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THE LONG SHADOW OF *UNITED STATES V. ROSENBERG*: A BIOGRAPHICAL PERSPECTIVE ON THE HON. IRVING ROBERT KAUFMAN

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INTRODUCTION

Ever since he was a student at New York City's DeWitt Clinton High School,[1] the Honorable Irving R. Kaufman was a man in a hurry. He graduated from high school at the age of sixteen, completed college and law school at Fordham in five years, and was known as the "boy prosecutor" when he began working at the U.S. Attorney's Office in the Southern District of New York at age twenty-four after several years in private practice.[2] Kaufman's ambition and accomplishments in

1. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman Sent to Current Biography (Feb. 11, 1963) (unpublished manuscript at 2) (on file with Library of Congress and author). Judge Kaufman's papers are at the Library of Congress. The Finding Aid for the papers is available at MANUSCRIPT DIV., LIBR. OF CONG., IRVING R. KAUFMAN PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS (2011), https://findingaids.loc.gov/exist_collections/ead3pdf/mss/2011/ms011059.pdf. Every document from Judge Kaufman's papers cited in this Article is available at the Library of Congress and also is on file with the author. Judge Kaufman's papers include three scrapbooks of newspaper articles about the judge. Many of the newspaper articles cited in this Article were found in those scrapbooks. Because the newspaper articles in the scrapbooks came from a clipping service, they often do not include the page number as part of the citation. Copies of these articles also are on file with the author.

2. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 2–3); Milton Lehman, *The* Rosenberg *Case: Judge Kaufman's Two Terrible Years*, SATURDAY EVENING POST, Aug. 8, 1953, at 84; Marilyn

government and private practice led to his appointment as a United States District Court judge in the Southern District of New York when he was thirty-nine years old.[3] At the time, he was one of the youngest federal judges in the nation.[4]

Less than two years after Kaufman was appointed to the bench, he presided over the most important criminal case of the Cold War, *United States v. Rosenberg*.[5] The defendants—including Julius and Ethel Rosenberg, a married couple with two young sons—were charged with conspiring to pass atomic secrets to the Soviet Union.[6] The case was tried in 1951, while the United States was involved in the Korean War and after the Soviet Union had surprised the world in 1949 by detonating an atomic bomb.[7] After the jury convicted the defendants, Kaufman sentenced the Rosenbergs to death.[8] Numerous appeals followed but none succeeded.[9] The United States executed Julius and Ethel Rosenberg in 1953 amid worldwide protests.[10]

Kaufman was only forty years old when he sentenced the defendants in *Rosenberg*.[11] Though he ultimately would serve on the federal bench for more than half of his life, his judicial career was defined by the case,

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Berger, *Judge Irving Kaufman, of* Rosenberg *Spy Trial and Free-Press Rulings, Dies at 81*, N.Y. TIMES, Feb. 3, 1992, at D10.

3. Lehman, *supra* note 2, at 84 (reporting that "[b]efore Kaufman was thirty-five years old, he was netting more than $100,000 annually [as a partner at a law firm]. Though most young attorneys would be content with such an income, he could scarcely wait to turn it down for a $15,000-a-year district judgeship.").

4. *Id.* at 21. *See* MARTIN J. SIEGEL, JUDGMENT AND MERCY: THE TURBULENT LIFE AND TIMES OF THE JUDGE WHO CONDEMNED THE ROSENBERGS 61 (2023) ("Although some news reports wrongly described him as the youngest federal judge in America – that was J. Skelly Wright, named to the district court in New Orleans at the same time – the thirty-nine-year-old Kaufman was still plenty green."). Citations to Siegel's *Judgment and Mercy* are to the page numbers of the advance copy that the author provided to Professor Citron and *Rutgers University Law Review*. Although Kaufman was not the youngest judge in the nation at the time of his appointment, he was the youngest judge in the Southern District of New York. SAM ROBERTS, THE BROTHER: THE UNTOLD STORY OF THE ROSENBERG CASE 300 (2001).

5. *See generally* United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952). The stenographer's minutes in the case are available at Transcript of Record, United States v. Rosenberg, 109 F. Supp. 108 (S.D.N.Y. 1953) (No. 134-245), https://famous-trials.com/images/ftrials/Rosenberg/documents/RosenbergTrial.pdf.

6. *Rosenberg*, 195 F.2d at 583.

7. *See* Ted Morgan, *The* Rosenberg *Jury*, ESQUIRE, May 1, 1975, at 124.

8. *Rosenberg*, 195 F.2d at 583, 590.

9. *See* William R. Conklin, *Pair Silent to End; Husband Is First to Die - Both Composed on Going to Chair*, N.Y. TIMES, June 20, 1953, at 6.

10. William R. Conklin, *Eisenhower Is Denounced To 5,000 in Union Sq. Rally*, N.Y. TIMES, June 20, 1953, at 1.

11. RONALD RADOSH & JOYCE MILTON, THE ROSENBERG FILE: A SEARCH FOR THE TRUTH 287 (1983).

which made him one of the most well-known judges in the nation.[12] When the *Rosenberg* case was in the news, newspapers referred to him as the "Atom-Spy Case" judge and covered his speeches and visits to other cities.[13] Kaufman did not shy away from such publicity, as he continued to be a man in a hurry. Twice before the decade ended, he sought to be elevated to the United States Court of Appeals for the Second Circuit.[14] Each time, his role in the *Rosenberg* case figured in the debate over his nomination.[15] In 1961, Kaufman secured his appointment to the Second Circuit,[16] where he developed a reputation as a liberal jurist committed to protecting the First Amendment[17] and, among other things, wrote the court's decision in *Filartiga v. Pena-Irala*,[18] a landmark human rights case.

In the 1970s, while Kaufman was chief judge of the Second Circuit, controversy over *Rosenberg* was revived by the release of documents showing that he had conferred with government attorneys while presiding over the case.[19] The Rosenbergs' sons, by then young adults, had pushed for the government to release its files on their parent's case.[20] The records showed that, on a number of occasions, Kaufman had ex parte communications with prosecutors, notably prior to the sentencing hearings in the case.[21] Under legal ethics rules, ex parte contacts are generally prohibited.[22] The revelation that Kaufman had such contacts

12. *See* Roger K. Newman, *Kaufman, Irving Robert*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/kaufman-irving-robert (last visited Nov. 29, 2022).

13. *See, e.g.*, *Atom-Spy Case Judge Here*, L.A. TIMES, July 24, 1953, at 27. This Article can be found in one of three scrapbooks kept by the judge that are part of his papers at the Library of Congress. *See supra* note 1.

14. *See infra* Section IV.B.1.

15. *See infra* Section IV.B.1.

16. *Kaufman, Irving Robert*, FED. JUD. CTR., https://www.fjc.gov/node/1383086 (last visited Nov. 29, 2022).

17. *See infra* Section V.A.

18. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

19. *See, e.g.*, *An Open Letter to Judge Irving R. Kaufman*, N.Y. TIMES, June 19, 1977, at 146. This full-page advertisement was paid for by the National Committee to Reopen the Rosenberg Case ("NCRRC") and reproduced a number of documents showing communications between Judge Kaufman and government attorneys about the case. *Id.*

20. *Id.*

21. *Id.*

22. CANONS OF JUD. ETHICS Canon 17 (AM. BAR ASS'N 1924), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.pdf. Canon 17, adopted in 1924, provided that "[a judge] should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application." *Id.* Canon 17 also provided

with the government added new controversy to the decades-old case. Though reports of the ex parte contacts prompted criticism of Kaufman, including calls for congressional investigation of his conduct, Kaufman continued to serve as chief judge.[23]

As chief judge, Kaufman performed his administrative responsibilities capably and efficiently until his service concluded in 1980.[24] Energetic and ambitious, Kaufman also published articles about the law in numerous publications, including the *New York Times* and various law reviews, while managing his case load and handling numerous administrative tasks.[25] As his tenure on the bench turned to its final phase, Kaufman was well aware that his judicial legacy would be defined first and foremost by his role in *Rosenberg* despite his best efforts to develop a reputation as a liberal jurist, accomplished administrator, and prolific author.[26] Kaufman's judicial career, as the *New York Times* wrote, was "inextricably linked" with the espionage case.[27]

In 1987, Kaufman's quest for recognition was satisfied when President Ronald Reagan awarded him the Presidential Medal of Freedom, the nation's highest civilian honor, given to only ten other individuals that year.[28] At the White House ceremony, Reagan, an ardent Cold Warrior, praised Kaufman's conduct in the *Rosenberg* case.[29] Yet even this celebration of Kaufman's career was shadowed by controversy. Nearly three weeks before the ceremony, the *Washington Post* reported

that "[o]rdinarily all communications of counsel to the judge, intended or calculated to influence action should be made known to opposing counsel." *Id.* Regarding Judge Kaufman's ex parte contacts in the *Rosenberg* case, see *infra* Section V.B.

23. *See infra* Section V.B.

24. *See infra* Section V.A.

25. Examples of these articles include Irving R. Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1 (1984); Irving R. Kaufman, *A Legal Remedy for International Torture?*, N.Y. TIMES, Nov. 9, 1980, at T11.

26. Berger, *supra* note 2, at D10.

27. *Id.*

28. *See* Ronald Reagan, U.S. President, Remarks on Presenting the Presidential Medal of Freedom to Irving R. Kaufman (Oct. 7, 1987), https://www.reaganlibrary.gov/archives/speech/remarks-presenting-presidential-medal-freedom-irving-r-kaufman. While Reagan was President, he gave the Medal of Freedom to only one other judge, Warren Burger, who had served as Chief Justice of the United States Supreme Court from 1969 through 1986. *See Recipients of the Presidential Medal of Freedom 1981-1989*, REAGAN LIBR., https://www.reaganlibrary.gov/reagans/reagan-administration/recipients-presidential-medal-freedom-1981-1989 (last visited Nov. 29, 2022).

29. Remarks on Presenting the Presidential Medal of Freedom to Irving R. Kaufman, *supra* note 28.

that Attorney General Edward Meese had arranged for Kaufman to get the award after the judge "agreed to retire from active service."[30] Kaufman, who had taken senior status several months before the ceremony, would continue to serve on the Second Circuit.[31] However, his retirement allowed Reagan, a Republican, to nominate his replacement.[32] Kaufman served as a senior judge until shortly before his death in 1992.[33]

This Article explores a number of aspects of Judge Kaufman's life and work. Part I sketches a profile of Irving Kaufman before he became a federal judge. He was an accomplished and ambitious attorney with sharp political instincts, qualities that led to his appointment as a federal district court judge at age thirty-nine. The Article then turns to the *Rosenberg* case, which can be understood as having three distinct parts: the trial, the sentencing, and the aftermath. Part II revisits the criminal trial over which he presided, which concluded with the jury rendering a guilty verdict for all of the defendants. Though at times Kaufman seemed to help the government prove its case—for instance, he allowed testimony about the defendants' Communist views and sometimes questioned witnesses in a way that supported the prosecution—Kaufman also took steps to protect the defendants' right to a fair trial. On direct appeal, the Second Circuit rejected the defendants' claims that they had not been given a fair trial, holding that Kaufman acted within the discretion afforded to him as a trial court judge.[34]

Part III examines the sentencing hearings, focusing on Judge Kaufman's decision to sentence both Julius and Ethel Rosenberg to death. Even in 1951, at one of the hottest points of the Cold War, this was a controversial judgment. FBI Director J. Edgar Hoover, as zealous an anti-Communist as any American in the twentieth century, supported capital punishment for Julius but not Ethel.[35] With sole legal

30. Ruth Marcus & David Hoffman, *U.S. Judge Retires, Gets Reagan Award*, WASH. POST (Sept. 19, 1987), https://www.washingtonpost.com/archive/politics/1987/09/19/us-judge-retires-gets-reagan-award/9b8f306f-0d50-4255-9dca-977553e89fc9/. The article explained that Kaufman's retirement would allow Reagan, a Republican President, to nominate a judge for the Second Circuit and reported that according to "one well-informed source, the judge's retirement and the Medal of Freedom were part of an 'explicit' trade." *Id.* It also reported that "Meese denied through a spokesman that any trade was made." *Id.*

31. *Id.*

32. *Id.*

33. Berger, *supra* note 2, at D10.

34. *See* United States v. Rosenberg, 195 F.2d 583, 592–93 (2d Cir. 1952).

35. *See* RADOSH & MILTON, *supra* note 11, at 279–82; *see also* CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 424 (1991) ("[N]o one in the hierarchy of the FBI, including its director, favored a death penalty for Ethel."); GENTRY, *supra*, at 424–28

responsibility for determining the defendants' sentences, Kaufman imposed the maximum punishment available. In doing so, he cast himself as a solitary Cold Warrior who had prayed at synagogue before determining the sentence to hold the defendants accountable for jeopardizing the nation's safety and security. This image does not accord with the ex parte communications Kaufman engaged in with government officials prior to the sentencing hearings. On direct appeal, the Second Circuit reluctantly affirmed the sentences.[36] Subsequently, no reviewing court, including the Supreme Court, set aside the conviction or the death sentence.[37] Neither did President Eisenhower, who rejected the Rosenbergs' pleas for executive clemency.[38] The Rosenbergs were executed in June 1953, after the case had developed into a worldwide political affair.[39]

Part IV explores the legacy of the *Rosenberg* case. It gave Kaufman a national profile, boosting his efforts for elevation to a higher court.[40] It also created political controversy, at times impeding his efforts for promotion.[41] After Kaufman was appointed to the Second Circuit in 1961, the case informed his efforts to develop a reputation as someone other than the judge who sentenced the couple to death.[42] Part V surveys Kaufman's tenure on the Second Circuit, noting some of his most important decisions as well as renewed focus on *Rosenberg* after the disclosure of Kaufman's ex parte contacts noted earlier. The trial court judge who sentenced the Rosenbergs to death developed a liberal record as an appeals court judge, writing decisions that championed First Amendment protections for the press, often supported the rights of individuals against the government, and opened the federal courts to claims of human rights violations against foreign defendants.[43]

(detailing developments pertaining to the sentencing of the Rosenbergs from the perspective of the FBI).

36. *See Rosenberg*, 195 F.2d at 609.

37. *See* Rosenberg v. United States, 346 U.S. 273, 288 (1953).

38. Andrew Glass, *Eisenhower Denies the Rosenbergs Clemency*, POLITICO (Feb. 11, 2019, 12:01 AM), https://www.politico.com/story/2019/02/11/this-day-in-politics-february-11-1159905.

39. *See* Hadley Freeman, *The Rosenbergs Were Executed for Spying in 1953. Can Their Sons Reveal the Truth?*, GUARDIAN (June 19, 2021, 6:00 AM), https://www.theguardian.com/world/2021/jun/19/rosenbergs-executed-for-spying-1953-can-sons-reveal-truth.

40. *See infra* Section IV.B.

41. *See infra* Section IV.B.

42. *See* Berger, *supra* note 2, at D10.

43. *See infra* Part V.

Part VI examines Kaufman's intense interest in his legacy. It focuses on three assessments of the judge: a *New York Times* profile in 1983, which generally was favorable but nevertheless elicited a detailed letter from Kaufman complaining about what he believed to be the newspaper's errors and omissions;[44] President Reagan's fulsome praise of Kaufman in 1987 when awarding him the Medal of Freedom, an honor Kaufman had sought for years;[45] and his *New York Times* obituary in 1992, which the judge knew would highlight his decision to sentence the Rosenbergs to death.[46] The Article concludes with some final thoughts on Kaufman's judicial career.

Kaufman's conduct as a judge raises a number of questions. To what extent did his great ambition and relentless quest for acclaim inform his conduct as a judge? More specifically, in the decades after the Rosenbergs were executed, to what extent did he seek to make amends for sentencing the couple to death in the liberal decisions he wrote? Kaufman was ambitious. He sought positions of power and accomplished a great deal at every stage of his career. Kaufman also sought recognition. This desire for recognition contributed to his successful effort to be assigned the trial court judge in *Rosenberg*. As Kaufman desired, the case made him a national figure, albeit a controversial one. Ultimately, to his regret, *Rosenberg* became the case that defined his legacy and overshadowed his many other accomplishments.

I. IRVING ROBERT KAUFMAN: A BIOGRAPHICAL SKETCH

Judge Kaufman died well before research on this Article began. In putting together this biographical sketch, the Article relies on Judge Kaufman's papers at the Library of Congress, secondary sources, and interviews on background with a number of people who knew the judge.[47] The secondary sources include newspaper profiles of the judge at different times. In presenting himself to journalists, Kaufman emphasized certain aspects of his biography. As detailed below, the shorthand self-portrait of Kaufman was of a man who had a sharp sense

44. *See infra* Section VI.A.

45. *See infra* Section VI.B.

46. *See infra* Section VI.C.

47. The newspaper profiles include: *Kaufman Refused to Let Reds Tour*, N.Y. TIMES, Apr. 6, 1951, at 11; Milton Lehman, *supra* note 2, at 21; *Solid Judge of the Law: Irving Robert Kaufman*, N.Y. TIMES, Mar. 24, 1958, at 16; *Judge Hand Gives Kaufman Backing*, N.Y. TIMES, June 18, 1961, at 41; Berger, *supra* note 2, at D10. This Section also draws on the biographical summaries of Kaufman set out in RADOSH & MILTON, *supra* note 11, and ROBERTS, *supra* note 4. *See* Newman, *supra* note 12.

of propriety (in the story courting his wife, for example), a tireless work ethic, and a commitment to public service. Perhaps most importantly, Kaufman emphasized that he was a man of accomplishment and ambition—and that is how he was depicted in these profiles.

This Article does not question the anecdotes that supported this self-portrait. What is notable is that they indicate the care Kaufman gave to how he was portrayed by journalists. This is even more noteworthy given the rules of engagement between reporters and judges in the 1950s and 1960s, when many of the profiles were written. Though there were many newspapers then—far more than there are today—their coverage of courts and judges was dominated by an effort to write about the events (or "news") that occurred in courtrooms.[48] Judges tend not to talk to reporters, certainly not on the record, and newspapers generally did not write about how courts operated.[49] Because Kaufman sought recognition, he cultivated news reporters and benefitted from their favorable coverage.[50]

With that introductory context, here is a biographical sketch of Irving Robert Kaufman. He was born in 1910, one of five children of Herman Kaufman and Rose Spielberg.[51] Herman and Rose were born in Hungary; each immigrated to the United States at a young age.[52] Herman Kaufman

48. *See* Robert E. Drechsel, *How Minnesota Newspapers Cover the Trial Courts*, 62 JUDICATURE 195, 196 (1978) (quoting a 1972 article by David Grey stating that "the press often handles such complex fields as law by preoccupation with personalities, drama, action and other superficial issues"); *see also* Everette E. Dennis, *Another Look at Press Coverage of the Supreme Court*, 20 VILL. L. REV. 765, 771–74 (1975) (describing how journalists covering the United States Supreme Court performed their jobs).

49. *See* Drechsel, supra note 48, at 197, 199 (noting that while judges on "lower level courts" may be willing to talk to reporters, they generally do so on background). To be sure, there were reporters who distinguished themselves when writing about the judiciary. For example, *New York Times* reporter (and later columnist) Anthony Lewis is credited with bringing a "new approach to legal journalism" when he began covering the Supreme Court and the Justice Department in 1955. *See* Allison Terry, *Anthony Lewis Dies: Pioneering Journalist Gave Legal Writing a Storyline*, CHRISTIAN SCI. MONITOR (Mar. 26, 2013), https://www.csmonitor.com/USA/USA-Update/2013/0326/Anthony-Lewis-dies-Pioneering-journalist-gave-legal-writing-a-storyline.

50. *See* SIEGEL, *supra* note 4, at 255–56 (describing Kaufman's efforts to promote himself to reporters from the 1930s through the 1950s). In his professional biography prepared in 1963, Kaufman listed a number of articles written about him in newspapers and magazines. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 7).

51. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 1).

52. Alvin H. Goldstein, *Judge Who Sentenced Spies to Death*, ST. LOUIS POST-DISPATCH, May 3, 1951.

owned a tobacco humidifier manufacturing company.[53] The family was Jewish and lived in New York City.[54] Kaufman attended public schools: P.S. 79, P.S. 10, and DeWitt Clinton High School.[55]

Kaufman had ambitions that would take him away from the life of being the son of immigrant parents.[56] His first step in that direction was enrolling at Fordham University when he was sixteen years old.[57] The newspaper profiles portrayed Kaufman as an excellent student. In a story that would become a staple of his public biography, Kaufman "immediately impressed the Catholic fathers who taught him" at Fordham: "When the final grades for a difficult course in Christian doctrine were announced, the Murphys and O'Briens drew down 75's and 80's, but Irving Kaufman rated 99, the highest in the class. Thereafter, his classmates took to calling him 'Pope Kaufman.'"[58]

After taking the two years of college courses necessary to be eligible for law school, Kaufman applied and was admitted to Fordham Law School.[59] While in law school, Kaufman "attended trials at the Southern District Court across the way."[60] According to a *Saturday Evening Post* profile of Kaufman published in 1953, Kaufman was inspired by those visits to become a federal judge.[61] Kaufman graduated law school in 1931 and was, according to the article, "top man in his class and the youngest graduate in the law school's history."[62] Only twenty when he completed

53. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 1).

54. Goldstein, *supra* note 52; Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 1).

55. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 1–2).

56. As Siegel describes, Kaufman's parents encouraged these ambitions: "Family lore, told two and three generations on, held that [Kaufman's mother] Rose sat her boys down one day and gave them an order." SIEGEL, *supra* note 4, at 11. As the story goes, she instructed Irving to become a lawyer. *Id.*

57. *See* Berger, *supra* note 2, at D10.

58. Lehman, *supra* note 2, at 84; Goldstein, *supra* note 52 ("In the undergraduate school at Fordham where he was one of the few Jewish students enrolled, he had distinguished himself as a top rank student but his most remarkable achievement at the Catholic-endowed institution was when, to the amusement of the Jesuit faculty, he earned the highest mark of the class in 'Christian Doctrine.'"); *see* RADOSH & MILTON, *supra* note 11, at 287.

59. *See* Lehman, *supra* note 2, at 84.

60. *Id.*

61. *Id.*

62. *Id.* At the time, Fordham Law School was located in the Woolworth Building in downtown Manhattan. *See* ROBERT J. KACZOROWSKI, FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY 100–04 (2012).

law school, Kaufman "was disconcerted to learn he was automatically disqualified from taking bar examinations until he" turned twenty-one.[63]

Kaufman's first job after law school was in private practice, working for an attorney named Louis Rosenberg—no relation to the defendants in the espionage case he would try nearly two decades later.[64] After two and a half years of trying "cases in various courts of the State" and arguing "appeals in the various Appellate Courts," Kaufman left the firm to join the United States Attorney's Office in the Southern District of New York.[65] As Kaufman no longer worked for Rosenberg, Kaufman now believed it was appropriate to ask out his former boss's daughter.[66] A year after Kaufman asked Helen Rosenberg out, they were married.[67] The story of the judge who was mindful of acting appropriately in courting his wife became another staple of his public biography.[68]

While at the U.S. Attorney's Office, Kaufman prosecuted different types of cases. The most prominent involved charges of fraud.[69] Though experienced, Kaufman was only twenty-four years old when he started working in the office.[70] Kaufman looked young as well. According to the *Saturday Evening Post*, Kaufman considered growing a mustache "in the style of Thomas E. Dewey until his wife and closest friends discouraged this project."[71] In another profile, the writer described how Kaufman's "[boyish looks] helped him win one of his toughly contested cases."[72] This article recounted how, despite his inability to match the "loquacity" of the two defense attorneys, Kaufman nevertheless secured the defendant's conviction for insurance fraud.[73] According to the article, "[j]urors later confided their sympathy had gone out to this modern David in the seemingly one-sided battle he was waging against the legal Goliaths."[74]

63. Goldstein, *supra* note 52.
64. Lehman, *supra* note 2, at 84.
65. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 2).
66. *Solid Judge of the Law: Irving Robert Kaufman*, *supra* note 47, at 16.
67. *Id.*
68. *Id.*; Berger, *supra* note 2, at D10 ("[H]e did not want to appear to be courting the boss's daughter.").
69. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 2–3); *see* Newman, *supra* note 12.
70. *See* Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 2).
71. Lehman, *supra* note 2, at 84.
72. Goldstein, *supra* note 52.
73. *Id.*
74. *Id.*

In his initial position as a special assistant to the U.S. Attorney, Kaufman took part in the prosecution of "Noel Scaffa, [the] famous private jewel theft investigator."[75] A year and a half after joining the office, Kaufman became an Assistant U.S. Attorney, a position he held for four years.[76] During his tenure, he prosecuted a number of securities fraud cases; according to a professional biography Kaufman prepared in 1953, the "best known . . . was the McKesson & Robbins- Coster-Musica investigation."[77]

In 1940, Kaufman left the prosecutor's office to become a partner in a law firm that included Gregory Noonan, his former boss from the U.S. Attorney's Office.[78] The practice was "politically tinged" and very successful.[79] According to the *Saturday Evening Post*, Kaufman's clients included "a nation-wide chain of grocery stores, a syndicate of theaters and hotels, and Milton Berle, the comedian."[80] Before he turned thirty-five, the article stated, Kaufman "was netting more than $100,000 annually."[81]

75. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 2). Scaffa was profiled in the *New Yorker* in 1931 as a "detective who specializes in returning stolen jewels to their owners." *See* Charles Cooke et al., *Detective*, NEW YORKER: THE TALK OF THE TOWN, June 27, 1931, at 7. Scaffa was convicted of perjury before a grand jury and sentenced to six months in jail. *See Scaffa, Jewelry Retriever, Dead*, N.Y. TIMES, Sept. 1, 1941, at 17.

76. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 3–4).

77. *Id.* (unpublished manuscript at 3). For an overview of the 1938 McKesson & Robbins case, see generally Sheila D. Foster & Bruce A. Strauch, *Auditing Cases That Made a Difference: Mckesson & Robbins*, 5 J. BUS. CASE STUD. 1 (2009). According to one newspaper profile of Kaufman published shortly after Kaufman sentenced the Rosenbergs to death in 1938, F. Donald Costner, then under investigation, "claimed he was too ill to come to court for arraignment." *See Spy Judge a Scourge of Criminals*, CHI. NEWS, Apr. 5, 1951 ("Kaufman went to his home, taking along a portable fingerprinting set. Despite the industrialist's protest, Kaufman fingerprinted him, a procedure most prosecutors might have waived under such conditions. The fingerprints later unmasked Coster as Philip Musica, a former thief."); *see U.S. Prosecutors Study Coster Data*, N.Y. TIMES, Jan. 13, 1939, at 3 (discussing conference in Washington, D.C. about next steps in the case, noting involvement of Assistant United States Attorneys, including Kaufman).

78. Unpublished Submission of Biographical Information on Judge Irving R. Kaufman, *supra* note 1 (unpublished manuscript at 4).

79. Newman, *supra* note 12. Eagan was another partner in the law firm for nearly three years until he was dismissed. Letter from Irving R. Kaufman, Att'y, Noonan, Kaufman, & Eagan, to Edward P.F. Eagan, Att'y, New York State Athletic Comm'n (Oct. 1, 1948) (on file with author). Kaufman wrote the dismissal letter, explaining that while Eagan was a partner, he had "taken out sums many times larger than any fees [he] brought in." *Id.*

80. Lehman, *supra* note 2, at 84.

81. *Id.* According to Siegel, this was a "serious exaggeration." SIEGEL, *supra* note 4, at 47. Nonetheless, "[b]y 1947, Kaufman earnied $56,000," which "was rich for the day." *Id.*

Kaufman's success in a lucrative private practice did not diminish his ambition for the federal bench. In 1947, he became a special assistant to Attorney General Tom Clark, where he organized "a new Justice Department section on lobbying" that worked on tightening and enforcing federal lobbying laws.[82] As part of his responsibilities at the Justice Department, "Kaufman filtered and approved all candidates for positions in the U.S. attorney's office and the federal bench in New York."[83]

In 1949, President Truman nominated him for the United States District Court for the Southern District of New York.[84] Kaufman took his seat on the bench before the end of the year, at the age of thirty-nine.[85] At the time, he was the youngest judge in the Southern District.[86] When Kaufman became a judge, he was one of several Jewish judges on the district court in the Southern District. Another was Simon Rifkind, who became a lifelong friend.[87] Appointed by President Franklin Roosevelt in 1941, Rifkind resigned from the bench in 1950 to start his own law firm and went on to become one of the most able and accomplished lawyers of his generation.[88]

Another Jewish judge on the district court was Samuel Kaufman,[89] who was appointed in 1948 and presided over the first criminal trial of Alger Hiss a year later.[90] The two would not be confused after Irving was

He had "achieved his goal of establishing a successful and profitable law practice . . . in very short order." *Id.*

82. Newman, *supra* note 12.

83. *Id.*

84. Lehman, *supra* note 2, at 84.

85. Newman, *supra* note 12.

86. Lehman, *supra* note 2, at 84.

87. *See Simon Hirsch Rifkind*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/simon-hirsch-rifkind (last visited Nov. 29, 2022); Cherna v. Cherna, 427 So. 2d 395, 396 n.2 (Fla. Dist. Ct. App. 1983) (quoting a speech by Kaufman where he calls Rifkind "my close friend"); *see Man in the News; A Judge Who Likes Action*, N.Y. TIMES, July 29, 1983, at A8.

88. *See* Tom Goldstein, *The Law Firm That Stars in Court*, N.Y. TIMES, Dec. 19, 1976, at F1; *see also* David Margolick, *At the Bar: The Continuing Lawyerly, Lincoln-like Life of Simon H. Rifkind*, N.Y. TIMES, Apr. 20, 1990, at B8. As detailed below, Rifkind was Kaufman's ardent defender throughout the controversies generated by the *Rosenberg* case. *See infra* Sections V.B, VI.A, VI.B.

89. JEWS IN AMERICAN POLITICS 457 (L. Sandy Maisel & Ira N. Forman eds., 1st ed. 2001).

90. JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT 156 (1987). Hiss was tried for perjury in connection with his grand jury testimony regarding Whittaker Chambers, who had "testified at a hearing of the House Un-American Activities Committee . . . that [he] had passed secret U.S. documents to the Soviet Union while he was in the State Department." *Id.* This first trial ended in a hung jury. *Id.* The second trial, presided

assigned to try the case of *United States v. Rosenberg*, an assignment that came less than two years after his appointment.[91] One authoritative account of the case states that the judge "lobbied vigorously for it."[92] Roy Cohn, a prosecutor in the *Rosenberg* case, claimed, "I was instrumental in getting Irving Kaufman assigned to the . . . case."[93] In this book, written as Cohn was dying of AIDS, Cohn stated that "[Kaufman] wanted the Rosenberg case as much as he wanted the [federal] judgeship – and when Irving want[ed] something he [didn't] stop . . . until you [did] what he want[ed]."[94] A key factor in Kaufman getting assigned the case was his familiarity with the issues raised by the prosecution of Communists accused of subversive criminal conduct.[95]

Kaufman's familiarity with these issues came from his presiding over a trial in 1950, of two defendants investigated for Soviet espionage but ultimately charged only with obstruction of justice.[96] The defendants, Abe Brothman and Miriam Moskowitz, were charged with improperly influencing the grand jury testimony of Harry Gold.[97] Gold had engaged in espionage, confessed, and later testified for the prosecution in

over by a different district court judge, ended with the jury convicting Hiss on both counts of perjury. *Id.* at 156–57. He was sentenced to five years in prison on each count, with "the terms to run concurrently." *Id.* at 157; *see* ALLEN WEINSTEIN, PERJURY: THE HISS-CHAMBERS CASE 437 (1978).

91. ROBERTS, *supra* note 4, at 286.

92. *Id.* at 300.

93. SIDNEY ZION, THE AUTOBIOGRAPHY OF ROY COHN 65 (1988).

94. *Id.*; *see also* Jerome Hornblass, *The Jewish Lawyer*, 14 CARDOZO L. REV. 1639, 1649 (1993) ("During a 1985 course that I conducted at the New School for Social Research on 'Jews and the Jewish Community,' Cohn told me that he used his own and his father's political influence to get the assignment to Judge Kaufman, on condition that at least one of the Rosenberg's would be executed if found guilty."). According to Cohn, he lobbied "the clerk in charge of the criminal calendar" to assign *Rosenberg* to Kaufman, citing the fact that the judge had recently tried "an obstruction of justice case involving industrial espionage" in which two of the government's key witnesses, Harry Gold and Elizabeth Bentley, slated for the *Rosenberg* case had testified. ZION, *supra* note 93, at 65–66. As a judge with knowledge of the issues, Kaufman would not "have to learn everything from the beginning." *Id.* at 66. Although it is not possible to determine whether Cohn's plea, if made, actually influenced the clerk, Kaufman was assigned the case. *Id.* at 66. In the obstruction of justice case, as noted in the text of this Article, the government secured the conviction of the defendants, Abraham Brothman and Miriam Moskowitz. *See infra* notes 96–100 and accompanying text. The prosecutors were U.S. Attorney Irving Saypol and Assistant U.S. Attorney Roy Cohn, who also prosecuted the *Rosenberg* case. ZION, *supra* note 93, at 66; *see infra* notes 124–37 and accompanying text.

95. *See* ZION, *supra* note 93, at 66.

96. *Id.*; RADOSH & MILTON, *supra* note 11, at 154.

97. ROBERTS, *supra* note 4, at 300; *see also* RADOSH & MILTON, *supra* note 11, at 153–54.

Rosenberg.[98] The defendants took the case to trial and were convicted by the jury.[99] Kaufman sentenced Brothman and Moskowitz to the maximum punishment available under the law, stating, "I have no sympathy or mercy for these defendants in my heart, none whatsoever."[100]

II. *UNITED STATES V. ROSENBERG*: THE TRIAL

A. *The Players: The Judge and the Attorneys*

Once Kaufman was assigned *Rosenberg*, he reportedly said to Cohn, "Well . . . you've really put me in the soup now, my friend. Whatever I do I'm sure to be criticized. There's no way to be popular in a case this fraught with emotion and political overtones. But it's my duty."[101] If Kaufman in fact said this to Cohn, it was more than just a moment of self-pity. It also was an accurate assessment of the challenges presented by the case as well as an insight into how Kaufman would preside over it.

To begin with, the case was sensational and would draw enormous attention from journalists and the public.[102] With the United States and the Soviet Union set in their Cold War hostility and the Korean War occurring, the *Rosenberg* case not only promised the intrigue of an international spy ring but also provided an explanation for how the United States had lost its monopoly on atomic weapons, putting its

98. *See* RADOSH & MILTON, *supra* note 11, at 151–69.

99. *Id.* at 153–55.

100. John Simkin, *Abraham Brothman*, SPARTACUS EDUC., https://spartacus-educational.com/Abraham_Brothman.htm (Jan. 2020) (quoting Judge Kaufman as expressing "regret that the law under which these defendants are to be sentenced is so limited and so restricted that I can only pass the sentence which I am going to pass, for I consider their offense in this case to be of such gross magnitude. I have no sympathy or mercy for these defendants in my heart, none whatsoever"); *see* RADOSH & MILTON, *supra* note 11, at 153–55.

101. ZION, *supra* note 93, at 67. Cohn's account includes his response to Kaufman. *Id.* Privately, he "almost threw up." *Id.* Nonetheless, he "stifled [himself] and played the game," telling Kaufman he "would do justice" and "perform in the great tradition of the federal judiciary." *Id.* Cohn concluded that "it ranked with the phoniest conversations of the [twentieth] century." *Id.*

102. Judge Kaufman's records at the Library of Congress include three scrapbooks of newspaper articles about the judge and the cases he worked on. *See supra* note 1. Kaufman retained a clipping service that collected articles from different newspapers around the country. *See supra* note 1. The first volume consists almost entirely of articles about the *Rosenberg* case. *See supra* note 1.

national security in jeopardy.[103] In understanding the political context for the trial, it must be noted that the Alger Hiss prosecution, a dramatic and controversial case, had concluded the year before with the defendant convicted of two counts of perjury.[104] Hiss, a prominent State Department official, had been involved in a Soviet espionage scheme.[105] Though an espionage prosecution could not be brought due to the statute of limitations, Hiss was indicted and convicted for lying to federal officials about the scheme.[106]

For the judge trying the case, *Rosenberg* presented an extraordinary professional opportunity, albeit a very challenging one. With the nation following on a daily basis, it was imperative for the trial to be perceived as fair and not to be a mere show trial in which the defendants' guilt was a foregone conclusion. It was just as imperative for the defendants to be convicted if in fact they were guilty and to be sentenced accordingly.

If the jury convicted the defendants, inevitably they would appeal the judgment of conviction and the sentence imposed by the court. This meant that Kaufman had to conduct the trial with the prospect of an appeal to the Second Circuit and, perhaps, the Supreme Court. His rulings would be scrutinized. The pressure to try the case properly, always present in a trial, was magnified in a highly-publicized political case in which the stakes were life or death.[107]

It is also necessary to note the legal context in which the trial occurred. By the time the trial began in March 1951, the Second Circuit had affirmed the convictions of the defendants in *United States v. Dennis*.[108] After a long and, at times, unruly trial, the jury convicted the defendants, the leaders of the Communist Party USA, for

> "wilfully and knowingly" conspiring to organize the Communist Party of the United States as a group to "teach and advocate the overthrow and destruction" of the government "by force and violence," and "knowingly and wilfully to advocate and teach the

103. *See* Brad Snyder, *Taking Great Cases: Lessons from the* Rosenberg *Case*, 63 VAND. L. REV. 885, 886–87 (2010); Michael E. Parrish, *Cold War Justice: The Supreme Court and The Rosenbergs*, 82 AM. HIST. REV. 805, 805–06 (1977).

104. *See* Walter Goodman, *The* Rosenberg *Case*, N.Y. TIMES, May 24, 1970, at SM15 ("The recent exposure of Alger Hiss as a helpmate of the Soviets in the 1930's had confirmed for the political right everything they had always [b]elieved about the New Deal. On the left, the case had been traumatic.").

105. *Id.*

106. *Id.*

107. *See* Lehman, *supra* note 2, at 20.

108. United States v. Dennis, 183 F.2d 201, 233 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

> duty and necessity of overthrowing and destroying" the government by "force and violence."[109]

Judge Learned Hand, perhaps the nation's most respected federal appeals court judge at the time, wrote the decision.[110] In upholding the convictions, Hand wrote:

> The American Communist Party, of which the d [sic] defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind . . . . It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means.[111]

The Supreme Court subsequently affirmed the defendants' convictions in a six-to-two decision.[112] *Dennis* reflected the judiciary's endorsement of anti-Communist prosecutions given the high stakes of the Cold War.[113] It is noteworthy that Hand, whom Kaufman revered,[114] wrote the Second Circuit's decision affirming the convictions.[115]

At the same time, another Second Circuit decision, also written by Hand, would have sounded a cautionary note for Kaufman prior to trial. In *United States v. Coplon*, decided in December 1950, the Second Circuit reversed the conviction of a spy for, among other things, "attempt[ing] to

109. *Id.* at 205 (quoting 18 U.S.C. § 2385).

110. *Id.*

111. *Id.* at 212; *see* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 598–612 (1994).

112. Chief Justice Vinson wrote the Court's plurality decision affirming the judgment of the Second Circuit. *See Dennis*, 341 U.S. at 495. Justice Frankfurter and Justice Jackson concurred in separate opinions, while Justice Black and Justice Douglas dissented in separate opinions. *Id.* at 517 (Frankfurter, J., concurring); *id.* at 561 (Jackson, J., concurring); *id.* at 579 (Black, J., dissenting); *id.* at 581 (Douglas, J., dissenting).

113. *See* William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 376–77, 434 (2001).

114. Judge Learned Hand wrote a letter to President John F. Kennedy supporting Kaufman's appointment to the United States Court of Appeals for the Second Circuit in 1961. *See infra* Section IV.B.2. Gerald Gunther, Hand's biographer, notes that, "[r]epeatedly in his career, Kaufman, especially when he was a target of criticism, defended himself in part on the basis of Hand's supporting letter." GUNTHER, *supra* note 111, at 652.

115. *Dennis*, 183 F.2d at 205.

deliver 'defence information' to a confederate" who was a citizen of the Soviet Union.[116] Although the conduct giving rise to Judith Coplon's arrest was incriminating, the appeals court could not sustain the judgment of conviction due to procedural defects attendant to her prosecution.[117] Judge Hand's decision in *Coplon*, joined by two other eminent judges, Thomas Swan and Jerome Frank, would have signaled to Kaufman that the Second Circuit would not simply rubber stamp its approval of the government's conduct in prosecuting subversives.[118]

In addition to recalling the anti-Communist context in which the trial occurred, it also must be noted that it was 1951. Chief Justice Fred Vinson presided over a relatively conservative, pro-government Supreme Court.[119] The criminal procedure reforms that the Court would adopt under its next Chief Justice, Earl Warren, were years away.[120] Just two examples, as a matter of federal constitutional law: it did not necessarily violate due process for the prosecution to withhold evidence favorable to the accused if requested by the defendant.[121] In addition, the defendant had only a limited right to prior statements made by witnesses to FBI officials.[122] The Rosenbergs went to trial when the political and legal climate was openly hostile to communism, and the rules of criminal procedure favored the government.[123]

Finally, the Rosenbergs were overmatched at trial with respect to counsel.[124] The government attorneys were zealous and experienced.[125] United States Attorney Irving Saypol, the top prosecutor in the Southern

116. United States v. Coplon, 185 F.2d 629, 631–40 (2d Cir. 1950); *see* GUNTHER, *supra* note 111, at 592–98.

117. GUNTHER, *supra* note 111, at 593–96.

118. *See Coplon*, 185 F.2d at 640 (noting that the court will "take the law as we find it" and that "under it [Coplon's] conviction cannot stand").

119. Wiecek, *supra* note 113, at 377.

120. *See generally* A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968).

121. The Supreme Court did not decide *Brady v. Maryland*, 373 U.S. 83 (1963), until more than a decade after the trial in *Rosenberg*. In *Brady*, the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Prior to *Brady*, "nondisclosure by a prosecutor" violated the defendant's due process rights only when the prosecutor acted in bad faith, for example, by knowingly presenting perjured testimony. *Id.* at 86 (discussing *Mooney v. Holohan*, 294 U.S. 103 (1935)).

122. *See* Jencks v. United States, 353 U.S. 657, 672 (1957). Prior to the Supreme Court's decision, the defendant had to show an inconsistency before obtaining the prior statement. *Id.* at 666.

123. RADOSH & MILTON, *supra* note 11, at 279–82.

124. *Id.* at 170–71.

125. *Id.*

District of New York, headed the government team.[126] He was an ardent anti-Communist.[127] Saypol was described in one history of the case as a "bulldoglike figure with a firm set of jaw and slicked-back graying hair, [who] looked the part of the hard-nosed prosecutor."[128] "No orator, however, he spoke in a monotone that was barely audible to reporters in the press box, and his addiction to bad jokes" prompted Kaufman at one point to ask Saypol "to restrain [his] desire to be another Milton Berle."[129]

Saypol's assistants at trial were Roy Cohn and James Kilsheimer.[130] At the time of the trial, the twenty-four-year-old Cohn already had been an Assistant U.S. Attorney for more than two years.[131] He was brilliant—Cohn graduated from Columbia Law School at the age of twenty—and had a sophisticated understanding of New York City politics.[132] Though the political and legal controversies that would define Cohn's life were still to come,[133] he already was relentlessly ambitious.[134] As the case headed towards trial, Cohn became Saypol's principal assistant, displacing the more experienced Myles Lane.[135] It was Cohn who

126. *See* Tom Goldstein, *Justice Irving H. Saypol, 71, Dies;* Rosenberg *Spy-Trial Prosecutor*, N.Y. TIMES, July 1, 1977, at 15.

127. *See id.* (prior to the *Rosenberg* trial, "Saypol supervised the Government's cases against Alger Hiss, Judith Coplon and the [eleven] top Communist leaders" in *Dennis v. United States*, 341 U.S. 494 (1951)); *see also Communists*: *The Sheepdog*, TIME (July 23, 1951), http://content.time.com/time/subscriber/article/0,33009,890148,00.html. After the Rosenbergs were convicted, *Time* described Saypol as "the nation's [number one] legal hunter of top Communists." *Communists*: *The Sheepdog*, *supra.*

128. *See* RADOSH & MILTON, *supra* note 11, at 170–71.

129. *Id.* at 171; *see* United States v. Rosenberg, 195 F.2d 583, 602 (2d Cir. 1952). On appeal, one of the defendants, Morton Sobell, contended that "the prosecutor's ill attempts at courtroom humor and 'questions' containing inadmissible testimony deprived him of a fair trial." *Id.* The Second Circuit did not agree with this contention. *Id.*

130. ROBERTS, *supra* note 4, at 300.

131. *Id.* at 309–10.

132. *Id.*

133. *See* Richard Pearson, *Obituaries: Cohn*, WASH. POST (Aug. 3, 1986), https://www.washingtonpost.com/archive/local/1986/08/03/obituaries/ce5b8387-1b0c-4aae-84cb-ef3c8a03393c/. After the *Rosenberg* trial, Cohn served as chief counsel for the Senate Permanent Committee on Investigations chaired by Senator Joseph McCarthy. *See id.* Cohn played a central role in the "Red Scare" investigations conducted by the committee. His service ended in disgrace with the Army-McCarthy hearings in 1954. *Id.* Cohn returned to New York, where he established a lucrative—and controversial—private practice. *See id.* Cohn was disbarred in 1986, shortly before he died. *See id.* In his autobiography, Cohn says he consulted Kaufman before taking the job with McCarthy. *See* ZION, *supra* note 93, at 85. In his words, Kaufman "said not to do it, not to go near Washington. 'It's a jungle there, all you'll get is aggravation and misery.' As I would discover years later, Irving was exactly right about the capital." *Id.*

134. ROBERTS, *supra* note 4, at 309–10.

135. *See id.* at 310.

developed the more "streamlined trial outline" that relied on the testimony of David and Ruth Greenglass to make the case against Julius and Ethel Rosenberg.[136] Kilsheimer, twenty-nine years old at the time of the trial, and Lane rounded out the trial team.[137]

Saypol, Cohn, and Kilsheimer were Jewish.[138] So were the attorneys for the Rosenbergs,[139] Emanuel ("Manny") Bloch, an experienced civil rights attorney, and his father, Alexander Bloch, a seventy-year-old commercial lawyer who had never tried a criminal case before.[140] While Manny represented Julius and his father represented Ethel, the couple stood together, completely denying the charges and proclaiming their innocence.[141] Manny Bloch acted as their principal lawyer.[142] In deciding to stand together, the Rosenbergs made a decision that very well may have cost Ethel her life. As the trial demonstrated, the Blochs were overwhelmed by the government.

As the trial judge, Kaufman had an important but circumscribed role to play in the trial of a criminal case. The judge's responsibilities include ruling on legal matters, such as whether evidence should be admitted or a legal objection should be sustained, managing the trial, and instructing the jury on the applicable law.[143] The determination of guilt or innocence would be made by a jury.[144] If the jury entered a guilty verdict, the trial judge would determine the sentence.[145] When the trial occurred in 1951,

136. RADOSH & MILTON, *supra* note 11, at 174. As detailed below, David was Ethel Rosenberg's younger brother, and Ruth was his wife. Under its initial trial plan, the government intended "to show that the recruitment of [David] Greenglass was . . . part of an ongoing espionage operation directed by the Rosenbergs." *Id.* This would have required the testimony of even more witnesses than actually testified at the trial and presented the jury with a "long, complex" case. *Id.* Under the second trial plan, developed by Cohn, the prosecution's case would be simpler and shorter and would hinge on testimony of the Greenglasses. *Id.*

137. *See* ROBERTS, *supra* note 4, at 300.

138. *See id.* at 301–02.

139. Deborah Dash Moore, *Reconsidering the Rosenbergs: Symbol and Substance in Second Generation American Jewish Consciousness*, 8 J. AM. ETHNIC HIST. 21, 30 (1988).

140. ROBERTS, *supra* note 4, at 306.

141. *See id.* at 306–07.

142. *See id.*; *see also* RADOSH & MILTON, *supra* note 11, at 236 ("Alexander Bloch, Ethel's lawyer of record, had little experience with criminal trials and inevitably deferred to his son's judgment.").

143. *See, e.g.*, *Special Functions of the Trial Judge*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_trialjudge/#6-1.1 (last visited Nov. 29, 2022).

144. *See How Courts Work, The Role of Juries*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jury_role/ (last visited Nov. 29, 2022).

145. *Id.*

Judge Kaufman had sole, unreviewable discretion to decide the sentence for the Rosenbergs and their co-defendants if they were convicted.[146]

Judge Kaufman was mindful of the sacrifice required by the jurors in taking the time to serve and deliberate in an important case.[147] During jury selection on the second day of the trial, Kaufman displayed a flash of impatience at the start of the proceedings.[148] At 10:30 AM, juror number ten was missing. "I thought I made myself sufficiently clear that I wanted everybody to attend promptly at the sessions," the judge commented.[149] Then another prospective juror spoke up, saying that he wanted the court to know that he was a World War II veteran, something that he should have mentioned the day before in response to Kaufman's questions to prospective jurors.[150] The following colloquy ensued:

> The Court: Didn't you understand that I asked the jurors that time and time again, whether you were veterans?
>
> Mr. Ciner: You did, sir.
>
> The Court: Was there anything vague about the question?[151]

Kaufman then explained, "the reason that I perhaps appear a little irritated is because jurors that are selected are going to sit here for several weeks, and if over a simple little thing like that they have difficulty in understanding something that seems to me was very clear."[152] He then concluded, "I am disturbed over the fact that you didn't understand that."[153]

This exchange is revealing insofar as it shows Kaufman's approach to presiding over the trial. He demanded punctuality from everyone involved in the trial.[154] Kaufman was committed to conducting the trial

146. United States v. Rosenberg, 195 F.2d 583, 604–05 (2d Cir. 1952) ("Unless 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.").

147. *See* Transcript of Record, *supra* note 5, at 1–121.

148. *See id.* at 125–249.

149. *Id.* at 122. Later that day, after the jury was selected, Kaufman commented that he was "quite a fuss budget about being prompt." *Id.* at 179.

150. *See id.* at 123.

151. *Id.* at 122–24.

152. *Id.* at 124.

153. *Id.* Subsequent to this exchange, the prosecution exercised a peremptory challenge and Ciner was excused from serving on the jury. *Id.* at 143.

154. S*ee* ROBERTS, *supra* note 4, at 315.

efficiently.[155] Though Kaufman was short, only five foot four, there never was any question as to who was in charge in the courtroom.[156] Roberts's account of the trial notes that Kaufman was "so prickly and imperious that Julius Rosenberg characterized him as 'a cross between a rabbinical student and an army sergeant.'"[157] An experienced trial lawyer before he became a judge, Kaufman occasionally corrected or chastised counsel while they questioned witnesses.[158]

B. An Overview of the Prosecution's Case and the Rosenbergs' Defense

While thus far this Article has discussed only Julius and Ethel Rosenberg, in fact there were five defendants in *United States v. Rosenberg*.[159] In addition to the Rosenbergs, Ethel's younger brother David Greenglass, Anatoli Yakovlev, and Morton Sobell were charged with conspiring to commit espionage for the Soviet Union.[160] Two other individuals were part of the conspiracy but not charged: Harry Gold, who already had pleaded guilty in another Soviet espionage case involving Klaus Fuchs, a British physicist; and Ruth Greenglass, David's wife.[161] Only the Rosenbergs and Sobell stood trial before Judge Kaufman in the spring of 1951.[162] Yakovlev had fled to the Soviet Union to avoid arrest.[163] Greenglass pleaded guilty before the trial; Judge Kaufman would determine his sentence after the trial.[164]

155. *See, e.g.*, *id.* at 301. Once while David Greenglass was testifying, for example, Cohn said he was going to start a new area of questioning and asked to adjourn for the day a half hour early. Kaufman granted the request but apologized to the jury for doing so, saying, "it sort of goes against the grain of my Scotch soul." Transcript of Record, *supra* note 5, at 599; ROBERTS, *supra* note 4, at 315.

156. *See* ROBERTS, *supra* note 4, at 300.

157. *Id.* at 300, 304.

158. *See, e.g.*, Transcript of Record, *supra* note 5, at 1167a (overruling defense counsel's objection and stating, "don't give me any course of instruction as to what is usually done in a courtroom. This is the way I am running this courtroom, Mr. Kuntz, and I think I understand the way a courtroom should be run. I don't care to hear anything further from you"); *id.* at 1657 (commenting that Emmanuel Bloch was "taking a very ponderous route[,] again," while presenting the testimony of Julius Rosenberg).

159. *See* United States v. Rosenberg, 195 F.2d 583, 588 (2d Cir. 1952).

160. *See id.*

161. *Id.* at 592; Transcript of Record, *supra* note 5, at 1154–55, 1172–79 (Gold's testimony regarding meetings with Klaus Fuchs as part of espionage scheme).

162. *Rosenberg*, 195 F.2d at 590. Sobell was represented by Edward Kuntz and Harold Phillips. RADOSH & MILTON, *supra* note 11, at 253–54.

163. *Trials: Guilty*, TIME (Apr. 9, 1951), https://content.time.com/time/subscriber/article/0,33009,814581,00.html ("Soviet Vice Consul Anatoli Yakovlev . . . fled home to Russia in 1946.").

164. RADOSH & MILTON, *supra* note 11, at 286.

The heart of the case against the Rosenbergs was atomic espionage.[165] Here is a brief overview of the case presented by the prosecution: during the last two years of World War II, David Greenglass had been stationed at Los Alamos, where he worked as a machinist.[166] While there, at the urging of Julius Rosenberg, he obtained information about the government's work on the atomic bomb and shared it either with Julius in New York or with his wife Ruth or Harry Gold in New Mexico.[167] Ruth then gave the information to Julius when she returned to New York, while Gold provided the information to Yakovlev.[168] As the Second Circuit summarized:

> The indictment listed ten overt acts done in furtherance of the conspiracy, including the receipt by Julius Rosenberg from Ruth Greenglass of a paper containing written information after a trip by Ruth to New Mexico, and the additional receipt by Julius from David Greenglass of a paper containing sketches of experiments conducted at the Los Alamos Project.[169]

The prosecution presented its case through a number of witnesses.[170] The most important testimony regarding the atomic espionage conspiracy came from David and Ruth Greenglass, who testified about Ruth's visit to New Mexico in November 1944, David's furlough in New York in early 1945, Harry Gold's visit to New Mexico in June 1945, and another meeting after that in 1945 in New York when David "turned over a sketch of the cross-section and a ten-page exposition of the bomb to [Julius] Rosenberg."[171] According to the Second Circuit's summary of the trial testimony, "Ethel typed up the [ten-page] report."[172] During all of

165. *See Rosenberg*, 195 F.2d at 588–89.
166. *Id.*
167. *Id.* at 589.
168. *Id.*
169. *Id.* at 588. Sobell was charged as part of the conspiracy but was not involved in any of the overt acts involving atomic espionage. *Id.* at 601. Specifically, he was charged with conspiring with Julius Rosenberg to share other military information with the Soviet Union. *Id.* at 600–02; *see* Paul W. Valentine, *Morton Sobell, Convicted in* Rosenberg *Atomic Bomb Spy Trial, Dies at 101*, WASH. POST (Jan. 30, 2019, 5:18 PM), https://www.washingtonpost.com/local/obituaries/morton-sobell-convicted-in-rosenberg-atomic-bomb-spy-trial-dies-at-101/2019/01/30/4ae88196-24d7-11e9-90cd-dedb0c92dc17_story.html.
170. *See* Transcript of Record, *supra* note 5, at 25–28.
171. *Rosenberg*, 195 F.2d at 588–89; *see* Transcript of Record, *supra* note 5, at 547–655, 688–763, 970–1026.
172. *Rosenberg*, 195 F.2d at 589. The testimony of David and Ruth Greenglass regarding Ethel's typing constituted the principal evidence in support of convicting Ethel Rosenberg

these meetings, David Greenglass provided information about the atomic bomb to Julius Rosenberg "with intent and reason to believe that [it] would be used to the advantage of the Soviet Union."[173] Other witnesses, including Gold, provided supporting testimony.[174]

In their defense, both Julius and Ethel Rosenberg testified at trial, denying the charges in their entirety.[175] Both were subject to vigorous cross-examination.[176] Ultimately, the jury credited the testimony of the Greenglasses and other prosecution witnesses and convicted the Rosenbergs and Sobell.[177]

Section III.C discusses Judge Kaufman's conduct during the trial. It is based primarily upon a review of the trial transcript and the Second Circuit's decision affirming the conviction and sentences for all three defendants on direct appeal. It does not take into account the documents

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and, then, the basis for her death sentence. *See* Robert D. McFadden, *David Greenglass, the Brother Who Doomed Ethel Rosenberg, Dies at 92*, N.Y. TIMES (Oct. 14, 2014), https://www.nytimes.com/2014/10/15/us/david-greenglass-spy-who-helped-seal-the-rosenbergs-doom-dies-at-92.html. Decades later, David and Ruth Greenglass admitted that it was fabricated. *Id.*

173. *Rosenberg*, 195 F.2d at 588, 590.

174. Transcript of Record, *supra* note 5, at 1150–1230. For example, Gold testified that at the direction of Yakovlev, he met David Greenglass in New Mexico in June 1945. *Id.* at 1187–88. Because they had never met before, Gold presented Greenglass with half of a Jell-O box. *Id.* at 1188. Greenglass had the other half. *Id.* at 1187–94. According to David Greenglass and Gold, the idea of cutting the Jell-O box in half to confirm the meeting, which made for gripping trial testimony, came from Julius Rosenberg. *Id.* at 626–29. Gold further testified that Greenglass provided him with information meant to illustrate the principles of implosion used to build the atomic bomb. *Id.* at 1196–1201. Gold, in turn, gave this information to Yakovlev. *Id.* at 1199–1200; *see Rosenberg*, 195 F.2d at 588–89. The Jell-O box introduced at trial was a facsimile. *See* Jell-O Box Exhibit Used in the Espionage Trial of Julius and Ethel Rosenberg and Morton Sobell (photograph), *in File Unit: Exhibits from the Julius and Ethel Rosenberg Case File*, NAT'L ARCHIVES CATALOG (Mar. 12, 1951), https://catalog.archives.gov/id/278774; *see also* RADOSH & MILTON, *supra* note 11, at 170–275 (providing a detailed account of the trial). This Article does not describe the trial in detail because of its focus on Judge Kaufman's conduct during the trial. To put it another way, this Article does not re-litigate whether Julius and Ethel Rosenberg were guilty of the charges against them. As discussed in the conclusion of this Part, the historical record shows that Julius engaged in espionage while the case against Ethel was sparse and problematic. *See generally* RADOSH & MILTON, *supra* note 11; ROBERTS, *supra* note 4. Instead, this Article focuses on Kaufman's rulings and actions as the trial court judge responsible for presiding over the case.

175. *Rosenberg*, 195 F.2d at 590.

176. Sobell, by contrast, decided not to testify at trial. Transcript of Record, *supra* note 5, at 1723–1907, 2000–83. The case against him depended upon one witness, and his lawyers elected to rest upon the cross-examination of that witness. RADOSH & MILTON, *supra* note 11, at 253–58; *see* Transcript of Record, *supra* note 5, at 250–540 (testimony of Max Elitcher).

177. *Rosenberg*, 195 F.2d at 590–92.

showing that Kaufman engaged in ex parte contacts with government attorneys prior to and during the trial.[178] That is because evidence regarding those communications did not emerge until more than two decades later and therefore was not part of the record submitted to any of the courts in the Rosenbergs' many appeals.[179] It also does not take into account the revelations by David and Ruth Greenglass more than four decades after the trial regarding certain aspects of their trial testimony or Morton Sobell's admission near the end of his life that he did in fact engage in espionage for the Soviet Union.[180] Again, that is because these disclosures came well after the conclusion of the trial in 1951 and the execution of the Rosenbergs in 1953.[181]

For now, the focus is on how Judge Kaufman tried the case based upon the positions taken by the prosecution and the defense and the evidence put forward to support their cases. Although Judge Kaufman's rulings and conduct seemed to support the prosecution in certain ways, the judge also was well aware that any judgment of conviction would be scrutinized on appeal. Accordingly, he took care in exercising his discretion as a trial court judge and showed concern for the trial record that would be reviewed by the Second Circuit and, perhaps, the Supreme Court in any appeal.

C. Judge Kaufman's Conduct During the Trial

1. Allowing Testimony About the Rosenbergs' Political Views and Membership in the Communist Party

As noted earlier, the trial occurred during one of the hottest points of the Cold War.[182] The defendants were charged with conspiring to commit espionage for the benefit of the Soviet Union.[183] From opening arguments through the presentation of witnesses, the prosecution contended that

178. The government documents indicating that Judge Kaufman spoke to government officials, including U.S. Attorney Saypol, the lead prosecutor, are discussed below in Part III, which examines Judge Kaufman's decision to sentence the Rosenbergs to death, and Part IV, which discusses Judge Kaufman's tenure on the Second Circuit. *See* discussion *infra* Parts III, IV.

179. *See* RADOSH & MILTON, *supra* note 11, at 276–78.

180. *See* ROBERTS, *supra* note 4, at 482–84 (disclosures made by David and Ruth Greenglass); Valentine, *supra* note 169 (disclosures made by Sobell).

181. *See* ROBERTS, *supra* note 4, at 471–72, 483–84 (describing Roberts' first meeting with David Greenglass in 1996, setting out what Roberts was told by David and Ruth Greenglass when he interviewed them); Valentine, *supra* note 169.

182. *See* Berger, *supra* note 2, at D10.

183. United States v. Rosenberg, 195 F.2d 583, 588 (2d Cir. 1952).

the Rosenbergs' political views and membership in the Communist Party were relevant to its case.[184] The defendant strenuously objected, arguing that such evidence was inflammatory and should be excluded.[185] Judge Kaufman agreed with the prosecution that such evidence was relevant to show motive: that is, why the Rosenbergs engaged in the alleged conspiracy.[186] In allowing this evidence to be presented, he instructed the jury that it did not establish that the defendants were guilty.[187] He explained that the "government will have to establish . . . some connection between communism and committing the offense charged in the indictment."[188]

On appeal, the Second Circuit upheld Judge Kaufman's rulings and instructions as a permissible exercise of discretion.[189] In explaining this decision, Judge Jerome Frank acknowledged that "such evidence can be highly inflammatory in a jury trial."[190] Furthermore, he recognized that Kaufman's instruction to the jury that evidence of Communist Party membership was not, on its own, sufficient to support a determination of guilt may have been "no more than an empty ritual without any practical effect on the jurors."[191] This possibility was inherent in trial by jury, however, "and the defendants made no effort to procure a trial by a judge alone," as permitted under the Federal Rules of Criminal Procedure.[192] In sum, Judge Kaufman's rulings regarding this evidence sided with the prosecution but nevertheless were permissible.

184. *See* Transcript of Record, *supra* note 5, at 226–36.

185. *See, e.g.*, *id.* at 234 (statement of E.H. Bloch) ("I persist in objecting to . . . the Communist issue in this case . . . .").

186. *See id.* at 233–35.

187. *Id.* at 235.

188. *Rosenberg*, 195 F.2d. at 595; *see* Transcript of Record, *supra* note 5, at 226, 234–35. Regarding the questioning of the Rosenbergs about their Communist associations, see generally Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of* United States v. Rosenberg, 86 YALE L.J. 1622 (1977).

189. *Rosenberg*, 195 F.2d at 595–96 (holding that evidence of defendants' preference for "the Russian social and economic organization over ours" was relevant to motive and that trial judge did not abuse his discretion by allowing evidence of defendants' "Communist Party membership" to show "motive or intent to aid Russia").

190. *Id.* at 596.

191. *Id.*

192. *Id.*

2. Active Questioning of Witnesses

During the course of a trial, the judge makes rulings, confers with counsel, and explains the process to the jury.[193] To protect against the possibility that the jury does not follow what it may believe to be the judge's views, the judge instructs the jury that it must disregard anything the judge said during the trial when it evaluates the evidence.[194] As Judge Kaufman told the jurors in his charge, "I tell you again, you are the sole and exclusive judges of the facts of this case; you, and you alone, will pass upon the credibility of all the witnesses."[195] This is a fundamental instruction, given at every trial.[196]

In *Rosenberg*, the Second Circuit cited this instruction in response to the defendants' claim that Judge Kaufman improperly took "too active a part in the trial process by his questioning of witnesses."[197] A review of the trial transcript shows Kaufman repeatedly involved himself in the examination of witnesses, including the Rosenbergs, when they testified.[198] For example, the judge pressed Julius on his testimony that he was afraid that David Greenglass would "blackmail" him:

BY THE COURT

Q: Blackmail you? Where did he try to blackmail you?

A: Well, he threatened me to get money. I considered it blackmailing me.

Q: What did he say he would do if you didn't give it to him? You said he said you would be sorry.

A: Yes. I consider it blackmail when someone says that.

Q: Did he say what he would do to you?

193. *See id.*; *see also* Transcript of Record, *supra* note 5, at 2328, 2360–61; *Trial*, OFFS. OF THE U.S. ATT'YS, https://www.justice.gov/usao/justice-101/trial (last visited Nov. 29, 2022).

194. Transcript of Record, *supra* note 5, at 2360–61; *see generally Trial*, *supra* note 193.

195. Transcript of Record, *supra* note 5, at 2328, 2360–61; *Rosenberg*, 195 F.2d at 595.

196. *How Courts Work, Instructions to the Jury*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct/.

197. *Rosenberg*, 195 F.2d at 593.

198. On appeal, the defendants' attorneys cited a "hundred or so incidents" of Kaufman's questioning of witnesses, contending that it violated their rights to a fair trial. *Id.*

A: No, he didn't.

Q: Did he say he would go to the authorities and tell them you were in a conspiracy with him to steal the atomic bomb secret?

A: No.

Q: Do you think that was what he had in mind?

A: How could I know what he had in mind?

Q: What do you mean by blackmail then?

A: Maybe he threatened to punch me in the nose or something like that.[199]

With Ethel, Judge Kaufman pressed on her testimony that she wanted her younger brother to "tell the truth, whichever it was," by asking what she meant when she said she would "stand[] by him?"[200] To which Ethel replied, "Well, I wouldn't love [him] any less."[201]

Kaufman's questioning of witnesses during the trial raises two questions.[202] In the adversarial system, may the judge actively participate in the questioning of witnesses? If so, why would a judge do so? The answer to the first question, the Second Circuit ruled when reviewing the defendants' claims on appeal, is yes.[203] As the trial court judge, Kaufman possessed the "unchallenged power to bring out the facts

199. Transcript of Record, *supra* note 5, at 1887–87a; *see Rosenberg*, 195 F.2d at 592 n.5, 593–94; RADOSH & MILTON, *supra* note 11, at 250.

200. Transcript of Record, *supra* note 5, at 1998; *see* RADOSH & MILTON, *supra* note 11, at 253.

201. Transcript of Record, *supra* note 5, at 1998. Furthermore, as noted below, the judge ruled that the prosecution could cross-examine Ethel about her assertion of her Fifth Amendment privilege against self-incrimination before the grand jury followed by her testimony at trial. *See* Transcript of Grand Jury Testimony of Ethel Rosenberg at 9211, United States v. Rosenberg, 109 F. Supp. 108 (S.D.N.Y. 1953) (No. 134-245).

202. Judge Kaufman did not limit his questioning to the Rosenbergs. *Rosenberg*, 195 F.2d at 593 n.5. When Ruth Greenglass's sister testified, for example, she was cross-examined by Manny Bloch about Julius Rosenberg's criticism of the United States government for being "capitalistic." Transcript of Record, *supra* note 5, at 1136–39 (testimony of Dorothy Abel). Though she said "that is about all I can remember," Kaufman asked questions that required her to elaborate on Julius's preference for communism as compared to capitalism. *Id.* at 1137–39 (testimony of Dorothy Abel); *Rosenberg*, 195 F.2d at 583.

203. *Rosenberg*, 195 F.2d at 592–93.

of the case."[204] Accordingly, the Second Circuit rejected the defendants' claim that they had been denied a fair trial by Kaufman's questioning of witnesses.[205]

One explanation for Kaufman's questions, as the Court of Appeals stated, was clarification. Another possible explanation is that Kaufman sought to elicit testimony that would help the prosecution prove its case. A review of the trial transcript shows that Kaufman pressed the Rosenbergs more often during their testimony than the government witnesses.[206] It also shows that he periodically asked questions to dispel ambiguities in the witnesses' testimony and occasionally asked questions to highlight a point made by a government witness.[207]

If the Rosenbergs were in fact guilty, Kaufman's active questioning was not necessarily problematic because his questions would have had the effect of clarifying the facts in a way to ensure that the jury arrived at the correct verdict.[208] It is undisputed today that Julius Rosenberg spied for the Soviet Union and that this included his successful effort to recruit his brother-in-law to provide atomic secrets to the Soviet Union.[209] Furthermore, the Rosenbergs stood together and completely denied being involved in any espionage scheme.[210] Kaufman's questions probed their denials, which were false. There are limits to the argument that the verdict was accurate and correct, however, because the prosecution's case against Ethel was thin at best and depended upon testimony by David and Ruth Greenglass that they later admitted was false.[211]

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204. *Id.* at 594.

205. *See id.* at 592.

206. *See*, *e.g.*, Transcript of Record, *supra* note 5, at 1628 (interrupting direct examination of Julius Rosenberg to ask, "Is your wife a typist?" When Rosenberg answered yes, Kaufman asked, "Do you have a typewriter at home?"). *See also* SIEGEL, *supra* note 4, at 101 (noting that Kaufman "was far too eager to intervene in the trial in ways that almost always transparently helped the prosecution").

207. *See*, *e.g.*, Transcript of Record, *supra* note 5, at 950–52 (showing that while David Greenglass was being cross-examined about a "violent quarrel" between him and Julius Rosenberg over their business, Kaufman asked a number of questions to elicit Greenglass's testimony that "the quarrels ceased" and, in the judge's words, they subsequently "patched things up").

208. As detailed below, today it is not disputed that Julius Rosenberg spied for the Soviet Union and that his efforts included recruiting his brother-in-law to provide atomic secrets to the Soviet Union. *See infra* Section II.C.5, At the same time, the prosecution's case against Ethel was thin at best and depended upon testimony by David and Ruth Greenglass that they later admitted was false.

209. *See infra* note 264 and accompanying text.

210. Freeman, *supra* note 39.

211. *See* McFadden, *supra* note 172; *see also* Sam Roberts, *Secret Grand Jury Testimony from Ethel Rosenberg's Brother Is Released*, N.Y. TIMES (July 15, 2015),

Moreover, if one views the trial court judge as an umpire who should allow the parties to litigate their cases and allow the chips to fall where they may, Kaufman's conduct was problematic because it supported the prosecution. Given the highly politicized environment in which the Rosenbergs were charged and tried, the strength of the prosecution's trial team, and the life-or-death stakes for the defendants, Kaufman's active questioning was unnecessary and aligned the court with the prosecution. This alignment was inconsistent with separation of powers principles and supported the impression, advanced by the Rosenbergs' defenders, that they did not receive a fair trial.

3. Allowing Cross-Examination of Ethel Rosenberg Regarding Her Refusal to Answer Questions Before the Grand Jury

Another ruling by Judge Kaufman would prove to be controversial several years after the conclusion of the case. Prior to the trial, when Ethel was summoned to the grand jury, she asserted her Fifth Amendment right against self-incrimination in response to a number of the prosecutor's questions.[212] Subsequently, during the trial, Ethel Rosenberg testified in her defense, denying many of the specific statements made by prosecution witnesses and stating that she and her husband had not engaged in any of the criminal actions asserted by the government.[213]

On cross-examination, when Saypol pressed her on why, when she was asked these questions before the grand jury months before, she had declined to answer them on the grounds of self-incrimination.[214] Now, at trial, Saypol asked Ethel to explain why she now was willing to answer those questions. [215] At one point, when Saypol confronted her, he asked, "you said, 'It might incriminate me.' Those were your words, were they

https://www.nytimes.com/2015/07/16/nyregion/david-greenglass-grand-jury-testimony-ethel-rosenberg.html. *See generally* ROBERTS, *supra* note 4.

212. *See* Transcript of Grand Jury Testimony of Ethel Rosenberg, *supra* note 201, at 9210–11, 9252; *see also* RADOSH & MILTON, *supra* note 11, at 261–63.

213. *See* Transcript of Record, *supra* note 5, at 1969–90. For example, during Ethel Rosenberg's direct examination, her attorney, Alexander Bloch, asked: "Did your husband at any time ever mention to you that he was engaged in any spying or espionage work or transmitting information received from various sources or from any source to the Russians?" In response, Ethel Rosenberg testified: "He wasn't doing any such thing. He couldn't possibly have mentioned it to me." *Id.* at 1972.

214. *See* Transcript of Grand Jury Testimony of Ethel Rosenberg, *supra* note 201, at 9211.

215. Transcript of Record, *supra* note 5, at 2061.

not?"[216] Manny Bloch continually objected during the cross-examination, protesting that Ethel's proper assertion of the Fifth Amendment privilege before the grand jury now was being used to establish her guilt.[217]

Kaufman overruled the objections.[218] Now that Ethel Rosenberg was testifying voluntarily at trial, he held that she could be cross-examined on the basis that she had previously given different—inconsistent—answers to the same questions.[219] Kaufman involved himself in the cross-examination to ensure that Ethel appreciated the significance of the questions and to rephrase some of the questions to ensure they were manageable.[220] To be clear, the transcript does not read as if Kaufman were trying to bolster the prosecution's case.[221] Rather, it suggests that while the judge thought the prosecutor's questions were permissible, he sought to manage the examination in a way to provide Ethel the full opportunity to explain her testimony.[222] If anything, Kaufman appears to be uncomfortable at times with this line of questions; he may have been concerned about how the exchange would read in the appeals courts. In any event, under the applicable law in 1951, Kaufman's ruling was reasonable and not improper.[223] Notably, the Rosenbergs did not challenge the judge's rulings on this point in any of their appeals.

However, several years after the Rosenbergs were executed in 1953, the Supreme Court held that a criminal defendant could not be cross-examined at trial about asserting the Fifth Amendment privilege against self-incrimination before the grand jury.[224] That is, well after the Rosenbergs had been tried, the Court essentially agreed with the position

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216. *Id.*

217. *See id.* at 2056, 2063. Manny Bloch argued

> that the method of trying to [impute] an unlawful act to a person who has asserted the privilege against self-incrimination destroys the privilege . . . and I object to this entire line of inquiry because inferences may be drawn which are not warranted under the law or under the facts.

Id. at 2063.

218. *Id.* at 2056–63.

219. *See id.* at 2059–65, 2079.

220. *Id.* at 2060–65.

221. *See id.* at 2061–66.

222. *See id.*

223. *Compare id.* at 2059–65 (Judge Kaufman's ruling that Ethel Rosenberg could be cross-examined on the basis of her prior inconsistent answers to the same questions), *with* Raffel v. United States, 271 U.S. 494, 498–99 (1926) (holding that defendant's failure during his first trial to take the stand to deny testimony as to an incriminating admission could be used on cross-examination at the second trial where he did take the stand to impugn the credibility of his denial of the same admission).

224. Grunewald v. United States, 353 U.S. 391, 417–18 (1957); *see* RADOSH & MILTON, *supra* note 11, at 261–63.

taken by Bloch during the trial.[225] Though it was too late for the Court's ruling to help them, their co-defendant Morton Sobell argued that the Court's change in the law supported his request for a new trial.[226]

At oral argument before the Second Circuit on Sobell's petition, then-Judge Thurgood Marshall asked the government's attorney, "If Sobell had been tried last Spring and we had him before us today, wouldn't it have been necessary for the court to reverse the decision?"[227] The government's attorney acknowledged that reversal would have been required.[228] Kaufman called the FBI to vent about *Grunewald v. United States* (as "not good law"), Marshall (as "naïve" and "inexperienced"), and the government attorney's answer (as "stupid").[229] Furthermore, according to the FBI memo, Kaufman said he had "raised hell" with Marshall about the matter."[230] Ultimately, the Second Circuit rejected Sobell's appeal, holding that, as a co-defendant, he could not invoke *Grunewald* to set aside his conviction; at most, only the defendant who was cross-examined about invoking the right against self-incrimination could benefit from the Court's change in the law.[231]

To summarize: Judge Kaufman properly interpreted the law at the time when allowing Ethel Rosenberg to be cross-examined about invoking her Fifth Amendment right against self-incrimination before the grand jury. Furthermore, he managed the cross-examination in such a way as to protect her rights to the extent possible under the applicable law.[232] Subsequently, with the change in the law by the Supreme Court, Kaufman feared a judicial ruling that would set aside the conviction of one of the defendants in the case.[233] As a matter of legal ethics, it was not improper for Kaufman to complain to an FBI official, who was not a judge

225. *Compare Grunewald*, 353 U.S. at 417, *with* RADOSH & MILTON, *supra* note 11, at 261–63.

226. United States v. Sobell, 314 F.2d 314, 318 (2d Cir. 1963).

227. RADOSH & MILTON, *supra* note 11, at 429.

228. *Id.*

229. *Id.* at 429–30; *An Open Letter to Judge Irving R. Kaufman*, *supra* note 19, at 146.

230. *An Open Letter to Judge Irving R. Kaufman*, *supra* note 19, at 146; *see* RADOSH & MILTON, *supra* note 11, at 428–30. Whether Kaufman in fact discussed with Marshall any aspect of the *Sobell* case is unclear.

231. *Sobell*, 314 F.2d at 318–26. By then, of course, Ethel had been dead for nearly ten years. *See* RADOSH & MILTON, *supra* note 11, at 418–19.

232. *See, e.g.*, Transcript of Record, *supra* note 5, at 2061 (Kaufman asking Ethel Rosenberg, "Has something transpired between the time you were questioned before the grand jury and the date of this trial, which makes you feel that your answers at this time, at the trial, those particular questions are not incriminating, and if so, what is it?"). *See also id.* at 2062, 2063 (stating that the prosecution has spent "a lot of time" on these questions, asking Saypol to "get along with this").

233. RADOSH & MILTON, *supra* note 11, at 429–30.

and did not have any legal authority regarding Sobell's appeal.[234] The FBI memo reveals that Kaufman had a proprietary, even obsessive, interest in defending the procedures followed and outcome arrived at in the Rosenberg case. [235] This aspect of the judge's communications with government officials about the case is discussed in more detail below.

4. Protecting the Defendants' Rights and Any Ensuing Conviction on Appeal

As the parties presented their cases at trial, Judge Kaufman kept in mind two audiences: the jury listening to the case and the courts of appeals that would review any judgment(s) of conviction. To be clear, if the defendants were acquitted, the government generally would not have the right to appeal.[236] There were a number of moments during the trial when Kaufman acted to protect the trial court record in anticipation of an appeal.[237]

The most notable instance occurred when the government arrested a potential witness, William Perl, for perjury during the trial.[238] Newspapers reported the arrest.[239] In fact, U.S. Attorney "Saypol told the New York Times that [Perl], who had been indicted for denying that he knew Julius Rosenberg and codefendant Morton Sobell, was expected to corroborate the testimony of David and Ruth Greenglass."[240] The publicity outraged the defense attorneys, who feared that jurors would see the articles and take them into account in their deliberations.[241] When trial resumed on the morning of March 15, Sobell's attorney

234. *Cf.* CANONS OF JUD. ETHICS Canon 17 (AM. BAR ASS'N 1924), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.pdf ("[A judge] should not permit private interviews, arguments or communications designed to influence his judicial action . . . .").

235. RADOSH & MILTON, *supra* note 11, at 428–30; *see An Open Letter to Judge Irving R. Kaufman*, *supra* note 19, at 146.

236. United States v. Scott, 437 U.S. 82, 91 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.").

237. *See, e.g.*, Transcript of Record, *supra* note 5, at 1165–66.

238. *Columbia Teacher Arrested, Linked to 2 on Trial as Spies*, N.Y. TIMES, Mar. 15, 1951, at 1, 12.

239. *Id.*

240. Snyder, *supra* note 103, at 900 (discussing front-page *New York Times* article, *Columbia Teacher Arrested Linked to 2 on Trial as Spies*).

241. *See* Transcript of Record, *supra* note 5, at 1087, 1180.

complained about the case being tried "in the newspapers" and requested a private, but on-the-record, conference.[242]

At one point, Kaufman said to one of Sobell's attorneys, "Will you keep your voice down?"[243] A reasonable reading of this exchange is that Kaufman was acting to ensure that the jury did not hear discussion of the news, which would have had the negative impact that the defendants were trying to avoid and could have resulted in the argument that the defendants had waived the issue of prejudicial publicity by bringing up Perl's arrest before the jury.[244] Subsequently, counsel did confer with Judge Kaufman.[245] However, none of the defense lawyers ever moved for mistrial or asked the court to determine whether any of the jurors had read or been influenced by the article.[246]

Earlier in the trial, during one of the most challenging parts of the prosecution's case, Manny Bloch took the unusual step of asking the court to impound and keep secret sketches made by David Greenglass of implosion lenses.[247] The sketches, made during the trial, were presented during David's direct testimony as copies of the drawings that he had given to Julius Rosenberg in 1945 and thus were critical evidence of the atomic secrets at the heart of the conspiracy.[248] Bloch's request supported the government's case that the sketches (still) contained vital national security secrets.[249] Saypol commented that it was "a rather strange request coming from the defendants."[250] Judge Kaufman welcomed it,

242. *Id.* at 1087–88.

243. *Id.* at 1087; *see* RADOSH & MILTON, *supra* note 11, at 244 (describing Kaufman cautioning Julius Rosenberg not to discuss William Perl while testifying on cross-examination).

244. RADOSH & MILTON, *supra* note 11, at 205–06.

245. Transcript of Record, *supra* note 5, at 1087.

246. RADOSH & MILTON, *supra* note 11, at 206. After the Rosenbergs were convicted and sentenced to death, they did not raise the issue of prosecutorial misconduct in connection with the arrest of Perl and the ensuing publicity on their direct appeal. *See generally* United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952). Later, in a federal habeas petition, they did raise the issue. Snyder, *supra* note 103, at 900–01. Although the Second Circuit called Saypol's statement to the press "wholly reprehensible," the court of appeals nevertheless upheld the district court judge's denial of the Rosenbergs' petition for relief, in substantial part because of defense counsel's failure to object to the prosecutor's conduct during the trial. *Id.*; United States v. Rosenberg, 200 F.2d 666, 670 (2d Cir. 1952); RADOSH & MILTON, *supra* note 11, at 206.

247. Transcript of Record, *supra* note 5, at 702.

248. *Id.*

249. *See* SIEGEL, *supra* note 4, at 88 (arguing that Bloch's "seconding the government's claim that Greenglass's sketch was a vital secret instead of an uneducated machinist's doodling backfired spectacularly").

250. Transcript of Record, *supra* note 5, at 703. Manny Bloch later said that he made the request in order to make a "grandstand play" to impress the jury with the patriotism of him

stating, "As a matter of fact, there might have been some question on appeal [had the government asked to impound the sketches]. I welcome the suggestion coming from the defense because it removes the question completely."[251] While this exchange illustrates a number of aspects of the trial, it is noted here to show Judge Kaufman's concern about how trial record would be viewed on appeal.

This Section has discussed two instances in which Judge Kaufman conducted the trial with an eye towards subsequent appeals if the defendants were convicted. One final example occurred during the testimony of Harry Gold. As the prosecution presented Gold's testimony, it introduced the fact that he had been a spy for the Soviet Union.[252] This point was not in dispute, as Gold previously had pleaded guilty to engaging in atomic espionage.[253] When Bloch objected to the testimony as conclusory, Kaufman engaged him in a colloquy to ensure that the record showed not only the nature of Bloch's objection but also that the prosecution's response to it would lead to detailed testimony about Gold's espionage activities—evidence that would strengthen the government's case.[254]

5. The Verdict

The *Rosenberg* trial lasted several weeks in March and concluded with the jury convicting all defendants, including Julius and Ethel Rosenberg and Morton Sobell, of conspiracy to commit espionage on

and his clients. RADOSH & MILTON, *supra* note 11, at 191. Technically, Bloch's request was not inconsistent with the defense he and his father were presenting at trial, which was a complete denial of any wrongdoing by their clients. *Id.* at 191–92. Nonetheless, the request helped the government navigate the conflict between protecting state secrets and ensuring that the defendants had a trial. *Id.* at 192–93. Morton Sobell's attorneys objected to the Blochs' proposed concessions. Transcript of Record, *supra* note 5, at 710–11, 720–21; *see* RADOSH & MILTON, *supra* note 11, at 190.

251. Transcript of Record, *supra* note 5, at 703; *see* RADOSH & MILTON, *supra* note 11, at 188.

252. Transcript of Record, *supra* note 5, at 1161.

253. *Extracts from Testimony Given by Harry Gold at Spy Trial*, N.Y. TIMES, Mar. 16, 1951, at 9 (mentioning Gold as a "confessed Soviet spy").

254. Transcript of Record, *supra* note 5, at 1161–70. At one point, Kaufman stated:

> I want the record to be clear that you objected to conclusions, you wanted to have each and every step which led to that conclusion, and in view of that objection and in view of your conference and in view of the statement made by Mr. Bloch on behalf of all counsel, I understand that counsel are asking for the steps which led to the conclusion.

Id. at 1165; *see* RADOSH & MILTON, *supra* note 11, at 210–11.

March 29.[255] Judge Kaufman thanked the jury for their service, adding, "My own opinion is that your verdict is a correct verdict, and what I was particularly pleased about was the time which you took to deliberate in this case."[256] The lawyers in the case thanked the jury as well; in his remarks, Manny Bloch also extended his "appreciation to the Court for its courtesies."[257]

In the ensuing decades, the *Rosenberg* case continued to be controversial.[258] The strongest argument in defense of Judge Kaufman's conduct would be that the jury reached the correct verdict on the evidence before it.[259] That is, the defendants received a fair trial and were correctly found guilty of conspiring to commit espionage.[260] Kaufman's former law clerks sounded this note in a 1954 article about the case:

> The fairness of the trial over which [Kaufman] presided was re-examined and upheld on numerous occasions, for in addition to sixteen applications in the district court, there were seven appeals to the Court of Appeals, seven applications to the Supreme Court, and two applications to the President for executive clemency. Although ordinarily a reviewing court will reverse the trial court only if the error committed below is deemed to be "substantial" and will dismiss minor or technical mistakes as "harmless error", because of the peculiar nature of this case, the Court of Appeals indicated that it would have reversed had any error been found. Of course, the conviction was affirmed.[261]

An American Bar Association subcommittee report completed in 1977, defending Kaufman's conduct in *Rosenberg* emphasized the same

255. Transcript of Record, *supra* note 5, at 2388–91. Decades later, a number of jurors discussed the case with a writer from *Esquire* magazine. Among other things, the article reported that:

> The jurors agreed from the start of their deliberations about the Rosenbergs' guilt. But one juror held out because he could not accept the possibility of a woman being sent to the electric chair. Because of that juror, the deliberations lasted nearly eight hours and went into a second day.

Morgan, *supra* note 7, at 105.

256. Transcript of Record, *supra* note 5, at 2390.

257. *Id.* at 2397; *see* United States v. Rosenberg, 195 F.2d 583, 592–93 (2d Cir. 1952).

258. Norman S. Beier & Leonard B. Sand, *The* Rosenberg *Case: History and Hysteria*, 40 A.B.A. J. 1046, 1046 (1954).

259. *See id.* at 1047.

260. *Id.* at 1046.

261. *Id.*

point.[262] According to the *New York Times*, the report stated: "While we recognize that this debate may rage endlessly . . . we are clear beyond doubt that there is ample evidence in the record to support the jury's verdict of guilt, the trial court's judgment of conviction and imposition of sentence and the various appellate courts' affirmances thereof."[263]

History has vindicated the jury's verdict to some extent. It no longer is disputed that Julius Rosenberg was a spy for the Soviet Union and organized the plot to obtain information about the atomic bomb for the Soviet Union.[264] It also is not disputed that Sobell spied for the Soviet Union, though he was not part of the atomic espionage conspiracy involving the Rosenbergs and the Greenglasses.[265] However, the case against Ethel Rosenberg was thin and problematic. She was indicted to pressure her husband to cooperate with the government's investigation of Soviet espionage in the United States.[266] Her conviction was based exclusively on the testimony of David and Ruth Greenglass.[267] Indeed, their testimony that Ethel typed up David's notes before they were delivered to a Soviet official provided the basis for Saypol's dramatic summation, asking the jury to convict her.[268] Decades later, David Greenglass admitted that this testimony was fabricated.[269] As the trial court judge, Kaufman was not responsible for the presentation of this flawed testimony. Nonetheless, as discussed in the next Part, Kaufman did not distinguish between the different degrees of culpability of husband and wife when sentencing the Rosenbergs.

III. *UNITED STATES V. ROSENBERG*: THE SENTENCING HEARINGS

After the jury convicted the defendants in late March, Judge Kaufman scheduled sentencing of the Rosenbergs and Sobell for a week later, on April 5.[270] At that time, under federal law, as the trial court

262. *Bar Group Backs Trial Judge*, N.Y. TIMES, Sept. 23, 1983, at B1.

263. *Id.* As the *New York Times* reports, the subcommittee report was not made available to the public after it was completed in 1977. *Id.*; *see* discussion *infra* Section V.B.

264. Valentine, *supra* note 169.

265. *Id.*

266. ROBERTS, *supra* note 4, at 264.

267. *Id.* at 291–96.

268. During his closing argument, Saypol singled out Ethel Rosenberg typing up David Greenglass's notes describing the atom bomb. Ethel, Saypol contended, "sat at that typewriter and struck the keys, blow by blow, against her own country in the interests of the Soviets." Transcript of Record, *supra* note 5, at 2291; *see* ROBERTS, *supra* note 4, at 372.

269. *See* McFadden, *supra* note 172.

270. *Rosenbergs Sentenced to Death for Spying*, HIST. (Apr. 2, 2021), https://www.history.com/this-day-in-history/rosenbergs-sentenced-to-death-for-spying.

judge, Kaufman possessed the sole authority to determine the sentence for the defendants.[271] The applicable espionage statute provided that a convicted defendant could be "punished by death or by imprisonment for not more than thirty years."[272]

As the public would learn decades later, Kaufman conferred with a number of government officials prior to the sentencing hearing.[273] In fact, even before the trial began, Kaufman apparently communicated to a senior Justice Department official that he was committed to sentencing the defendants to death should the evidence warrant that punishment.[274] Kaufman also conferred with two federal judges about the appropriate sentence during the week before the hearing, according to another FBI document.[275]

In addition, and most notably, Kaufman summoned Saypol, the lead prosecutor, to his chambers the day before the hearing and "asked for [his] views" on the sentences to be imposed.[276] Saypol said that he favored the death penalty for Julius and Ethel Rosenberg and a thirty year prison

271. *See* United States v. Rosenberg, 195 F.2d 583, 609 (2d Cir. 1952).

272. *Id.* at 603 (quoting 18 U.S.C. § 794(b)). The defendants had been convicted of a conspiracy that began in 1944 when the United States was at war. *See* Transcript of Record, *supra* note 5, at 2387. Under the law, it did not matter that the United States was not at war with the Soviet Union when the conspiracy began. *Rosenberg*, 195 F.2d at 603 n.21.

273. RADOSH & MILTON, *supra* note 11, at 277.

274. *Id.* According to Radosh and Milton: "The first indication that Judge Kaufman may have communicated off the record with an official of the Justice Department comes in AEC Chairman Gordon Dean's office diary for February 7, [1951,] a full month before the trial convened." *Id.* They elaborate that Dean noted that the chief of the Justice Department's criminal division had stated that "he talked to the judge" and that the judge "is prepared to impose [the death sentence] if the evidence warrants." *Id.* While this account is hearsay, Radosh and Milton note that Dean was a lawyer and therefore "it seems most unlikely that his diary entry was the result of a casual misunderstanding." *Id.* at 277, 428.

275. *Id.* at 278; *see* FBI Office Memorandum from Daniel M. Ladd to J. Edgar Hoover, Dir., FBI (Apr. 3, 1951) (on file with author). This memo reported that, according to Roy Cohn, Kaufman consulted with Judge Jerome Frank, who "indicated that he was against the death penalty for any of the defendants, but recommended that Judge Kaufman contact Judge Weinfeld of the District Court." FBI Office Memorandum from Daniel M. Ladd to J. Edgar Hoover, *supra*. The memo added that "[r]eportedly Weinfeld indicated he was in favor of the death penalty" for all three defendants. *Id.* It also reported that "Cohn related that Judge Kaufman personally favored sentencing Julius and Ethel Rosenberg to death and that he would give a prison term to Morton Sobell." *Id.* Judge Frank wrote the decision for the Second Circuit affirming the judgment of the district court in *Rosenberg*. *See infra* Section IV.A; SIEGEL, *supra* note 4, at 108 (noting that Kaufman "sounded out other judges," including Frank).

276. Letter from Irving H. Saypol, J., to Hon. Clarence M. Kelley, Dir., FBI (Mar. 13, 1975) (on file with author).

sentence for Sobell.[277] Kaufman also inquired about the position of the Justice Department and the FBI but Saypol did not know the views of their top officials.[278] Kaufman asked Saypol to go to Washington, D.C., that afternoon to learn them.[279] Saypol flew down on the next plane and learned that some senior officials at the Justice Department and the FBI—including Director J. Edgar Hoover—did not agree with his sentencing recommendations.[280] Significantly, there was disagreement as to whether Ethel Rosenberg, who had played a limited role in the conspiracy and was the mother of two young boys, should be sentenced to death.[281]

Saypol returned to New York City.[282] More than two decades later, he recounted what occurred when he saw Kaufman that same night at a bar association function.[283] Saypol informed Kaufman of the "Washington division" regarding the sentences for the defendants.[284] Kaufman then had Saypol call Peyton Ford, a senior Justice Department official. According to Saypol:

> It was at a public function that night that I phoned Mr. Ford in the presence of the judge who was attending the same event. Upon narrating to [Kaufman] the Washington division . . . I was then asked by the judge to refrain from making any recommendation for punishment the next day in the course of my closing statement at sentence.[285]

At the sentencing hearing the next day, Kaufman listened to arguments from the prosecution and defense before announcing the defendants' sentences.[286] Kaufman did not mention that he had conferred with Saypol or any other government official prior to the hearing.[287] To be clear: neither defense counsel nor any reviewing court was aware of

277. *See id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. RADOSH & MILTON, *supra* note 11, at 279–82; *see* GENTRY, *supra* note 35, at 424 ("[N]o one in the hierarchy of the FBI, including its director, favored a death penalty for Ethel.").
282. *See* Letter from Irving H. Saypol to Hon. Clarence M. Kelley, *supra* note 276.
283. *Id.*
284. *Id.*
285. *Id.*; *see also* RADOSH & MILTON, *supra* note 11, at 281; Transcript of Record, *supra* note 5, at 2447.
286. Transcript of Record, *supra* note 5, at 2401–47.
287. *Id.*

Kaufman's ex parte communications with government officials about the sentences to be imposed on the defendants.[288]

At the hearing, as indicated by his remarks to Saypol the night before, Kaufman stated that he did not want a recommendation from the government, explaining that he would not follow the regular practice here "because of the seriousness of this case and the lack of [precedent]."[289] He continued, "The responsibility is so great that I believe that the Court alone should assume this responsibility."[290]

Manny Bloch had presented a number of arguments intended to mitigate the magnitude of the Rosenbergs' actions.[291] For example, he noted that the conspiracy to deliver atomic secrets had occurred during World War II, when the Soviet Union was an ally of the United States.[292] Bloch also argued, based on a *Yale Law Journal* article, "that the Soviet Union would have perfected atomic weapons in due course, with or without the help of spies."[293] However, Kaufman rejected all of these arguments.[294] He stated that "this case is presented in a unique framework of history" with the United States engaged "in a life and death struggle with a completely different system."[295] The judge called the Rosenbergs' crime as "worse than murder" and said their actions "put[] into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb" and thereby caused "the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason."[296]

As to Ethel Rosenberg, Kaufman stated:

> The evidence indicated quite clearly that Julius Rosenberg was the prime mover in this conspiracy. However, let no mistake be made about the role which his wife, Ethel Rosenberg, played in this conspiracy. Instead of deterring him from pursuing this ignoble cause, she encouraged and assisted the cause. She was a mature woman, – almost three years older than her husband and

288. *Id.*
289. *Id.* at 2447.
290. *Id.*
291. RADOSH & MILTON, *supra* note 11, at 281.
292. Transcript of Record, *supra* note 5, at 2435–35a.
293. *Id.* at 2439–43; *see* RADOSH & MILTON, *supra* note 11, at 282.
294. Transcript of Record, *supra* note 5, at 2451–52.
295. *Id.* at 2449.
296. *Id.* at 2451–52; *see* William R. Conklin, *Atom Spy Couple Sentenced to Die; Aide Given 30 Years*, N.Y. TIMES, Apr. 6, 1951, at 1; RADOSH & MILTON, *supra* note 11, at 283–84.

> almost seven years older than her younger brother. She was a full fledged partner in this crime.[297]

Before announcing the sentence, Kaufman stated:

> What I am about to say is not easy for me. I have deliberated for hours, days and nights. I have carefully weighed the evidence. Every nerve, every fib[er] of my body has been taxed. I am just as human as are the people who have given me the power to impose sentence [sic]. I am convinced beyond any doubt of your guilt[]. I have searched the records – I have searched my conscience – to find some reason for mercy – for it is only human to be merciful and it is natural to try to spare lives. I am convinced, however, that I would violate the solemn and sacred trust that the people of this land have placed in my [hands were] I to show leniency to the defendants Rosenberg. It is not in my power, Julius and Ethel Rosenberg, to forgive you. Only the Lord can find mercy for what you have done.[298]

Kaufman then sentenced Julius and Ethel Rosenberg to death.[299] The *New York Times* reported the sentences on the front page.[300] When it came to Kaufman, the article stated he "plainly showed his burden of responsibility when he prepared to impose sentence," adding, "[i]n the last week he had a bit more than ten hours' sleep. Several times he went to his synagogue seeking spiritual guidance."[301] Kaufman had shared these personal details with reporters in a brief statement made after the hearing.[302]

The next day, Kaufman sentenced David Greenglass.[303] His attorney had asked for the hearing to take place the next week in order to distance Greenglass from the other defendants but Kaufman denied that

297. Transcript of Record, *supra* note 5, at 2453–54.

298. *Id.* at 2454.

299. *Id.*; Kaufman sentenced Sobell, who was not involved in atomic espionage, to thirty years in prison. *Id.* at 2461–62.

300. Conklin, *supra* note 296, at 1.

301. *Id.*

302. RADOSH & MILTON, *supra* note 11, at 285; *see* Goldstein, *supra* note 52 ("For guidance, Judge Kaufman left his law books, swept legal tradition from his mind . . . and turned to prayer. With spiritual adviser and in soul-searching sleepless nights, he debated his course.").

303. Transcript of Record, *supra* note 5, at 2463–94; *see* RADOSH & MILTON, *supra* note 11, at 286.

request.[304] At the hearing, despite an impassioned plea from his attorney that emphasized his cooperation with the government and his youth when he was involved in the conspiracy, Greenglass was sentenced to fifteen years in prison.[305]

By sentencing the Rosenbergs to death, Kaufman turned a sensational espionage trial into "one of the most controversial" cases "in American legal history."[306] Julius and Ethel were the first civilians to be executed for conspiracy to commit espionage and continue to be the only civilians ever to be executed for espionage during peacetime.[307] No other member of Julius Rosenberg's atomic espionage conspiracy was sentenced to death.[308] In fact, Klaus Fuchs, a leading British atomic scientist who turned over to Harry Gold "information . . . relat[ing] to the application of nuclear fission to the production of a military weapon" received a prison sentence of fourteen years from British authorities.[309]

Why did Kaufman sentence the Rosenbergs to death? One interpretation is that, as a former prosecutor and avowed anti-Communist, Kaufman aligned himself with the federal government, going so far as to act in a way that appeared to compromise his impartiality.[310] He conferred with government lawyers about the appropriate sentences for the defendants and then imposed the death penalty on Julius and Ethel Rosenberg to fully support the United States in what was viewed as a life-or-death struggle against the Soviet

304. ROBERTS, *supra* note 4, at 382.

305. Transcript of Record, *supra* note 5, at 2494; *see* RADOSH & MILTON, *supra* note 11, at 285–87; ROBERTS, *supra* note 4, at 376–85. After sentencing Greenglass, Kaufman went on vacation in Palm Beach, Florida with Thomas Dodd, "an old colleague who later became a congressman." Lehman, *supra* note 2, at 86.

306. MORRIS, *supra* note 90, at 159 (listing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. AMEND. XIV and Commonwealth v. Sacco, 151 N.E. 839 (Mass. 1926) as other controversial cases along with United States v. Rosenberg, 195 F.2d 583 (2d. Cir. 1952)).

307. *Execution of the Rosenbergs - Archive, 1953*, GUARDIAN (June 20, 1953, 11:01 AM), https://www.theguardian.com/world/1953/jun/20/usa.fromthearchive. The United States never formally declared war during the Korean conflict. JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 1 (2014) (the last formal declaration of war by the United States occurred in 1941 during WWII).

308. RADOSH & MILTON, *supra* note 11, at 284–88.

309. *Extracts from Testimony Given by Harry Gold at Spy Trial*, *supra* note 253, at 9; *see also* Steve Case, *An Interview with Nancy Thorndike Greenspan*, WASH. INDEP. REV. BOOKS (June 30, 2020), https://www.washingtonindependentreviewofbooks.com/index.php/features/an-interview-with-nancy-thorndike-greenspan.

310. RADOSH & MILTON, *supra* note 11, at 288; *see also* SIEGEL, *supra* note 4, at 104–05, 121–22.

Union.[311] In 1951, with the ongoing Korean War just one front in the Cold War, a liberal federal judge could view Communist spies who shared atomic secrets with the Soviet Union as traitors who deserved the maximum punishment.[312]

There are other explanations for Kaufman's actions in the Rosenbergs' case, including personal ambition.[313] Regardless of one's views on whether Kaufman's ex parte contacts violated professional ethics rules in 1951 when he sentenced the defendants, the fact that such communications occurred is inconsistent with how Kaufman presented himself at the hearing. In his remarks to journalists after the hearing, Kaufman portrayed himself as a solitary judge who had prayed at synagogue for guidance before delivering the sentence.[314] According to this interpretation, Kaufman cast himself as the anti-Communist hero of the drama—as the federal judge solely responsible for punishing the defendants for their atomic treachery.[315] To support this impression, Kaufman refrained from asking the prosecution for a recommendation in order to emphasize that the sentencing decision was his alone.[316] This request also prevented the record from reflecting that there was not governmental consensus for executing Ethel Rosenberg.[317] The Rosenbergs' sentencing hearing seems to have been the moment Kaufman was waiting for ever since he had lobbied to try the case.

Still another interpretation holds that Kaufman and the principal prosecutors were Jewish, as were the Rosenbergs and their lawyers, the Blochs.[318] According to this view, Kaufman's zeal was motivated by the desire to show that he was a loyal American who would not be swayed by, or could not forgive the treachery of, Jewish defendants convicted of being disloyal to the United States.[319] Kaufman did not have the self-confidence of, for example, Hugo Black or Earl Warren, well-known Christian judges of the same era.[320] To the extent this last interpretation is viable, it must be noted that public opinion supported the death

311. *See id.* at 288–89.
312. *Id.* at 289.
313. *See* SIEGEL, *supra* note 4, at 105.
314. *See* RADOSH & MILTON, *supra* note 11, at 284–85.
315. *Id.* at 287–88.
316. *Id.* at 289.
317. *See supra* note 280 and accompanying text.
318. *See* STUART SVONKIN, JEWS AGAINST PREJUDICE: AMERICAN JEWS AND THE FIGHT FOR CIVIL LIBERTIES 156–57 (1997).
319. *Id.*
320. *See, e.g.*, ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN (1997); ROGER NEWMAN, HUGO BLACK: A BIOGRAPHY (1994).

penalty,[321] and mainstream Jewish organizations defended Judge Kaufman's conduct in the case.[322] None of the various interpretations of Kaufman's actions—ardent Cold Warrior, ambitious judge, assimilationist Jew—are mutually exclusive.

In the ensuing decades, Kaufman defended his decision to sentence the Rosenbergs to death on the grounds that he had no choice but to impose the maximum penalty.[323] This is not correct. It is true that under the applicable law, Kaufman could not sentence the Rosenbergs to life imprisonment.[324] It also is true that had the Rosenbergs received a prison sentence for the maximum term of thirty years, either or both could have been released after serving substantially less than the full term.[325] Kaufman had to evaluate these facts along with the trial record and the jury's guilty verdict when sentencing the couple. Nearly a decade after the trial, Kaufman described sentencing as the trial court "judge's most important and difficult task."[326] Kaufman exercised his legal authority

321. George Gallup released a poll in January 1953 showing that seventy-three percent of those polled approved of the death penalty for persons convicted of treason. George Gallup, *Public Approves of Death Sentence for U.S. Traitors*, PUB. OP. NEWS SERV., Jan. 30, 1953. While the question did not specifically mention the Rosenbergs, the poll was conducted against the backdrop of the Rosenbergs' appeals. *See id.* Other indicia of public support for the death sentences include a *Chicago Daily News* "Man-on-Street" report that three out of four of those polled said the death penalty was justified. *Sentence Was Just, 3 Out of 4 Say Here*, CHI. DAILY NEWS, Apr. 5, 1951. The *Los Angeles Times* supported the death penalty for the Rosenbergs in an editorial published the day after they were sentenced. *Death for the Atom Spies*, L.A. TIMES, Apr. 6, 1951. Another example: A prominent rabbi publicly supported the death penalty for the Rosenbergs. In April, the *New York Times* reported that one rabbi in the city commended the sentence in his sermon, saying that "Judge Kaufman has done the American people a great service in making it clear that each of us must search his own conscience as did the judge before pronouncing the verdict." *Death for Treason Is Held Justified*, N.Y. TIMES, Apr. 8, 1951, at 23 (reporting that "Rabbi [Rosenblum] praises Judge Kaufman's [s]entencing of Soviet's Atomic Spies"). At the time, Rabbi William Rosenblum led a Reform synagogue on the Upper West Side of Manhattan. *See Rabbi William Rosenblum Dies; With Temple Israel Since 1930*, N.Y. TIMES, Feb. 10, 1968, at 33. The *New York Times* described him as "an outspoken advocate of interfaith harmony and racial justice" in his obituary. *Id.*

322. *See* SVONKIN, *supra* note 318, at 156–57 (noting that Jewish leaders "were united in their resolve to avoid casting doubt on the professional competency of Jewish jurists").

323. *See, e.g.*, Ralph Blumenthal, *Jurists Gather to Honor Judge Kaufman*, N.Y. TIMES, Nov. 2, 1974, at 36 ("In the face of some recent critical reassessment of the country's first peacetime executions for espionage, Judge Kaufman has always maintained that given the law and the circumstances of the case, he was legally bound to impose death sentences."); *see also* Beier & Sand, *supra* note 258, at 1049.

324. *See* Beier & Sand, *supra* note 258, at 1049.

325. *Id.*

326. Irving R. Kaufman, *Sentencing: The Judge's Problem*, ATLANTIC (Jan. 1960), https://www.theatlantic.com/magazine/archive/1960/01/sentencing-the-judges-problem/657710/.

over the Rosenbergs to sentence them to death.[327] In doing so, Kaufman made it clear that that Soviet spies would pay the ultimate price for their espionage and laid the groundwork for what would become a worldwide political affair in the first decade of the Cold War between the United States and the Soviet Union.[328] And he made the defining decision of his judicial career.

IV. *UNITED STATES V. ROSENBERG*: THE AFTERMATH

A. *The Appeals*

With the trial and sentencing completed, the appeals began. The most important was the defendants' direct appeal to the Second Circuit.[329] The Rosenbergs were optimistic about their prospects on appeal, especially with the Judge Jerome Frank on the panel.[330] Frank, a former New Deal lawyer who had taught at Yale Law School, was known to be thoughtful, liberal, and fair.[331] The other panel judges were Thomas Walter Swan, a former Yale Law School dean who had been appointed by President Calvin Coolidge, and Harrie B. Chase, a Vermont lawyer and judge who also had been appointed to the Second Circuit by Coolidge.[332] However, the Second Circuit rejected all of the defendants' claims in a thorough and thoughtful decision written by Frank.[333] Although he had had written perceptively about judicial procedure and the limits of the trial process, even expressing skeptical views in some

327. Berger, *supra* note 2, at D10.

328. Kenneth C. Petress, A Judicial Decision Under Pressure: A Dramaturgical Analysis of the Rosenberg Case (May 1988) (Ph.D. dissertation, Louisiana State University), https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=5530&context=gradschool_disstheses.

329. *See* RADOSH & MILTON, *supra* note 11, at 319 ("If any institution in the land could be expected to be immune from the [political] pressures of the time, however, it was the United States Court of Appeals, Second Circuit.").

330. *Id.* Prior to the Second Circuit's decision on this appeal, Julius Rosenberg was respectful of Frank in the letters he wrote to Ethel while they were imprisoned. *Id.* at 321. Subsequently, he dismissed Frank as a "so-called 'liberal.'" *Id.* To read the Rosenbergs' correspondence while in prison, see generally MICHAEL MEEROPOL, THE ROSENBERG LETTERS: A COMPLETE EDITION OF THE PRISON CORRESPONDENCE OF JULIUS AND ETHEL ROSENBERG (1994).

331. *See* ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 25–30 (1985).

332. Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 167 (1947); *Chase, Harrie Brigham*, FED. JUD. CTR., https://www.fjc.gov/history/judges/chase-harrie-brigham (last visited Nov. 30, 2022).

333. *See* United States v. Rosenberg, 195 F.2d 583, 590–611 (2d Cir. 1952).

writings, Frank deferred to Kaufman, the trial court judge, on evidentiary and procedural matters.[334]

The Rosenbergs' most promising contention, Frank suggested, was a legal argument that an appellate court should have some authority to modify the trial court's sentence.[335] However, appellate courts lacked this discretion under existing law.[336] Frank's careful review of the applicable law and cases as well as criticism of the upper courts' lack of "power to reduce harsh sentences" was directed to the Supreme Court, which could modify the law through a new interpretation of the applicable federal statute.[337] Ultimately, Frank concluded, "As matters now stand, this court properly regards itself as powerless to exercise its own judgment concerning the alleged severity of the defendants' sentences."[338] Despite the invitation to reconsider this question of law, the Supreme Court denied the defendants' petition for certiorari seeking review of the Second Circuit's judgment affirming the convictions and sentences.[339]

Though many appeals would follow, the Second Circuit's decision on the direct appeal sealed the defendants' fates, putting Julius and Ethel Rosenberg on the path to the electric chair.[340] As the cases wended their

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334. *See supra* Part II.

335. *See Rosenberg*, 195 F.2d at 604–07.

336. *Id.* at 604.

337. *Id.* at 605. This view is supported by Patricia Wald, who served as Judge Frank's law clerk the year *Rosenberg* was decided by the Second Circuit. In her words:

> Many historians thought there was enough evidence to convict and Frank and I agreed but he felt strongly that the death penalty was inappropriate . . . . Frank wrote a long and passionate opinion urging the Supreme Court to review (and implicitly in my view to reverse) the death sentences, which ultimately of course didn't happen.

ORAL HISTORY OF PATRICIA M. WALD 39–40 (June 5, 19 & 23, 2006), https://stacks.stanford.edu/file/zj195yf5579/WaldP_Transcript.pdf. Wald later became a judge on the United States Court of Appeals for the D.C. Circuit. *See* Adam Bernstein, *Patricia Wald, Pathbreaking Federal Judge Who Became Chief of D.C. Circuit, Dies at 90*, WASH. POST (Jan. 12, 2019, 12:10 PM), https://www.washingtonpost.com/local/obituaries/patricia-wald-pathbreaking-federal-judge-who-became-chief-of-dc-circuit-dies-at-90/2019/01/12/6ab03904-1688-11e9-803c-4ef28312c8b9_story.html.

338. *Rosenberg*, 195 F.2d at 607.

339. *Rosenberg*, 195 F.2d at 583, *cert. denied*, 344 U.S. 838 (1952).

340. *See generally* Rosenberg v. United States, 346 U.S. 273 (1953). The Supreme Court provided the following summary of the defendants' appeals: "One week" after the Supreme Court denied the defendants' petition for rehearing, "a motion was filed in the District Court under 2255 of the Judicial Code [28 U.S.C. § 2255] to vacate the judgment and sentence." *Id.* at 277–78. The district court denied this motion, the court of appeals affirmed, and the Supreme Court denied certiorari on May 25, 1953. *Id.* at 278–79. On the same day, the Supreme Court vacated a stay entered by the court of appeals. *Id.* at 279. Then "[o]n the

way through the legal system, the defense of the Rosenbergs moved from the courtroom to the political arena.[341] Some saw the defendants as victims of a frame-up.[342] Others objected to the death penalty.[343] The case was controversial and divisive. With the Cold War at a hot point—the Korean War, referred to by Judge Kaufman at the sentencing, still was being fought—many people considered the Rosenbergs' atomic treachery unforgivable.[344] The closer the Rosenbergs came to being executed, the more frenzied the political pleas became, with protests held worldwide.[345] President Dwight Eisenhower, elected in 1952, turned down their appeals for clemency.[346]

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same day, a petition for a stay, pending the consideration of a petition for rehearing, to be filed by June 9, 1953, was denied" by Chief Justice Vinson. *Id.*

> A petition for rehearing was filed and was pending during the last week of the 1952 Term of the Court, the adjournment of the Term having been announced for June 15, 1953. In the meantime execution of the sentence was set for the week of June 15th by the District Judge, and two further motions under 2255 to vacate judgment and sentence were denied in District Court, one on June 1, 1953 and another on June 8, 1953. Those denials were affirmed by the Court of Appeals on June 5 and June 11, 1953, respectively. In addition to those two motions under 2255, a petition was also presented to the Court of Appeals asking that a writ of mandamus be issued, directing the sentencing judge to resentence the defendants. On June 2, 1953, the Court of Appeals denied relief by way of mandamus. Thus, as of June 12, 1953, three decisions had been entered by the Court of Appeals [in] collateral attacks upon the sentence, all three attacks having been instituted by the defendants after our denial of certiorari on May 25, 1953, as to the first motion under 2255.

Id. at 277–80. Citations to the judicial decision discussed in the preceding text are in the footnotes of the Supreme Court's decision from which this summary and the quotations are taken.

341. *See, e.g.*, RADOSH & MILTON, *supra* note 11, at 322–30 (describing efforts of the National Committee to Secure Justice in the Rosenberg Case); *id.* at 341 (noting "[t]he flood of articles, letters, and telegrams [in support of the Rosenbergs], the reports of Rosenberg defense committees springing up in foreign countries" and other measures of support for the couple); *id.* at 347 ("Seemingly overnight, the whole world rose in protest against the death sentences that had been imposed on Julius and Ethel Rosenberg.").

342. Ronald Radosh, *Case Closed: The Rosenbergs Were Soviet Spies*, L.A. TIMES (June 4, 2015, 5:03 PM), https://www.latimes.com/la-oe-radosh17-2008sep17-story.html.

343. *Id.*

344. *See* Freeman, *supra* note 39.

345. RADOSH & MILTON, *supra* note 11, at 347.

346. Glass, *supra* note 38; Arthur Krock, *Case of the Rosenbergs Will Long Be Debated*, N.Y. TIMES, June 21, 1953, at E3; *see* Lee O. Lacy, *Executive Decision: The Clemency Requests of Julius and Ethel Rosenberg*, 36 AM. INTEL. J. 99, 106 (2019) ("From Eisenhower's point of view, if Ethel Rosenberg was permitted to live and eventually freed, the Soviets would recruit future spies who were female. Moreover, Eisenhower did not want to discount the negative psychological effect of clemency on the U.S. justice system.").

In June 1953, there was a last-ditch appeal to the Supreme Court that raised a substantial new legal claim as to whether the defendants had been sentenced under the proper federal statute.[347] Essentially the Rosenbergs claimed that they had been incorrectly sentenced to death under the Espionage Act of 1917.[348] They argued that their conduct was governed by the more specific and recently-enacted Atomic Energy Act of 1946.[349] Under the latter statute, the death sentence could be imposed only upon the jury's recommendation.[350] Accordingly, the Rosenbergs argued Judge Kaufman's death sentence should be vacated.[351] The story of this particular appeal has been told elsewhere in detail and will not be repeated here. Here, it suffices to note—and this still is extraordinary nearly seventy years later—that the Supreme Court rendered its final decision on this claim just a day after it heard three hours of argument on June 19, 1953.[352] The Rosenbergs were executed later that day at Sing Sing, at 8:00 PM.[353] Originally the execution was scheduled for 11:00 PM.[354] Because June 19 was a Friday, it was moved up to 8:00 PM to avoid executing the Rosenbergs on the Sabbath.[355]

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347. United States v. Rosenberg, 346 U.S. 273, 288–89 (1953).

348. *Id.* at 293 (Clark, J., concurring).

349. *Id.*

350. *Id.* at 294.

351. *Id.*

352. *Id.* at 273 (majority opinion). Regarding the Supreme Court's handling of this final appeal, see generally Snyder, *supra* note 103. As Professor Snyder elaborates:

> Vinson violated judicial ethics by holding a secret, ex parte meeting with Attorney General Herbert Brownell in an effort to stop Douglas [from entering a last-minute stay]. Vinson also flouted the Court's internal procedures, calling a special term without a vote of all nine Justices and vacating a single Justice's stay order without sending the issue to the lower courts. He was determined to keep the executions on schedule and disregarded the ramifications on the Court as an institution or on the public's perception of the case.

Id. at 935. See generally Michael E. Parrish, *Revisited: The* Rosenberg *"Atom Spy" Case*, 68 UMKC L. REV. 601 (2000), for further discussion on the decision. Professor Parrish also wrote an earlier law review article that criticized Justice Douglas's conduct on various petitions before the Supreme Court. *See generally* Parrish, *supra* note 103. Parrish's article drew a detailed response from one of Douglas's former law clerks defending the Justice's votes in the case. *See generally* William Cohen, *Justice Douglas and the* Rosenberg *Case: Setting the Record Straight*, 70 CORNELL L. REV. 211 (1985).

353. *See* ROBERTS, *supra* note 4, at 11.

354. *Id.* at 10.

355. RADOSH & MILTON, *supra* note 11, at 413. Arthur Miller, author of "The Crucible" and other plays, commented afterwards, "[t]hey were to be killed more quickly than planned . . . to avoid any shadow of bad taste." ROBERTS, *supra* note 4, at 11. Roberts provides an account of the conversation between Sing Sing's Jewish chaplain, Rabbi Irving Koslowe, and Judge Kaufman in which the rabbi asked for the execution to be postponed until after the Sabbath. *Id.* According to Koslowe, the judge "said the president wanted them to be

As the trial judge whose decisions were being appealed, Kaufman did not participate in any of the appellate proceedings.[356] That did not prevent him from expressing his views to the FBI about the case on a number of occasions. Notably, according to an FBI memo dated February 11, 1953, Kaufman talked to the Special Agent in Charge ("SAC") in New York to urge that the government "push the matter vigorously" so that the case not be held over for the Supreme Court's fall 1953 term.[357]

In the aftermath of the Rosenbergs' deaths, with the case concluded, Kaufman became the subject of steady press coverage. A *New York World-Telegram* article published the day after the executions described the challenge for Kaufman and his family as it "set about the task today of trying to pick up the threads of a normal life."[358] It described the pressures experienced by the judge and his family, including threatening phone calls to the family home, unsolicited comments from strangers, and the unanticipated pleasure of "more time to pal with" his sons.[359] The article featured quotes from Helen Kaufman and clearly was written with the cooperation of Judge Kaufman.[360] Articles on the opinion pages celebrated Judge Kaufman for his courage and commitment to "the Law."[361] Newspapers wrote about Kaufman's visits for vacation or speaking engagements.[362] Kaufman kept track of the press coverage—as

executed" and Kaufman concluded the conversation by saying, "Rabbi . . . you do your job. I'll do mine." *Id.*

356. *See* RADOSH & MILTON, *supra* note 11, at 319–34.

357. FBI Office Memorandum from A.H. Belmont to Director (Feb. 19, 1953) (on file with author).

358. Frederic Woltman, *Weighty Shadow Lifts from Kaufmans' Life*, N.Y. WORLD-TELEGRAM, June 20, 1953.

359. *Id.*

360. *See id.*

361. *See The Triumph of Law*, N.Y. DAILY MIRROR, June 22, 1953 (editorial commending Kaufman "as a man of unfailing integrity to whom the law is a devotion as it is his career"); George E. Sokolsky, *Judge Kaufman, Servant of the Law*, CHI. AM., June 25, 1953, at 23 ("As I happen to know, Judge Kaufman is a man of deeply religious sensibilities, and therefore it must have been doubly difficult for him to order the death of any human being.").

362. *See Atom-Spy Case Judge Here*, *supra* note 13; *Kaufman Stresses Right to Counsel*, N.Y. TIMES, Nov. 15, 1953, at 69 (describing speech "at a dinner meeting of the Buffalo Lawyers Club"); *Noted Jurist Guest Here*, HARTFORD TIMES, Sept. 21, 1954 ("Federal Judge Irving R. Kaufman, famous as presiding jurist at the . . . Rosenberg treason trial, was guest at a party held by Rep. Thomas Dodd at the congressman's West Hartford home."). All of these articles can be found in the LOC scrapbooks and copies are on file with the author. *See supra* note 1.

noted earlier, he retained a clipping service—and was sensitive to criticism of the case.[363]

B. Judge Kaufman's Quest for Appointment to the Second Circuit

1. Passed Over in the 1950s

While Kaufman continued to serve on the district court after *Rosenberg*, his quest for promotion and acclaim was shown in his efforts for appointment to the Second Circuit, the federal appeals court for New York, Connecticut, and Vermont.[364] In 1955, a few newspapers recommended that Kaufman be appointed to fill a vacancy on the court, but President Eisenhower nominated J. Edward Lumbard, Jr. for that seat.[365]

In January 1957, Jerome Frank died unexpectedly, creating a vacancy on the Second Circuit.[366] Kaufman enjoyed the support of

363. After the *New York Times* published an article in 1954 discussing a *Columbia Law Review* article criticizing certain aspects of the courts' handling of the *Rosenberg* case—most notably the haste with which the Supreme Court decided the Rosenbergs' final appeal—Kaufman wrote a letter to the newspaper's publisher saying that "more care should have been taken in reporting, so that those who fan the fire of communist propaganda, would not have additional fuel." Letter from Irving R. Kaufman, Dist. J., S. Dist. of New York, to Arthur Hays Sulzberger, Publisher, New York Times (Mar. 9, 1954) (on file with the New York Public Library, Arthur Hays Sulzberger Papers, Manuscripts and Archives Division). Sulzberger turned the letter over to Orvil Dryfoos, his assistant (and son-in-law), who then gave Kaufman's letter to Turner Catledge, the newspaper's managing editor. Letter from Arthur Hays Sulzberger, Publisher, New York Times, to Orvil Dryfoos, Assistant, New York Times (Mar. 10, 1954) (on file with author); Letter from Orvil Dryfoos, Assistant, New York Times, to Turner Catledge, Managing Ed., New York Times (Mar. 10, 1954) (on file with author). Catledge wrote a reply to Kaufman, essentially defending the original article as there was no "error in any matter of fact." Letter from Turner Catledge, Managing Ed., New York Times, to Irving R. Kaufman, Dist. J., S. Dist. of New York (Mar. 12, 1954) (on file with author). As discussed in this Article, Kaufman sought attention from the *New York Times* over the course of his career. *See, e.g.*, *infra* Section V.A.

364. *See* Letter from Irving R. Kaufman to Arthur Hays Sulzberger, *supra* note 363; *About the Court*, U.S. CT. OF APPEALS FOR THE SECOND CIR. (May 21, 2019), https://www.ca2.uscourts.gov/about_the_court.html.

365. *See, e.g.*, *Two First-Rate Judges*, N.Y. HERALD TRIB., May 6, 1955, at 14 (recommending Lumbard and Kaufman for appointment to the Second Circuit). President Eisenhower previously had appointed Lumbard to serve as the U.S. Attorney for the Southern District of New York. *Lumbard Named to Bench as Harlan Successor Here*, N.Y. TIMES, May 14, 1955, at 1. Though there were two vacancies on the Second Circuit at the time, the other nomination went to Sterry R. Waterman, a judge from Vermont. *Id.*

366. GUNTHER, *supra* note 111, at 648.

Senators Estes Kefauver and Styles Bridges and was "a major candidate" for the seat.[367] The *New York Times* reported that:

> One of the main arguments being used in favor of Judge Kaufman is that his promotion would constitute an expression of Presidential and Senatorial approval for his conduct of the Rosenberg trial. During the trial and since the execution of the two convicted spies, he has been under heavy attack from left-wing groups.[368]

However, President Eisenhower appointed Leonard Moore, the United States Attorney for the Eastern District of New York, who had taken the position with the understanding that he would be appointed to the bench.[369] Kaufman's elevation was opposed by Justice Felix Frankfurter and Judge Learned Hand, a distinguished senior judge on the Second Circuit.[370] "[A]long with others," they "wanted no part of the claim of Kaufman supporters that his promotion would signal approval of the death sentences for [the Rosenbergs]."[371]

Shortly after Moore was confirmed, Attorney General Herbert Brownell Jr. resigned, though not before apparently making a commitment to Kaufman that he would receive the next nomination.[372] Subsequently, Judge Harold Medina took senior status in early 1958, creating another vacancy.[373] Once again, Kaufman was a leading candidate.[374] Among his strongest supporters was Representative Emanuel Celler, a Democratic congressman from Brooklyn.[375] The other

367. *Id.* at 648–49; *see* BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 330–38 (1983).

368. *Big U.S. Court Job Hotly Contested*, N.Y. TIMES, Feb. 18, 1957, at 16.

369. GUNTHER, *supra* note 111, at 649; DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA 73–74 (2012).

370. DORSEN, *supra* note 369, at 74.

371. *Id.* In private correspondence, Justice Felix Frankfurter once wrote, "I despise a judge who feels God told him to impose a death sentence," adding "I am mean enough to try to stay here long enough so that K will be too old to succeed me." *Irving R. Kaufman, Judge in the Rosenberg, Dies at 81*, ASSOCIATED PRESS (Feb. 3, 1992), https://apnews.com/article/1ba425db680928c7168ca9c771869202; *see also* SIEGEL, *supra* note 4, at 115.

372. DORSEN, *supra* note 369, at 74.

373. *Id.* Medina continued to hear cases until 1980. J.Y. Smith, *Harold R. Medina, 102, Dies*, WASH. POST (Mar. 17, 1990), https://www.washingtonpost.com/archive/local/1990/03/17/harold-r-medina-102-dies/36851cac-0e26-4597-9432-e6185f3964d6/.

374. DORSEN, *supra* note 369, at 74.

375. Anthony Lewis, *Celler Pressing U.S. Over Judge*, N.Y. TIMES, June 2, 1958, at 16.

leading candidate was Henry Friendly, a brilliant partner in a Wall Street law firm, who had the strong support of Judge Hand.[376] As the two men and their advocates jockeyed for the nomination, Kaufman proposed to Friendly through an intermediary that he get this one.[377] In exchange, Kaufman would support the nomination of Friendly to succeed Judge Carroll C. Hincks, a Second Circuit judge due to take senior status.[378] According to his biographer, "Friendly's reaction was that a '. . . five-year-old' would see through the ruse, since Hincks's successor obviously would be from Connecticut."[379] Eisenhower nominated Friendly in March 1959; he was confirmed by the Senate later that year in September.[380]

Twice denied appointment to the Second Circuit, Kaufman continued to serve on the district court, where he presided over two other significant cases. One was a criminal trial involving an alleged organized-crime conspiracy.[381] The other was a school desegregation case.[382] As to the criminal case: in November 1957, more than sixty members of the Mafia, many of them leading figures, gathered at a private home in a small town near Binghamton, New York.[383] They were arrested by federal, state, and local law enforcement officials.[384] Known as the Apalachin meeting,[385] after the town where the meeting was held and the arrests occurred, it

376. GUNTHER, *supra* note 111, at 649–52; DORSEN, *supra* note 369, at 72. Hand wrote a letter to President Eisenhower that was published in the *New York Times* endorsing Friendly, stating, "I think there have been not more than two occasions during the long period I have served as a judge when I have felt it permissible to write a letter in favor of anyone for judicial appointment." DORSEN, *supra* note 369, at 75.

377. DORSEN, *supra* note 369, at 75. Dorsen reports that Kaufman met with Hand to seek his support for the appointment. *Id.* at 74. "Hand," however, "concerned that Kaufman was there to seek his endorsement, maneuvered to prevent him from asking. He told his clerk, Ronald Dworkin, to remain in the room." *Id.* Ultimately, "Kaufman was unable to solicit Hand to support his candidacy." *Id.*

378. *Id.* at 75–76.

379. *Id.* at 75.

380. *Id.* at 75–77.

381. *See* United States v. Bonanno, 177 F. Supp. 106, 110 (S.D.N.Y. 1959).

382. *See* Taylor v. Bd. of Educ. of City Sch. Dist. of New Rochelle (*Taylor I*), 191 F. Supp. 181, 182 (S.D.N.Y. 1961); Taylor v. Bd. of Educ. of City Sch. Dist. of New Rochelle (*Taylor II*), 195 F. Supp. 231, 232 (S.D.N.Y. 1961).

383. *See Sixty-Two Top Mafia Leaders Were Seized in the Apalachin Meeting in 1957*, N.Y. DAILY NEWS (Nov. 13, 2015, 12:00 PM), https://www.nydailynews.com/news/crime/62-mafia-members-seized-upstate-ny-1957-article-1.2428519 (reprinting Howard Wantuch & Sidney Kline, *Upstate Raid Collars Sixty-Two Mafia Big Shots from Coast to Coast*, N.Y. DAILY NEWS, Nov. 15, 1957, at 2).

384. Wantuch & Kline, *supra* note 383, at 2.

385. *See* Justin Peters, *On This Day in 1957, The FBI Finally Had to Admit That the Mafia Existed*, SLATE (Nov. 14, 2013, 3:26 PM), https://slate.com/news-and-politics/2013/11/apalachin-meeting-on-this-day-in-1957-the-fbi-finally-had-to-admit-that-the-mafia-existed.html.

still resonates in popular culture today as the moment when the general public learned about the Mafia.[386]

No shots were fired at the meeting or during the arrests, however.[387] In fact, none of the individuals who were arrested were carrying guns or any weapons at all.[388] It was just a meeting. Twenty individuals who attended the meeting were convicted for "conspiring to obstruct justice and commit perjury by giving, before federal grand juries, false and evasive testimony regarding [the Apalachin meeting]."[389] They went to trial before Judge Kaufman, were convicted after a lengthy trial, and fifteen of them received the maximum sentence of five years.[390] The case received extensive news coverage.[391] However, on appeal, the convictions were reversed because the Second Circuit held that the government "had not proved criminality in the meeting."[392]

In addition to *Rosenberg* and the Apalachin criminal trial, Judge Kaufman's other notable case as a district court judge involved desegregation of a public school district in New Rochelle.[393] The case was noteworthy for a number of reasons. Even though the Supreme Court had declared segregation in public schools unconstitutional in 1954, the

386. *See id.*; John Patterson, *Mob Mentality*, GUARDIAN (Apr. 21, 2006, 7:04 PM), https://www.theguardian.com/film/2006/apr/22/mafia (noting that in the film *Goodfellas*, the narrator orients the viewer by stating that "[i]t was a glorious time, before Appalachin [sic]").

387. *See* Emanuel Perlmutter, *Apalachin Story Still Unresolved Mystery*, N.Y. TIMES, Dec. 22, 1957, at 98.

388. *Id.*

389. United States v. Bufalino, 285 F.2d 408, 410 (2d Cir. 1960) (citations omitted) ("Russell Bufalino and nineteen co-defendants appeal from judgments of conviction in the Southern District of New York for conspiring to obstruct justice and commit perjury by giving, before federal grand juries, false and evasive testimony regarding a gathering attended by them and at least 39 others at the home of Joseph Barbara, Sr., in Apalachin, New York, on November 14, 1957."); *see 20 Apalachin Delegates Are Convicted; Officials Hail 'Intelligent' Verdict*, TEL., Dec. 19, 1959.

390. Emanuel Perlmutter, *Apalachin Men Sentenced; 15 Get Maximum 5 Years*, N.Y. TIMES, Jan. 14, 1960, at 1.

391. *See, e.g.*, Emanuel Perlmutter, *Judge Upholds Apalachin Raid*, N.Y. TIMES, Dec. 3, 1959, at 1; *Kaufman Rejects Apalachin Pleas*, N.Y. TIMES, Oct. 1, 1959, at 22. In his concurring opinion joining the Second Circuit's decision reversing the defendants' convictions, Judge Charles Clark commented that "[f]rom its inception this case was given unusual and disturbing publicity in newspapers, journals, and magazines; and this unfortunate feature has persisted up to this date, with even the prosecutors indulging in highly colored accounts while the case has been pending on appeal." *Bufalino*, 285 F.2d at 420 (Clark, J., concurring).

392. Berger, *supra* note 2, at D10; *see Bufalino*, 285 F.2d at 411–12 (explaining that "evidence was insufficient to prove the crime charged" for two reasons).

393. *See Taylor I*, 191 F. Supp. 181, 198 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2d Cir. 1961); *Taylor II*, 195 F. Supp. 231, 240–41 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2d Cir. 1961).

ensuing cases involved public schools in the south.[394] The New Rochelle case was the first litigation after *Brown v. Board of Education* involving school desegregation in a northern city.[395] Kaufman moved promptly and decisively in ruling on the plaintiffs' claims and by entering a decree that would remedy "a racially segregated school" that had been "deliberately and intentionally created and maintained" by the school board.[396] The Second Circuit affirmed Kaufman's judgment in the case.[397] The court concluded that the "crucial finding" of deliberate racial segregation was supported the record, and thus, upheld the district court's remedial decree, commenting that it was "noteworthy for its moderation."[398] Unlike many other school desegregation cases that lasted for decades, the New Rochelle case was resolved in a few years.[399] It would become a defining case for Kaufman, one that could be set alongside *Rosenberg* in understanding his legacy.

2. Appointed in 1961

In 1961, Congress created new federal judgeships across the country, including three new positions on the Second Circuit.[400] President Kennedy named Kaufman to one of the new seats.[401] Judge Hand, who previously had championed Friendly, now supported Kaufman's appointment.[402] In a letter to Kennedy, Hand wrote that "the promotion

394. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494–96 (1954); *see, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18–20 (1958) (rejecting an attempt by the Little Rock, Arkansas school board to delay desegregation until challenges to *Brown* had been decided); Gibson v. Bd. of Pub. Instruction of Dade Cnty., 272 F.2d 763, 767 (5th Cir. 1959) (finding that the Dade County public schools were not adequately complying with the *Brown* ruling).

395. Berger, *supra* note 2, at D10 ("Judge Kaufman's order to desegregate an elementary school in the North, a first, was in 1961, in Taylor v. Board of Education.").

396. *Taylor I*, 191 F. Supp. at 182, 187 (stating that *Brown* "was a lesson in democracy" that "imposed a legal and moral obligation upon officials who had created or maintained segregated schools to undo the damage which they had fostered"); *see Taylor II*, 195 F. Supp. at 233; Taylor v. Bd. of Educ. of City Sch. Dist. of New Rochelle (Taylor III), 294 F.2d 36, 38 (2d Cir. 1961); *see* Berger, *supra* note 2, at D10 ("In requiring the desegregation of the almost wholly black Lincoln School in New Rochelle in Westchester County, Judge Kaufman said, referring to the Brown v. Board of Education decision in 1954, 'Compliance with the Supreme Court's edict was not to be less forthright in the North than in the South.'").

397. *Taylor III*, 294 F.2d at 38.

398. *Id.* at 38–39.

399. *See Taylor I*, 191 F. Supp. at 197–98, 240–41; *Taylor III*, 294 F.2d at 51.

400. Act of May 19, 1961, Pub. L. No. 87-36, 75 Stat. 80.

401. Newman, *supra* note 12.

402. *See Judge Hand Gives Kaufman Backing*, *supra* note 47, at 41. The article noted that Kaufman "has presided at many significant trials, among them the recent New

of those best qualified in the lower levels is one of the most important considerations of efficiency" for service on the circuit court.[403] He also noted that Kaufman was a man of "exceptional capacity."[404] Kaufman treasured this letter.[405]

Kaufman became a federal district court judge and then a court of appeals judge during the period when the Supreme Court was believed to have one seat reserved for a Jewish justice.[406] This is shown in, for example, Justice Frankfurter's comments about staying on the Court long enough to prevent Kaufman from succeeding him.[407] Kaufman harbored ambitions for appointment to the Supreme Court.[408] For example, he apparently personally lobbied Burke Marshall, President Kennedy's Assistant Attorney General for Civil Rights, for the vacancy created by the retirement of Justice Charles Evans Whittaker in 1962.[409] As a Democrat[410] and, perhaps more importantly, a judge appointed by Democratic presidents (Truman and Kennedy),[411] the best opportunity for Kaufman's nomination for the Supreme Court seems to have been in the 1960s, when John F. Kennedy and Lyndon B. Johnson were President. However, neither seemed to have given Kaufman serious

Rochelle segregation case and the atomic espionage prosecution of Julius and Ethel Rosenberg." *Id.*

403. GUNTHER, *supra* note 111, at 652.

404. *Id.* A year earlier, in 1958, Hand had supported Friendly's appointment to the Second Circuit; when it seemed that Kaufman would be nominated, Hand wrote to Frankfurter, "I fear [Medina's] successor is settled–Irving Kaufman–a thoroughly competent lawyer, but interested primarily, if not completely, in recognition of Irving Kaufman." *Id.* at 650.

405. *See id.* at 652.

406. *See* Larry M. Roth, *Remembering 1965: Abe Fortas and the Supreme Court*, 28 MERCER L. REV. 961, 966 (1977).

407. *See supra* note 371 and accompanying text.

408. *See* SIEGEL, *supra* note 4, at 265–71 (discussing prospects for Kaufman's appointment to the Supreme Court); *see also* Interview by Larry J. Hackman with Burke Marshall, Former Assistant Att'y Gen., C.R. Div. of Dep't of Just., in Bedford, N.Y. (Jan. 19–20, 1970), https://www.jfklibrary.org/sites/default/files/archives/RFKOH/Marshall%2C%20Burke/RFKOH-BM-01/RFKOH-BM-01-TR.pdf.

409. *See* Interview by Larry J. Hackman with Burke Marshall, *supra* note 408 (discussing his conversations with then-Attorney General Robert Kennedy about the vacancy, noting that "Judge Kaufman [was] a very active judge, in the sense of sort of promoting his own promotion, and I was one of the means of communication he used to promote his own promotion").

410. GUNTHER, *supra* note 111, at 649.

411. Berger, *supra* note 2, at D10.

consideration.[412] Kaufman never was nominated for the Supreme Court.[413]

V. A BRIEF ACCOUNT OF JUDGE KAUFMAN'S RECORD ON THE SECOND CIRCUIT

A. A Champion of the First Amendment Who Often Defended Individual Rights and Served as Chief Judge

Judge Kaufman was fifty-one years old when began his service on the Second Circuit in 1961.[414] He would serve on the federal appeals court for more than three decades.[415] It is not possible in a law review article to do anything more than skim the surface when accounting for his judicial record on the court.[416] Nonetheless, there are discernible patterns in how Judge Kaufman voted in certain cases. Broadly speaking, Kaufman voted to protect individual or constitutional rights in cases involving those claims.[417] In the parlance of today's vocabulary for describing judges, Kaufman would be considered liberal.[418]

412. Kennedy appointed Byron White and Arthur Goldberg, accomplished lawyers who had distinguished themselves in public service and who personally knew Kennedy, to the Court. Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L.J. 19, 19 (1993); *Arthur Joseph Goldberg*, *in* BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES 224, 226 (Melvin I. Urofsky ed., 2006). Goldberg, a Jew, succeeded Frankfurter in 1962. *Arthur Joseph Goldberg*, *supra*. As President, Johnson persuaded Goldberg to resign so that he could nominate Abe Fortas to replace him. *See* Roth, *supra* note 406, at 963–65. *See generally* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990) (providing more in-depth analysis of Justice Fortas's life). With Fortas, as with Goldberg, a Jewish lawyer succeeded a Jewish Justice on the Court.

413. *See* S*upreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited Dec. 1, 2022).

414. *See* Berger, *supra* note 2, at D10.

415. *See id.*

416. *Irving Robert Kaufman (Deceased)*, LEXISNEXIS, https://advance.lexis.com/api/permalink/215d2317-765a-429a-ad5a-386ee22f3be6/?context=1518492 (last visited Dec. 1, 2022). According to a LexisNexis "(opinion by)" search, Judge Kaufman wrote 607 opinions while serving on the Second Circuit, including sixty concurrences and fifty-four dissents. *See id.*

417. *See infra* note 421 and accompanying text.

418. In his writings for the public, Kaufman did not employ such labels. Instead, he said that "abstract concepts of judging must be grounded in the realities of the judicial process." Kaufman, *The Anatomy of Decisionmaking*, *supra* note 25, at 1. Citing Judge Benjamin Cardozo, Kaufman added: "There are . . . many ingredients in the 'brew' that makes up a judicial decision," including "facts, . . . law, and . . . the influence of the judge's individual character." *Id.*

Judge Kaufman consistently championed the First Amendment in cases involving the press.[419] In his most well-known case in this area, Kaufman did not write an opinion.[420] As one of the *Pentagon Papers* cases was being litigated on an extraordinarily expedited basis in the summer of 1971, Kaufman joined two other judges in dissenting from a Second Circuit decision enjoining the *New York Times* from publishing secret government papers about the Vietnam War that it had obtained.[421] Subsequently, the Supreme Court reversed the Second Circuit, ultimately agreeing with Kaufman and the other dissenting judges that the First Amendment protected publication of the papers.[422]

Kaufman's dissent in the *Pentagon Papers* case became another defining case in his judicial legacy. During the course of the litigation, there was an incident in which the judge engaged in inappropriate conduct. According to James C. Goodale, the *Times*'s general counsel, "Kaufman, a friend of the *Times* and of Punch Sulzberger, called the *New York Times* newsroom after the [Second Circuit] argument, and said that he wanted [Alexander] Bickel to make more of the First Amendment."[423] Advising a party on its litigation strategy during the course of a case was

419. Berger, *supra* note 2, at D10. This article lists four decisions written by Kaufman "as among the most important" that he wrote in this area: Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 122 (2d Cir. 1977) (holding that newspapers do not commit libel when fairly and accurately reporting statements by others, even if those statements are defamatory), *cert. denied sub nom.* Edwards v. N.Y. Times Co., 434 U.S. 1002 (1977); Herbert v. Lando, 568 F.2d 974, 984 (2d Cir. 1977) (holding that journalists cannot be probed about their "state of mind"), *rev'd*, 441 U.S. 153 (1979); Reeves v. ABC, 719 F.2d 602 (2d Cir. 1983) (applying *Edwards* in affirming grant of summary judgment in favor of news organization); Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 216 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985) (holding that the magazine was constitutionally protected to publish excerpts of memoir). *See also* Naomi Sosner & George Freeman, *The Neutral Reportage Doctrine: MIA. Doesn't Good Journalism Demand It?*, 33 COMMC'NS LAW. 14, 15–16 (2018) (noting that Kaufman, author of *Edwards*, "had a strong First Amendment record").

420. *See* United States v. N.Y. Times Co., 444 F.2d 544, 544 (2d Cir. 1971) (Kaufman, J., dissenting), *rev'd sub nom.* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

421. *Id.*

422. *N.Y. Times Co.*, 403 U.S. at 714.

423. JAMES C. GOODALE, FIGHTING FOR THE PRESS: THE INSIDE STORY OF THE PENTAGON PAPERS AND OTHER BATTLES 135 (2013). Alexander Bickel, a Yale Law School professor, also argued for the *New York Times* in the Supreme Court. *Alexander M. Bickel Dies; Constitutional Law Expert*, N.Y. TIMES, Nov. 8, 1974, at 42. Arthur O. "Punch" Sulzberger, was publisher of the *New York Times* from 1963 through 1992. Elaine Woo, *Arthur Ochs Sulzberger Dies at 86; Former New York Times Publisher*, L.A. TIMES (Sept. 30, 2012, 12:00 AM), https://www.latimes.com/archives/la-xpm-2012-sep-30-la-me-arthur-ochs-sulzberger-20120930-story.html.

inconsistent with the notion of judicial impartiality.[424] This incident was not nearly as problematic as Kaufman's ex parte contacts with the government during the *Rosenberg* case.[425] Among other things, the Supreme Court would have the final say on whether the government's injunction should continue against the *Times*.[426] Nonetheless, it was consistent with his restless temperament. This time Kaufman opposed rather than supported the position of the executive branch.[427]

The rhetoric in Kaufman's First Amendment decisions demonstrated his commitment "to his belief that a fundamental condition of a democratic society is that the channels of communication be kept open to the maximum extent possible."[428] There was another dimension to Kaufman's First Amendment jurisprudence as well. Quite simply, pro-First Amendment decisions would be commended by the journalists from whom Kaufman sought favorable attention.[429]

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424. *See* CANONS OF JUD. ETHICS Canon 5 (AM. BAR ASS'N 1924), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.pdf (considering impartiality to be "essential conduct" for a judge); *see also* SIEGEL, *supra* note 4, at 245 (describing Kaufman's call to the *New York Times* newsroom as an "*ex parte* communication in violation of the rules of legal ethics").

425. *Compare An Open Letter to Judge Irving R. Kaufman*, *supra* note 19, at 146 (showing that Judge Kaufman's ex parte contacts in the *Rosenberg* case occurred before sentencing), *with* GOODALE, *supra* note 423, at 135 (showing that Judge Kaufman's ex parte contacts in the *Pentagon Papers* case occurred after oral arguments had already concluded).

426. *See N.Y. Times Co.*, 403 U.S. at 714.

427. *See* United States v. N.Y. Times Co., 444 F.2d 544, 544 (2d Cir. 1971) (Kaufman, J., dissenting), *rev'd sub nom.* N.Y. Times Co. v. United States, 403 U.S. 713 (1971). Siegel elaborates:

> Twenty years earlier, Kaufman had condemned the Rosenbergs for arrogating to themselves the decision to transmit atomic information to the Russians, even if the USSR was then an ally. Now, when the government accused the *Times* of a similar sort of arrogance—claiming it could decide for itself whether disclosing secret documents threatened the nation—Kaufman was far less credulous. The two cases differed greatly, of course, but it's also true that after two decades on the bench and all the accompanying political and social change, Kaufman was simply less willing to swallow government protestations of national security.

SIEGEL, *supra* note 4, at 247.

428. Irving R. Kaufman – A Biographical Sketch 1 (unpublished manuscript) (on file with Library of Congress). This document from Judge Kaufman's papers at the Library of Congress is undated. It appears to have been written in 1979, as it notes Kaufman's thirty years of service as a judge and a handwritten note "to Bell." Griffin Bell served as President Jimmy Carter's Attorney General from January 1977 through August 1979. Judge Kaufman sought the Medal of Freedom from President Carter and then President Ronald Reagan. *See infra* Section VI.B.

429. *See* MAX FRANKEL, THE TIMES OF MY LIFE AND MY LIFE WITH THE TIMES 413–14 (1999).

In his memoir, Judge Jon O. Newman, who served on the Second Circuit with Kaufman for more than a decade, noted that as chief judge, "Kaufman was so anxious to write the court's opinions in First Amendment cases that he instructed the court clerk to schedule those appeals for days when he would be a member of the panel."[430] Kaufman especially craved favorable coverage from the *New York Times*.[431] He maintained friendships with Arthur "Punch" Sulzberger, the publisher for nearly thirty years, and A.M. "Abe" Rosenthal, the executive editor from 1977 to 1988.[432] Kaufman assiduously courted each man.[433] Max Frankel, who held many positions at the *Times*, including executive editor after Rosenthal, recalled in his memoir:

> For some good deed in the distant past that was never revealed to me, [the publisher Arthur O. "Punch" Sulzberger] was maddeningly tolerant of the self-promoting agitations of Federal Judge Irving Kaufman. Punch . . . agreed with our judgment that Kaufman was . . . panting for favorable notice all his life to overcome his guilt for having sent Julius and Ethel Rosenberg to the electric chair.[434]

Whatever one makes of Frankel's diagnosis, it certainly was the case that Kaufman sought and received extensive coverage from the *New York Times*.[435] He also wrote for the *Times*, contributing opinion pieces and magazine articles that discussed developments in the law and reflected the author's (and the newspaper's) belief in certain fundamental civic virtues.[436] Kaufman's support of the First Amendment in his judicial

430. JON ORMOND NEWMAN, BENCHED 132 (2017).

431. *See* FRANKEL, *supra* note 429, at 413–14.

432. *See, e.g.*, *id.* at 414 (describing Kaufman's relationship with Sulzberger); *infra* Section VI.A (illustrating Rosenthal's views of Kaufman's interactions with the press).

433. *See* SIEGEL, *supra* note 4, at 256; *see, e.g.*, Letter from Irving R. Kaufman, J., to Abraham Michael Rosenthal, Exec. Ed., N.Y. Times, June 23, 1981 (on file with the New York Public Library, Manuscripts and Archives Division, and author). Kaufman's letter states, "Dear Abe, I consider your friendship one of my blessings. For those of us who bear heavy responsibilities, it is a stroke of fortune to be able to consult one with your scope, vision, and depth."

434. FRANKEL, *supra* note 429, at 413–14.

435. *See, e.g.*, Blumenthal, *supra* note 323, at 36.

436. *See, e.g.*, Kaufman, *A Legal Remedy for International Torture?*, *supra* note 25, at T11; *see also, e.g.*, Irving R. Kaufman, *Keeping Politics Out of the Court*, N.Y. TIMES MAG., Dec. 9, 1984, at 72. A more detailed list is on file with the author. According to Siegel, Kaufman averaged more than one *New York Times* op-ed per year from 1972 through 1990 and published a dozen articles in the *Times Magazine* from 1966 to 1987. SIEGEL, *supra* note 4, at 259.

decisions was matched by his votes and decisions in other cases protecting individual and constitutional rights.[437]

Indeed, while serving on the Second Circuit, Kaufman developed into a full-throated liberal who protected individuals from government overreach. Among other things, Kaufman wrote decisions that vindicated the rights of criminal defendants,[438] updated the insanity defense,[439] reformed prisons,[440] upheld the rights of conscientious objectors drafted to serve in the Vietnam War,[441] protected John Lennon from deportation,[442] and opened the federal courts to claims of human rights violations by foreign torturers.[443] This was hardly the most likely path

437. For example, Kaufman wrote the Second Circuit's decision in Hawkins v. LeFevre, 758 F.2d 866, 876–77 (2d Cir. 1985) (ruling that "the impeachment use of [a criminal defendant's] general failure to come forward and proclaim his innocence or divulge his exculpatory story prior to trial violated his constitutional right to due process"). He also sided with the majority in Daye v. Att'y Gen. of N.Y., 696 F.2d 186, 188 (2d Cir. 1982) (granting a federal habeas corpus review to an individual convicted under state law on the basis that he had exhausted available state law remedies).

438. *See, e.g.*, United States v. Harary, 457 F.2d 471, 472, 479–80 (2d Cir. 1972) (reversing judgment of defendant's conviction where, under the circumstances, defendant had "the right to have a lesser-included offense, although charged as a separate count in the indictment, withheld from the jury's consideration when the jury rationally [could not] return a verdict of not guilty of the greater offense but guilty of the lesser offense"); United States v. Mancuso, 420 F.2d 556, 558–59 (2d Cir. 1970) (reversing judgment of conviction under 18 U.S.C. § 1407 where defendant lacked knowledge or probability of knowledge of statute's provisions); United States v. Como, 340 F.2d 891, 892 (2d Cir. 1965) (reversing judgment of conviction after concluding that district court erred in denying defendant's motion to suppress).

439. *See* United States v. Freeman, 357 F. 2d 606, 624 (2d Cir. 1966) (setting aside the M'Naghten rules for determining criminal responsibility and adopting the criteria set out in the Model Penal Code). Kaufman later wrote about the case in an article about the insanity defense for the *New York Times* in 1982, the same year John Hinckley was found not guilty by reason of insanity after attempting to assassinate President Ronald Reagan. *See* Irving R. Kaufman, *The Insanity Plea on Trial*, N.Y. TIMES, Aug. 8, 1982, at 16.

440. *See* Wright v. McMann, 387 F.2d 519, 526–27 (2d Cir. 1967) (holding that prisoner's allegations regarding conditions in prison's "strip cell" stated claim for violation of Eighth Amendment's prohibition against cruel and unusual punishment); Todaro v. Ward, 565 F.2d 48, 50 (2d Cir. 1977) (holding that a prison violated its inmates' Eighth Amendment rights when it "denied access to medical help by arbitrary procedures and misadministration so gross that it must be deemed willful"); *see also* Irving R. Kaufman, *Prison: A Judge's Dilemma*, 41 FORDHAM L. REV. 495, 510 (1973) ("Courts are now confident enough of their role as guardians of basic rights to recognize that human dignity demands more than mere freedom from a bestial, subhuman existence.").

441. *See, e.g.*, United States v. Bornemann, 424 F.2d 1343, 1344, 1348–49 (2d Cir. 1970); United States v. Seeger, 326 F.2d 846, 854–55 (2d Cir. 1964).

442. *See* Lennon v. Immigr. & Naturalization Serv., 527 F.2d 187, 194–95 (2d Cir. 1975); *see also* Arnold H. Lubasch, *Deportation of Lennon Barred by Court of Appeals*, N.Y. TIMES, Oct. 8, 1975, at 42.

443. *See infra* Section V.C.

for the judge who condemned the Rosenbergs to death. Kaufman's jurisprudence tracked (and contributed to) the zeitgeist of liberalism.[444] These decisions generally aligned with the views of the *Times* editorial page and often were covered by the newspaper.

In 1973, Kaufman succeeded Friendly as chief judge of the Second Circuit.[445] The position, which went to the senior judge under the age of seventy, was administrative in nature.[446] Kaufman thrived in the position until 1980, when he was required to step down as chief judge upon turning seventy himself.[447] Over the course of his tenure as a federal judge, Kaufman was relentless in his efforts to promote judicial efficiency and court reform. In the court clerk's office, Kaufman was known by his initials, IRK.[448] During his clerkship the year Kaufman was chief judge, one law clerk has recounted, another judge on the Second Circuit "noted to smiles at the Judicial Conference that year, 'he irks us and irks us' to decide our cases and get our opinions out quickly, and preserve our standing as the fastest circuit in the land."[449] Kaufman also chaired numerous commissions[450] and wrote often about procedures to improve or facilitate the timely resolution of legal cases.[451]

B. The Disclosure of Judge Kaufman's Ex Parte Contacts with Government Officials in the Rosenberg *Case in the 1970s*

The Rosenbergs were executed in the summer of 1953.[452] The controversy generated by the case continued for decades and lives on,

444. SIEGEL, *supra* note 4, at 338–40.

445. Arnold H. Lubasch, *Kaufman Due to Succeed Friendly on U.S. Bench*, N.Y. TIMES, Apr. 6, 1973, at 45.

446. *Id.*

447. Berger, *supra* note 2, at D10. In 1979, a year before the end of Kaufman's tenure as chief judge, New York "Senator Daniel Patrick Moynihan . . . introduced a bill that would eliminate the age limitation of 70 for chief judges of Federal trial and appeals courts." Tom Goldstein, *Moynihan Seeks End of 70 Limit on Judges' Ages*, N.Y. TIMES, May 3, 1979, at 2. The bill did not become a law, however. *See S.862 - A Bill to Eliminate the Age Limitation of 70 Years for Chief Judges of the District Courts and Chief Judges of the Circuit Courts*, CONGRESS.GOV, https://www.congress.gov/bill/96th-congress/senate-bill/862?r=59&s=1 (last visited Dec. 2, 2022) (showing that the bill never progressed beyond the introductory stages of the legislative process).

448. *See* Memorandum from Bruce R. Kraus, Att'y, to Harold Hongju Koh, Att'y (quoted in Harold Hongju Koh, Filártiga v. Peña-Irala*: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, *in* INTERNATIONAL LAW STORIES 45, 51 (John E. Noyes et al. eds., 2007)).

449. *Id.*

450. Lubasch, *supra* note 445, at 45.

451. *See, e.g.*, Kaufman, *supra* note 326.

452. Morgan, *supra* note 7, at 105.

even today.[453] Beginning in the 1950s, books and articles were written about the case, keeping its memory alive.[454] To name just two examples, in 1965, Walter and Miriam Schneir wrote *Invitation to an Inquest*.[455] They contended that Julius and Ethel Rosenberg had been framed by the FBI and convicted by a politically acquiescent court.[456] In 1973, *The Implosion Conspiracy* by Louis Nizer was published.[457] From his

453. The most recent contribution to the literature is a biography of Ethel Rosenberg, ANNE SEBBA, ETHEL ROSENBERG: AN AMERICAN TRAGEDY (2021), which was reviewed in a number of newspapers. *See* Jessica T. Mathews, *Ethel Rosenberg: An American Tragedy*, FOREIGN AFFS. (Sept./Oct. 2021), https://www.foreignaffairs.com/reviews/capsule-review/2021-08-24/ethel-rosenberg-american-tragedy; Rachel Cooke, *A Mother Murdered by Cold War Hysteria*, GUARDIAN (June 27, 2001), https://www.theguardian.com/books/2021/jun/27/ethel-rosenberg-review-biography-cold-war-espionage-execution; Joseph Dorman, *How Ethel Rosenberg Offered Her Own Life as a Sacrifice*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/06/08/books/review/anne-sebba-ethel-rosenberg.html.

454. In addition to WALTER SCHNEIR & MIRIAM SCHNEIR, INVITATION TO AN INQUEST (1965) and LOUIS NIZER, THE IMPLOSION CONSPIRACY (1973), discussed *infra*, other books on the *Rosenberg* case include VIRGINIA GARDNER, THE ROSENBERG STORY (1954); WILLIAM A. REUBEN, THE ATOM SPY HOAX (1955); JOHN WEXLEY, THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG (1955); MALCOLM SHARP, WAS JUSTICE DONE?: THE ROSENBERG-SOBELL CASE (1956).

455. SCHNEIR & SCHNEIR, *supra* note 454. *See* Michael Carlson, *Obituary: Walter Schneir*, GUARDIAN (July 16, 2009), https://www.theguardian.com/world/2009/jul/16/walter-schneir-obituary ("Invitation to an Inquest argued that the Rosenbergs' conviction was based on documents forged by the FBI, on perjury suborned by the prosecution, exculpatory evidence withheld from the defence, and collusion between prosecutors and the judge."). Subsequent editions were published, including a 1983 edition, WALTER SCHNEIR & MIRIAM SCHNEIR, INVITATION TO AN INQUEST (1983), that came out the same year as the first edition of RADOSH & MILTON, *supra* note 11. For an excellent account of the disagreement between the Schneirs and Radosh and Milton, see Curt Suplee, *The Rosenbergs: The Unending Passion*, WASH. POST (Sept. 10, 1983), https://www.washingtonpost.com/archive/lifestyle/1983/09/10/the-rosenbergs-the-unending-passion/4d75324e-9fd7-45c5-99cd-17629619cbe2/. The Schneirs' final account of the case, WALTER SCHNEIR, FINAL VERDICT: WHAT REALLY HAPPENED IN THE ROSENBERG CASE (2010), was published in 2010. In it, they acknowledged that Julius Rosenberg engaged in espionage but argue that he was not a major figure in the atomic spy ring as was charged by the government. Final Verdict*: What Really Happened in the* Rosenberg *Case*, MELVILLE HOUSE BOOKS, https://www.mhpbooks.com/books/final-verdict/ (last visited Dec. 1, 2022). They also contended that Ethel Rosenberg, while aware of Julius's espionage activities, nevertheless was not involved in them. *Id.*

456. Michael C. Moynihan, *The Defense Rests*, WALL. ST. J. (Oct. 20, 2010, 12:01 A.M.), https://www.wsj.com/articles/SB10001424052702304510704575562223216619854 (reviewing SCHNEIR, *supra* note 455) (noting the Schneirs' 1965 book's claim of "a massive government conspiracy to frame the Rosenbergs").

457. NIZER, *supra* note 454.

perspective as a trial lawyer, Nizer argued that the guilty verdicts were supported by sufficient evidence.[458]

In the mid-1970s, the case returned to the public eye in a dramatic way. After their parents were executed, Michael and Robert Rosenberg were adopted by Abel Meeropol and his wife.[459] The brothers took the last name of their adoptive parents and, as adults, began investigating the case that concluded with their parents' execution.[460] Through Freedom of Information Act ("FOIA") requests, they obtained government documents showing private communications between Judge Kaufman and Justice Department and FBI officials while the case was pending before him and afterwards.[461]

As discussed earlier, the government records documented ex parte communications between Judge Kaufman and government attorneys, including the prosecutors in the case prior to the sentencing hearings.[462] They also showed that Kaufman kept a close eye on public discussion of the case; for example, the records include the judge's complaints to the FBI about depictions of the case in a play and on television.[463] The play, performed in Cleveland in 1969, portrayed the Rosenbergs as innocent and was reviewed twice in the *New York Times*.[464] In his correspondence with FBI Director J. Edgar Hoover, Kaufman provided former Judge Simon Rifkind's letter to the *Times*, criticizing the reviews and the play for presenting the Rosenbergs as innocent.[465] In 1974, Kaufman complained about two television programs about the *Rosenberg* case; at that time, according to the records, Kaufman also informed the FBI "that Simon Rifkind was writing an article for *TV Guide* giving the true facts about the case."[466]

In 1976, the Meeropols delivered to Kaufman's chambers the most pertinent documents relating to his conduct in the *Rosenberg* case and

458. Robert Coover, *Louis Nizer Finds the Defendants Guilty as Convicted*, N.Y. TIMES, Feb. 11, 1973, at 356 (reviewing NIZER, *supra* note 454).

459. Morgan, *supra* note 7, at 105.

460. *Id.*

461. Vern Countryman, *Out, Damned Spot: Judge Kaufman and the* Rosenberg *Case*, NEW REPUBLIC, Oct. 8, 1977, at 15.

462. *Id.* at 15–16.

463. *Id.* at 16–17.

464. *Id.* at 16.

465. *Id.*; *see* Letter from Irving R. Kaufman, Cir. J., U.S. Ct. of Appeals for the Second Cir., to J. Edgar Hoover, Dir., FBI (May 7, 1969) (on file with author) (enclosing a copy of a letter from former federal judge Simon Rifkind published in the *New York Times*).

466. Countryman, *supra* note 461, at 16–17; *see* U.S. Gov't Memorandum from W.A. Brannigan to W. R. Wannall (Mar. 12, 1974) (on file with author).

asked him to respond and disclose his own files about the case.[467] Kaufman never answered the request.[468] The next year, the National Committee to Reopen the Rosenberg Case, organized by the Meeropol brothers, took out an advertisement in the *New York Times* that provided excerpts from key documents and renewed their request for additional documents and answers about the case.[469]

In 1976, the American Bar Association formed a subcommittee to prepare a report evaluating Judge Kaufman's conduct.[470] Rifkind, the judge's defender, served as the subcommittee chair.[471] The subcommittee's report, completed in 1977, concluded that criticism of Kaufman's conduct in the case was "unwarranted and without merit."[472] It dismissed accounts of ex parte contacts in some of the documents as "hearsay" and "courtroom gossip," defended any one-sided communications that occurred as permissible under the applicable law and practices of the era, and emphasized that the verdicts and the sentences imposed were supported by "ample evidence in the record."[473] This last point—that the guilty verdicts were correct and the judgments of conviction were affirmed by every court that reviewed the case—was central to Kaufman's defense of his conduct in *Rosenberg*.

The Meeropols' campaign against Judge Kaufman had mixed results—a split verdict, if you will. On the one hand, Kaufman continued to serve as chief judge of the Second Circuit. On the other hand, the disclosure of the ex parte contacts tarnished Kaufman's reputation.[474] Previously, some, such as the Schneirs, insisted that the Rosenbergs had been framed by the government.[475] While they charged that Kaufman colluded with the prosecution to bring about the guilty verdict, this accusation depended upon an active conspiracy entered into by the

467. *An Open Letter to Judge Irving R. Kaufman*, *supra* note 19, at 146.

468. *Id.*

469. *Id.* Within the *New York Times*, there was discussion about whether to write about the advertisement, but the editors decided they had written enough about the controversy generated by the *Rosenberg* case. *See* Memorandum from Seymour Topping, Journalist, N.Y. Times, to Arthur Ochs Sulzberger, Publisher, N.Y. Times (June 30, 1977) (on file with New York Public Library, Manuscripts and Archives Division, and author).

470. *Bar Group Backs Trial Judge*, *supra* note 262, at B1.

471. *Id.*

472. *Id.*

473. The report was not made available to the public when it was completed in 1977. *Id.* After Radosh and Milton criticized Kaufman for his ex parte contacts in the first edition of *The Rosenberg File* in 1983, a lawyer showed the report to the *New York Times*, resulting in an article discussing its findings. *See id.*

474. See Countryman, *supra* note 461.

475. *E.g.,* Moynihan, *supra* note 456.

prosecutors and the judge and had been rejected in a number of reviews of their book.[476] The record of ex parte contacts shifted the focus to Kaufman's conduct as a judge. That is, regardless of whether the verdicts were correct, Kaufman had apparently engaged in inappropriate conduct.[477] The magnitude of his transgression was amplified by when the disclosures occurred—in the mid-1970s, after Watergate and President Richard Nixon's resignation, when public distrust of government was part of the zeitgeist.[478]

C. Filartiga*: Opening the Federal Courts to Legal Claims of Torture*

In 1980, Kaufmann turned seventy and served his last year as chief judge.[479] He also wrote an opinion that would open the federal courts to legal claims of torture in certain, limited circumstances.[480] To put that case in perspective, it is instructive to recall that the responsibilities of an appellate court judge differ from those of a trial court judge. As a district court judge, Kaufman managed hundreds of pending cases (and the lawyers litigating them) from the start of the case until its conclusion.[481] The work of an appellate court judge, by contrast, is more academic. An appeals court judge does not hear witnesses or evaluate testimony; instead, his or her primary responsibility is to ensure that the law is correctly interpreted and applied.[482] Generally a case does not come to a federal court of appeals until the district court has entered a final judgment.[483] Much of the work consists of reading briefs, preparing

476. *See, e.g.*, Robert Pitofsky, *Review*, 66 COLUM. L. REV. 608 (1966) (reviewing SCHNEIR & SCHNEIR, *supra* note 454). Pitofsky later served as chairman of the Federal Trade Commission from 1995 through 2001. *See* BIOGRAPHICAL INFORMATION: ROBERT PITOFSKY C1 (2001), https://dcchs.org/wp-content/uploads/2019/01/pitofsky-resume-bio.pdf.

477. *See, e.g.*, Tom Goldstein, *Issue over the* Rosenberg *Case Brings Debate on Role of Judges*, N.Y. TIMES, Mar. 18, 1977, at 25 ("What is at issue is not the guilt or innocence of the Rosenbergs, but whether alleged contacts between the trial judge, Irving R. Kaufman, and the prosecution were proper judicial conduct.").

478. *See* Michael Meeropol & Robert Meeropol, *Opening the Rosenberg Files*, N.Y. TIMES, Jan. 8, 1976, at 31.

479. *See* The Editors of Encyclopedia Britannica, *Irving Robert Kaufman*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Irving-Robert-Kaufman (last visited Dec. 1, 2022).

480. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

481. *See* Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 441–47 (2011).

482. *About the U.S. Courts of Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals (last visited Dec. 1, 2022).

483. *See* 28 U.S.C. § 1291 (describing the final judgment rule).

for oral argument, and drafting written decisions.[484] As a circuit court judge, Kaufman's opportunity to distinguish himself tended to be limited to the decisions he wrote.

In 1980, Kaufman was part of the Second Circuit panel that decided *Filartiga v. Pena-Irala*, a case with implications for international human rights law and foreign policy.[485] Kaufman wrote the decision, which ushered in a new era of human rights litigation in United States courts.[486] In certain legal circles, *Filartiga* is the case for which Kaufman is most well known after *Rosenberg*.[487]

The underlying events giving rise to *Filartiga* occurred in Paraguay in 1976.[488] As detailed in the plaintiffs' legal filings, Dr. Joel Filártiga was a vocal critic of General Alfredo Stroessner Matiuada.[489] The General maintained his regime through imprisonment and torture.[490] Dr. Filártiga was detained and tortured on at least three occasions.[491] What prompted the doctor and his wife Dolly to sue occurred on the night of March 29, 1976, when their seventeen-year-old son Joelito was kidnapped and taken to the home of Américo Norberto Peña-Irala, a government official.[492] There, Joelito was tortured and murdered.[493] Filártiga and his wife pursued legal redress in Paraguay to no avail.[494]

In 1978, Peña-Irala moved to the United States, relocating to Brooklyn.[495] Filártiga and his wife came to the United States and searched for Peña-Irala.[496] In March 1979, Dolly learned his address.[497] She notified the Immigration and Naturalization Service, leading to Peña-Irala's arrest as he was leaving his apartment.[498] While he was being detained at the Brooklyn Naval Yard pending a deportation hearing, Peña-Irala was served with the summons and complaint in a

484. *See Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/types-cases/appeals (last visited Dec. 1, 2022).

485. *Filartiga*, 630 F.2d at 876.

486. Koh, *supra* note 448, *at* 45 (arguing that *Filartiga* "inaugurated the era of human rights litigation in which we now live").

487. *See* Natalie R. Davidson, *Shifting the Lens on Alien Tort Statute Litigation: Narrating US Hegemony in* Filártiga *and* Marcos, 28 EUR. J. INT'L L. 147, 53–54 (2017).

488. *Filartiga*, 630 F.2d at 878.

489. *Id.*

490. Koh, *supra* note 448, at 46.

491. *Id.*

492. *Id.* at 46–47.

493. *Id.* at 47.

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.* at 48.

498. *Id.*

civil case.[499] The Filártigas sued him for "wrongful death and 'torts in violation of U.S. treaties and the law of nations'," seeking $10 million in compensatory and punitive damages.[500]

Peña-Irala retained counsel, who moved to dismiss the complaint.[501] Essentially, Peña-Irala claimed that the federal district court lacked subject matter jurisdiction and did not have the power to hear the case.[502] The federal statute invoked by the plaintiffs, the Alien Tort Claims Act ("ATCA"), had been given a restrictive reading and, Peña-Irala argued, did not authorize the plaintiffs' suit against him.[503] His motion was supported by existing case law, including a prior Second Circuit decision written by Judge Friendly holding that "the only claims for violations of the law of nations cognizable under the statute were those that relate to 'international law,' literally understood: that is, relations between states or between individuals and foreign states."[504] The Filártigas' civil suit asserting claims sounding in tort did not fit into either category. Reluctantly, the district court granted Peña-Irala's motion to dismiss on the ground that violations of the law of nations "do not occur when the aggrieved parties are nationals of the acting state."[505]

The plaintiffs appealed the decision to the Second Circuit.[506] In October 1979, the parties argued the appeal before a panel consisting of Kaufman and Judges Wilfred Feinberg and John Smith.[507] During the oral argument, as recounted by Kaufman's law clerk:

> [T]he Judge from the bench did something utterly un-Judge like. He asked (not directing the question to anyone in particular) why we hadn't heard from the State Department about this . . . . I think the plaintiff's lawyer, Peter Weiss, may have expressed

499. Filartiga v. Pena-Irala, 630 F.2d 876, 879 (2d Cir. 1980).

500. Koh, *supra* note 448, at 49.

501. *Filartiga*, 630 F.2d at 879.

502. *Id.*

503. *See* Koh, *supra* note 448, at 49.

504. *Id.*; *see* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010). In *IIT*, Judge Friendly famously described the ATCA as "a kind of legal Lohengrin; although it has been with us since the First Judiciary Act . . . no one seems to know whence it came." *IIT*, 519 F.2d at 1015 (citation omitted); *see* Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir. 1976) (dismissing complaint alleging tort claim in violation of the law of nations and asserting subject matter jurisdiction under 28 U.S.C § 1350).

505. Filartiga v. Pena-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984) (summarizing district court's prior decision that was reversed on appeal).

506. Koh, *supra* note 448, at 50.

507. *Id.* Judge Smith died before the case was decided. He was replaced by Amalya Kearse, who had recently been appointed to the Second Circuit by President Carter. *Id.*

> some confidence that the Carter State Department was with him in spirit, but the Judge wouldn't take his word for it, and the decision was postponed until State's views were made known.[508]

As chief judge, Kaufman was known for exhorting his colleagues to decide cases promptly, something he did consistently.[509] *Filartiga*, however, sat on the docket.[510] Eventually, in 1980, the Carter administration submitted a brief that supported recognizing the plaintiffs' claim under the Alien Tort Claims Act.[511] Subsequently, Kaufman wrote the decision for the Second Circuit, reversing the district court and holding that the federal district court had jurisdiction over the plaintiffs' claims.[512]

Drafting the decision was a delicate task. As a legal matter, Kaufman had to distinguish Judge Friendly's prior decision.[513] This task was made even more challenging by the fact that Friendly enjoyed a reputation as a brilliant judge.[514] In addition, the prospect of opening federal courts in the United States to human rights claims implicated the foreign policy interests of the United States.[515] Succinctly put, *Filartiga* was a political case. The State Department's brief provided cover for the court, should it wish to revise the law here.[516]

Kaufman's decision is a masterpiece, not because it reads as a ringing judicial condemnation of torture, but instead as the inexorable result of a number of undisputed legal principles. An important consideration, Kaufman's law clerk stated, was "bending over backwards not to open any floodgates."[517] The court canvassed numerous sources to support its conclusion that the law of nations—international law—prohibits torture.[518] Then, because international law is "part of our law," the court held that Alien Tort Claims Act authorized individuals to bring suit in federal court to enforce "rights already recognized by international

508. *Id.* at 51.
509. *Id.*
510. *Id.*
511. *Id.* at 53.
512. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
513. *See id.* at 888.
514. *See* Koh, *supra* note 448, at 51 (noting "Judge Friendly's enormous prestige" at the time).
515. *See id.* at 53–57.
516. *See* SIEGEL, *supra* note 4, at 304–06.
517. Koh, *supra* note 450, at 52–53 (excerpt of memorandum of Bruce Kraus).
518. *Filartiga*, 630 F.2d at 880–89.

law."[519] The court specifically stated that courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today" in applying the statute.[520] In a bit of a rhetorical flourish, one that underscored the narrow scope of the decision, Kaufman wrote: "[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind."[521]

Much has been written about *Filartiga*.[522] For now, three points will suffice. First, as for the case itself, Peña-Irala was deported before the Second Circuit issued its decision.[523] On remand, the case proceeded without him and the district court entered a default judgment of nearly $10.4 million in favor of the plaintiffs.[524] The Filártigas never have been able to collect on the judgment.[525]

Second, *Filartiga* ushered in a new era of international law in the United States. Harold Hongju Koh has called the case the *Brown v. Board of Education* of human rights litigation.[526] For more than two decades, federal courts were receptive to claims under the Alien Tort Claims Act.[527] That changed under the Roberts Court, and the scope of the Act continues to be litigated before the Supreme Court.[528]

Third, Kaufman promoted his decision in *Filartiga* with an article in the *New York Times*.[529] Writing for a popular audience, unconstrained by precedent, Kaufman struck a pragmatic yet anodyne note: "[The] nation's approach toward the problem of torture must be carefully considered.

519. *Id.* at 887 (quoting Louisville & N.R. Co. v. Behlmer (*The Paquete Habana*), 175 U.S. 667, 700 (1900)).

520. *Id.* at 881; *see also id.* at 878 ("[D]eliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.").

521. *Id.* at 890.

522. *See, e.g.*, Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's Filartiga*, 89 NOTRE DAME L. REV. 1695 (2014); Perry S. Bechky, *Homage to* Filartiga, 33 REV. LITIG. 333 (2014); WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA-IRALA (2007).

523. *Filartiga*, 630 F.2d at 879 n.2.

524. Filartiga v. Pena-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

525. Koh, *supra* note 448, at 60 (reporting that plaintiffs never have collected on the judgment).

526. *Id.* at 60, 67.

527. *See, e.g.*, David P. Stewart & Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013) ("[T]he 1980 court of appeals decision in *Filartiga v. Pena-Irala* permitt[ed] a wide of range human rights cases to go forward under the [Alien Tort Statute] . . . .").

528. *See generally* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

529. Kaufman, *A Legal Remedy for International Torture?*, *supra* note 25, at T11.

The goal is peace, the prerequisite to meaningful communication between nations."[530] Meanwhile, he concluded, "the nation and the world will continue to look with hope to the President, the Congress and the courts for an articulation of this nation's principled commitment to enforcing universally accepted norms of international law."[531]

Rosenberg and *Filartiga* serve as bookends for Kaufman's career on the bench.[532] As noted earlier, one interpretation of the judge's conduct during the former case is that, as a former prosecutor and avowed anti-Communist, Kaufman aligned himself with the federal government in a way that compromised his impartiality.[533] *Filartiga* provides an instructive contrast to *Rosenberg*. On the one hand, there is a similarity between the two cases in that Kaufman ruled in a way that promoted the policy desired by the executive branch. [534] On the other hand, by 1980, the Cold War had thawed.[535] Moreover, Kaufman, near the end of his term as chief judge and nearly seventy years old, no longer was the young federal district judge angling for his next position.[536] Compared to his conduct in *Rosenberg*, his course of action in *Filartiga* was more measured—no ex parte contacts, no rhetorical bluster—and produced a less controversial and more acclaimed decision.

As the preceding discussion of *Filartiga* shows, as a federal judge, Kaufman was assisted by law clerks, young lawyers immediately or recently out of law school.[537] He was able to and did hire graduates of elite law schools who had excelled in their studies.[538] He generally did not hire graduates of Fordham Law School, from which he had graduated.[539] In 1955, Kaufman hired a woman, Frances Bernstein, as a

530. *Id.*
531. *Id.*
532. *See* Berger, *supra* note 2, at D10.
533. *See id.*
534. *Compare* United States v. Rosenberg, 195 F.2d 583, 609 (2d Cir. 1952) (upholding Judge Kaufman's decision to sentence the Rosenbergs for spying against the United States during the Cold War), *with* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (upholding the right of a torture victim's family to sue in federal district court under the Alien Tort Claims Act).
535. *See Détente and Arms Control, 1969–1979*, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1969-1976/detente (last visited Dec. 1, 2022).
536. *See* Berger, *supra* note 2, at D10.
537. *See* Arnold H. Lubasch, *Ex-Clerks to Honor Judge Kaufman*, N.Y. TIMES, Nov. 8, 1981, at 54.
538. *See id.*; *see also* SIEGEL, *supra* note 4, at 192 (noting that, while Kaufman served on the Second Circuit, his law clerks "hailed mostly from Harvard and Columbia, and occasionally Yale or Stanford," while "Fordham graduates never got a shot at the prestigious position").
539. SIEGEL, *supra* note 4, at 192.

law clerk—a progressive act at the time, when many law firms would not hire a woman.[540] She told the *New York Times* in 1981 that the judge "opened doors that might otherwise have remained closed."[541] Kaufman was a demanding boss.[542] There was much work to be done, not only on pending cases, but also on the committees he served on and the articles he wrote.[543] He had high standards and did not hesitate to let a clerk know when his or her work was unsatisfactory.[544] More than once, a law clerk quit before his term ended.[545] Some, but not all, returned to finish their stint.[546]

Near the end of its obituary, the *New York Times* noted that "Judge Kaufman was known as a stern taskmaster who was demanding of his law clerks. He was so demanding that in recent years several resigned the prestigious position rather than put up with what they described as angry shouting."[547] In the next paragraph, aiming for balance, the article quoted

> Edward P. Krugman, a clerk in 1978 and 1979, [who] said: "It was in many ways the best year of my life, if not necessarily the pleasantest. I've since discovered that the tension I found to be the unpleasant aspect was endemic to the practice of law, and not peculiar to life in those chambers."[548]

540. Lubasch, supra note 537, at 54.
541. *Id.*
542. *See Berger, supra* note 2, at D10; *see also* SIEGEL, *supra* note 4, at 64–67, 191–96.
543. Lubasch, *supra* note 537, at 54.
544. *See* ANDREW D. KLEIN, HOW ANDY KLEIN AND THE INTERNET CAN GIVE EVERYONE A SEAT ON THE EXCHANGE 1–2 (1998), https://public.summaries.com/files/1-page-summary/wallstreet-dot-com.pdf.
545. *Id; see also* SIEGEL, *supra* note 4, at 65, 195 (noting that two law clerks quit in the 1950s and law clerks "kept quitting in unusually high numbers, while others were fired").
546. *Compare* KLEIN, *supra* note 544, at 1, *with* Berger, *supra* note 2, at D10. At one point in the mid-1980s, all three of Judge Kaufman's law clerks "resigned in protest" because of how they were treated. KLEIN, *supra* note 544, at 1. However, "[t]hey were finally persuaded to finish out their one year terms." *Id.* (providing a summary biography of Andrew D. Klein, former law clerk).
547. Berger, *supra* note 2, at D10.
548. *Id.*; *see also* SIEGEL, *supra* note 4, at 66, 195 (noting that, for Kaufman's law clerks, "real training *did* accompany the pain" and that "for all the misery" attendant to being Kaufman's clerk, it was nonetheless true for many that "the experience improved as the year went on and Kaufman softened").

VI. JUDGE KAUFMAN'S QUEST TO DEFINE HIS LEGACY

As Kaufman entered the twilight of his career, he knew that any measure of his career would start with the *Rosenberg* case.[549] He was said to be fixated on how his obituary in the *Times* would read.[550] Indeed, when it was published, the obituary reported that he kept index cards on his desk with quotations from the trial and would show them to his law clerks and that "he was known to carry clippings endorsing his conduct of the trial in his breast pocket, to quote from at dinner parties."[551] With his legacy at stake, Kaufman relentlessly sought to put his judicial record in the best light.[552] Accordingly, Kaufman may have been more preoccupied than ever with how he was described in the press. As detailed in this Part, this meant downplaying *Rosenberg* in the *New York Times* but accepting President Reagan's praise for his conduct in the case when receiving the Presidential Medal of Freedom.[553] When Kaufman died in 1992, as he predicted, his obituary in the *Times* began with his decision to sentence the Rosenbergs to death.[554]

A. A New York Times *Profile in 1983*

In 1983, the *New York Times* profiled Kaufman as a "Man in the News" after President Reagan appointed him to chair a Commission on Organized Crime.[555] Kaufman's response to the article reveals his sharp

549. *See* Newman, *supra* note 12.

550. *Id.* (Kaufman, "noted one friend, was 'haunted by the thought that his obituary will read, "Rosenberg Judge Dies"'").

551. Berger, *supra* note 2, at D10 ("Often on top was the remark by a defense lawyer, Emanuel H. Bloch, thanking [Judge Kaufman] for his 'utmost courtesy' at the trial."); *see* Transcript of Record, *supra* note 5, at 2167.

552. *See id.*

553. *See* Letter from Irving R. Kaufman, J., Second Cir., to Peter Millones, Metro. Ed., New York Times (Aug. 2, 1983) (on file with the New York Public Library, Manuscripts and Archives Division); Remarks on Presenting the Presidential Medal of Freedom to Irving R. Kaufman, *supra* note 28.

554. Berger, *supra* note 2, at D10.

555. *Man in the News; A Judge Who Likes Action*, *supra* note 87, at A8. Linda Greenhouse wrote the article. Decades later, in a telephone interview, Greenhouse said she kept her byline off the article because she was not able to write what she knew about Judge Kaufman due to his "special relationship" with the *New York Times*. Telephone Interview with Linda Greenhouse, Clinical Lecturer in L. & Senior Rsch. Scholar in L., Yale L. Sch. (Oct. 10, 2022). At the time, Greenhouse was the *Times*'s Supreme Court reporter, a position she held for three decades. *See Linda Greenhouse*, YALE L. SCH., https://law.yale.edu/linda-greenhouse (last visited Dec. 1, 2022); *see also* Letter from Irving R. Kaufman to Peter Millones, *supra* note 553.

focus on how the newspaper portrayed him.[556] Specifically, he sought to downplay the significance of the *Rosenberg* case while highlighting other aspects of his career.[557] Kaufman's response also shows how relentless he could be in advocating for himself. At seventy-three years old when the article was written, he very well may have viewed the article as a preview of how his obituary would read in the *Times*.

The headline read, "A Judge Who Likes Action," and the article introduced this theme in its opening paragraph: "In nearly 34 years on the Federal bench, Irving R. Kaufman has rarely been content to be just a judge. The Commission on Organized Crime announced here today is the latest of a long list of panels and commissions Judge Kaufman has headed or served on."[558] The article noted his "unflagging energy," described "speculation" that Kaufman would take senior status in order to accommodate the demands of heading such a demanding project, and stated, "[t]hose who guessed correctly that Judge Kaufman would remain on active status counted on the fact that he has never been known to walk away from the action."[559]

Consistent with the form of a newspaper profile, the article reviewed Kaufman's biography and described a number of his notable cases, including the Apalachin organized crime trial (important because of the commission Kaufman would chair), *Rosenberg*, and the New Rochelle desegregation case.[560] "In the years after the Rosenberg case," the article stated, "Judge Kaufman gained a reputation for liberal rulings involving civil rights and civil liberties."[561] Though generally favorable, the article noted controversy over Kaufman's conduct in the *Rosenberg* case, suggested that he attempted to extend his tenure as chief judge after he turned seventy, and reported that "[s]everal young lawyers who have begun clerkships in his chambers have not completed the year, which is unusual for a highly prized Court of Appeals clerkship."[562]

Kaufman disputed these points in a "personal & confidential" three-page letter to Peter Millones, the metropolitan editor at the *Times*.[563] In the letter, which began, "I do not ask that this letter be published nor do I seek a retraction," Kaufman also complained that the article "ignore[d] most of my many landmark opinions of the past 15 years, and instead . . .

556. Letter from Irving R. Kaufman to Peter Millones, *supra* note 553.
557. *See id.*; *Man in the News; A Judge Who Likes Action*, *supra* note 87, at A8.
558. *Man in the News; A Judge Who Likes Action*, *supra* note 87, at A8.
559. *Id.*
560. *Id.*
561. *Id.*
562. *Id.*
563. *See* Letter from Irving R. Kaufman to Peter Millones, *supra* note 553.

concentrate[d] on ancient history."[564] Kaufman cited three First Amendment cases that "[t]he writer . . . saw fit to ignore."[565] Regarding *Rosenberg*, Kaufman cited the work of the ABA subcommittee headed by Judge Rifkind.[566] "The subcommittee spent a full year in its examination of the Rosenberg case, and drafted a comprehensive report which dismissed each of the allegations raised by partisan groups challenging the decisions in that case," he wrote.[567]

Millones forwarded the letter to the *Times*'s executive editor, A.M. Rosenthal, with his own note: "Judge Kaufman called to chat the other day" about the "Man-in-the-News" profile, Millones wrote.[568]

> He said he had told Punch it was good but . . . Punch told him, he said, to relax because it made him look good. But of course Kaufman can't relax. I listened to him . . . and finally suggested he send me a note on the specific complaints . . . .[569]

Millones described a number of Kaufman's points in his letter as "very fine" but added that Kaufman's "assertion that he did not inspire the Moynihan bill to extend the age limit probably should be in the morgue clips."[570] In response, Rosenthal told Millones, "Do as you think best with this."[571]

B. The Presidential Medal of Freedom in 1987

While serving as chief judge of the Second Circuit, Kaufman began his campaign for the Presidential Medal of Freedom.[572] A "biographical sketch" in Kaufman's papers at the Library of Congress in support of his receiving the medal appears to have been sent to President Jimmy

564. *Id.*
565. *Id.* Kaufman stated that the writer could "have noted my dissent in the Pentagon Papers case, which was adopted by the Supreme Court, or my decision for the court in *Baker v. F & F Investment* . . . or in *Edwards v. Nat'l Audubon Society*." *Id.*
566. *Id.*
567. *Id.*
568. Memorandum from Peter Millones, Metro. Ed., New York Times, to A.M. Rosenthal, Exec. Ed., New York Times (Aug. 3, 1983) (on file with the New York Public Library, Manuscripts and Archives Division).
569. *Id.*
570. *Id.*
571. Letter from A.M. Rosenthal, Exec. Ed., New York Times, to Peter Millones, Metro. Ed., New York Times (Aug. 12, 1983) (on file with the New York Public Library, Manuscripts and Archives Division).
572. Marcus & Hoffman, *supra* note 30.

Carter's then-Attorney General Griffin Bell.[573] After introducing Kaufman as a "man of wisdom, scholarship and courage," the biography stated, "[m]any of Judge Kaufman's most significant contributions to the law have been in interpreting the First Amendment's mandate of free expression."[574] Nowhere did it specifically mention *Rosenberg*, though on the penultimate page it noted that "[a]s a District Judge, Kaufman presided over some of the most celebrated trials of the era."[575] In seeking the Medal from President Carter, Kaufman downplayed the *Rosenberg* case.[576]

Although Kaufman did not receive the Medal from President Carter, his efforts eventually succeeded with President Reagan.[577] Reagan and Kaufman had met in the 1950s and enjoyed a friendly correspondence over the years.[578] They shared, among other things, ardent anti-Communist views.[579] In 1987, Kaufman was one of eleven individuals who received the Presidential Medal of Freedom.[580] *Rosenberg* figured

573. *See* Irving R. Kaufman – A Biographical Sketch, *supra* note 428 (unpublished manuscript at 1).

574. *Id.*

575. *Id.* (unpublished manuscript at 5). By contrast, Judge Kaufman's professional biography from 1964 and 1965 listed *Rosenberg* first as one of the "many cases of the greatest national importance" that he presided over as a district court judge. Irving R. Kaufman: United States Circuit Judge, United States Court of Appeals, Second Circuit 1 (n.d.) (unpublished manuscript) (on file with Library of Congress).

576. *See* Irving R. Kaufman – A Biographical Sketch, *supra* note 428 (unpublished manuscript at 5).

577. *See id.*

578. The day after Reagan defeated Jimmy Carter in the 1980 presidential election, Kaufman wrote him a letter stating, "After all these years – it is more than 25 years since we first met – I must confess that as a Reagan career watcher, I am overwhelmed by your extraordinary victory. Nancy played no small part in this." *See* Letter from Irving R. Kaufman, J., to the Hon. Ronald W. Reagan (Nov. 5, 1980) (on file with Library of Congress and author). Kaufman added, "This is not the time to reminisce over the early years during our annual visits to California, which started shortly after the end of the trial in the Rosenberg case." *Id.* Kaufman's correspondence with President Reagan includes handwritten notes from the first lady, Nancy Reagan, and a telegram from the President sending "warm wishes" to Kaufman and his wife, Helen, on their fiftieth wedding anniversary. *See* Note from Nancy Reagan, First Lady, to Irving R. Kaufman, J. (Oct. 28, 1986) (on file with Library of Congress and author) ("Dear Irving, Thank you so much for your thoughtfulness in sending me the New York Times Magazine article you wrote on drug testing."); Telegram from Ronald Reagan, President, to the Honorable and Mrs. Irving Kaufman (June 21, 1986) (on file with Library of Congress and author).

579. *See* Remarks on Presenting the Presidential Medal of Freedom to Irving R. Kaufman, *supra* note 28.

580. *See* Marcus & Hoffman, *supra* note 30.

prominently in Reagan's remarks at the ceremony.[581] In fact, the President began his remarks by commending Kaufman for his work on the case, describing it as an example of Kaufman "keeping [the] judiciary independent and protecting the courts from political pressures."[582] He explained:

> [O]nly a short walk from here is the office where President Eisenhower told you that of all the crises in his own life, and he specifically mentioned the Normandy invasion, he had never felt so much public pressure as he did during the international campaign to thwart the course of justice in the Rosenberg espionage case. But President Eisenhower also told you that whenever he considered weakening or giving in to that political pressure, he thought of the courage that you had shown during the trial and sentencing, and I know he told you he took inspiration from that.[583]

Reagan then noted three other cases—the Apalachin criminal trial and the New Rochelle school desegregation case from Kaufman's service on the district court and the *Pentagon Papers* dissent—as among the moments when Kaufman had "been at the center of . . . recent judicial history."[584] Reagan lauded Kaufman for his high standards and hard work, citing the judge's commitment to "jury reform" and "[j]udicial [a]dministration" along with "his wide and varied writings for legal journals and popular magazines and newspapers."[585]

After receiving the medal from Reagan, Kaufman spoke, eliciting laughter at one point.[586] "I've been fortunate to have served with some very capable Attorneys General," he said.[587] "And I put among the leaders of those Attorneys General, Ed Meese, who had the wisdom to recommend me . . . or to be one of those who recommended me for the Medal."[588] Kaufman briefly noted several accomplishments omitted by the President, including his service as chief judge of the Second Circuit.[589]

581. Remarks on Presenting the Presidential Medal of Freedom to Irving R. Kaufman, *supra* note 28.
582. *See id.*
583. *Id.*
584. *Id.*
585. *Id.*
586. *Id.*
587. *Id.*
588. *Id.*
589. *Id.*

"[N]o easy task, the chief judge of that herd," he commented.[590] In thanking the President, Kaufman stated that the Medal of Freedom "represents the crowning moment in my lifetime of devotion to law and justice."[591] He concluded by expressing gratitude to his wife, saying that, after nearly fifty-two years of marriage, she was worthy of the Congressional Medal of Honor, the nation's most prestigious military decoration.[592]

Even as Kaufman enjoyed the glory of the occasion, he had prepared for the possibility of controversy.[593] Nearly three weeks before the ceremony, the *Washington Post* reported that Meese arranged for Kaufman to get the award after the judge "agreed to retire from active service."[594] The article explained that Kaufman's retirement would allow Reagan, a Republican President, to nominate a judge for the Second Circuit.[595] Meese acknowledged having dinner with Kaufman in New York in the spring of 1987 and discussing the medal with him.[596] But he denied that the medal was traded for Kaufman's retirement.[597] The article also noted that Kaufman had open-heart surgery in the spring and quoted sources stating that the judge's "decision to retire was related to his health problems."[598]

Kaufman was prepared for questions about his receiving the Medal of Freedom should they come up at the ceremony.[599] A two-page document in his papers includes on the first page the judge's public statement about how honored he was to receive the medal.[600] Below this paragraph was another under the heading "Off the Record," which read: "The Judge recommends that you contact officials in the Administration to find out more about the procedure by which the Medal is awarded. The Judge was not privy to that process."[601] On the other page of the document was a prepared statement by Simon Rifkind: "I regret that those entertaining goals different from those of this Administration have

590. *Id.*
591. *Id.*
592. *Id.*
593. Marcus & Hoffman, *supra* note 30.
594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.*
598. *Id.*
599. *See* Statement by Judge Simon H. Rifkind (n.d.) (unpublished statement) (on file with Library of Congress, Manuscript Division and author).
600. *Id.*
601. *Id.* The phone number of Terry Eastland, a Justice Department official, was handwritten next to that quotation. *Id.*

seized upon this award as an excuse to advance their own agendas. They are tainting the reputation of one of our Nation's finest, most-dedicated jurists."[602] Based upon news coverage of the ceremony, it appears that Judge Rifkind never had to make the statement.

C. The New York Times *Obituary in 1992*

Kaufman died in 1992.[603] Despite the liberal rulings, extensive public service, and hundreds of articles, and despite the Presidential Medal of Freedom, the first case mentioned in his *New York Times* obituary was *Rosenberg*.[604] The opening sentence noting his death began: "Judge Irving R. Kaufman, who gained national attention in 1951 as the judge who sentenced Julius and Ethel Rosenberg to the electric chair."[605] Nonetheless, Kaufman's efforts were not entirely unavailing. In the same sentence, the writer noted that Kaufman "wrote landmark decisions in First Amendment, antitrust and civil rights cases for more than 30 years on the Federal bench."[606] The judge's final ambition had been at least partially realized.

The obituary reflected the dueling portraits of Kaufman inspired by *Rosenberg*.[607] On the one hand, it presented Kaufman's accomplishments after the case as an effort—in the words of Professor Yale Kamisar—to "develop[] an image of a thoughtful, liberal, sensitive, concerned person on public issues."[608] Regardless of the effort Kaufman put into burnishing his image, he was viewed with measured skepticism by the *Times* in this final assessment. After quoting Professor Kamisar, the *Times* quoted Republican Attorney General William Barr: "Judge Kaufman was a courageous servant of justice and a friend of law enforcement. His intellect and leadership will be greatly missed."[609] Barr's comment was straightforward and conveyed the same endorsement of Kaufman's conduct in the *Rosenberg* case as President Reagan's comment during the Presidential Medal of Freedom ceremony.

602. *Id.*
603. Berger, *supra* note 2, at D10.
604. *Id.*
605. *Id.*
606. *Id. See generally* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).
607. *See* Berger, *supra* note 2, at D10.
608. *Id.*
609. *Id.*

CONCLUSION

Kaufman told journalists that he always wanted to be a federal judge.[610] For someone who sought prestige and power, his ambition was understandable. Through hard work, professional success in public service and private practice, and political connections, Kaufman accomplished this objective before the age of forty. Acknowledging that hindsight is twenty-twenty, Kaufman may have set his sights on a position for which he was not entirely temperamentally suited. A judge is required to abstain from the fray, to be impartial, and to maintain the appearance of impartiality while deciding the cases that come before him. *Rosenberg*, the case that defined Kaufman's judicial career, began with his lobbying to be assigned the case. In presiding over the trial and sentencing the Rosenbergs to death, Kaufman made decisions that were legally supportable but suggested his alignment with the government prosecuting the case. The revelation of Kaufman's ex parte communications with government lawyers and FBI agents confirmed this impression and indelibly tarnished his reputation.

After *Rosenberg*, Kaufman invested his energy and intellect in becoming a liberal judge who supported desegregation, the First Amendment rights of the press, and the protection of individual constitutional rights. Was he making amends for sentencing the Rosenbergs to death with these decisions? Perhaps. More likely, Kaufman was doing what he always did: putting himself at center stage in an effort to receive the acclaim that he desired and would bolster his reputation. But, it seems, he tried too hard. The reasoning and results Kaufman arrived at in his decisions often were accompanied by an asterisk; to what extent did the decision reflect Kaufman's attempt to promote himself? Professor Hazard's perceptive observation in the *New York Times* obituary provides an apt conclusion: Ultimately, Kaufman's "strong inclination to be in the public eye . . . diminished the professional appreciation of his judicial abilities."[611]

610. *Id.* ("From the first time he saw a black-robed judge enter a courtroom, Judge Kaufman said, it was his ambition to be a judge.").

611. *Id.*