Out, Damned Spot

by Vern Countryman

In 1951 Julius and Ethel Rosenberg and Morton Sobell were convicted of conspiracy to commit espionage. Judge Irving R. Kaufman presided over their trial in the federal district court in Manhattan. The Rosenbergs were electrocuted in 1953. In 1975 their sons sued the FBI and other federal agencies under the Freedom of Information Act, seeking all documents relating to the Rosenberg prosecution. So far, the FBI has turned over 30,000 pages of documents.

The FBI documents—internal memos and letters to the agency from outsiders—leave the fundamental issue of the Rosenbergs' guilt or innocence as murky as ever. But these files do contain some fascinating and shocking information about the conduct of Judge Kaufman, both during the trail and in the decades since. Ten years after the Rosenberg trial Irving Kaufman was promoted to the US Circuit Court of Appeals. Kaufman has spent 26 years on the federal bench since the Rosenberg case, 16 of them on the Circuit Court of Appeals. He has a considerable reputation. You would have supposed he would be eager to put the sordid Rosenberg affair behind him. These documents suggest that, on the contrary, Kaufman is obsessed by the Rosenberg case. He appears to be constantly on the lookout for efforts to reopen the case—in the public media or in the courts—and seems eager to enlist the FBI in efforts to suppress any such challenges to his trial back in 1951.

During the trial itself (if these FBI documents can be relied upon), Kaufman seems to have been in regular contact with the Justice Department prosecution staff, who were in turn passing information to the FBI. In the middle of the trial, before the defense had put on any witnesses, a Justice Department official told an FBI agent he knew the judge would impose the death penalty if the Rosenbergs were convicted, "if he doesn't change his mind." After the jury returned its guilty verdict and two days before sentencing, assistant prosecutor Roy Cohn told an FBI agent that Judge Kaufman "personally favored" the death penalty for the Rosenbergs and would give a prison term to Sobell. Needless to say, this kind of *ex parte* (out-of-court) communication with the prosecution—discussing the sentence before the trial is over—is highly improper.

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Lady Macbeth *by F. A. M. Retzsch (1779-1857)*
From the Art Collection of the Folger Shakespeare Library

Kaufman appears to have been even more determined than the Eisenhower administration to achieve a death penalty. On the day before sentencing, Kaufman asked the prosecutor, Irving Saypol, to obtain the views of the Department of Justice on what the sentences should be. This is standard operating procedure. But when Saypol reported back that the views within the department were divided, Judge Kaufman asked him not to make any recommendation. Saypol obliged, and Kaufman thereupon sentenced the Rosenbergs to death and Sobell to a 30-year prison term. During sentencing Kaufman declared, "Because of the seriousness of this case, and the lack of precedence [sic], I have refrained from asking the government for a recommendation." This was untrue. He apparently *did* ask for a recommendation, then changed his mind when it appeared the recommendation would not be severe enough. He thus concealed the fact that the Justice Department was not prepared to recommend the death penalty.

In 1956, after the Rosenbergs had been executed, Sobell filed a motion for a new trial. Judge Kaufman

told an assistant prosecutor that if the motion came before him he would deny it without a hearing. The motion was assigned to Judge Kaufman and he did deny it without a hearing. In doing so he complained that improper *ex parte* approaches had been made to him, but asserted that "safeguards and procedures" developed by the American judicial system had been "the sole guide posts for this Court." Presumably Kaufman was referring to the Canons of Judicial Ethics adopted by the American Bar Association. At the time of the Rosenberg trial, these canons provided that, "Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel." Needless to say, Kaufman had not told the Rosenbergs' lawyers about these approaches.

Kaufman continued to interfere in the Rosenberg case after it had left his jurisdiction. In February 1953, while the Rosenbergs had a petition for certiorari pending in the Supreme Court, Judge Kaufman called the FBI and expressed concern that the Supreme Court would not dispose of the case before its spring adjournment. He urged that the Justice Department be encouraged to "push the matter vigorously." Kaufman delivered the same message to an assistant prosecutor, who then strongly recommended to the Justice Department that it ask the Supreme Court to expedite consideration of the case. In May 1953, the Court denied this petition for certiorari.

On June 15, 1953, the Supreme Court denied the Rosenberg's application for stay of execution, then adjourned for the summer. On June 16, a new application for stay was filed with Justice Douglas. On June 17, Kaufman called the FBI to pass on some information he had learned from an assistant prosecutor: as of 7:30 pm on June 16, Justice Douglas had been disposed to grant the stay, but after dinner he was undecided. He also reported that the Attorney General and Chief Justice Vinson had met and decided that if Douglas granted a stay Vinson would reconvene the Court. Justice Douglas granted a stay of execution on June 17, a special term of Court was called on June 18, it vacated the stay on June 19, and the Rosenbergs were executed.

In September 1957, Kaufman told an FBI public relations man that he was "very much upset" by a question raised for the first time in Sobell's 1956 motion for a new trial. The question arose from a 1952 Supreme Court decision in the *Grunewald* case that it is unconstitutional for the prosecution in a criminal trial to cross-examine the defendant about having asserted the Fifth Amendment privilege against self-incrimination before the grand jury that indicted him or her. Since the government had been allowed to cross-examine Ethel Rosenberg on this point, Kaufman was afraid that the court might upset the case unless the Department vigorously defended it, which he urged it to do. In the event, the Supreme Court denied certiorari.

The *Grunewald* precedent continued to worry Judge Kaufman. In 1962 the district court denied another Sobell motion for a new trial, he appealed, and the appeal was argued before the Court of Appeals. Judge Kaufman had been elevated to that court, but did not sit on this appeal. Nevertheless, he took an interest in the appellate arguments, during which Judge (now Mr. Justice) Thurgood Marshall asked whether the *Grunewald* decision would not have required a reversal of Sobell's conviction if it had occurred after that decision, and the assistant prosecutor replied, "probably." This incited another phone call to the FBI. According to their memo of the call, Kaufman declared that, "The *Grunewald* decision is not good law and in his opinion certainly does not apply to this case"; that the assistant prosecutor's answer was "stupid"; that the Bureau might want to report this man to the Department of Justice; and that he had "raised hell" with Marshall, whom he characterized as "naive and inexperienced." The Court of Appeals affirmed the denial of Sobell's motion for a new trial.

If these FBI papers are accurate, they reveal a judge so obsessed with protecting the verdict, judgment, and sentence entered in the trial over which he presided that he was driven to conduct completely unacceptable from a judicial officer. Much of it would be unacceptable even from a prosecuting attorney.

Kaufman also has attempted to stifle criticism of the Rosenberg case outside the courts. In November 1957, Kaufman called FBI Director J. Edgar Hoover to say he had learned that Sobell's wife was going to talk to Jim Bishop, who was writing a book on the Rosenberg case. He suggested that an FBI official warn Bishop against talking with her. In 1969 Kaufman called Hoover to discuss a play about the Rosenberg case then being performed in Cleveland. Kaufman was "alarmed" that the *New York Times* had reviewed the play twice. Five days later Kaufman wrote to Hoover thanking him for "furnishing me the background information" on the play's author and sending Hoover a copy of a letter written to the *New York Times* by Simon Rifkind. Rifkind, a recurring minor player in Kaufman's own passion play, served on the federal district court with Judge Kaufman. He left the bench in 1950 to return to a lucrative law practice. He not infrequently appears before Judge Kaufman, as do others in his law firm of Paul, Weiss, Rifkind, Wharton & Garrison. In his letter to the *Times* Rifkind complained of the "generous allocation of space" to the play because "both reporters, as well as the play" presented the Rosenbergs as innocent. He said that in view of the number of courts and judges involved in the case, this was a slur on American justice.

On a 1974 visit to FBI headquarters, Kaufman expressed displeasure about two television programs dealing with the Rosenberg case, and advised the FBI

that Simon Rifkind was writing an article for *TV Guide* giving the true facts about the case. The article duly appeared and reiterated the theme that no one whose case had been reviewed by so many courts and judges could have been wrongly convicted.

In May 1975, Judge Kaufman called the FBI to express his concern about an article in *Esquire* on the Rosenberg case, and about recent activities of the National Committee to Reopen the Rosenberg Case. He urged that "some counteraction should be taken."

Thus, if the FBI papers are accurate, a judge who had sworn to uphold the Constitution, including the first amendment, has been attempting to suppress the exercise of freedom of speech and the press.

But the FBI papers only raise questions; they do not provide answers. No FBI reports can be given that much credence, even when they were compiled with no particular incentive to falsify. The letters apparently written by Judge Kaufman and others to the FBI must be verified. So must the statements in the FBI memos which, as supporters of Judge Kaufman point out, contain hearsay three and four times removed. By March 1976, the American Bar Association was sufficiently concerned about mounting criticism of the case and the judge to establish a special Subcommittee to Review and Evaluate the Rosenberg Case. Its functions were defined thusly: first, "to make certain that public respect for law and the judicial process is not subverted by unfounded charges"; and second, "whenever necessary, to counteract unwarranted criticism directed to . . . Judge Irving Kaufman." Simon Rifkind was named chairman of the subcommittee.

After the Rosenbergs' sons released the FBI papers in June 1976, more than 100 law professors joined me in a letter to the House and Senate Judiciary Committees, asking for an investigation of the issues raised by those documents.

A copy of this letter came into the hands of Simon Rifkind. In September 1976, he dispatched a five-page letter of remonstrance to me. He asserted that Roy Cohn had recently denied having discussed sentencing with Judge Kaufman. But otherwise Rifkind did not challenge the contents of the FBI documents. Rather, he reiterated his theme that the trial must have been fair since so many judges had reviewed it (although no judge has reviewed it since the FBI papers were released); he pointed with pride to Judge Kaufman's "shining reputation" since the Rosenberg case; and he asserted that it was "common practice" for judges to receive *ex parte* communications after verdict and before sentencing from "all sorts of people," citing a wildly inapposite 1949 case. In fact, every federal Court of Appeals that had ruled on the question at the time Judge Rifkind wrote to me had held improper an *ex parte* communication from the prosecutor to the judge after verdict or guilty plea and before sentencing. Judge Kaufman's own court ruled this way in 1973. Only last March the Supreme Court held that it was a violation of the due process clause to sentence a defendant on the basis of a probation officer's report without disclosing the contents of the report to the defendant.

As his final point, Rifkind said I was too willing "to leap to inferences from meager premises," because I was still "acting in the role of advocate" for Morton Sobell. (In 1966 I participated in an effort to get Sobell a new trial. Today Sobell has been released from prison and has no action pending). Rifkind on the other hand, wrote to me in his "private capacity and not as Chairman of the ABA Committee concerned with the Rosenberg case."

At least I heard from Rifkind. I have never heard from the chairman of either of the Judiciary Committees. I have received individual responses from a few committee members manifesting varying degrees of interest. Unfortunately the most affirmative response came from one who shortly thereafter became ex-Senator John Tunney. In March of this year, Senator James Abourezk advised me that neither had any plans to act on the matter.

A colleague of mine who is a member of the prestigious Association of the Bar of the City of New York requested the Association to investigate Judge Kaufman. He was officially advised that the Association found no basis for investigation. Most of the federal appellate practice of the Association's members is in Judge Kaufman's court.

In March of this year the American Civil Liberties Union adopted a resolution urging the Judiciary Committees of the House and Senate to investigate the relationship of Judge Kaufman with the prosecution in the Rosenberg case. The *New York Times* weighed in with an editorial condemning the ACLU's action. The editorial followed familiar themes: The Rosenbergs' trial must have been fair since it was reviewed by so many judges and Judge Kaufman's conduct since that time has been "exemplary." The *Times* declared that the ACLU request "would never have been made were it not for the efforts of a group in the union that wishes to reopen the case"—neither a penetrating observation nor a devastating critique. One month later the *New York Post* published a heated editorial advocating swift penalties for state court judges guilty of the *ex parte* fixing of traffic tickets.

So there matters stand. The unreviewed conduct attributed to Judge Kaufman by the FBI papers probably will remain unreviewed. If all of the statements in these papers are true, few will be found to say that the judge's conduct was proper or that a fair trial was had. If they are false in whole or in part, Kaufman might be vindicated. Obviously the resolution of those issues is less important to those in power than allowing the judge to remain undisturbed in his declining years. Meanwhile other judges should feel free to emulate the behavior that Judge Kaufman's friend Simon Rifkind describes as "common practice."