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trials by statute or vest the trial judge with discretion to exclude the public from the courtroom. It cannot be denied that the public has an interest in public trials, however, the public right in a public trial is not derived from the constitutional guarantee of a public trial, but rather is an independent right bestowed on the public so that they may see and know how justice is administered. The right to a public trial, as provided for in the Federal and State Constitutions, is for the benefit of the accused and the public merely has a privilege to attend.

JOSEPH M. KOLMACIC

Espionage Prosecutions In The United States

The great dispute over the legality of the death sentence for the Rosenbergs, convicted of conspiracy to commit espionage in violation of the 1917 Espionage Act,¹ has now entered that collection of controversies which will always be a subject for study, particularly to legal minds, of the extreme care exercised in American judicial processes to assure that no person, however guilty, however heinous his crime, shall be condemned except by due process of law.

In the entire record of espionage against the United States, there has been no case of its magnitude and drama.² The case attracted the attention of the

¹ 50 U. S. C. §§32 (a), 34. The Act as now reads is 18 U. S. C. §§794 et seq., the pertinent parts of which are:

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits or attempts to communicate, deliver, or transmit, to any foreign government, . . . or to any representative, officer, agent, employee, subject, or citizen thereof, either directly, or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be imprisoned not more than twenty years.

(b) Whoever violates subsection (a) in time of war shall be punished by death or by imprisonment for not more than thirty years.

(c)

(d) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

² The literature by partisans of opposing viewpoints is voluminous, of which the following are a few examples: America, *Atomic-age Executions*, July 4, 1953, p. 353; America, *The Rosenberg Case: A Cause Celebré*, June 27, 1953, p. 329; Christian Century, *No Executive Clemency for the Rosenbergs*, Feb. 25, 1953, p. 213; Commonweal, *Regarding the Rosenbergs*, Jan. 9, 1953, p. 344; Life, *The Case of the World's Greatest Secret*, April 16, 1953, p. 53; Look, *Red Spies in the United States*, June 19, 1951, p. 31; New Republic, *The Crime and Punishment of the Rosenbergs*, June 29, 1953, p. 6; Scholastic, *Atom Spies: Last Round?*, Feb. 25, 1953, p. 14; Time, *Mercy and Justice*, Feb. 23, 1953, p. 24; The Nation, *Rosenberg Case*, Nov. 8, 1952, p. 422; US News and World Report, *How the Law Protected the Rights of the Rosenbergs*, June 26, 1953, p. 32.

world. It is the first time in the history of the 1917 Act that the supreme penalty has ever been imposed by a civil court in an espionage prosecution in the United States.⁸

The case centers around these facts: Julius Rosenberg, an electrical engineer, and his wife, Ethel, both native New Yorkers, transmitted to a Soviet vice-consul material on the atom bomb supplied by David Greenglass (brother of Mrs. Rosenberg and an employee at the atomic bomb project in Los Alamos, New Mexico) and further secret information pertaining to the national defense supplied by Morton Sobell, an electronics expert.⁴ Julius Rosenberg, himself, while working at the Emerson Electric Company in New Jersey, stole and delivered to the Russians the secrets of the famous proximity fuse. These acts took place during the years 1944 to 1950.

On July 17, 1950, Julius Rosenberg was arrested; Ethel, a month later. The trial began on March 6, 1951, and on March 29, they were found guilty by a New York jury of having served as espionage agents for Russia during the years 1944 to 1950. Conviction was by the unanimous vote of the twelve jurors. The trial judge, on April 5, 1951, imposed the death penalty.⁵

After the sentencing, the Rosenbergs had the benefit of an appeal to the United States Court of Appeals, which appraised and upheld the convictions and sentence;⁶ and successively, a petition to vacate and set aside the convictions;⁷ a petition for a rehearing of their appeal;⁸ a petition to the Supreme Court of the United States for a writ of certiorari;⁹ and a further petition to the Supreme Court seeking a rehearing.¹⁰ Again and again the case went to the White House. President Eisenhower, after carefully considering every detail of the case, concluded that there was no basis for clemency.¹¹

Finally, on June 15, 1953, the Supreme Court of the United States, prior to adjourning for the summer, refused to review the case,¹² which, in one form or other had come to the highest tribunal on seven different occasions.¹³ Almost immediately, in the absence of the Justices, a new application for a stay of execu-

⁸ *United States v. Rosenberg*, 195 F. 2d 583 (2d Cir. 1952).

⁴ Greenglass and Sobell testified for the State and, as a result, the former was sentenced to 15 years, and the latter, 30 years.

⁶ Judge Irving R. Kaufman exercised his clear statutory choice as provided under the statute. 18 U. S. C. § 794 (b).

⁶ *United States v. Rosenberg*, 195 F. 2d 583 (2d Cir. 1952).

⁷ *United States v. Rosenberg*, 108 F. Supp. 798 (S. D. N. Y. 1952).

⁸ *United States v. Rosenberg*, 200 F. 2d 666 (2d Cir. 1952).

⁹ *Rosenberg v. United States*, 344 U. S. 850 (1952).

¹⁰ *Rosenberg v. United States*, 344 U. S. 889 (1952).

¹¹ In rejecting their plea, President Eisenhower remarked, "I can only say that, by immeasurably increasing the chances of atomic war, the Rosenbergs may have condemned to death tens of millions of innocent people all over the world."

¹² *Rosenberg v. United States*, 345 U. S. 1003 (1953).

¹³ October 13, 1952—first appeal for review of trial denied; November 17, 1952—Supreme Court refused to reconsider its denial; May 25, 1953—second appeal for review denied; June 15, 1953—Supreme Court refused to reconsider its denial; June 15, 1953—Supreme Court denied a stay of execution; June 17, 1953—Justice Douglas granted a stay of execution; June 19, 1953—Supreme Court vacated Douglas' stay order.

tion was presented to Justice William O. Douglas, who, acting within his statutory power, on June 17, 1953, (the day before the execution was scheduled), issued a stay of execution until, what he considered was a substantial legal question, could be determined by further court proceedings.¹⁴ That question was whether the provisions of the Atomic Energy Act of 1946¹⁵ rendered the District Court powerless to impose the death sentence under the Espionage Act of 1917, under which statute the indictment was laid.

A Special Term of the Court was held. Then followed, more than a three-hour argument before the full court on the merits of the point of law upon which Justice Douglas had based his stay order. The next day, June 19, the Court, (with Justices Black and Douglas dissenting, and Justice Frankfurter reserving his views until later), deciding that a substantial legal question did not exist since some of the overt acts were committed prior to the enactment of the Atomic Energy Act, vacated the stay order.¹⁶ The execution of the Rosenbergs took place that evening.

In the light of this background, it is not necessary to challenge their guilt. Their punishment was an affirmation by America, as the voice of humanity, of its will to survive.

The Rosenbergs received every protection of the democratic processes of justice: jury trial, legal counsel, right of defense and of appeal. The United States gave them twenty-seven months of legal review. Their appeals and proceedings exemplify the presumption of regularity and due process attending judgments of conviction.¹⁷ More than two years lapsed before they had exhausted their legal recourses, which is a tribute to the thorough legal processes afforded by American jurisprudence.

The novelty of this case, unprecedented and unparalleled, warrants a discussion of espionage prosecutions in this country.

The entry of the United States into World War I brought espionage to the front as a major problem in this country. Attempts by the foreign aggressor (by means of sympathetic citizens residing in this country or even by means of foreign agents) to undermine the internal security of this country, emphasized the fact that espionage was a deadly danger.¹⁸ It was immediately realized that additional legislation was needed to keep in check the foreign aggressor. The exigencies of the time and the interests to be guarded resulted in the enactment of the Espionage Act of 1917 by Congress.¹⁹

¹⁴ The power of a Justice to grant a stay of execution has existed since 1789 under section 14 of the First Judiciary Act, 1 Stat. 72, 81, 82.

¹⁵ 42 U. S. C. §1810 (b) (2) (3).

¹⁶ *Rosenberg v. United States*, 346 U. S. 273 (1953).

¹⁷ *Canzio v. United States*, 327 U. S. 87 (1946).

¹⁸ From a Report on Espionage by J. Edgar Hoover, Director, Federal Bureau of Investigation.

¹⁹ The Act during World War I had the close scrutiny of Congress and resulted in different bills in the House, which were reconciled only after a second conference report. (H. R. 291, 65th Cong., 1st Sess., Conference Report No. 69) 55 Cong. Rec. 3301.

The Espionage Act of 1917 has continued in force as the federal law governing espionage, censorship, and related anti-social activities.²⁰ Among other things, it denounces the harboring or concealing of violators of the Act;²¹ it prohibits the obtaining of defense information in certain ways;²² and prohibits the disclosing of defense information to aid a foreign government.²³

The statute is explicit in defining the crime of espionage as "an act of obtaining information connected with or related to the national defense with intent or reason to believe that such data will be used to the injury of the United States or to the advantage of a foreign nation." The evil which the statute punishes is the obtaining or furnishing of prohibited information either to our loss or another's gain.

No distinction is made between friend or foe. Possibly, the reason for this is as stated in *Gorin v. United States*,²⁴ that "unhappily the status of a foreign nation may change." Thus, the contention by the defendants in the *Rosenberg* case, that they, at the most, had given secret information to Russia when that country was our wartime ally, was without merit. As the trial judge expressed it, ". . . the conspiracy did not end in 1945, while Russia was still a friend," but ". . . continued during the period when it was apparent that we were dealing with a hostile nation."

The delimiting words in the statute are those requiring "intent or reason to believe" that the information obtained is to be used to the advantage of a foreign nation, or to the injury of the United States. In a prosecution for the crime, it is therefore not necessary to prove that the advantage to the foreign nation was an advantage as against the United States, and that the information obtained was to be used to the injury of the United States.²⁵ It is sufficient that those prosecuted have acted knowingly and in bad faith. The sanctions of the provisions apply only when scienter is established.²⁶

Proof that the defendant did attempt to perform some service for a foreign government for the purpose of benefiting that country in some way, is sufficient evidence to establish violation of the Act.²⁷ Accordingly, the courts have upheld convictions: where the defendant entered a military reservation with a camera and took pictures therein which could be used to the injury of the United States and to the advantage of the foreign nation;²⁸ where the defendant conspired with others to transmit to the German and Japanese governments information relating to the size and equipment of the armed forces with intent or reason

²⁰ 40 Stat. 217 (1917), 50 U. S. C. §§ 31 et seq., is now incorporated into 62 Stat. 736, 18 U. S. C. §§792 et seq. (1948).

²¹ 18 U. S. C. §792, formerly 50 U. S. C. §35.

²² 18 U. S. C. §793, formerly 50 U. S. C. §31.

²³ 18 U. S. C. §794, formerly 50 U. S. C. §32.

²⁴ 312 U. S. 19, 30 (1941).

²⁵ *Gorin v. United States*, 312 U. S. 19 (1941).

²⁶ Cf. *Hygrade Provision Co. v. Sherman*, 266 U. S. 497 (1944).

²⁷ *United States v. Ebeling*, 146 F. 2d 254 (2d Cir. 1944).

²⁸ *Shackow v. Government of Canal Zone*, 108 F. 2d 625 (5th Cir. 1939).

to believe that such information would be used to the benefit of those countries,²⁹ where the defendant furnished photos of an apparatus to de-ice airplanes, and knew that they were to be forwarded to Germany, even though the United States was not at war with Germany at the time;³⁰ where the defendant gathered information taken from reports in the files of the Naval Intelligence, giving a detailed report of counter-espionage work, knowing that such information was capable of use to the advantage of the foreign nation.³¹

The rationale underlying the prosecutions is that every man, who knowingly and willingly acts, is held to have intended the natural consequences of his acts and to be accountable for the reasonable effects which his acts were likely to produce.³²

The philosophy behind the prohibitive scope of the Act is that there are some kinds of information "relating to the national defense" which must not be given to a foreign power, not even to an ally, no matter how innocent, or even commendable, the purpose of the transferor might be. The loyal and disloyal alike may be forbidden to do acts which place our national security in peril.³³ Hence, in *United States v. Coplion*,³⁴ where the evidence consisted of state secrets, which, if divulged, would imperil the national security, the court held that the Government cannot, and should not be required to divulge these secrets, because "*salus rei publicae suprema lex.*"

The statute, on the other hand, does not apply to information which comes from sources lawfully accessible to everybody,³⁵ or to information which the military services have made public, or permitted to be made public.³⁶ Information which thus has been made public has become available to foreign governments in one way or another, and the "advantage" which the statute prohibits has already accrued to those countries.

For example, where the defendant collected all available information about American production of airplanes from the newspapers, from magazines, and from books and journals, in order to advise Germany of American defense in the event of war, his conviction was reversed, because the information came from sources accessible to anyone who was willing to go through the trouble of gathering and of arranging it.³⁷ This interpretation is in accordance with the traditional freedom of discussion permitted in this country with respect to matters pertaining to internal security and national defense.³⁸

²⁹ *United States v. Molzahn*, 135 F. 2d 92 (2d Cir. 1943.)

³⁰ *United States v. Grote*, 140 F. 2d 413 (2d Cir. 1944).

³¹ See note 25 *supra*.

³² *Cramer v. United States*, 325 U. S. 1 (1944); *Abrams v. United States*, 250 U. S. 616 (1919).

³³ *Ibid.*

³⁴ 185 F. 2d 629 (2d Cir. 1950).

³⁵ *United States v. Heine*, 151 F. 2d 813 (2d Cir. 1945).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ That the House intended this interpretation is inferred from the words used by the Judiciary Committee in its report: "Where there is no occasion for secrecy as with reports

The words "national defense" as used in the Act refer to the military and naval establishments and the related activities of national preparedness.³⁹ The question of the connection of the information with national defense is a question of fact to be determined by the jury. The function of the court is to instruct as to the kind of information which is violative of the statute, and the jury is to decide whether the information obtained is of the kind defined.⁴⁰

Provision is made in the Act for the punishment of conspiring to violate other sections of the Act.⁴¹ At least two or more persons must join in the unlawful enterprise to constitute it a conspiracy.⁴² It is enough if the minds of the parties meet and unite with a single design to accomplish a common purpose.⁴³ What distinguishes a single conspiracy to commit espionage from several related ones is a single unified purpose, a common end.⁴⁴ In the *Rosenberg* case, the common end of the conspirators consisted in the transmission to Russia of any and all kinds of secret defense information.⁴⁵ Generally, therefore, when parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same prohibited result, a conspiracy is shown to violate the Act.⁴⁶

In prosecutions for a conspiracy to commit espionage in violation of the Act, charges are frequently of broad scope.⁴⁷ Nevertheless, the overt acts charged must have a tendency to accomplish the object of the conspiracy. Thus, in *United States v. Ault*,⁴⁸ where all the overt acts charged in the indictment to effect the object of the conspiracy were publications which had no relation to the result sought to be achieved, a demurrer to the indictment was sustained. It is not necessary, however, that the overt act in itself be criminal.⁴⁹ In *Farnsworth v. Zerbst*,⁵⁰ the court held that conspiring with others to deliver writings, connected with the national defense, to a foreign nation, and going to stated places in furtherance thereof, constituted a criminal conspiracy, even though going to such places was not in itself unlawful. Although the overt act in *United States v. Lang*,⁵¹ was innocent standing alone, it was nevertheless, performed in the furtherance of an unlawful conspiracy, which was sufficient to implicate the defendant in the conspiracy and to support his conviction thereon. Hypothetically,

relating to the national defense published by the authority of Congress or the military departments, there can . . . be no reasonable intent to give an advantage to a foreign government." See note 17 *supra*.

³⁹ See note 25 *supra*.

⁴⁰ See note 35 *supra*.

⁴¹ 18 U. S. C. §794 (d).

⁴² *Farnsworth v. Zerbst*, 98 F. 2d 541 (5th Cir. 1938).

⁴³ *United States v. Gordon*, 138 F. 2d 174 (7th Cir. 1943).

⁴⁴ See note 3 *supra*, at p. 600.

⁴⁵ *Ibid*.

⁴⁶ See note 43 *supra*.

⁴⁷ *VonMoltke v. Gillies*, 332 U. S. 708 (1948).

⁴⁸ 263 Fed. 800 (W. D. Wash. 1920).

⁴⁹ *Pierce v. United States*, 253 U. S. 239 (1920).

⁵⁰ 98 F. 2d 541 (5th Cir. 1938).

⁵¹ 73 F. Supp. 561 (E. D. N. Y. 1947).

Judge Byers reasoned that "even if the defendant had only worn a designated flower in his coat at a designated time and place," for the purpose of furthering the conspiracy of which he was a part, to transmit information pertaining to the national defense for the advancement of a foreign country, "the verdict against him would be legal and just."⁵²

The validity of espionage prosecutions under the Espionage Act is settled as against a variety of objections based on constitutional grounds. Accordingly, it has been held that the Act does not infringe the constitutional guaranties of freedom of speech and freedom of the press;⁵³ that the language of the Act is sufficiently definite and certain to be consonant with due process;⁵⁴ that the Act is not repealed, limited, or superseded by the subsequent passage of the Atomic Energy Act;⁵⁵ that the Act cannot be invalidated on the theory that some of the matters dealt with constitute treason, and are punishable as such, or not at all.⁵⁶

It should be noted, at this point, that the offense described by section 32 is distinct from the crime of treason as defined in the Constitution of the United States (Article 3, § 3, cl. 1) for which the death penalty is authorized.⁵⁷ Consequently, where one of the conspirators in the *Rosenberg* case argued that the evidence, at most, showed a general treasonous intent to betray, therefore, conviction could not be established unless on the testimony of two witnesses to the same overt act, the court held that in a trial for conspiracy to violate the Espionage Act, the parties were not entitled to the constitutional safeguards applicable to treason.⁵⁸

The power of Congress to prescribe the death penalty is in no way limited to treasonous acts as pointed out in *Cramer v. United States*:⁵⁹

. . . the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security.

And further, reference is made to the debate before the Constitutional Convention, whereupon Rufus King observed that:

The controversy relating to treason might be of less magnitude than was supposed . . . the legislature might punish capitally under other names than treason. 2 Farrand 347.

The Congressional power extends to prescribing the death penalty for espionage in time of war.⁶⁰ The United States, compelled to the extreme measure of self-defense, exercised this power for the first time in executing the Rosenbergs, whose acts of espionage extended from 1944 (through wartime) to 1950. In

⁵² *United States v. Lang*, 73 F. Supp. 561, 562 (E. D. N. Y. 1947).

⁵³ *Abrams v. United States*, 250 U. S. 616 (1919).

⁵⁴ See note 3 *supra*.

⁵⁵ *Ibid.*

⁵⁶ *Frohwerk v. United States*, 249 U. S. 204 (1919).

⁵⁷ See note 3 *supra*.

⁵⁸ *United States v. Rosenberg*, 108 F. Supp. 798, 808 (S. D. N. Y. 1952).

⁵⁹ 325 U. S. 1, 45 (1945).

⁶⁰ U. S. CONST. ART. I, §8, cl. 1, 18.