosenbergs.

It is customary for a trial judge to ask in open court for a prosecutor's recommendation on sentencing.

However, Kaufman opened the sentencing statement with this remark: "Because of the seriousness of this case and the lack of precedence, I have refrained from asking the government for a recommendation. The responsibility is so great that I believe that the court alone should assume this responsibility."

Perlin said this statement was untrue if Saypol's account of the private conversation on the day before is accurate. The attorney said he had sent a copy of Saypol's letter to Kaufman for comment but had not received a reply.

Other FBI documents, Perlin said, show that Kaufman privately involved himself in the case on several occasions, often acting through FBI agents.

One example, he said, is a memo to then FBI Director J. Edgar Hoover in February, 1953, while the Rosenbergs were petitioning the Supreme Court. The memo, written by a high FBI official, A. H. Belmont, quotes an agent as saying that Kaufman was anxious to have the matter settled before the court recessed that summer.

The agent, according to the memo, had been called by Kaufman, who said that "unless this matter is pushed vigorously by the government, this whole case may hang over until fall." The agent, according to Belmont's memo, had reported that "Judge Kaufman was of the opinion that the department should push the matter vigorously to get it before the Supreme Court."

Another memo, dated May 2, 1969, 16 years after the Rosenbergs were executed, quotes Kaufman as having been concerned by production in New York of a play entitled, "The United States vs Julius and Ethel Rosenberg." The play was critical of the government's handling of the case.

According to the FBI memo: "Judge Kaufman was alarmed that The New York Times reviewed this play two weeks in a row on April 20 and 27, 1969, which was highly unusual. Judge Kaufman indicated that he understands the play is critical of the director (of the FBI), the prosecutor, and Judge Kaufman who was the trial judge in the Rosenberg case. The judge added that he felt the Attorney General should be informed and the director advised that he would let the Attorney General know."

The memo went on to report that an FBI agent had attended a performance of the play in Cleveland. It also said that the FBI had no "derogatory information" on the director of the play or any of the actors and actresses.

Release of the FBI documents has also prompted Vern Countryman, a professor at Harvard Law School, to circulate a petition calling for an inquiry by the House and Senate Judiciary committees.

Countryman, in a letter to other law professors, said that if the facts in the documents are verified "it would reveal a shocking pattern of ex parte contacts with the United States attorney, FBI officials, and others in the Department of Justice . . ."