

NOTICE

THE BEST COPIES OBTAINABLE ARE INCLUDED IN THE REPRODUCTION OF THE FILE. PAGES INCLUDED THAT ARE BLURRED, LIGHT OR OTHERWISE DIFFICULT TO READ ARE THE RESULT OF THE CONDITION AND OR COLOR OF THE ORIGINALS PROVIDED. THESE ARE THE BEST COPIES AVAILABLE.

F.O.I.A.

JULIUS ROSENBERG ET AL.

FILE DESCRIPTION

HQ

FILE

SUBJECT MARTIN SOBELL

FILE NO. 101-2483

VOLUME NO. 31

SERIALS

1121

1145

File No: 101-2483
Det 31

Re: Sobell

Date: _____
(month/year)

Serial	Date	Description (Type of communication, to, from)	No. of Pages		Exemptions used or, to whom referred (Identify statute if (b)(3) cited)
			Actual	Released	
1121	5/5/54	Hennrich memo to Belmont	1	1	
1121	5/7/54	HQ let DOJ	2	2	
1122	5/26/54	SF let HQ	1	1	
1123	6/4/54	Hennrich memo to Belmont	1	1	
1124	5/28/54	NY let HQ	9	9	
1125	6/8/54	Brannigan memo to Belmont	1	1	b7D b7C
1126	6/7/54	Brannigan memo to Belmont	2 9	2 9	
1127	6/8/54	AL rept HQ	5	5	
1128	6/7/54	WFO TT HQ	1	1	
1129	6/7/54	NY TT HQ	1	1	
1129	6/8/54	HQ let NY	2	2	
1130	6/15/54	SF let HQ	1	1	

36 36 0 0
rev ne deny ref presumed proper

File No: 101-2483 Re: Lochell Date: _____
(month/year)

Serial	Date	Description (Type of communication, to, from)	No. of Pages		Exemptions used or, to whom referred (Identify statute if (b)(3) cited)
			Actual	Released	
1130	7/1/54	HQ let NY	1	1	
1131	6/25/54	NY let HQ	1	1	
1132	6/24/54	WFO rept HQ	8 19	8 11	
1133	7/2/54	NY TT HQ	1	1	
1133	7/6/54	HQ TT SF	1	1	
1134	7/15/54	HQ let SF	1	1	
1135	7/15/54	Beaman memo to Belmont	1	1	b1
1136	7/15/54	NY let HQ and end.	2 3	2 3	b2 b7D
1137	7/28/54	NY rept HQ	7	7	
NR	8/1/54	Bulky Exhibit inventory	1	1	b1
1138	8/6/54	SF let HQ	1	1	
NR	8/1/54	Bulky Exhibit inventory	1	1	

40 40
rev me deny ref presume preprom
FBI/DOJ

File No: 101-2483
sect 31

Re: LoBell

Date: _____
(month/year)

Serial	Date	Description (Type of communication, to, from)	No. of Pages		Exemptions used or, to whom referred (Identify statute if (b)(3) cited)
			Actual	Released	
1139	8/17/54	SF let HQ	2	2	b2b7D
1139	8/31/54	HQ let DOJ	1	1	b2b7D
1140	8/27/54	SF att HQ	1	1	
NR	8/31/54	LA let HQ	1	1	b2b7D
1141	9/1/54	SF TT HQ	1	1	
1142	9/2/54	SF let HQ and encl.	7/5	7/5	
1142	9/20/54	HQ let DOJ	1	1	
1143	9/3/54	Branigan memo to Belmont	4	4	
1144	8/31/54	SF let HQ	8	8	
1145	9/9/54	NY TT HQ	1	1	
NR	10/21/66	Jones memo to Wick and encl.	2/1	2/1	

55 35
rev rel deny ref presumed proper

Office Memorandum • UNITED STATES GOVERNMENT

TO : MR. A. H. BELMONT

DATE: May 5, 1954

FROM : MR. C. E. HENRICH

SUBJECT: MORTON SOBELL, was.
ESPIONAGE - R

Tolson _____
Ladd _____
Nichols _____
Belmont _____
Clegg _____
Glavin _____
Harbo _____
Rosen _____
Tracy _____
Mohr _____
Trotter _____
Winterrowd _____
Tele. Room _____
Holloman _____
Miss Gandy _____

CONFIDENTIAL
(4) Declassified
10/16/77
WAB/arc
#2355

Mr. Frank Lovett, Assistant Director, Bureau of Prisons, called on the morning of May 5. He advised that the Bureau of Prisons is receiving considerable quantities of mail from individuals throughout the country, demanding the transfer of Morton Sobell out of the Federal Penitentiary at Alcatraz. Lovett stated that these communications are not being answered; that they are now being received at the rate of four or five a day, and that their files contain an accumulation of several hundred such communications. He suggested that many of the letters are probably from persons in whom the Bureau would be interested and stated that his purpose in calling was to let us know these files were available in the event we desired to look them over.

Undoubtedly much of the mail being received by the Bureau of Prisons will be from liberals, sentimentalists, and innocent persons who have been prevailed upon by others to write to the Bureau of Prisons. The fact that such communications are being sent would not, therefore, of itself be indicative of subversive action on the part of the senders. It appears it would be unnecessary to make a detailed review of all this material; however, just to be sure, I think we should have the Washington Field Office contact Mr. Lovett and look through the material to see if there is anything of special significance contained therein.

RECOMMENDATION:

RECORDED-74

101-2483-1171

If you agree, I will call the Washington Field Office and instruct that they contact Mr. Lovett and look through the material.

CEH:LL

Classified 2355
Exempt from GDS
Date of declassification

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 put-ole

~~CONFIDENTIAL~~

Assistant Attorney General
Warren Olney III

May 7, 1954

Director, FBI

MORTON SOBELL
ESPIONAGE - R

RECORDED-74

EX-107

100-3483-1121

Information has been received that the National Committee to Secure Justice in the Rosenberg Case now has as its primary aim to secure the transfer of Morton Sobell from Alcatraz to a penitentiary in the eastern part of the United States, preferably Lewisburg. The above-named Committee is securing signatures to a petition to be presented to the Director of the Bureau of Prisons with a request that he transfer Sobell.

In this connection, Mr. Frank Cleveland, Assistant Director, Bureau of Prisons, advised on May 5, 1954, that considerable quantities of mail are being received at the Bureau of Prisons from individuals throughout the country demanding the transfer of Sobell from Alcatraz. He stated these letters are being received at the rate of four or five per day, and the Bureau of Prisons now has several hundred of these letters.

The above is furnished to you for your information.

ALL INFORMATION CONTAINED

HEREIN IS UNCLASSIFIED

DATE 4/17/87 BY 3042 fwt-DIC

COMM - FBI

MAY 7 - 1954

MAILED 27

cc 2 - Mr. James F. Bennett
Director
Bureau of Prisons

cc 1 - 100-337235 National Committee to Secure Justice in the
Rosenberg Case

Sobell was convicted along with Julius and Ethel Rosenberg of conspiracy to commit espionage; he received a 30 year sentence, and is now at Alcatraz penitentiary. He is now reviewing items taken from Sobell at the time of his arrest preparatory to having an agent contact Sobell relative to the disposition of these items and at the same time furnish an opportunity for Sobell to talk to him as to the disposition. It is not

CONTINUED ON PAGE 2

Tolson _____
Ladd _____
Nichols _____
Belmont _____
Clegg _____
Glavin _____
Harbo _____
Rosen _____
Tracy _____
Gandy _____
Mohr _____
Winterrowd _____
Tele. Room _____
Holloman _____
Miss Gandy _____

51 MAY 14 1954

U.S. DEPT. OF JUSTICE

RECEIVED - MAY 10 1954

DECLASSIFIED TO: 101-101

CONFIDENTIAL

WAB

UNRECORDED COPY FILED IN 100-3483-1121

~~CONFIDENTIAL~~

Re: [illegible]

believed desirable to inform the Bureau of Prisons as suggested by New York concerning our contemplated interview of Sobell as the decision to transfer him is now for the Bureau of Prisons to make and not the FBI.

~~CONFIDENTIAL~~

Office Memorandum • UNITED STATES GOVERNMENT

TO : DIRECTOR, FBI (101-2483)

FROM : SAC, SAN FRANCISCO (65-4228)

SUBJECT: MORTON SOBELL
ESPIONAGE - R

DATE: 5/26/54

Re: SF letter to Bureau 4/8/54 advising that HELEN SOBELL was authorized to visit subject at Alcatraz on 4/19 & 21/54.

Prison Authorities have advised that subject's wife visited him on the above-mentioned dates, however, that nothing of significance was noted.

The "DPW", west coast Communist newspaper, for April 23, 1954, carried an interview with Mrs. SOBELL following her visit with subject. She is quoted as saying SOBELL "felt the attack on Oppenheimer was another attempt to push scientists into absolute conformity." Mrs. SOBELL, according to the article, who devotes all her energies to the campaign for her husband's vindication, says he is "working and studying" but at the same time reflecting the strain of confinement in the grimmest of U.S. prisons, a structure designed for so-called incorrigible prisoners.

The article continues and quotes her as stating, "He wants to come home to me and the children a free man and a vindicated one."

The article states the campaign to achieve this end is proceeding on two fronts, according to Mrs. SOBELL.

"First, there is the national campaign, just getting started, to get Sobell transferred from Alcatraz to a prison more in keeping with the political nature of his confinement. This campaign is being directed at James V. Bennett, director of prisons, 101 Indiana Ave., Washington, D.C.

"Secondly, there is the continuing legal battle, which involves both the question of a new trial and Sobell's transfer from Alcatraz. Mrs. Sobell said legal moves are in preparation in both fields."

FFP:lq
REGISTERED

CC. NEW YORK (100-37388)

RECORDED 13

101-2483-7122

EX-129

JUN 2 1954

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 JWB/ME

ESP/SEC

53 JUN 10 1954

Office Memorandum • UNITED STATES GOVERNMENT

TO : Mr. A. H. Belmont

DATE: June 4, 1954

FROM : Mr. C. E. Hennrich

SUBJECT: MORTON SOBELL
ESPIONAGE - R
Bufile 101-2483

Tolson _____
Ladd _____
Nichols _____
Belmont _____
Clegg _____
Glavin _____
Harbo _____
Rosen _____
Tracy _____
Mohr _____
Winterrowd _____
Tele. Room _____
Holloman _____
Miss Gandy _____

Special Agent Tom Mendenhall of the Washington Field Office delivered to the Bureau on the afternoon of June 4 a copy of the motion filed on June 4, 1954, before the Supreme Court asking leave to file petition for rehearing on the petition for writ of certiorari. This motion is presently being reviewed in the Espionage Section and a memorandum will be prepared.

ACTION:

For your information.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 *Int-Ole*

RECORDED - 118
EX-118

101-2483-1123

JUN 8 1954

cc - Mr. W. A. Branigan
cc - Mr. J. P. Lee

CEH:anc

FUSC

60 JUN 10 1954

Office Memorandum • UNITED STATES GOVERNMENT

TO : Director, FBI (101-2483)
 FROM : SAC, New York (100-37158)

DATE: 5/28/54

SUBJECT: MORTON SOBELL, was
 ESPIONAGE - R

~~SECRET~~

ReNYlet 3/20/54 and Bulet 4/14/54.

Reference is made to report of SA REX I. SHRODER dated 8/23/50 at San Antonio captioned as above. This report lists the personal property that was taken from SOBELL at the time of his arrest. The following is a list of the property maintained in this office or in the office/the USA that was taken from SOBELL:

PROPERTYNY Exhibit No.DISPOSITION

1. One key

118

ALL INFORMATION CONTAINED
 HEREIN IS UNCLASSIFIED
 DATE 4/17/87 BY 3042 fuit dfe

✓ 2. Mexican tourist
 card for MORTON
 SOBELL #070538
 dated 6/22/50, NY,
 NY

189

✓ 3. Mexican tourist
 card for HELEN L.
 SOBELL #070544
 dated 6/22/50, NY,
 NY

95

APPROPRIATE
 FIELD OFFICES
 ADVISED BY ROUTING
 SLIP(S) OF
 DATE 10-19-77
 Decl. 10/16/75
 WAB/Buc
 #2355

✓ 4. Certificate of
 vaccination for
 SIDNEY SOBELL

93

✓ 5. Mexican tourist
 visa for MARY
 SOBELL dated 6/23/50
 at Mexico D.F.

96

Class
 Exch
 Date

RM

2-San Francisco (65-4228) (AM - REGISTERED)

JAN 10 1961
 COPIES DESTROYED

11 0 MAR 13 1961

cc Brangan ~~SECRET~~

RECORDED - 115

101-2483

JUN 1961

EXP. PROC.

Memorandum
 to SAC, New York
 6/1/54

Letter to Director
NY 100-37158

<u>PROPERTY</u>	<u>NY EXHIBIT NO.</u>	<u>DISPOSITION</u>
✓ 6. Mexican tourist visa for SIDNEY SOBELL dated 6/23/50 at Mexico D.F.	1B97	To be returned to SOBELL
7. American Airlines leatherette ticket and passport folder	90	"
✓ 8. Certificate of vaccination for MORTON SOBELL dated 8/8/50 at Mexico, D.F.	91	"
✓ 9. Certificate of vaccination for HELEN L. SOBELL dated 8/11/50 at Mexico D.F.	92	"

Pages 3,4,5,6,7, and 8 list seven letters that were found in SOBELL's luggage. Amongst these letters is a so-called "New letter" which is named as item one on page three of report. After some consideration it is NY's opinion that none of these letters should be returned to SOBELL at this time. It is realized that these letters are social in nature but they also contain some of the aliases used by SOBELL while he was in Mexico and away from his wife. It is also realized that during the trial SOBELL's lawyers admitted in open court the identity of all these letters that were found in SOBELL's possession that were written by him.

✓ 10. Schedule of the Home Lines "SS Argentina", Central American-European Service, Provisional East Bound Trip, June, 1951 (revised)	81	"
---	----	---

Letter to Director
NY 100-37158

Appearing in ink in long hand at the bottom of this schedule appears the following: "one quarter passage between 1-5 years". Also appearing on the top of this schedule in long hand ink is the notation "\$80 to (illegible).

<u>PROPERTY</u>	<u>NY EXHIBIT NO.</u>	<u>DISPOSITION</u>
✓ 11. Schedule for "SS Argentina" itinerary, 1950	1B80	To be returned to SOBELL
✓ 12. Sailing schedule of Polish ports issued by Ministry of Shipping	112	"
✓ 13. "Boletin Economico" issued by agricultural office containing sailing schedules to Rumania, Bulgaria and Poland and written in Spanish	116	"
✓ 14. Home Lines schedule for "SS Argentina" issued for Wagons-Lits/Cook	102	"
✓ 15. Cuban travel folder	103	"
✓ 16. Pan American World Airways time table June, 1950	104	"
✓ 17. Pamphlet by Air France of schedules and fares schedule #32	105	"
18. Pamphlet entitled "Aerovias Guest" effective 4/15/50	106	"

SECRET

Letter to Director
NY 100-37158

<u>PROPERTY</u>	<u>NY EXHIBIT NO.</u>	<u>DISPOSITION</u>
✓ 19. Pamphlet of Cuban Tourist Commission	107	To be returned to SOBELL
✓ 20. Airlines schedule issued by Salidas de Aviones	108	"
21. Pamphlet of the Pan American World Air- ways entitled "Mexicana de Aviacion"	109	"
22. Street guide of Mexico City	110	"
23. Pamphlet of Elma Sewing Machine Company	111	"
24. Mexican museum and art gallery pamphlet	113	"
25. Hotel guide issued by Plateria Ortega, S.A. 5 de Mayo 13	117	"
26. Schedule of Pan American World Airways flights to Houston, Mexico, New Orleans, Panama	114	"
27. Pages 452 to 456 torn out of a travel book entitled "Mexico" with various markings on same	115	"
✓ 28. Sucesos map of Europe and northern Africa	119	"

Letter to Director
NY 100-37158

<u>PROPERTY</u>	<u>NY EXHIBIT NO.</u>	<u>DISPOSITION</u>
29. Two bills from the Gas Economico S.A. in sum of \$16.25	100	To be returned to SOBELL
30. A receipt from "Elcentro Mercantil S.A." dated August, 1950	99	"
31. Receipt from "Elcentro Mercantil" dated 8/14/50	99	"
32. Receipt from "Elcentro Mercantil" dated 8/14/50 in sum of \$6.00	99	"
33. Scraps of paper torn from envelope shows MANUEL resides at 153-5 Cordova, Mexico	84	Will not return to SOBELL
34. Four pieces of paper on which appear several lines in pencil written in Spanish	85	"
35. Copies of rough drawing entitled "Voltage to digital converter" 6/19/50	86	In view of conflicting statements by SOBELL this item will not be returned to him

~~SECRET~~

Letter to Director
NY 100-37158

<u>PROPERTY</u>	<u>NY EXHIBIT NO.</u>	<u>DISPOSITION</u>
36. Piece of paper on which appear algebraic equations in pencil and green ink		To be returned to SOBELL
37. Receipt from the Bureau of Customs dated 6/23/50 at Dallas, Texas signed by SOBELL and listing the following: Leica Camera # 248674 Elmar 135F50-156589 Summitar F5cm1.2 #585463 Bolex L8WYVAR 128 Lens #70591	98	"
38. Laird and Lees vest pocket dictionary, English-Spanish	87	"
39. Black morocco wallet	89	"
40. American Airlines leatherette ticket and passport folder	88	"
41. American Airlines passenger ticket #012A121896. Ticket was issued for SIDNEY SOBELL from NY to Mexico City and to return	134	"

Mr. ROBERT LYNCH, former ASAC, NYO, advised that this ticket is still good and redeemable. He stated that the ticket

Letter to Director
NY 100-37158

with appropriate letter should be forwarded to Mr. V.J. LONG, Assistant Comptroller, American Airlines, 910 South Boston, Tulsa, Oklahoma.

<u>PROPERTY</u>	<u>NY EXHIBIT NO.</u>	<u>DISPOSITION</u>
42. Divorce papers for HELEN LEVITOV GUREWITZ and CLARENCE DARROW GUREWITZ dated 12/4/44, Arlington, Virginia	132	To be returned to SOBELL
43. Certificate of marriage of MORTON SOBELL and HELEN GUREWITZ	131	"
44. Birth certificate of MORTON SOBELL	120	"
45. Certificate of birth for MARK SOBELL, son of subject	121	"
46. Birth registration for HELEN LEVITOV	124	"
47. Birth registration for SIDNEY FLORENCE GUREWITZ, step- daughter of subject	123	"
48. Certificate of marriage of CLARENCE GUREWITZ and HELEN LEVITOV	122	"
49. Operator's license of MORTON SOBELL dated 1948	129	"

Letter to Director
NY 100-37158

<u>PROPERTY</u>	<u>NY EXHIBIT NO.</u>	<u>DISPOSITION</u>
50. Social security card #055-16-7426 for MORTON SOBELL	127	To be returned to MORTON SOBELL
51. Amateur radio operator's license for MORTON SOBELL	130	"
52. Identification card of Liberty Mutual Insurance issued to HELEN L. SOBELL	128	"
53. Membership card of MORTON SOBELL in NY Academy of Sciences	126	"
54. Card captioned "Taller de Plomeria y Hojalateria"	125	"
55. One pair of eye glasses of MORTON SOBELL	142	"
56. One small Hallmark date book of SIDNEY GUREWITZ	133	"
57. Three rent receipts - 2 for the month of July and 1 for the month of August, 1950	101	"

The attention of the Bureau and San Francisco is directed to the fact that the current activity of the National Committee to Secure Justice for MORTON SOBELL in the Rosenberg Case is to raise funds to get a new trial for SOBELL but above all to have SOBELL transferred from Alcatraz. NY believes

Letter to Director
NY 100-37158

that before SOBELL is approached for the purpose of turning back to him his property any application that Mrs. SOBELL or the National Committee to Secure Justice for MORTON SOBELL in the Rosenberg Case has pending with Mr. JAMES BENNETT, Director of the Federal Bureau of Prisons, for a transfer from Alcatraz should be disposed of. NY makes this suggestion because it has had the experience that when SOBELL has an application in any nature pending he will not turn his mind to any other subject or topic until the matter under consideration has been disposed of.

It is suggested San Francisco determine the nature of the current correspondence between SOBELL and his wife with particular reference to any plans that the Committee has for him.

The attention of the Bureau and San Francisco is further directed to the fact that the National Committee to Secure Justice in the Rosenberg Case has issued a call for a memorial period from 5/10/54 to 6/20/54. During this period the Committee plans to hold several meetings in various cities particularly on 6/19/54 which is the anniversary of the execution of the ROSENBERGS. Further in connection with the memorial service for the ROSENBERGS the committee plans demonstrations, appeals and collections to secure a new trial for SOBELL and to effect his removal from Alcatraz. It is probable that SOBELL is aware of these plans of the Committee and will want to see the results of the actions of the Committee. For this additional reason NY believes that SOBELL should not be approached until at least after 6/20/54.

The opinion of the Bureau and San Francisco to the foregoing is solicited.

Office Memorandum • UNITED STATES GOVERNMENT

TO : A. H. Belmont

DATE: June 7, 1954

FROM : W. A. Branigan

SUBJECT: MORTON SOBELL
ESPIONAGE - RALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 fwt-dse

Tolson _____
Boardman _____
Belmont _____
Clegg _____
Glavin _____
Harbo _____
Rosen _____
Tamm _____
Tracy _____
Mohr _____
Winterrowd _____
Tele. Room _____
Holloman _____
Miss Gandy _____

On June 4, 1954, Howard N. Meyer, subject's attorney, filed with the United States Supreme Court (USSC) a motion for leave to file a petition for rehearing on petition for writ of certiorari to the U. S. Court of Appeals for the Second Circuit and asks that the order of the Court dated 10/13/52 denying certiorari be vacated. A copy of the petition is attached. The petition notes that time for rehearing has expired but claims that unusual circumstances exist which justify such action. You will recall that on October 13, 1952, the USSC denied an application for certiorari in both the Rosenberg and Sobell appeals.

This petition is based on the single question of whether the trial court in a conspiracy trial may withdraw from the jury the question of whether the petitioner was proved to have entered into the principal conspiracy when objection is made that the proof has shown two separate conspiracies. The defense contends that actually two conspiracies were alleged, one between Rosenberg and Greenglass covering atomic information and one between Rosenberg and Sobell covering non-atomic information and that the jury was improperly charged by the trial judge on the question of whether Sobell joined the conspiracy embracing atomic secrets.

The arguments raised are:

1. Two conspiracies, one atomic and one non-atomic existed and the jury should have decided whether Sobell acquiesced in the atomic as well as the non-atomic conspiracy since he was not charged with atomic espionage.
2. No proof was offered that Sobell was even aware of any atomic espionage being committed.
3. The trial judge did not permit the jury to decide whether two conspiracies existed.

Attachment
101-2483

JPL:egp:mpp

53 JUN 16 1954

F313

RECORDED - 44

INDEXED - 46

101-2483-1126

3 JUN 10 1954

[Handwritten signatures and initials]

It will be recalled that in the original appeal to the Circuit Court of Appeals, Judge Jerome Frank in a dissenting opinion adopted the view that Rosenberg had engaged in two separate conspiracies, one with Greenglass and one with Sobell and that Sobell ~~and that Sobell~~ was entitled to a new trial inasmuch as the proof offered by the prosecution covered one over-all conspiracy.

This petition does not mention the FBI nor is any question of fact raised.

ACTION:

None. For your information.

ADDENDUM:

Supervisor Dudley Payne of WFO advised on June 7, 1954, that a check of the records of the Supreme Court reflects that the Supreme Court has denied the petition of Morton Sobell to file a Second petition for a rehearing of this Case. Chief Judge Warren took no part in the decision.

JFK

DP

R2

Office - Supreme Court, U.S.

FILED

JUN 4 1954

HAROLD M. PHILLIPS, Clerk

Supreme Court of the United States

No. 112, October Term 1952

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 jmt-DTB

MOTION SOBELLO,

Petitioner,

v.

UNITED STATES OF AMERICA.

**MOTION FOR LEAVE TO FILE PETITION FOR
REHEARING ON PETITION FOR WRIT OF CER-
TIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

HOWARD N. MEYER,
Counsel for Petitioner.

HAROLD M. PHILLIPS,
EDWARD KUNTZ,
of Counsel.

INDEX

	PAGE
Motion for Leave to File Petition for Rehearing_____	1
Power of the Court_____	3
Reasons for Granting Reconsideration_____	3
Argument _____	5
Conclusion _____	12

CASES CITED

Berger v. United States, 295 U. S. 78_____	11
Canella v. United States, 157 F. 2d 470_____	2
Carrigan v. United States, 197 F. 2d 817_____	4, 11
Lefco v. United States, 74 F. 2d 66_____	4
McGrath v. Manufacturers Trust Co., 337 U. S. 953_____	3
Stone v. White, 300 U. S. 643_____	3
United States v. Andolschek, 142 F. (2d) 503_____	11
United States v. Heine, 151 F. 2d 813_____	5
United States v. Lutwak, 195 F. 2d 748_____	4
Zap v. United States, 330 U. S. 800_____	3

OTHER AUTHORITIES

Note, The Rosenberg Case (1954) 54 Col. Law Rev. 219 _____	9, 10, 11
92 Cong. Rec. 6082_____	6
Laurence, The Hell Bomb_____	6
Newman & Miller, The Control of Atomic Energy_____	6, 7, 8
Sen. Rep. 1211, 79 Cong. 2d Sess._____	7
U. S. Senate, Special Committee on Atomic Energy 79 Cong. 2d Sess:	
Hearings pursuant to S. Res. 179_____	7
Hearings, Atomic Energy Act of 1946_____	7

Supreme Court of the United States

No. 112, October Term 1952

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

**MOTION FOR LEAVE TO FILE PETITION FOR
REHEARING ON PETITION FOR WRIT OF CER-
TIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

Morton Sobell respectfully moves this Court for leave to file a Second Petition for Rehearing with respect to the denial of certiorari herein.

This motion is addressed to, and limited to, a single question presented on the original petition for a writ of certiorari herein, namely, *whether* the trial court, in a conspiracy trial, may withdraw from the jury the question whether petitioner was proved to have entered into the principal conspiracy charged in the indictment when objection is seasonably raised that the proof has shown two separate conspiracies, if any.¹

A supervening event of major significance occurred subsequent to the denial of certiorari as to this aspect of this petitioner's case: namely, the review by the Court (346 U. S. 273) of the stay of execution granted by Mr.

¹ This was the Question Presented as 1(b) in the Petition, No. 112, O.T. 1952 and discussed as 9(b) in the Solicitor General's Brief in Opposition.

Justice Douglas to petitioner's co-defendants.² The Court's examination of the substantiality of the question whether the Atomic Energy Act of 1946 had affected the sentencing power of the trial court had the incidental effect of newly illuminating this separate question on which Circuit Judge Frank had dissented from the affirmation of Sobell's conviction (R. 1666-7; 195 F. 2d at p. 601-2). The result is to furnish express substantiation of contentions made on behalf of petitioner when review was originally sought. These significant contentions are:

(1) That the jury was improperly directed by the trial judge on the question of whether Sobell had joined an overall conspiracy embracing atomic secrets;

(2) That secrets pertaining to atomic energy and atomic weapons are and were of such a qualitatively different character from other military information as to have required explicit direction by the trial judge that the jury should have found it to be the "fair import of the concerted purpose" of the conspiracy, as Sobell understood it, that it should include atomic espionage, as a condition precedent to petitioner's conviction under the indictment and on the record below.

It hardly requires to be said that the examination of the question now presented does not draw into consideration to any extent whatsoever the validity of the conviction, judgment or sentence on petitioner's co-defendants. It is well settled (e.g., *Canella v. United States*, 157 F. 2d 470) that the "central figure" may not complain if his conviction should be found to rest on two separate conspiracies rather than an all-inclusive whole.

Basic to the position of this petitioner is the fact acknowledged by the trial judge at the moment he was sentenced, "The evidence in the case did not point to any activity on your part in connection with the atom bomb project" (R. 1666-7; 195 F. 2d at p. 601-2). The result is to furnish express substantiation of contentions made on behalf of petitioner when review was originally sought. These significant contentions are:

There has also been a further conflict of circuits since the original submission; see p. 4, *infra*.

1620). The evidence did not merely fail to show "activity"; it failed to show acquiescence, interest, knowledge, or even unconscious assistance in atomic espionage. Indeed the case against Sobell does not even purport to show testimony claimed to constitute direct evidence of membership in any conspiracy until a date later than the completion of all of the alleged overt acts relating to the atomic espionage conspiracy—conclusion of which prior to 1946 has now been held to constitute the overriding factor which prevented consideration of the effect of the Atomic Energy Act on the sentencing power of the trial judge.

Power of the Court

The present motion, for leave to secure reconsideration at a time subsequent to the expiration of the time provided for by Rule of Court for rehearing, is unusual but by no means unprecedented. *Zap v. United States*, 330 U. S. 800; *Stone v. White*, 300 U. S. 643; *McGrath v. Manufacturers Trust Company*, 337 U. S. 953; see 28 U. S. C. 452. The circumstances of this case clearly warrant the exercise of the unusual, but undoubtedly existing, power of this Court to grant leave to file for rehearing at this stage in the proceedings.

Reasons for Granting Reconsideration

The particular question sought to be presented—and never reviewed by this Court at any stage of this case—is one of general importance in the administration of federal criminal justice, and as to which there has existed, since the decision below, a conflict of circuits warranting exercise of this Court's certiorari jurisdiction. The conflict as claimed at the time of submission of the original petition for the writ, as to the role of the jury where a

² Said to be the "early part of 1946" (R. 245).

defendant has raised a colorable claim of proof of more than one conspiracy, was stated then to be between the decision below, in the Second Circuit, and the decision of the Third Circuit in *Lefco v. United States*, 74 F. (2d) 66.

Further conflict in circuits: Subsequent to that original submission (which was June 7, 1952), the Ninth Circuit held, in *Carigan v. United States*, 197 F. 2d 817 (cert. den. 344 U. S. 866³), that it was for the jury to determine whether the prosecution had proved "the existence of a single overall plan in which all participated" (at p. 820). And shortly before the original submission, and unknown to counsel at the time, the Seventh Circuit in *United States v. Lutwak*, 195 F. 2d 748 (aff'd without consideration of the question 344 U. S. 604), held that it was appropriate for the jury to consider "the issue of common purpose and design" (at p. 751) and the sufficiency of the evidence of "interrelated coordinated conduct by the several parties" (at pp. 752-753).

The foregoing reasons are quite independent of the basic need that one who maintains his innocence, as does this petitioner, of any crime, and particularly a crime of such grave consequence, should be convicted only after a trial in which adequate safeguards exist against miscarriage of justice. The protection of such safeguards is of particular importance where, as here, the conspiracy device has been employed for the procedural advantage of the prosecutor. The jury which was called upon to determine petitioner's fate was overwhelmed with the awful fears constantly associated with every aspect of control of atomic energy information in a trial in which the transfer of the "secret" of the atomic bomb to a power considered hostile dominated the courtroom from the beginning to the end.

³ Sub nom. *Davidson v. United States*.

Argument

1. It may not be inconceivable that two or more conspirators should plot to transmit both non-atomic and atomic secrets as part of a single conspiracy. But the question insistently sounded by this record is whether Morton Sobell has been fairly convicted of having participated in *such* a conspiracy.
- The original petition did not, as it now appears, adequately present to the Court the significant proposition demonstrating that an important choice of inferences necessarily must be made before one accused of having conspired with respect to non-atomic secrets can be found to have been willing to accept a "common purpose" embracing both atomic and non-atomic espionage.
- The supervening circumstance of the court's review, in Special Term, of the stay based on the Atomic Energy Act focusses attention on the mass of data which refute the proposition blandly stated by the Government in opposition to Sobell's petition for a writ of certiorari:
- "There is not a 'different kind of a difference' (see Pet. 26) between data on the (atomic) bomb and the large, albeit random, collection of data about the United States Military effort that Sobell must have known was being undertaken" (No. 112, O.T. 1952, Br. Opp. 47).

This is precisely what the Attorney General's "Application to Convene Court in Special Term" of June 17, 1953, and the consequent opinions of this Court, as well as the legislative materials referred to therein, demonstrate to be wholly incorrect. The quality and character of atomic energy information was recognized, for example, as wholly different from all "information relating to the national defense" therefore covered by the Espionage Act, in that the latter was to be determined to be "secret" by the armed services (e.g. *United States v. Heine*, 151 F. 2d 813),

whereas the former is to be classified by the civilian Atomic Energy Commission (Application to Convene Court in Special Term, p. 7, n). The problem of atomic energy control raised the question—never theretofore relevant to the subjects protected by the Espionage Act—of the need "to reconcile the requirement for security control of information with the necessity for sufficient freedom of interchange between scientists to assure the nation of continued scientific papers" (Application to Convene Court in Special Term, p. 8). The nature of the subject matter involved was such that "The Espionage Act as it was written would not do" (Sen. McMahon, 92 Cong. Rec. 6082, quoted at p. 9 of Application to Convene Court in Special Term). At another point in the same debate Senator McMahon stated "atomic energy makes its own rules. It is sui generis" (92 Cong. Rec. 6082). Or, as stated by Newman & Miller, *The Control of Atomic Energy*, p. 226 (1948), "it was the clear intent of Congress, as evinced by the drastic penalties alone, to treat atomic energy as a category special and unique". (Emphasis supplied.)

This has been not only legislative policy, but the policy of the executive in international affairs pertaining to the subject matter:

"The official United Nations' proposals for international control of atomic energy apparently involve the assumption that A-bombs are so unique technically and so menacing as to set them apart from conventional weapons and to justify separate consideration in the United Nations and a separate regulatory system." *Lawrence, the Hell Bomb*, pp. 174-175 (1951).

It has never been questioned in any responsible quarter that there was overwhelming evidence before the Congress to justify the treatment of control of information relating to atomic energy as "a category special and unique". The legislative process itself was unique, a Senate Special Committee on Atomic Energy having been constituted pursuant to Sen. Res. 139 and having conducted numerous hearings

prior to the drafting on the bill S. 1717 that ultimately became fashioned into the Act. In Sen. Rep. 1211, 79th Cong., 2d Sess., reporting S. 1717 as amended by the Committee after numerous further hearings, the following point was made part of a "terse summary of the main lines of the testimony" (S. Rep. 1211, p. 5):

"(1) The atomic bomb is a weapon of appalling destructiveness. While quantitative comparisons with other explosives can be made, the arithmetical ratio describe inadequately the profound changes in all relations between nations foreshadowed by the existence of the atomic bomb."

The unique character of atomic energy secrets was inherent in the subject matter and was not produced but merely registered by the enactment of the Atomic Energy Act of 1946. Detailed consideration of the evidence on which the Senate Committee and the Congress were prompted to act seems hardly necessary. The differences between atomic energy information and other "information relating to the national defense" are repeatedly emphasized in the testimony of the witnesses before the Committee.

The words of the counsel to the Senate Special Committee summarize aptly the outstanding fact of national thin-

ing from 1945 forward with respect to the difference:

"In the course of the Committee's schooling it no doubt received a good deal of information and admonition on the military applications of atomic energy. However, the point that that atomic bomb is terrifying beyond imagination did not need to be labored; it was recorded adequately in the wasted bodies, the twisted members, the ashes, and the debris of Nagasaki and Hiroshima. If the Committee members were less sensitive than John Hersey in registering all the im-

* U. S. Senate, Special Committee on Atomic Energy, 79th Cong., Second Sess. Hearings pursuant to S. Res. 179, Hearings, Atomic Energy Act of 1946, passim.

cations of this record, they had to be no more imaginative than millions of their constituents to feel an apprehensive dread in their hearts.

"The somber fear that the cities of the United States might be the Nagasaki and Hiroshimas of a future war brooded over their deliberations."

Newman & Miller, The Control of Atomic Energy, p. 52 (1948).

2. Absent from the record below is any evidence of any

awareness of, aid to or interest in atomic espionage on the part of Morton Sobell. The Government's position in this Court has been that the Rosenbergs participated in "a single conspiracy to transmit secret information, without restriction as to type, to the Soviet Union" (Br. opp. p. 45, No. 112, O.T. 1952) and that it *could have been inferred* that Sobell "understood and shared this objective" from testimony claimed to show that he supplied some unidentified information, sought to obtain some on ordnance fire control, sought to persuade a fellow technician in ordnance fire control to remain with the Navy Department, and asked this technician in ordnance fire control for the names of others who might be of similar bent (Br. opp. p. 46).

The character of the difference between such matters and atomic energy information is such that it *could have been inferred instead* that the intent evidenced by such testimony did not extend to a "common purpose" including both atomic and non-atomic espionage.⁵ However, the jury was not directed in explicit, unequivocal terms that an intent of a character evil enough to base a finding of willingness to transmit atomic secrets was required to be inferred to justify a finding that Sobell was a member of the principal conspiracy charged. Instead they were told, as shown in Judge Frank's analysis of the charge (R. 1664-1667; 195

⁵ Petitioner also argued, and still maintains, that, as a matter of law, no other inference was possible (Pet., pp. 19-29).

F. 2d at pp. 600-602), that if they "believed Elitcher's testimony, Sobell was a member of the larger conspiracy charged in the indictment."⁶

With characteristic understatement, the Columbia Law Review remarked with respect to this issue:

"... it does not seem that the evidence was so conclusive as to warrant withdrawal of the issue of multiple conspiracies from the province of the jury... Judge Frank argued, however, that inasmuch as the evidence might equally have supported an inference of two conspiracies, Judge Kaufman's failure to instruct the jury clearly on this possibility constituted reversible error."

Note, *The Rosenberg Case* (1954), 54 Col. Law Rev. 219, 232.

To support the conclusion of the trial judge, and the majority of the Court of Appeals, that the Government's case against Sobell warranted an instruction such as that given below it is necessary to reject every fact of national life, every finding prompting congressional action, with respect to the difference between atomic and non-atomic information. The nub of the point was stated by the prosecutor himself in resisting the motion of the Rosenbergs' counsel for reduction of their sentence when he stated: "Ordinary espionage is one thing. Atomic espionage is another" (cited at No. 719, O.T. 1952, R. 343). 3. In opposition to Sobell's petition for a writ of certiorari of June 7, 1952, of which reconsideration is now sought, the Government had taken the position with respect to the question then and now presented, that the court had

⁶ Compare comment of Mr. Justice Frankfurter, who was not, however, considering petitioner's point in making the following observation:

"Only one conspiracy could have been found by the jury to have existed, and that was the conspiracy averred in the indictment, a conspiracy continuous from a date certain in 1944 to a date certain in 1950" (346 U. S. at p. 304).

in fact so charged the jury as to permit it to be said that their verdict showed "that a comprehensive conspiracy existed" and that "Sobell was a part of it" (No. 112, O.T. 1952, Br. opp. p. 49). The representation thus made was that the jury's role had been respected by the trial judge and hence no conflict of circuits existed.

That the question was withdrawn from the jury and that Judge Kaufman's action in doing so is believed to have been approved by the denial of certiorari herein, was subsequently demonstrated by the comment of the learned trial judge on the proceedings on the motion for the reduction of this petitioner's sentence:

"Mr. Kilshheimer (Asst. U. S. Atty.): Judge Frank's dissent was predicated purely on a legal ground concerning the charge which he thought should have been given to the jury—

The Court: His dissent was purely on the ground, as I recall it, as to whether or not I should have submitted to the jury the question whether there were two conspiracies instead of one, instead of ruling on them as a matter of law.

Mr. Kilshheimer: And the majority found there was sufficient in your Honor's—

The Court: And I have always understood that to be the law for many years—that there was a question of law for the judge to decide." (Emphasis supplied.)

United States District Court, S. D. N. Y., January 8, 1953, S. M. 17.

Responsible scholarly opinion has now reviewed the proceedings in these cases. And with respect to this aspect of the character of the charge to the jury it is stated in Note (1954) *The Rosenberg Case*, 54 Col. Law Rev. 219, 228:

"... the jury was directed in effect that if they found that Sobell had committed acts within the terms of the indictment it was their duty to find him a co-conspirator with the Rosenbergs, Greenglass and Gold, and that in no event was it their function to distinguish between atomic and non-atomic espionage. Thus the

issue of multiple conspiracies, that is, a Rosenberg-Sobell conspiracy distinct from a Rosenberg-Greenglass-Gold conspiracy, was never submitted to the jury." (Emphasis supplied.)

A jury properly instructed would have been free to make the judgment—the factual judgment—as to the scope of the agreement into which petitioner had entered. The "dragnet" of conspiracy prosecution may be employed to impose vicarious responsibility for unknown co-conspirators and unknown crimes only within the "scope of the agreement actually made"—this is so because a party may only be held to have "taken his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them." *United States v. Andolschek*, 142 F. (2) 503, 507 (per Learned Hand, J.).

"The somber fear that the cities of the United States might be the Nagasaki and Hiroshimas of a future war" (cited supra, p. 8, from Newman & Miller, op. cit.) brooded over the deliberations of the jury in this case, casting a blacker shadow indeed, than over the deliberations of Congress four years before, prior to the revelation of Soviet mastery of the atomic bomb. Its prejudicial effect was so manifest that the Government has not claimed in any court, at any stage, that if "separate conspiracies" were involved the joint trial constituted "harmless" error (cf. *Berger v. United States*, 295 U. S. 78). But the jury

¹ Compare the instructions quoted with approval in *Carigan v. United States*, 197 F. (2) 817:

"An indictment charging a specified crime cannot be supported by proof of a different crime. If you find that two or more of the defendants entered into some conspiracy somewhere at some time, but that they did not enter into the conspiracy charged in the indictment, then you must acquit them of the conspiracy charged in the indictment."

was never allowed to consider whether Morton Sobell would have agreed to join a plot which might result in making a Hiroshima of the city where he lived with his wife and children, had he contemplated the possibility.

Conclusion

WHEREFORE, it is respectfully prayed that leave be granted this petitioner, by reason of supervening circumstances, to file petition for rehearing herein, and that the order of the Court of October 13, 1952, denying certiorari, be vacated, that certiorari be granted to review the decision of the Court of Appeals for the Second Circuit, and on such review the judgment be reversed and a new trial ordered.

Respectfully submitted,

HOWARD N. MEYER,
Counsel for Petitioner,
205 West 34 Street,
New York 1, N. Y.

HAROLD M. PHILLIPS,
EDWARD KUNTZ,
of Counsel.

FEDERAL BUREAU OF INVESTIGATION

FORM NO. 1

THIS CASE ORIGINATED AT

NEW YORK

FILE NO.

REPORT MADE AT ALBANY, N.Y.	DATE WHEN MADE JUN 8 54	PERIOD FOR WHICH MADE 5/19,26,27/54	REPORT MADE BY JOSEPH P. BENSON HDL
TITLE MORTON SOBELL			CHARACTER OF CASE ESPIONAGE - R

SYNOPSIS OF FACTS:

Information set forth pertaining to technical reports published by General Electric Company, Schenectady, N.Y. concerning "Project Thumper", digital computer or "Thinking Machine" related to "Project Thumper", and concerning ordnance pamphlets 1600 through 1600F.

-RUC- AGENCY DNI, OSI, G-2, RAB
REQ. REC'D
DATE FORW. 6-18-54
HOW FORW. R/S
BY JPL

DETAILS: AT SCHENECTADY, N.Y.

R.O. DUNHAM, Marine Systems Engineering, Aeronautics and Ordnance Systems Division, Schenectady, furnished the following information.

Mr. DUNHAM advised that a final report concerning "Project Thumper" was issued on June 30, 1949. He advised that this report was not classified and contained 216 pages. He stated that it bore no technical report number.

DUNHAM advised that no separate report was issued on the digital computer or "Thinking Machine" related to "Project Thumper." He stated that the following six digital computer reports were issued:

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/82 BY 3042 fut-D
APPROPRIATE AGENCIES
AND FIELD OFFICES
ADVISED BY ROUTING
SLIP(S) OF Declass
DATE 10-19-17 Went/12

APPROVED AND FORWARDED: <u>DKS/mj</u>	SPECIAL AGENT IN CHARGE	DO NOT WRITE IN THESE SPACES	
COPIES DESTROYED COPIES OF THIS REPORT 111 0 MAR 13 1961		101-2483-127	
6 - Bureau (101-2483) (RM) 5 - NY (100-37158) (RM) 2 - Albany (65-8872)		RECORDED - 32 INDEXED - 32	

PROPERTY OF FBI - This confidential report and its contents are loaned to you by the FBI and are not to be distributed outside of agency to which loaned.

60 JUN 18 1954

AL 65-1672

<u>Tech. Report No.</u>	<u>Classification</u>	<u>Pages</u>
TR55412	Unclassified	31
TR55413	Unclassified	23
TR55414	Restricted	25
TR55415	Confidential	44
TR49A0417	Secret	95
TR49A0422	Unclassified	30

Mr. DUNHAM furnished the following information pertaining to technical reports on "Project Thumper", beginning with TR45841 and ending TR55330:

<u>Techn. Report No.</u>	<u>Classification</u>	<u>Pages</u>
TR45841	Confidential	11
TR45842	Confidential	18
TR45843	Confidential	6
TR45844	Confidential	15
TR45846	Confidential	10
TR45849	Confidential	24
TR55302	Confidential	15
TR55307	Secret	12
TR55308	Confidential	25
TR55311	Secret	13
TR55313	Secret	18
TR55314	Confidential	19
TR55315	Secret	12
TR55318	Confidential	45
TR55330	Secret	21

Total 264 pages

The following information was furnished by KENNETH BRIGGS, Restricted Books Division, Aeronautics and Ordnance Systems, General Electric Company, Schenectady, pertaining to ordnance pamphlets 1600 through 1600F:

AL 65-1672

OP 1600 - "Gun Fire Control System Mark 56", (preliminary)
Published January, 1946 PP173 Classification, restricted,
now confidential.

Mr. BRIGGS advised that this pamphlet is presently being revised for the first time. He stated that the instant volume was not published by the General Electric Company, and that he does not know by whom it was published.

OP 1600A (Volume 1) - "Radar Equipment Mark 35 Mod 2 For Gun Fire Control System Mark 56"
Published October 14, 1949 PP 374 Classification, confidential

It is indicated in this volume that it supercedes 1600A (Preliminary) and 1600A (Interim), copies of which Mr. BRIGGS advised were not available.

OP 1600A (Volume 2), same title as 1600A (Volume 1)
Published October 14, 1949, containing diagrams which go with text of Volume 1, pages 375 through 461. Classification, confidential.

OP1600B - "Gun Fire Control System Mark 56 Physical Description"
Published January, 1941 PP 241 Classification, restricted.

OP1600B (Volume 2), according to Mr. BRIGGS is now being prepared.

OP1600B (Volume 3), according to Mr. BRIGGS published on June 24, 1953 contains 286 pages and is restricted.

OP1600C (Volume 1) - "Gun Fire Control System Mark 56 Maintenance"
Published September 12, 1950 PP406 Classification, restricted

OP 1600C (Volume 2) - "Gun Fire Control System Mark 56 Mod 18 For 5"/38-3"/50 cal Guns - Functional Circuit Diagrams"
Published July, 1952 PP9 (introductory material) Figures 33
Classification, restricted

~~CONFIDENTIAL~~

AL 65-1672

OP 1600C (Volume 3) - "Gun Fire Control System Mark 56 Mod 22
For 5"/54 - 3"/50 cal Guns and Mark 56 Mod 32 For 6"/47 - 3"/50
cal Guns - Functional Diagrams"
Published July, 1952 PP 9 (Introductory Material) Figures 34
Classification, restricted

OP 1600C (Volume 4) - "Gun Fire Control System Mark 56 Mod 11
For Single 3"/50 cal Guns Functional Circuit Diagrams"
Published July 25, 1952 PP 7 (Introductory Material) Figures, 24
Classification, restricted.

OP 1600C (Volume 5) - "Gun Fire Control System Mark 56 Mod 15
For 5"/30 - 3"/50 cal Gun - Functional Circuit Diagrams"
Published July 25, 1952 PP 7 (Introductory Material) Figures, 34
Classification restricted.

OP 1600F (First revision) - "Gun Fire Control System Mark 56
Operating Instructions."
Published June 7, 1949 PP 141 Classification, restricted.

Mr. BRIGGS advised that this pamphlet was not published
by General Electric Company, and that he does not know by whom it
was published. He stated that OP 1600 D and E were not published
insofar as he knows.

-RUC-

~~CONFIDENTIAL~~

AL 65-1672

ADMINISTRATIVE PAGE

REFERENCE: Report of SA JOHN A. HARRINGTON at N.Y. dated 4/26/54. *see 1120*

FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
COMMUNICATIONS SECTION

JUN 7 1954

TELETYPE

Mr. Tolson
Mr. Boardman
Mr. Nichols
Mr. Belmont
Mr. Harbo
Mr. Mohr
Mr. Parsons
Mr. Rosen
Mr. Tamm
Mr. Sizoo
Mr. Winterrowd
Tele. Room
Mr. Holloman
Miss Gandy

WASH AND WASH FLD 17 FROM NEW YORK

7 11:48 P

DIRECTOR AND SAC

U R G E N T

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 fct-De

MORTON SOBELL, ESP DASH R. NEW YORK PAPERS TONIGHT REPORT THAT SUPREME COURT FOR ~~THE~~ THIRD TIME REFUSED TO REVIEW CASE OF SUBJECT. WFO WILL CHECK RECORDS OF SUPREME COURT AND ADVISE BUREAU, SAN FRANCISCO AND NEW YORK OF THE POINTS RAISED ON THIS LAST APPLICATION AND ALL PERTINENT INFO RE SAME. SAN FRAN ADVISED BY MAIL.

KELLY

END

J444

6 HOLD
JUN 17 1954
M NY R 17 WA WS

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

EX-130

JUN 10 1954

750-130

SAC, New York (100-37158)

June 8, 1954

RECORDED - 46
EX-129

Director, FBI (101-2483) 1129

~~SECRET~~

MORTON SOBELL, was.
ESPIONAGE - R

Reurlet May 28, 1954, setting out a list of personal property taken from Morton Sobell at the time of his arrest and your recommendations for returning certain items to Sobell. In addition to the items set forth in your letter not to be returned to Sobell, the Bureau feels the following items should also be retained:

- (1) Items 2 through 6 inclusive should not be returned inasmuch as they prove Sobell's intent in fleeing the United States, which items might be of importance in the event of a new trial. (Also item 8 + 9 - see 1121)
- (2) Items 10 through 17 inclusive should not be returned as they are indicative of plans on the part of Sobell to flee from Mexico.
- (3) Items 19 and 20 should be retained for the same reason.
- (4) Item 28 should be retained for the same reason as set forth in item number 2.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 JAC/SLC

MAILED 7
JUN 8 1954
FBI COMM - FBI

The Bureau agrees that any contact with Sobell should be postponed until such time as the National Committee to Secure Justice for Morton Sobell in the Rosenberg Case completes the memorial period in honor of the anniversary of the death of Julius and Ethel Rosenberg. This memorial period is scheduled to end on June 30, 1954. With regard to the appeals to transfer Sobell from Alcatraz, this type of an approach to the Federal Bureau of Prisons is of a continuing nature and it is believed that the plans to approach Sobell should be completed without waiting for a decision from the Federal Bureau of Prisons. It is noted that the Committee is in the process of gathering signatures for a petition to be presented to the Director of the Federal Bureau of Prisons. However, it is not known when such campaign will be completed.

cc - 2 - San Francisco (65-4228)

JPL:gks

APPROPRIATE AGENCIES

ROUTING
SLIP(S) OF
DATE 6/10/54

Nichols
Belmont
Clegg
Glavin
Harbo
Rosen
Tracy
Mohr
Trotter
Winterrowd
Tele. Room
Holloman
Miss Gandy

Classified by 2555
Exempt from GDS, Category
Date of Declassification Indefinite

282
20
Declassify
10/16/85
WAB/SLC
#2355

As you know, even though Sobell has appealed his case to the United States Supreme Court on several occasions, the possibility of further legal efforts by Sobell to obtain a new trial cannot be overlooked. On 6-4-54, Sobell filed with the United States Supreme Court motion asking leave to petition for rehearing on petition for writ of certiorari denied October 13, 1952. This petition was denied by the United States Supreme Court on June 7, 1954. Therefore, prior to making any contact with Sobell, you should solicit the opinion of the United States Attorney for the Southern District of New York regarding the disposition of the balance of the items belonging to Sobell presently in the possession of your office.

C Nr 1130 San Francisco is requested to submit promptly its comments concerning the plan to interview Sobell.

~~SECRET~~

Office Memorandum • UNITED STATES GOVERNMENT

TO : DIRECTOR, FBI (101-2483)

DATE: 6/15/54

FROM : SAC, SAN FRANCISCO (65-4228)

SUBJECT: MORTON SOBELL, was.
ESPIONAGE - R

ReBulet 6/8/54, New York letter to Bureau 5/28/54, and San Francisco letter to Bureau 4/8/54.

As indicated in referenced San Francisco letter to Bureau, the San Francisco Office agrees with the New York plan to interview subject, and recommends that the interview be conducted as outlined by New York.

San Francisco also agrees that the most opportune time to approach subject would be at the period when he does not have legal or other action pending, from which he may expect to receive some relief. However, as the Bureau points out, the campaign to have SOBELL transferred from Alcatraz is a continuous one and it is not known when it will be completed. It is also felt by San Francisco that it will be some time before SOBELL, his family, sympathetic friends or Communists cease all legal and other attempts for a review of his case by the courts, or for a new trial.

It is therefore recommended that following the memorial period for the ROSENBERGS, which is scheduled to end June 20, 1954, and after the opinion of the United States Attorney for the Southern District of New York regarding disposition of the items belonging to SOBELL is received, that SOBELL be interviewed in accordance with the plan as set forth by New York.

FPP:efw

cc: New York (100-37158)

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 put-dse

RECORDED - 10 101-2483- 1130

JUN 21 1954

Memo 7/1/54
65-4228-54
SAC

SAC, New York (100-37158)

July 1, 1954

Director, FBI (101-2483)-1130
RECORDED - 87
MORTON SOBELL, was EX-125
ESPIONAGE - R

Re SF letter 6-15-54, recommending interviews with Sobell along the lines indicated in NYC letters 3-30 and 5-28, 1954.

Prior to approval of these interviews, the Bureau wishes to be informed of the opinion of the USA, SDNY, concerning the disposition of Sobell's property as indicated in Bulet 6-8-54. You will recall that disposition of his property is the pretext under which the series of interviews with Sobell was to be held.

cc - 2 - San Francisco (65-4228)

GAD:sjr

NOTE:

Sobell, convicted with Julius Rosenberg, is presently in Alcatraz. He has heretofore refused to cooperate and both NYC and SF recommend a series of interviews with him regarding the disposition of the property seized at the time of his arrest. It is believed an opportunity will arise for a successful interview concerning his espionage activities.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 pwt-djc

APPROPRIATE
FIELD OFFICES
ADVISED BY ROUTING
SLIP(S) OF
DATE 8-19-77

Tolson _____
Ladd _____
Nichols _____
Belmont _____
Clegg _____
Glavin _____
Harbo _____
Rosen _____
Tracy _____
Mohr _____
Trotter _____
Winterrowd _____
Tele. Room _____
Holloman _____
Miss Gandy _____

COMM - FBI
JUL 1 1954
MAILED 31

JUL 7 1954

JUL 1 15 05 PM '54

U S DEPT OF JUSTICE

F B I

RECEIVED

Declassified 10/16/75
WAB/pc
#2355
WAB/pc
#2355
WAB/pc
#2355

Office Memorandum • UNITED STATES GOVERNMENT

TO : Director, FBI (101-2483)
 FROM : SAC, New York (100-37158)
 SUBJECT: MORTON SOBELL, was
 ESPIONAGE - R

DATE: 6/25/54

Re NY let, 5/28/54, and Bulet, 6/8/54.

On 6/25/54, AUSA LEONARD B. SAND, SDNY, advised that it was proper to return to SOBELL certain items of his property taken from him at the time of his arrest. He requested that in addition to the items to be kept, as set forth in relets, that items 8 and 9, as set forth in NY let, the certificates of vaccination for MORTON SOBELL and HELEN L. SOBELL, dated 8/8/50 and 8/11/50 respectively at Mexico, D. F., also be retained.

AUSA SAND further requested that photostatic copies of the material to be returned to SOBELL be made and retained. He further requested that the property not returned to SOBELL be retained in the NYO.

Accordingly, San Francisco will approach SOBELL, as previously suggested, and will immediately advise the Bureau and NY of the results of this contact.

ALL INFORMATION CONTAINED
 HEREIN IS UNCLASSIFIED
 DATE 4/17/87 BY 3042 fwt-DSC Teletype & SF
 7-6-51
 GAP

RM

2 - San Francisco (RM, AMSD)

INDEXED-11

RECORDED-11

EX-103

101-2483-1131

JUN 28 1954

APPROPRIATE ~~AGENCY~~
 FIELD OFFICES
 ADVISED BY ROUTING
 SLIP(S) OF ~~RECEIVED~~
 DATE 10-19-77 ~~th~~

JAH:RLW

58 JUL 14 1954

Declassify 10/10/75
 #2355

ESP SEC

Classified by 2345
 Exempt from GDS
 Date of review 10/12/75

FEDERAL BUREAU OF INVESTIGATION

FORM NO. 1

THIS CASE ORIGINATED AT NEW YORK

CONFIDENTIAL

~~CONFIDENTIAL~~ 10/2/55
Declassified

REPORT MADE AT WASHINGTON, D. C.	DATE WHEN MADE JUN 24 1954	PERIOD FOR WHICH MADE 6/4,7/54	REPORT MADE BY HOWARD FLETCHER, JR. dgt
TITLE MORTON SOBELL			CHARACTER OF CASE ESPIONAGE - R

SYNOPSIS OF FACTS:

Motion for Leave to File Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by subject's attorney, HOWARD N. MEYER, with the Clerk of the United States Supreme Court, Washington, D. C., on 6/4/54. This motion was limited to whether the Trial Court, in a conspiracy trial, may withdraw from the jury the question whether petitioner was proven to have entered into the principal conspiracy charged in the indictment when objection is reasonably raised that the proof had shown two separate conspiracies, if any. On 6/7/54 the U. S. Supreme Court ruled, "The Motion for Leave to File a Second Petition for Rehearing is denied. The Chief Justice took no part in the consideration or decision of this application."

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 *put-Dele*

AGENCY RAB; ONI; OSI; G-2
REQ. REC'D
DATE FORW. 2-6-54
HOW FORW. R/S
BY GAD

DETAILS: AT WASHINGTON, D. C.

Mr. REGINALD DILLI, Assistant Clerk, United States Supreme Court, Washington, D. C., furnished a copy of the "Motion for Leave to File Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit." This Motion had been filed by HOWARD N. MEYER, Counselor for the Petitioner, in the case MORTON SOBELL versus United States of America, Docket Number 112, October Term 1952. Mr. HAROLD M. PHILLIPS and EDWARD KUNTZ were listed as Counselors. This Motion to Leave to File a Petition for Rehearing follows:

APPROPRIATE AGENCIES
AND FIELD OFFICES
ADVISED BY ROUTING
SLIP(S) OF *Classified*
DATE 10-19-77 *Wm. J. [illegible]*

APPROVED AND FORWARDED COPY IN FILE	SPECIAL AGENT IN CHARGE	DO NOT WRITE IN THESE SPACES	
COPIES OF THIS REPORT ⑦ - Bureau (101-2483) (Encl. 1) 2 - New York (100-37158) (Encl. 1) 1 - San Francisco (Info)(RM) (Encl. 1) 2 - Washington Field (101-2316) ENCLO. ATTACHED COPIES DESTROYED		101-2483 - 2 JUN 28 1954	1132 RECORDED-11 INDEXED-11 EX-103

PROPERTY OF FBI 111 MAR 13 1961
This confidential report and its contents are loaned to you by the
FBI and are not to be distributed outside of agency to which loaned.

79 JUL 7 - 1954

~~CONFIDENTIAL~~
Declassified 10/2/55 *WAB*

MORTON SOBELL respectfully moves this Court (United States Supreme Court) for leave to file a Second Petition for Rehearing with respect to the denial of certiorari herein.

This motion was addressed to, and limited to, a single question presented on the original petition for a writ of certiorari herein, namely, whether the trial court, in a conspiracy trial, may withdraw from the jury the question whether petitioner was proven to have entered into the principal conspiracy charged in the indictment when objections were reasonably raised that the proof had shown two separate conspiracies, if any.

The supervening events of major significance occurring subsequent to the denial of certiorari as to this aspect of this petitioner's case: namely, the review by the Court (United States Supreme Court) of the stay of execution granted by Justice DOUGLAS to petitioner's co-defendants. The Court's examination of the substantiality of the question whether the Atomic Energy Act of 1946 had affected the sentencing power of the trial court had the incidental effect of newly illuminating this separate question on which Circuit Judge FRANK had dissented from the affirmance of SOBELL's conviction. The result was to furnish express substantiation of contentions made on behalf of petitioner when review was originally sought. These significant contentions are:

- (1) That the jury was improperly directed by the trial judge on the question of whether SOBELL had joined an overall conspiracy embracing atomic secrets;
- (2) That secrets pertaining to atomic energy and atomic weapons are and were of such a qualitatively different character from other military information as to have required explicit direction by the trial judge that the jury should have found it to be the "fair import of the concerted purpose" of the conspiracy, as SOBELL understood it, that it should include atomic espionage, as a condition precedent to petitioner's conviction under the indictment and on the record below.

It hardly requires to be said that the examination of the question now presented does not draw into consideration to any extent whatsoever the validity of the conviction, judgment or sentence on petitioner's co-defendants. It is well settled that the "central

figure" may not complain if his conviction should be found to rest on two separate conspiracies rather than an all-inclusive whole.

Basic to the position of this petitioner is the fact acknowledged by the trial judge at the moment he was sentenced, "The evidence in the case did not point to any activity on your part in connection with the atom bomb project". The evidence did not merely fail to show "activity"; it failed to show acquiescence, interest, knowledge, or even unconscious assistance in atomic espionage. Indeed the case against SOBELL does not even purport to show testimony claimed to constitute direct evidence of membership in any conspiracy until a date later than the completion of all of the alleged overt acts relating to the atomic espionage conspiracy--conclusion of which prior to 1946 has now been held to constitute the overriding factor which prevented consideration of the effect of the Atomic Energy Act on the sentencing power of the trial judge.

REASONS FOR GRANTING RECONSIDERATION

The particular question sought to be presented--and never reviewed by this Court at any stage of this case--is one of general importance to the administration of federal criminal justice, and as to which there has existed, since the decision below, a conflict of circuits warranting exercise by this Court's certiorari jurisdiction. The conflict as claimed at the time of submission of the original petition for the writ, as to the role of the jury where a defendant has raised a colorable claim of proof of more than one conspiracy, was stated then to be between the decision below, in the Second Circuit, and the decision of the Third Circuit.

The foregoing reasons are quite independent of the basic need that one who maintains his innocence, as does this petitioner, of any crime, and particularly a crime of such grave consequence, should be convicted only after a trial in which adequate safeguards exist against miscarriage of justice. The protection of such safeguards is of particular importance where, as here, the conspiracy device had been employed for the procedural advantage of the prosecutor. The jury which was called upon to determine petitioner's fate was overwhelmed with the awful fears constantly associated with every aspect of control of atomic energy information in a trial in which the transfer of the "secret" of the atomic bomb to a power considered hostile dominated the courtroom from the beginning to the end.

WFO 101-2316

The argument presented in this motion contained three points as follows:

(1) It may not be inconceivable that two or more conspirators should plot to transmit both non-atomic and atomic secrets as part of a single conspiracy. But the question insistently sounded by this record is whether MORTON SOBELL has been fairly convicted of having participated in such a conspiracy.

The original petition did not, as it now appears, adequately present to the Court the significant proposition demonstrating that an important choice of inferences necessarily must be made before one accused of having conspired with respect to non-atomic secrets can be found to have been willing to accept a "common purpose" embracing both atomic and non-atomic espionage.

The supervening circumstance of the court's review, in Special Term, of the stay based on the Atomic Energy Act focused attention on the mass of data which refuted the proposition blandly stated by the Government in opposition to SOBELL's petition for a writ of certiorari:

"There is not a 'different kind of a difference' between data on the (atomic) bomb and the large, albeit random, collection of data about the United States Military effort that SOBELL must have known was being undertaken."

This is precisely what the Attorney General's "Application to Convene Court in Special Term" of June 17, 1953, and the consequent opinions of this Court, as well as the legislative materials referred to therein, demonstrate to be wholly incorrect. The quality and character of atomic energy information was recognized, for example, as wholly different from all "information relating to the national defense" theretofore covered by the Espionage Act, in that the latter was to be determined to be "secret" by the armed services, whereas the former is to be classified by the civilian Atomic Energy Commission. The problem of atomic energy control raised the question--never theretofore relevant to the subjects protected by the Espionage Act--of the need "to reconcile the requirement for security control of information with the necessity for sufficient freedom of interchange between scientists to assure the nation of continued scientific papers."

(2) Absent from the record below is any evidence of any awareness of, aid to or interest in atomic espionage on the part of MORTON SOBELL. The Government's position in this Court has been that the ROSENBERGS participated in "a single conspiracy to transmit secret information, without restriction as to type, to the Soviet Union" and that it could have been inferred that SOBELL "understood and shared this objective" from testimony claimed to show that he supplied some unidentified information, sought to obtain some on ordnance fire control, sought to persuade a fellow technician in ordnance fire control to remain with the Navy Department and asked this technician in ordnance fire control for the names of others who might be of similar bent.

The character of the difference between such matters and atomic energy information is such that it could have been inferred instead that the intent evidenced by such testimony did not extend to a "common purpose" including both atomic and non-atomic espionage. However, the jury was not directed in explicit, unequivocal terms that an intent of a character evil enough to base a finding of willingness to transmit atomic secrets was required to be inferred to justify a finding that SOBELL was a member of the principal conspiracy charged. Instead they were told, as shown in Judge FRANK's analysis of the charge that if they "believed ELITCHER's testimony, SOBELL was a member of the larger conspiracy charged in the indictment."

To support the conclusion of the trial judge, and the majority of the Court of Appeals, that the Government's case against SOBELL warranted an instruction such as that given below it is necessary to reject every fact of national life, every finding prompting congressional action, with respect to the difference between atomic and non-atomic information. The nub of the point was stated by the prosecutor himself in resisting the motion of the Rosenbergs' counsel for reduction of their sentence when he stated: "Ordinary espionage is one thing. Atomic espionage is another."

(3) In opposition to SOBELL's petition for a writ of certiorari of June 7, 1952, of which reconsideration is now sought, the Government has taken the position with respect to the question then and now presented, that the court had in fact so charged the jury as to permit it to be said that their verdict

WFO 101-2316

showed "that a comprehensive conspiracy existed" and that "SOBELL was a part of it." The representation thus made was that the jury's role had been respected by the trial judge and hence no conflict of circuits existed.

A jury properly instructed would have been free to make the judgment--the factual judgment--as to the scope of the agreement into which petitioner had entered. The "dragnet" of conspiracy prosecution may be employed to impose vicarious responsibility for unknown co-conspirators and unknown crimes only within the "scope of the agreement actually made"--this is so because a party may only be held to have "taken his chances as to its content and membership, so be it that they fall within the common purposes as he understood them. Nevertheless he must be aware of these purposes, must accept them and their implications, if he is to be charged with what others may do in the execution of them."

"The somber fear that the cities of the United States might be the Nagasakis and Hiroshimas of a future war" brooded over the deliberations of the jury in this case, casting a blacker shadow indeed, than over the deliberations of Congress four years before, prior to the revelation of the Soviet mastery of the atomic bomb. Its prejudicial effect was so manifest that the Government had not claimed in any court, at any stage, that if "separate conspiracies" were involved the joint trial constituted "harmless" error. But the jury was never allowed to consider whether MORTON SOBELL would have agreed to join a plot which might result in making a Hiroshima of the city where he lived with his wife and children, had he contemplated the possibility.

The records of the United States Supreme Court were examined on June 7, 1954, and listed under the actions taken by the court on that date was Number 112, October term of 1952, MORTON SOBELL versus the United States, "The motion for leave to file a second petition for rehearing is denied.

"The Chief Justice (WARREN) took no part in the consideration or decision of this application."

WFO 101-2316

ENCLOSURES:

TO THE BUREAU:

One copy of the Motion for Leave to File Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, filed June 4, 1954.

TO NEW YORK:

One copy of the Motion for Leave to File Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, filed June 4, 1954.

TO SAN FRANCISCO:

One copy of the Motion for Leave to File Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, filed June 4, 1954.

-RUC-

~~CONFIDENTIAL~~

Declassified 10/2/75
RUC

~~CONFIDENTIAL~~

Declassified 10/2/75
RUC

WFO 101-2316

ADMINISTRATIVE PAGE

LEADS

SAN FRANCISCO DIVISION:

(INFORMATION)

One copy of this report is being furnished to San Francisco at the request of the Office of Origin.

REFERENCE: New York teletype to Washington Field dated June 7, 1954.

SUGGESTED BUREAU INDEXING☐

No additional indexing required. Derogatory information regarding individuals listed herein other than subject previously reported or is currently being submitted by this office in individual reports relating to these persons.

☐

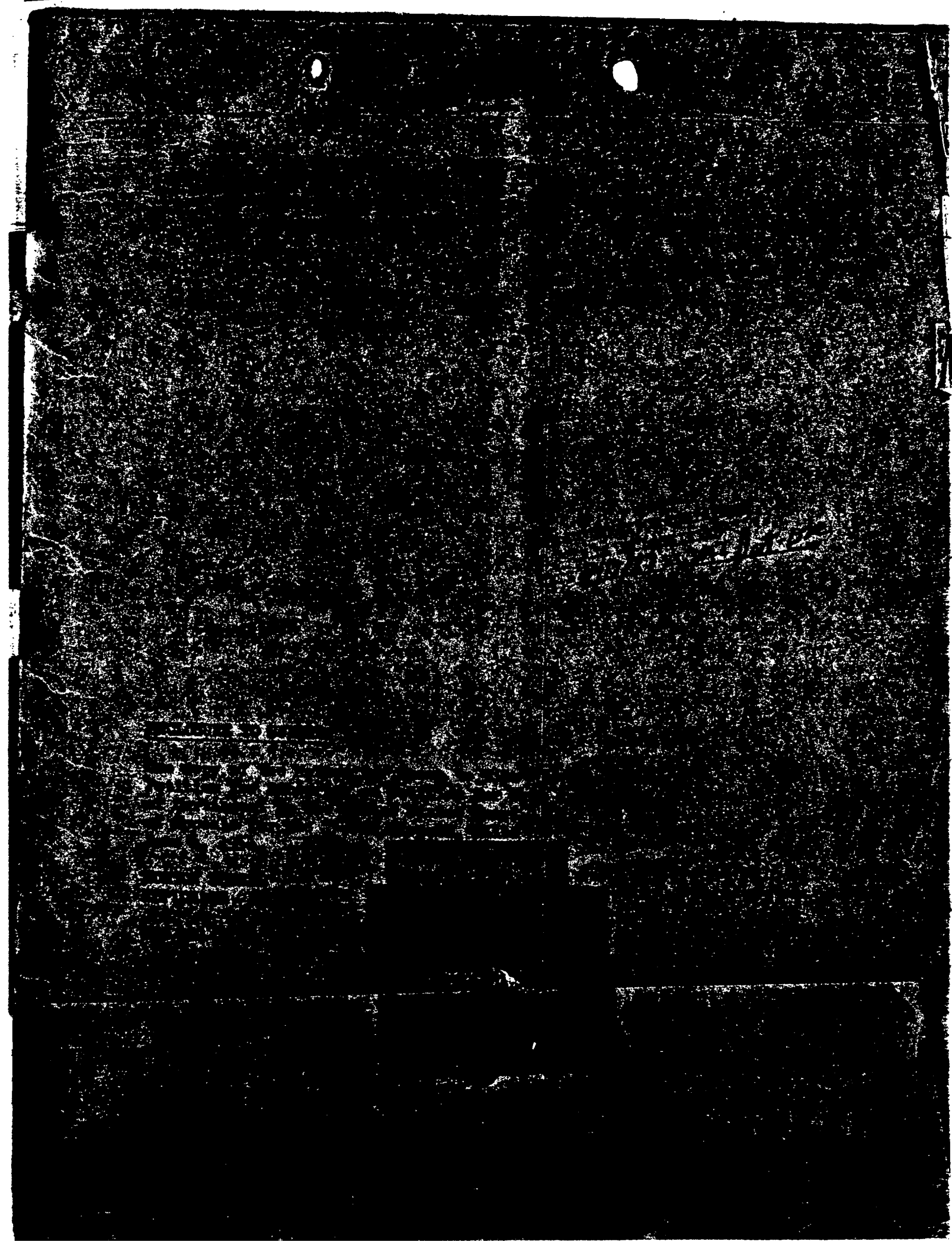
Above applies, with the exception of those names checked in blue ink on right-hand margin, original pages.

☒

New information. Normal indexing suggested.

JH
(Initials of field
dictating or reviewing
Agent.)

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE *4/17/97* BY *3042 jwk-bk*



Office - Supreme Court, U.S.

F. T. 100-10

JUN 4 1954

HAROLD B. WELLEY, Clerk

Supreme Court of the United States

No. 112, October Term 1952

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

**MOTION FOR LEAVE TO FILE PETITION FOR
REHEARING ON PETITION FOR WRIT OF CER-
TIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/17/87 BY 3042 *put - bsc*

HOWARD N. MEYER,
Counsel for Petitioner.

HAROLD M. PHILLIPS,
EDWARD KUNTZ,
of Counsel.

101-2483-1132

INDEX

	PAGE
Motion for Leave to File Petition for Rehearing.....	1
Power of the Court.....	3
Reasons for Granting Reconsideration.....	3
Argument	5
Conclusion	12

CASES CITED

Berger v. United States, 295 U. S. 78.....	11
Canella v. United States, 157 F. 2d 470.....	2
Carrigan v. United States, 197 F. 2d 817.....	4, 11
Lefco v. United States, 74 F. 2d 66.....	4
McGrath v. Manufacturers Trust Co., 337 U. S. 953.....	3
Stone v. White, 300 U. S. 643.....	3
United States v. Andolschek, 142 F. (2d) 503.....	11
United States v. Heine, 151 F. 2d 813.....	5
United States v. Lutwak, 195 F. 2d 748.....	4
Zap v. United States, 330 U. S. 800.....	3

OTHER AUTHORITIES

Note, The Rosenberg Case (1954) 54 Col. Law Rev. 219	9, 10, 11
92 Cong. Rec. 6082.....	6
Laurence, The Hell Bomb.....	6
Newman & Miller, The Control of Atomic Energy.....	6, 7, 8
Sen. Rep. 1211, 79 Cong. 2d Sess.....	7
U. S. Senate, Special Committee on Atomic Energy 79 Cong. 2d Sess:	
Hearings pursuant to S. Res. 179.....	7
Hearings, Atomic Energy Act of 1946.....	7

Supreme Court of the United States

No. 112, October Term 1952

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING ON PETITION FOR WRIT OF CER- TIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Morton Sobell respectfully moves this Court for leave to file a Second Petition for Rehearing with respect to the denial of certiorari herein.

This motion is addressed to, and limited to, a single question presented on the original petition for a writ of certiorari herein, namely, *whether* the trial court, in a conspiracy trial, may withdraw from the jury the question whether petitioner was proved to have entered into the principal conspiracy charged in the indictment when objection is seasonably raised that the proof has shown two separate conspiracies, if any.¹

A supervening event of major significance occurred subsequent to the denial of certiorari as to this aspect of this petitioner's case: namely, the review by the Court (346 U. S. 273) of the stay of execution granted by Mr.

¹ This was the Question Presented as 1(b) in the Petition, No. 112, O.T. 1952 and discussed as 9(b) in the Solicitor General's Brief in Opposition.

Justice Douglas to petitioner's co-defendants.² The Court's examination of the substantiality of the question whether the Atomic Energy Act of 1946 had affected the sentencing power of the trial court had the incidental effect of newly illuminating this separate question on which Circuit Judge Frank had dissented from the affirmance of Sobell's conviction (R. 1666-7; 195 F. 2d at p. 601-2). The result is to furnish express substantiation of contentions made on behalf of petitioner when review was originally sought. These significant contentions are:

(1) That the jury was improperly directed by the trial judge on the question of whether Sobell had joined an overall conspiracy embracing atomic secrets;

(2) That secrets pertaining to atomic energy and atomic weapons are and were of such a qualitatively different character from other military information as to have required explicit direction by the trial judge that the jury should have found it to be the "fair import of the concerted purpose" of the conspiracy, as Sobell understood it, that it should include atomic espionage, as a condition precedent to petitioner's conviction under the indictment and on the record below.

It hardly requires to be said that the examination of the question now presented does not draw into consideration to any extent whatsoever the validity of the conviction, judgment or sentence on petitioner's co-defendants. It is well settled (e.g., *Canella v. United States*, 157 F. 2d 470) that the "central figure" may not complain if his conviction should be found to rest on two separate conspiracies rather than an all-inclusive whole.

Basic to the position of this petitioner is the fact acknowledged by the trial judge at the moment he was sentenced, "The evidence in the case did not point to any activity on your part in connection with the atom bomb project" (R.

² There has also been a further conflict of circuits since the original submission; see p. 4, *infra*.

1620). The evidence did not merely fail to show "activity"; it failed to show acquiescence, interest, knowledge, or even unconscious assistance in atomic espionage. Indeed the case against Sobell does not even purport to show testimony claimed to constitute direct evidence of membership in *any* conspiracy until a date later³ than the completion of all of the alleged overt acts relating to the atomic espionage conspiracy—conclusion of which prior to 1946 has now been held to constitute the overriding factor which prevented consideration of the effect of the Atomic Energy Act on the sentencing power of the trial judge.

Power of the Court

The present motion, for leave to secure reconsideration at a time subsequent to the expiration of the time provided for by Rule of Court for rehearing, is unusual but by no means unprecedented. *Zap v. United States*, 330 U. S. 800; *Stone v. White*, 300 U. S. 643; *McGrath v. Manufacturers Trust Company*, 337 U. S. 953; see 28 U. S. C. 452. The circumstances of this case clearly warrant the exercise of the unusual, but undoubtedly existing, power of this Court to grant leave to file for rehearing at this stage in the proceedings.

Reasons for Granting Reconsideration

The particular question sought to be presented—and never reviewed by this Court at any stage of this case—is one of general importance in the administration of federal criminal justice, and as to which there has existed, since the decision below, a conflict of circuits warranting exercise of this Court's certiorari jurisdiction. The conflict as claimed at the time of submission of the original petition for the writ, as to the role of the jury where a

³ Said to be the "early part of 1946" (R. 245).

defendant has raised a colorable claim of proof of more than one conspiracy, was stated then to be between the decision below, in the Second Circuit, and the decision of the Third Circuit in *Lefco v. United States*, 74 F. (2d) 66.

Further conflict in circuits: Subsequent to that original submission (which was June 7, 1952), the Ninth Circuit held, in *Carrigan v. United States*, 197 F. 2d 817 (cert. den. 344 U. S. 866^{3a}), that it was for the *jury* to determine whether the prosecution had proved "the existence of a single overall plan in which all participated" (at p. 820). And shortly before the original submission, and unknown to counsel at the time, the Seventh Circuit in *United States v. Lutwak*, 195 F. 2d 748 (aff'd without consideration of the question 344 U. S. 604), held that it was appropriate for the *jury* to consider "the issue of common purpose and design" (at p. 751) and the sufficiency of the evidence of "interrelated coordinated conduct by the several parties" (at pp. 752-753).

The foregoing reasons are quite independent of the basic need that one who maintains his innocence, as does this petitioner, of any crime, and particularly a crime of such grave consequence, should be convicted only after a trial in which adequate safeguards exist against miscarriage of justice. The protection of such safeguards is of particular importance where, as here, the conspiracy device has been employed for the procedural advantage of the prosecutor. The *jury* which was called upon to determine petitioner's fate was overwhelmed with the awful fears constantly associated with every aspect of control of atomic energy information in a trial in which the transfer of the "secret" of the atomic bomb to a power considered hostile dominated the courtroom from the beginning to the end.

^{3a} Sub nom. *Davidson v. United States*.

Argument

1. It may not be inconceivable that two or more conspirators should plot to transmit both non-atomic and atomic secrets as part of a single conspiracy. But the question insistently sounded by this record is whether Morton Sobell has been fairly convicted of having participated in *such* a conspiracy.

The original petition did not, as it now appears, adequately present to the Court the significant proposition demonstrating that an important choice of inferences necessarily must be made before one accused of having conspired with respect to non-atomic secrets can be found to have been willing to accept a "common purpose" embracing both atomic and non-atomic espionage.

The supervening circumstance of the court's review, in Special Term, of the stay based on the Atomic Energy Act focusses attention on the mass of data which refute the proposition blandly stated by the Government in opposition to Sobell's petition for a writ of certiorari:

"There is not a 'different kind of a difference' (see Pet. 26) between data on the (atomic) bomb and the large, albeit random, collection of data about the United States Military effort that Sobell must have known was being undertaken" (No. 112, O.T. 1952, Br. Opp. 47).

This is precisely what the Attorney General's "Application to Convene Court in Special Term" of June 17, 1953, and the consequent opinions of this Court, as well as the legislative materials referred to therein, demonstrate to be wholly incorrect. The quality and character of atomic energy information was recognized, for example, as wholly different from all "information relating to the national defense" theretofore covered by the Espionage Act, in that the latter was to be determined to be "secret" by the armed services (e.g. *United States v. Heine*, 151 F. 2d 813),

whereas the former is to be classified by the civilian Atomic Energy Commission (Application to Convene Court in Special Term, p. 7, n). The problem of atomic energy control raised the question—never theretofore relevant to the subjects protected by the Espionage Act—of the need “to reconcile the requirement for security control of information with the necessity for sufficient freedom of interchange between scientists to assure the nation of continued scientific papers” (Application to Convene Court in Special Term, p. 8). The nature of the subject matter involved was such that “The Espionage Act as it was written would not do” (Sen. McMahon, 92 Cong. Rec. 6082, quoted at p. 9 of Application to Convene Court in Special Term).

At another point in the same debate Senator McMahon stated “atomic energy makes its own rules. It is sui generis” (92 Cong. Rec. 6082). Or, as stated by Newman & Miller, *The Control of Atomic Energy*, p. 226 (1948), “it was the clear intent of Congress, as evinced by the drastic penalties alone, to treat atomic energy as a *category special and unique*”. (Emphasis supplied.)

This has been not only legislative policy, but the policy of the executive in international affairs pertaining to the subject matter:

“The official United Nations’ proposals for international control of atomic energy apparently involve the assumption that A-bombs are so unique technically and so menacing as to set them apart from conventional weapons and to justify separate consideration in the United Nations and a separate regulatory system.” *Laurence, the Hell Bomb*, pp. 174-175 (1951).

It has never been questioned in any responsible quarter that there was overwhelming evidence before the Congress to justify the treatment of control of information relating to atomic energy as “a category special and unique”. The legislative process itself was unique, a Senate Special Committee on Atomic Energy having been constituted pursuant to Sen. Res. 139 and having conducted numerous hearings

prior to the drafting on the bill S. 1717 that ultimately became fashioned into the Act. In Sen. Rep. 1211, 79th Cong., 2nd Sess., reporting S. 1717 as amended by the Committee after numerous further hearings, the following point was made part of a “terse summary of the main lines of the testimony” (S. Rep. 1211, p. 5):

“(1) The atomic bomb is a weapon of appalling destructiveness. While quantitative comparisons with other explosives can be made, the arithmetical ratios describe inadequately the profound changes in all relations between nations foreshadowed by the existence of the atomic bomb.”

The unique character of atomic energy secrets was inherent in the subject matter and was not produced but merely registered by the enactment of the Atomic Energy Act of 1946. Detailed consideration of the evidence on which the Senate Committee and the Congress were prompted to act seems hardly necessary. The differences between atomic energy information and other “information relating to the national defense” are repeatedly emphasized in the testimony of the witnesses before the Committee.⁴

The words of the counsel to the Senate Special Committee summarize aptly the outstanding fact of national thinking from 1945 forward with respect to the difference:

“In the course of the Committee’s schooling it no doubt received a good deal of information and admonition on the military applications of atomic energy. However, the point that that atomic bomb is terrifying beyond imagination did not need to be labored; it was recorded adequately in the wasted bodies, the twisted members, the ashes, and the debris of Nagasaki and Hiroshima. If the Committee members were less sensitive than John Hersey in registering all the impli-

⁴ U. S. Senate, Special Committee on Atomic Energy, 79th Cong., Second Sess. Hearings pursuant to S. Res. 179, Hearings, Atomic Energy Act of 1946, passim.

cations of this record, they had to be no more imaginative than millions of their constituents to feel an apprehensive dread in their hearts.

The somber fear that the cities of the United States might be the Nagasakis and Hiroshimas of a future war brooded over their deliberations."

Newman & Miller, The Control of Atomic Energy,
p. 52 (1948).

2. Absent from the record below is any evidence of any awareness of, aid to or interest in atomic espionage on the part of Morton Sobell. The Government's position in this Court has been that the Rosenbergs participated in "a single conspiracy to transmit secret information, without restriction as to type, to the Soviet Union" (Br. opp. p. 45, No. 112, O.T. 1952) and that it *could have been inferred* that Sobell "understood and shared this objective" from testimony claimed to show that he supplied some unidentified information, sought to obtain some on ordnance fire control, sought to persuade a fellow technician in ordnance fire control to remain with the Navy Department, and asked this technician in ordnance fire control for the names of others who might be of similar bent (Br. opp. p. 46).

The character of the difference between such matters and atomic energy information is such that it *could have been inferred instead* that the intent evidenced by such testimony did not extend to a "common purpose" including both atomic and non-atomic espionage.⁵ However, the jury was not directed in explicit, unequivocal terms that an intent of a character evil enough to base a finding of willingness to transmit atomic secrets was required to be inferred to justify a finding that Sobell was a member of the principal conspiracy charged. Instead they were told, as shown in Judge Frank's analysis of the charge (R. 1664-1667; 195

⁵ Petitioner also argued, and still maintains, that, as a matter of law, no other inference was possible (Pet., pp. 19-29).

F. 2d at pp. 600-602), that if they "believed Elitcher's testimony, Sobell was a member of the larger conspiracy charged in the indictment."⁶

With characteristic understatement, the Columbia Law Review remarked with respect to this issue:

" * * * it does not seem that the evidence was so conclusive as to warrant withdrawal of the issue of multiple conspiracies from the province of the jury * * *. Judge Frank argued, however, that inasmuch as the evidence might equally have supported an inference of two conspiracies, Judge Kaufman's failure to instruct the jury clearly on this possibility constituted reversible error."

Note, *The Rosenberg Case* (1954), 54 Col. Law Rev. 219, 232.

To support the conclusion of the trial judge, and the majority of the Court of Appeals, that the Government's case against Sobell warranted an instruction such as that given below it is necessary to reject every fact of national life, every finding prompting congressional action, with respect to the difference between atomic and non-atomic information. The nub of the point was stated by the prosecutor himself in resisting the motion of the Rosenbergs' counsel for reduction of their sentence when he stated: "Ordinary espionage is one thing. Atomic espionage is another" (cited at No. 719, O.T. 1952, R. 343).

3. In opposition to Sobell's petition for a writ of certiorari of June 7, 1952, of which reconsideration is now sought, the Government had taken the position with respect to the question then and now presented, that the court had

⁶ Compare comment of Mr. Justice Frankfurter, who was not, however considering petitioner's point in making the following observation:

"Only one conspiracy could have been found by the jury to have existed, and that was the conspiracy averred in the indictment, a conspiracy continuous from a date certain in 1944 to a date certain in 1950" (346 U. S. at p. 304).