

Issue Over the Rosenberg Case Brings Debate on Role of Judges

By TOM GOLDSTEIN

The convictions and sentences of Ethel and Julius Rosenberg were upheld after as much scrutiny by appellate courts as any case in American history. But now, 24 years after they were electrocuted as atomic-espionage plotters, a different aspect of the case has become the topic of debate among prominent law professors, leaders of the bar and civil libertarians.

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. This focus has, in turn, raised more general questions: How much should judges be allowed to talk to the prosecution outside of the courtroom? What is the appropriate body to investigate the actions of Federal judges?

The latest action on the Rosenberg matter has been the American Civil Liberties Union's call for two Congressional committees to investigate the "relationship" of Judge Kaufman, now chief judge of the Second Circuit Court of Appeals in New York, with the Rosenberg prosecution.

That request was part of a resolution adopted earlier this month by the A.C.L.U. board of directors asking for the House and Senate Judiciary Committees to "investigate the need for legislation to prohibit ex parte relations" — for private communications — "between Federal judges and prosecutors and other law enforcement officials."

Disclosure of Documents

This resolution was prompted by the disclosure last June of documents of the Federal Bureau of Investigation — which consist mostly of second- and third-hand information — relating to contacts between Judge Kaufman and F.B.I. agents and prosecutors.

Ordinarily, all communication by one side's lawyers to a judge are made known to the other. But Simon Rifkind, a leading New York City lawyer and chairman of a subcommittee of the American Bar Association formed last year to "counteract unwarranted criticism" of Judge Kaufman, has said it is "quite customary" and proper for a judge to consult privately with anyone, including the prosecutor, on the sentence to be handed down.

"Our board resolution," said Norman Dorsen, the A.C.L.U. chairman, "reflects the perception of those of us who are practicing attorneys that such ex parte contacts occur in run-of-the-mill cases in the Federal courts with disturbing frequency" and represent the "violation of due process."

has long been conducted by the pro-Rosenberg lobby and used as a recruiting tool for the radical left." He added: "For the Civil Liberties Union to advocate Congressional inquiry of a judge's conduct of judicial business is reminiscent of McCarthyism at its worst."

After months of debate, the A.C.L.U. resolution was adopted by a 38-to-13 vote two weeks ago. It was opposed by the New York State chapter of the liberties group.

In a memorandum, Donald D. Shack, chairman of the state chapter, said that "despite the seriousness of the allegations against Judge Kaufman," the A.C.L.U. "ought to be the last organization to legitimize such congressional investigations." The state board of directors concluded there was "no appropriate body" to examine charges of misbehavior by Federal judges, except for impeachment proceedings in Congress.

Aides to Peter W. Rodino Jr., Democrat of New Jersey and the head of the House Judiciary Committee, and James O. Eastland, Democrat of Mississippi and head of the Senate committee, said they had not yet studied the resolution. Nor have they taken action upon a similar request last fall by law professors.

More than 100 professors signed a letter circulated by Vern Countryman, a Harvard law professor, asking the Congressional committees to look into Judge Kaufman's behavior because the F.B.I. documents raised "doubts about the propriety of conduct of one who is one of our highest judicial officers."

Mr. Countryman, who at one time represented Morton Sobell, who had been convicted of nonatomic espionage conspiracy with the Rosenbergs, said he had contacted 200 professors whom he knew and who in the past had signed petitions relating to the judiciary.

Many professors who did not sign what has in law school circles come to be known as the "Countryman letter" were



the New York Times

Judge Irving R. Kaufman

upset about the prospect of Congressional investigation of a judge.

One professor wrote to the Association of the Bar of the City of New York last fall and suggested that it was the proper body to conduct the investigation. George N. Lindsay, chairman of the bar group's executive committee, said an "informal" subcommittee had decided that "no action by the association at this time was warranted."

A proposal similar to Mr. Countryman's came up for consideration at last December's meeting of the Society of American Law Teachers. But, according to Howard Lesnick, president of the group and a law professor at the University of Pennsylvania, the discussion was "inconclusive enough to put it off until the April meeting."

Adoption by the law teachers' group of a resolution similar to the Countryman one was strongly opposed by Louis H. Pollack, dean of the University of Pennsylvania Law School. "I know and respect a great many people who signed the Countryman letter," he said. "I respectfully disagree with their proposal. Maybe it's constitutional purity on my part. But I get alarmed at the idea of asking the legislature to look at past judicial conduct."

His comments were contained in a letter he sent this week to the chairmen of the two Congressional committees and to Chief Justice Warren E. Burger in his capacity as head of the Judicial Conference of the United States.

"Although we do not prejudice this issue," Mr. Dorsen, a law professor at New York University, said the F.B.I. documents "raise the possibility that the trial judge in an historic case maintained an improper ex parte relationship with the prosecution, at least with respect to the question of sentencing."

In the F.B.I. documents there are indications that Judge Kaufman conferred with others before he imposed the Rosenberg sentence. When these documents were released, lawyers for the Rosenbergs' two sons said that if accurate, they showed the judge had acted improperly.

Since the code of judicial conduct prevents judges from speaking out on their own behalf, in the last year, Mr. Rifkind, a former Federal judge, has been steadfast in his defense of Judge Kaufman, and he called the A.C.L.U. resolution "part of the orchestrated campaign that