Chapter Four

A SHIFT IN PRIORITIES

The Joint Chiefs of Staff Directive 1067 (approved by President Roosevelt on September 29, 1944) governed the initial phase of the occupation of Germany. Although the Morgenthau Plan had been rejected, JCS 1067 retained some of its punitive elements.[1] The policy aimed to demilitarize, denazify, and deindustrialize the vanquished nation, removing the threat by approaching it as a social problem. The German army had been crushed, so demilitarization was never an issue. This overwhelming task fell to U.S. Military Governor General Lucius Clay and the U.S. Military Government. Although the Americans were the most conspicuous advocates of reeducation, they were not alone. Prior to the defeat of the Third Reich, prominent European intellectuals like Thomas Mann had called for the reeducation of Germany. Even German historian Friedrich Meinecke called for some type of reform.[2] Although there was a consensus that Germany needed to be reformed, there was no agreement about how to achieve this. Americans like Justice Robert Jackson hoped that the trials would aid the American reeducation effort by establishing an empirical record of the Nazi crimes. The trials would prove to the German

people that under an American-inspired system of justice, due process of law was extended to even the guiltiest.[3]

Although the Nuremberg trials were the highest-profile legal proceeding, by far the largest number of cases were tried by U.S. denazification courts. Given the immensity of their task, these courts did not live up to the Atlantic Charter's promise to arrest, detain, and remove Nazis from public office. On March 5, 1946, German states in the American zone of occupation enacted the De-Nazification Law, which established four levels of offenses by members of the recently criminalized Nazi organizations.[4] The implications of this vague commitment were both radical and enormous: a large percentage German population would have to be processed judicially.[5] Many Germans considered the American questionnaire, or *Fragebogen*, used to categorize them an intrusively detailed accounting of individual wartime activities. Like the war crimes trials, many saw the denazification program yet another manifestation of the Allied victors' justice. German historian Jörg Friedrich describes it as "a form of political purge" with "no basis in international law. The Hague rules of land warfare do not authorize an occupier to undertake any such interference in the enemy's domestic affairs."[6] More than 13.4 million Germans registered with denazification boards; 945,000 were tried by denazification courts, and 130,000 were found guilty under some category of law. Penalties were not very severe. Sentences ranged from ineligibility to hold public office to restricted employment, fines, and at worst, forced labor.[7]

The year 1946 was transitional in American foreign policy. Cold War historians agree that Secretary of State James Byrnes's Stuttgart speech on September 6 "renounced the more retributive elements of JCS 1067 and began to relax the external controls of the occupation in an effort to move Germany down the road to self-government."[8] From the beginning, the State Department had taken a dim view of the "vindictive" elements of JCS 1067 (war crimes trials, denazification). There was also the perception that high-placed Jews within the Roosevelt administration had tainted the American occupation with "blind vengeance." According to Peter Grose's recent book *Operation Rollback*: "By the summer of 1946, Washington's top military intelligence officers had abandoned the fervor of de-Nazification and were arranging for ex-Nazis with 'special' qualifications, such as expertise in rocket science and other high technology, to be excused from the indignities of prisoner-of-

war status and join the service of the United States for the demands of the postwar era."[9]

Denazification underwent a significant shift in March 1946, when the U.S. military turned the program over to the German government. Many considered this an abandonment of the reeducation program, but General Clay argued that the best way for Germans to learn democracy was to live it.[10] Although denazification proceedings continued until 1949, they often appeared farcical under German administration. Former Assistant U.S. High Commissioner Benjamin Buttenweiser recalled that "some of the denazification trials were absolutely shocking mockeries . . . they were by no test a complete success. Many who were cleared I'm pretty sure were Nazis."[11] The results were predictable. Like Reconstruction after the American Civil War, the grand social engineering project known as reeducation was quickly and quietly winding down.

Industrial leaders Friedrich Flick and Alfried Krupp, diplomat Ernst von Weizsäcker, and bureaucrat Hans Lammers could not be handed over to the military because they had not violated the laws of war. Moreover, an important part of the American reeducation effort was to compile a record of Nazi atrocities that would withstand the test of time. This task remained unfinished.

By 1947, high-level war crimes policy was the greatest anomaly in American foreign relations. The Allied war crimes effort provided one of the first rallying points for Germany's post–World War II nationalists. Their relationship with the trials was beginning to resemble that of a previous generation of German nationalists with the Treaty of Versailles. The theme remained the same: the expansion of Bolshevism was "divine retribution" for the "unjust" treatment of Germany.[12]

Robert Jackson probably never doubted that the United States should conduct subsequent proceedings under the laws created for the IMT. On December 4, 1945, in a letter to President Truman, Jackson suggested that the United States begin to prepare for another series of high-level trials and that Colonel Telford Taylor be put in charge of the preparations.[13] In his report to President Truman, Jackson offered practical reasons why the United States should proceed alone: "A four-power, four-language, International trial, was inevitably the slowest and most costly method of procedure. The purposes of this extraordinary and difficult method of trial had been accomplished."[14] Jackson had distrusted the Soviets from the start, and now he had a reason to exclude them. He suggested that the

United States hold a series of trials modeled after the IMT, under the auspices of General Lucius Clay's U.S. Military Government.

Three military decrees brought the United States closer to these autonomous trials. Joint Chiefs of Staff directive 1023/10, issued in the summer of 1946, ordered the American Theatre Commander to identify, investigate, and apprehend all persons suspected of war crimes. Military Ordinance No. 7 established three-man tribunals to preside over the American trials and define the court's role. But the most important of the decrees was Control Council Law No. 10, which was, in effect, a mandate to take up where the IMT had left off. It was supposed to "give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto in order to establish a uniform legal basis in Germany for the prosecution of war criminals."[15] Military Governor Lucius Clay was responsible for overseeing the American trials. A number of participants from the IMT joined the prosecution and defense staffs for the subsequent proceedings. Clay believed that the trials were an important part of the reconstruction and reeducation effort and argued that no new legal system could be established in Germany until all the vestiges of the previous one had been swept away.[16] Since the trials were under military law, all verdicts were subject to the Military Government's review and confirmation. Clay's commitment to the subsequent proceedings would soon be tested.[17]

The man directly in charge of the trials was Justice Jackson's deputy at the IMT, the recently promoted Brigadier General Telford Taylor. He had graduated from Harvard Law School in 1932, and for the next decade built a promising career, advancing through a number of legal positions within the New Deal. In 1939, he was appointed Special Assistant to Robert Jackson, then Attorney General. Taylor attracted the attention of Henry Stimson during "the Great German War on the Potomac" when he argued that a great trial had the potential to do more than simply render justice: "it would give meaning to the war."[18] Justice Jackson felt that the trial's high aspirations would not be compromised under Telford Taylor's leadership. Like those who had provided the impetus for the first trial, the prosecution staff possessed a disproportionate number of Harvard law school graduates, former New Dealers, and liberal Democrats.[19]

The most famous and, to some Germans, infamous prosecutor was

neither a Harvard graduate nor a New Dealer. He was a German Jew named Robert Kempner. In the early 1930s, Kempner worked in the legal division of the Prussian police department. His opposition to National Socialism led to his expulsion from Germany. For Kempner, the trials were personal; he was settling old scores. "This trial started in 1930 in Berlin when I was Chief Legal Advisor of the Prussian Police. At the time I had my first fights with Hitler and his consorts. The people in Prussia tried to suppress the Nazi Party and to send Hitler, as a kind of enemy alien, back to Austria."[20]

After Robert Kempner was forced to emigrate to the United States from Germany in 1940, he began to collect war crimes evidence on behalf of the Justice Department. His first-hand knowledge of German law and government made him valuable to the IMT, where he served as both an interrogator and a prosecutor. When he interrogated Hermann Goering, the man who had stripped him of his German citizenship, Goering was startled to see his old adversary. Kempner recalled, "First he didn't want to answer me, he said, 'You are biased against me.' So I said to him, 'Reichsmarshall, I am not biased against you, I am very happy, you threw me out on February 3, 1933. If you hadn't done it I would have been smoke through a chimney.' "[21] However, many would become critical of Kempner's heavy-handed interrogation methods. In one well-documented incident, Kempner threatened to turn Nazi Foreign Minister Joachim von Ribbentrop's former legal advisor, Friedrich Gaus, over to the Soviet Union unless he was willing to cooperate.

Kempner: *Well, things aren't as simple as that. The Russians are interested in you. Do you know that?*
Gaus: *The Russians?*
Kempner: *Yes, as a professional violator of treaties.*
Gaus: *No, that is not correct in the least. My God.*
Kempner: *Well, let's finish for today. I'll tell you something . . .*
Gaus (interrupting): *Don't extradite me to the Russians.*[22]

In the summer of 1946, Telford Taylor prepared to try two to four hundred high-ranking suspected war criminals. Five additional courtrooms were added to Nuremberg's Palace of Justice. The defendants in this second series of trials were a diverse mix. Although the laws that ultimately composed the London Agreement Charter were written with

the leaders of the Reich in mind, they were also designed to "cast a wider net" of criminality so that bankers, industrialists, and diplomats could be charged with war crimes. The problem facing the subsequent proceedings was that if a court rejected the prosecution's expanded definition of international criminality, the heart of a number of cases would be removed. In an effort to give the greatest amount of credibility to the decisions, Justice Jackson suggested that civilian judges should preside over the courts,[23] but was thwarted by the newly appointed Supreme Court Chief Justice Fred Vinson. Clay recalled, "Great difficulty was experienced in obtaining qualified jurists for the courts and our hope of substantial representation from the federal judiciary was dashed by Chief Justice Fred Vinson's decision that federal court judges could not be granted leave for the purpose. It took a considerable period of time to obtain qualified jurists from the state judiciary system to form six courts."[24]

Some of America's most prominent jurists were beginning to turn against the war crimes trials. More important than their specific opinions was the emergence of a general conservative position that flatly rejected the presumptions of the Nuremberg trials. Chief Justice Harlan Fiske Stone described the IMT as "a high-grade lynching party . . . a little too sanctimonious a fraud to meet my old-fashioned ideas." He was especially incensed by his colleague Robert Jackson's "pretense that he is running a court or proceeding according to common law."[25] Robert Taft had criticized the Nuremberg trials in 1946 on the ground that they "accepted the Russian idea of the purpose of trials." He believed that "By clothing policy in the forms of legal procedure, we may discredit the whole idea of justice in Europe for years to come."[26]

By 1947, the tone of the criticism had changed. Conservative congressmen like John J. Rankin launched a broader and more conspiratorial, anti-Semitic attack on the Nuremberg trials from the floor of the U.S. House of Representatives: "I desire to say that what is taking place in Nuremberg, Germany, is a disgrace to the United States. Every other country now has washed its hands and withdrawn from this saturnalia of persecution. But a racial minority, two in a half years after the war closed, are in Nuremberg not only hanging German soldiers but trying German businessmen in the name of the United States."[27] Many midwestern isolationists felt that prominent American Jews (like Henry Morgenthau) had a disproportionately large say in American policy toward Germany.

Although the Morgenthau Plan was their favorite example, Nuremberg was a close second.

On the diplomatic front, certain quarters within the State Department had opposed war crimes trials from the very beginning. Author of the Long Telegram and the famous "Mr. X" article published in *Foreign Affairs* magazine in 1947, George Kennan was a bitter critic of American war crimes policy. He later characterized the Germans under the American occupation as "sullen, bitter, unregenerate and pathologically attached to the old chimera of German unity."[28] To the architect of containment, the IMT was nothing more than a pretentious sham that created confusion and tarnished American foreign policy with hypocrisy: "The only implication this procedure could convey was . . . that such crimes were justifiable and forgivable when committed by the leaders of one government, under one set of circumstances, but unjustifiable and unforgivable, and to be punished by death when committed by another set of government leaders under another set of circumstances."[29] For the United States to turn a blind eye to the cruelties of the Russian Revolution, collectivization, purges of the 1930s, and wartime atrocities would "make a mockery of the only purposes the trials could conceivably serve, and to assume, by association, a share of the responsibility for these Stalinist crimes themselves."[30] Kennan favored traditional military justice:

> I personally considered that it would have been best if the Allied commanders had had standing instructions that if any of these men fell into the hands of Allied forces they should, once their identity had been established beyond doubt, be executed forthwith. But to hold these Nazi leaders for public trial was another matter. This procedure could not expiate or undo the crimes they had committed.[31]

George Kennan viewed the Nuremberg trials with "horror." He and others in the State Department objected to both the war crimes trials and the basic premise underlying the American reform and reeducation program outlined by JCS 1067. In a wartime memo to the European Advisory Commission in London, Kennan had written that "whether we like it or not, nine tenths of what is strong, able and respected in Germany has been poured into those very categories" slated for reform.[32]

Kennan did not consider the Nazi tactics unique; the Germans were Europeans, after all. He believed that Nazi atrocities in Eastern Europe

and Russia were consistent with the "customs of warfare which have prevailed generally in Eastern Europe and Asia for centuries in the past, they are not the peculiar property of the Germans."[33] However, Kennan had certainly been wrong about the Nazis and their intentions in April 1941, when he was a State Department officer posted at the American embassy in Berlin. He downplayed accounts of Nazi atrocities: "It cannot be said that German policy is motivated by any sadistic desire to see other people suffer under German rule. . . . Germans are most anxious that their new subjects should be happy in their care."[34] George Kennan also exhibited a strange unwillingness to consider whether or not the Nazi atrocities were *sui generis*. In a telling passage from his postwar memoirs, he wrote: "If others wish, in the face of this situation, to pursue the illumination of those sinister recesses in which the brutalities of war find their record, they may do so; the degree of relative guilt which such inquiries may bring to light is something of which I, as an American, prefer to remain ignorant."[35] Kennan preferred "to remain ignorant" while colleagues like OSS Chief Allen Dulles and General Edwin Siebert continued to enlist former Nazis to aid America against the Soviets.

Reinhard Gehlen, a former Nazi intelligence officer, provided the United States with exaggerated estimates of Soviet power and motives in the years immediately following World War II. He had anticipated Hitler's defeat and a struggle between the United States and the Soviet Union. In early March 1945, Gehlen and his senior officers microfilmed all the *Fremde Heere Ost* (military intelligence section of the General Staff) holdings on the Soviet Union, placed the data in steel drums, and buried them in the Austrian Alps. Once this task was complete, the officers surrendered to American counterintelligence agents.[36]

According to the Potsdam Agreements, the United States was obligated to send individuals involved in "Eastern" activities back to the Soviet Union. However, Generals Edwin Sibert and Walter Bedell Smith considered these intelligence assets too valuable to hand over.[37] According to Harry Rositzke, former CIA head of espionage in the Soviet Union, "in 1946 [U.S.] intelligence files on the Soviet Union were virtually empty."[38] As a result of this lack of basic information, Gehlen played a disproportionately large role in shaping American perceptions of Soviet military capabilities and intentions.[39] According to historian Hugh Trevor Roper, Reinhard Gehlen "lived on the primacy of the Cold War and on the favor of those American and German governments which believed in the pri-

macy of the Cold War."[40] Historian Mary Ellen Reese writes: "Looking back it is easy to say that after waking to the fact that their former ally was implacably hostile, the United States overreacted, that the Soviets were in no position to wage war. But the fact is that the Americans did not know the degree of Soviet preparedness, a lack which played into Reinhard Gehlen's hands."[41] By late 1946, a duality was emerging in America's occupation policy.

Most of the American Nuremberg tribunals were presided over by retired state supreme court judges. Prosecution counsel Drexel Sprecher recalled that "Some of them were very good. . . . On the other hand, there were some judges that weren't. The War Department didn't have any real means of checking them out. . . . It was difficult to recruit top level judges, the Nuremberg Trials were not front page stuff after the first trial."[42] By 1947, General Clay was under pressure from the Department of the Army to finish the trials, and he set July 1, 1948 as the target date for completion.[43]

On October 25, 1947, the first indictment was filed against Nazi doctors, and the American Nuremberg trials took up where the IMT had left off.[44] Case One, *United States v. Karl Brandt*, charged Nazi doctors with war crimes for conducting medical experiments on humans for the *Luftwaffe* at the Dachau concentration camp. Defendant Karl Brandt had been Hitler's personal doctor before he was made an SS Major General and named Reich Commissioner of Health and Sanitation, the highest medical position in the Third Reich. Other defendants included the *Wehrmacht*'s Chief of Medical Services, Lieutenant General Siegfried Handloser; the head Luftwaffe medical expert, Oskar Schroeder; Chief SS Surgeon Karl Gebhardt; and tropical medicine expert Gerhard Rose.[45] The doctors conducted experiments in which conditions of high altitude were simulated in low-pressure chambers. Inmates were immersed in extremely cold water for hours at a time. The doctors also infected concentration camp inmates with malaria, typhus, and other diseases in order to test tropical medicine vaccines.[46] Many died as a result of the experiments. In addition, some of the defendants were involved with the secret euthanasia programs that eliminated what they described as "useless eaters." Most victims were old, deformed, insane, or ill.

Although the indictment included conspiracy and crimes against humanity charges, the Brandt case was fairly straightforward because the defendants' actions were clear violations of a number of the Hague and

Geneva Convention articles.[47] Because the defendants could not dispute the facts of the case, some offered a superior orders defense, while others claimed to have been powerless to prevent the crimes. Karl Brandt and Wolfram Sievers had the most difficulty justifying their actions. The two doctors had carefully inspected hundreds of live concentration camp inmates before selecting 112 Jews for the skeleton collection at the Reich University at Strasbourg. The live victims were measured and photographed, then killed and sent to Strasbourg for defleshing and preservation.[48]

The tribunal, headed by Judge W. B. Beals of Washington State, handed down its decisions on August 19 and 20, 1947. The court rejected the defense of superior orders and the defendants' claims that they had been powerless to prevent the crimes. The unanimous opinion declared: "The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society. . . . All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts."[49] Probably the most significant thing to come out of the Brandt case was a ten-point set of scientific standards that required medical research on human subjects both to be voluntary and to lead to "fruitful results for the good of society."[50] Today, this set of rules appears to have been one of the Nuremberg trials' most enduring legacies. The sentences only served to bolster the stern tone of the tribunal opinion: seven defendants were sentenced to death, five to life, and three to prison terms; seven were acquitted.[51]

Luftwaffe Field Marshal Erhard Milch was the only defendant in Case Two. He was charged with allocating slave labor and participating in the Luftwaffe's medical experiments at Dachau.[52] Milch was charged under three counts: slave labor, war crimes, and crimes against humanity. The defendant was head of Hitler's Central Planning Board, the agency established to govern wartime production. The former Field Marshal conceded that many of the orders he had followed were violations of international law. His defense was a combination of military necessity and superior orders: "It was my duty toward my people to maintain my allegiance. I had sworn an oath to keep allegiance to Hitler, too."[53] His counsel, Dr. Bergold, contended that any protest would have effectively sentenced Milch to death.[54] The superior orders defense would be heard many times in the coming months as various defendants argued that

under a dictatorship there was only one leader. When the tribunal handed down their decisions on April 17, 1947, Milch was found not guilty on the charges relating to the medical experiments and guilty on the slave labor charges. He was sentenced to life in a unanimous decision.[55]

The judgment in *U.S. v. Oswald Pohl et al.* (the Pohl case) came on November 3, 1947. Eighteen leading members of the Economic and Administrative Department of the SS were charged with crimes arising from their duties as concentration camp administrators. Their section was also responsible for the allocation of labor for concentration camps, factories, and mines.[56] Although the indictment in the Pohl case contained crimes against humanity and conspiracy charges, as in the Brandt case, the prosecution had a solid, traditional war crimes case. The majority of the concentration camp administrators could not contest the mountains of documentary evidence and offered variations of the superior orders defense.[57] The tribunal ruled firmly and unequivocally: "It was a national Reich-approved plan for deliberate and premeditated murder on a large scale." The judges pointed to the Nazis' careful accounting of the defendants' personal property: "After the extermination, the victim's personal effects, including the gold in his teeth, were shipped back to the concentration camp and a report of 'death from natural causes' was made out."[58]

The court was not swayed by the defense arguments. Their opinion read: "Under the spell of National Socialism, these defendants today are only mildly conscious of any guilt in the kidnapping and enslavement of millions of civilians. The concept that slavery is criminal per se does not enter into their thinking."[59] Four were sentenced to death, three to life, nine to various prison terms, and three were acquitted. The judgments in the first three cases followed the cautious precedent of the IMT. The convictions were for violations of the laws of war, not the more novel legal constructions of the War Department.[60] However, legally speaking, these were relatively simple cases compared to the *U.S. v. Josef Altstoetter* (the Justice case), *U.S. v. Ernst von Weizsaecker et al.* (the Ministries case), *U.S. v. Alfried Krupp et al.* (the Krupp case), *U.S. v. Friedrich Flick et al.* (the Flick case), and *U.S v. Carl Krauch et al.* (the Farben case).

The tribunal in the Justice case, with Oregon's James Brand presiding, handed down its judgments on December 3 and 4, 1947. Case Three promised to be an important test case for the more radicial charges of the indictment. Nazi judges, prosecutors, and ministerial officers were

accused of "crimes committed in the name of law." Because the highest-ranking Nazi legal officials were dead (Minister of Justice Otto Thierack, President of the *Reichsgericht* Erwin Bumke, and People's Court President Roland Freisler), three Under-Secretaries of the Reich's Justice Ministry were also indicted.[61] The defendants included Franz Schlegelberger, Curt Rothenberger, Herbert Klemm, Chief Public Prosecutor of the Reich Ernst Lautz, three Chief Justices from the "Special Courts," and judges from Hitler's infamous "People's Courts."[62]

The defendants were charged with conspiracy, war crimes, crimes against humanity, and membership in a criminal organization. The prosecution's opening statement charged them with "judicial murder and other atrocities, which they committed by destroying law and justice in Germany, and then utilizing the emptied forms of the legal process for persecution, enslavement, and extermination on a vast scale." Although they did not actually commit the crimes, the defendants were held accountable for them because they were committed pursuant to Nazi legal decrees. When the prosecution introduced the *Nacht und Nebel* (Night and Fog) decree, they argued, "The dagger of the assassin was concealed beneath the robe of the jurist.."[63]

Witness Herbert Lipps described defendant and former Nazi Judge Rudolf Oeschey's courtroom manner: "Defendants were insulted by Oeschey in the most abusive manner and death candidates were told by Oeschey right at the beginning of their session that they had forfeited their lives."[64] Defendant Curt Rothenberger described the relationship between politics and law in a wartime memo: "The independent judge is a sad remnant of a liberalistic epoch. Law must serve the political leadership." Defendant Schlegelberger's novel defense would be heard many times in the coming months. He claimed to have stayed in the Ministry of Justice in order to prevent the Justice Department from being absorbed by Himmler's SS.[65] Because the defendants could not deny the existence of the legislation they had written and enforced, they attacked the indictment on the ground that it applied retroactive law. This was a classic legal tactic that would serve the Germans well in the coming years—when the facts are against you, argue the laws; when the laws are against you, argue the facts; when both are against you, attack the other side.

When the tribunal handed down its decisions on December 4, 1947, it was clear that they would take the broadest reading of their mandate. The court unanimously rejected a traditional reading of international

law and argued instead that "The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constitute violations not alone of statute but also of common international law."[66] The tribunal unanimously rejected the defense of necessity: "Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. . . . He feared that if he were to resign, a worse man would take his place. . . . Upon analysis this plausible claim of the defense squares neither with the truth, logic, or the circumstances."[67] The tribunal also addressed the *ex post facto* arguments put forward by the defense:

> It would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle the law at birth.[68]

The decision in the Justice case would be one of the high points for those who favored a broadened conception of international criminality at Nuremberg. The tribunal sentenced Franz Schlegelberger, Oswald Rothaug, Herbert Klemm, and Rudolf Oeschey to life, six others to prison terms, and acquitted four.[69]

After presiding in the Justice case, Judge James Brand was asked to stay on for a second trial. He declined but recommended his colleague and friend from Oregon, Robert Maguire. The attorney was at an American Bar Association meeting in Cleveland when he received the invitation. Robert Maguire was "flattered and pleased" by the offer and assumed that it was "an opportunity which comes only once in a lifetime."[70] He returned to Portland and told his partners that he would need a six-month leave of absence. Although a conservative Republican, Maguire was sympathetic to the views of the War Department. His father, Frank Maguire, had been a theosophist who embraced evolution, socialism, and women's suffrage. His mother, Kate Maguire, had been a pioneer social worker in the United States. It was with great excitement and a sense of purpose that the attorney boarded a converted navy frigate and set sail for Europe.[71]

Robert Maguire saw himself as part of the vanguard of the American reform and reeducation effort. After two weeks at sea, he and his wife, Ruth, disembarked in Bremerhaven on November 21, 1947. As they drove to Nuremberg, Maguire was struck by the damage wrought by the Allied air war: "Bremerhaven, Bremen, Giessen, and Frankfurt were terribly knocked about by bombs. Bridges were in ruins . . . factories gutted by fire or crumpled by bombs, houses and building blocks a mess of ruins, railroad yards torn up, with twisted cars and locomotives rolled off the right of way. . . . A sad, sad sight."[72] When they arrived in Nuremberg, he was greeted by similar destruction; the city was "literally pulverized. I should say that more than 90 per cent of the buildings are piles of brick, stone, mortar, twisted pipes and wire."[73] Maguire's first order of business was a visit with James Brand; the two were reunited at Nuremberg's social hub, the Grand Hotel. They walked through the old city and talked about the trials. Brand was leaving in a matter of days and took this opportunity to pass the torch to his old friend.[74] However, Maguire would not be assigned to a case until December 19, 1947.

In late November 1947, Robert Maguire flew to Berlin, where he met with General Clay and was assigned to a tribunal. The other two judges on his court, Leon Powers and William Christianson, were retired state supreme court justices (from Iowa and Minnesota, respectively). After the judges had been convened as a tribunal, the Supervisory Committee of Presiding Judges assigned them Case Eleven, *The United States Government v. Ernst von Weizsaecker*, which would come to be known as the Ministries or *Wilhelmstrasse* case. The indictment was filed on November 1, 1947 against Ernst von Weizsäcker, Gustav Adolf Steengracht von Moyland, Wilhelm Keppler, Ernst Wilhelm Bohle, Ernst Woermann, Karl Ritter, Otto von Erdmannsdorff, Edmund Veesenmayer, Hans Heinrich Lammers, Wilhelm Stuckart, Richard Walther Darré, Otto Meissner, Otto Dietrich, Gottlob Berger, Walter Schellenberg, Schwerin von Krosigk, Emil Puhl, Karl Rasche, Paul Koerner, Paul Pleiger, and Hans Kehrl. Of all the American Nuremberg trials, the Ministries case most closely resembled the IMT. Robert Maguire described the various defendants:

> The head men of the Foreign Office, the Gaulitier [sic] of the Auslandes [sic] Organization, said to be the framers of the fifth columns, two or three of the top party men, Generals in the S.S., the Finance Minister, the head of the Reich Chancellory, several of the Reich's Kommis-

> ars [sic] who had charge of Austria, Czechoslovakia, Poland, Holland, Belgium, Denmark, and Norway; the head of the Dresdner Bank and two of the leading industrialists.[75]

Among other things, the Ministries case explored the culpability of bureaucratic leaders in a totalitarian state. As Robert Jackson had remarked in his opening statement before the IMT, "whatever else we may say of those who were the authors of this war, they did achieve a stupendous work in organization."[76] In many instances these were the "CEOs" of the Third Reich—the efficient bureaucrats who translated Hitler's words into deeds. But had they committed war crimes?[77] The answer to that question depended on the court's reading of their legal mandate. The diplomats and fifth columnists were the best candidates for the aggression and conspiracy charges since the IMT. However, the prosecution faced a daunting task—convincing a conservative American court both that the aggression and conspiracy charges were valid and that the defendants had violated them. Case Eleven was the prosecution's last hope for a crimes against peace conviction.

Telford Taylor opened the prosecution's case on January 7, 1948. The Chief Counsel derisively referred to the defendants as "the gentlemen of the *Wilhelmstrasse*." He recognized that convictions for aggression in the Ministries case could bolster the IMT's aggression precedent. Taylor told the tribunal, "We have indicted in this case the chief civil executives of the Third Reich. . . . Without their administration and implementation, and without the directives and orders which they prepared, no Hitler, no Goering, could have planned and waged aggressive wars."[78] In this case more than any other, the prosecution aggressively pressed for multiple convictions under the aggression charge. However, up to this point the court had not convicted a single person for aggression. Of the thirty-five defendants charged in the Farben case, Krupp case, and the High Command case, none had been convicted.[79] The defense was fully aware of the prosecution's need for legal innovation. Defendant Ernst von Weizsäcker's son, Richard, stated that "The prosecution depended largely on principles established in the main Nuremberg Trial, which were not codified but were based largely on natural right."[80]

During Hitler's early campaign of lightning wars (1939–41), the Foreign Office provided lists of alleged violations of neutrality that served as pretexts for the various Nazi invasions.[81] Eight of the Ministries case

defendants were career diplomats who had risen through the ranks of the German Foreign Office. The most important case would be that of former State Secretary Ernst von Weizsäcker. He entered the German Foreign Office in 1921 and served for seventeen years in Switzerland, Denmark, Norway, and Berlin. Although he would later claim to loathe the boorish Nazis, he was a German nationalist and shared many goals with them: the repudiation of the Treaty of Versailles, a return to the status of a great power, and rearmament.[82]

After accepting the post of State Secretary in 1938, von Weizsäcker lent his diplomatic expertise to help orchestrate the Third Reich's absorption of her neighbors. Although he would present evidence that he had helped the German resistance, many questions remained. Most difficult to explain would be two memos from Heinrich Himmler to von Weizsäcker that authorized the deportation of a total of 6,000 French Jews to Auschwitz. In 1943, the defendant was named Ambassador to the Vatican, where he remained until the end of the war. In addition to keeping the Pope silent on the Final Solution, von Weizsäcker played a key role in the deportation of Rome's Jews. He would present one of the most legally and morally complex defenses of the Nuremberg trials. The court would be forced to reexamine their definition of resistance given the unique circumstances of the Nazi dictatorship. The von Weizsäcker case would also highlight the differences between legal and moral guilt.[83]

Defendant Wilhelm Keppler was not a Foreign Office aristocrat but a Nazi true believer. In 1927, he joined the National Socialist Party as an economic advisor and never left. In 1936, he was named Plenipotentiary for Austria, where he organized Nazi fifth columnists and delivered Hitler's ultimatum to Austrian President Wilhelm Milkas.[84] On his role in the Anschluss, SS Chief Heinrich Himmler gushed, "I would like to express to you, Keppler, once more, in writing, how you have accomplished a very difficult task under very difficult conditions, so clearly and bravely for the Führer. I do not have to reassure you that it will be a joy for me to allow SS men to work under your leadership in the future for these tasks."[85] When Germany invaded Poland, Hitler demanded the return of Danzig and the emancipation of "oppressed" German minorities.[86] Keppler played an important behind-the-scenes role: he and defendant Veesenmayer incited border incidents so that Germany would have a pretext for invasion.

The other two State Secretaries, Steengracht von Moyland and Ernst Bohle, were responsible for similar acts of "Germanism beyond the borders of the Reich."[87] From his position at the *Auslandsorganization*, Bohle directed fifth column activities. The other four members of the Foreign Office were lower in rank. Under-Secretary of State Ernst Woermann acted as von Weizsäcker's man in the field. In Czechoslovakia he provided military and financial assistance to the Sudeten German Party; in Poland he helped fabricate border incidents.[88] Ambassador Karl Ritter and Ministerial Dirigent Otto von Erdmannsdorf organized the actions of pro-Nazi groups.

The second group of defendants were Reich ministers involved in domestic policies. The highest-ranking official was Chief of the Reich Chancellery Hans Lammers, who had been a National Socialist since 1922. Lammers was the author and signatory of "legal" decrees that aided the Nazi consolidation of power.[89] These included the Enabling Act and the Reich Defense Law, both of which allowed Hitler to dissolve Germany's constitutional government. Of all the defendants, Lammers was involved in the broadest range of activities—everything from the exploitation of occupied territories to directives on captured pilots.

State Secretary Otto Dietrich was Josef Goebbels's rival in the Ministry of Propaganda. In his post as Minister of Public Enlightenment, Dietrich orchestrated the misinformation campaigns that preceded each invasion. German newspapers were ordered to print headlines like CONCENTRATION OF CZECH TROOPS ON THE BORDERS OF SUDETENLAND.[90] He was also an arch anti-Semite; he wrote, "In everything it must be established that the Jews are to blame! The Jews wanted war! . . . Naturally, those reports that do not lend themselves to anti-Semitic propaganda must be adapted for use as anti-Semitic propaganda." Dietrich condemned the Allied city bombing campaign in the strongest terms: "The further material on hand regarding the cynical utterances of our enemies on the air war is to be emphasized with full force, thus underlining once again England's responsibility for the terror methods in the conduct of war. In doing so, the case of the American Murder Corporation is to be brought up once again as proof . . . the war criminal Churchill will one day receive his punishment for his historical guilt."[91] Reich Peasant Leader and Minister of Food and Agriculture Richard Darré was the author of the "blood and soil decree."[92] In a letter Darré bragged that he had "created the prerequisites which made it

possible for the Führer to wage his war as far as food is concerned."[93] Other long-time National Socialists were State Secretary to the Reich Ministry of Interior Wilhelm Stuckart and Presidential Chancellor Otto Meissner.[94] The economic mobilization had been so successful in restructuring the German economy to withstand the pressures of war that Plenipotentiary of the War Economy Walter Funk was moved to comment, "It is known that the German war potential has been strengthened very considerably by the conquest of Poland. We owe it mainly to the Four-Year Plan, that we could enter the war economically so strong and well prepared."[95]

The third group of defendants were involved in Hermann Goering's "Four-Year Plan." Paul Koerner left his job as an industrial engineer in 1931 to work for Goering. This personal association helped him rise to a position of prominence within the Reich. He joined the SS in order to help Heinrich Himmler place SS men in other sectors of the government. In 1936, when the Office of the Four-Year Plan took control of the economy, Koerner was named State Secretary for the Four-Year Plan.[96] In 1936, *Reichsmarshall* Goering stated that in "all current business concerning the Four-Year Plan, I shall be represented by State Secretary Koerner."[97] During the 1940s, Koerner shifted his focus to exploiting the resources of occupied territories. He worked for the Economic Staff East and sat on the Central Planning Board with Albert Speer and Walter Funk. Defendants Paul Pleiger and Hans Kehrl served as industrial and economic experts under Koerner.

The fourth group of defendants consisted of bankers involved in a variety of Nazi enterprises. One defendant, Karl Rasche, held a top position at the Dresdner Bank, which liquidated seized assets for the Nazis and financed the construction of concentration camps with low- or no-interest loans.[98] Schwerin von Krosigk was in charge of fiscal mobilization for the Minister of Finance.[99] He imposed fines against German Jews that totaled one billion Reichsmarks; when individuals were unable to pay, their property was expropriated and sold. Krosigk was also named a successor in Hitler's will. The other banker, Emil Puhl, had been vice president of the Reichsbank. Puhl issued an eight-million-Reichsmark loan to aid the expansion of the SS; the loan was low interest and the terms included the right to defer payment as long as necessary. Puhl said: "We agree that the credit in question cannot be considered from the viewpoint of ordinary business."[100] The Reichsbank also received seventy-six

shipments of dental gold from Auschwitz. By the end of the war its vaults held thirty-three tons of gold teeth, rings, and glasses worth more than 60 million Reichsmarks.[101]

The SS was represented by Gottlob Berger, Walter Schellenberg, and Edmund Veesenmayer. A former gymnastics instructor, Berger was an ardent anti-Semite and proponent of the Final Solution. He had been one of Heinrich Himmler's experts on racial selection for the SS. In a wartime article, he wrote, "We the National Socialists believe the Führer when he says that the annihilation of *Jewry* in Europe stands at the end of the fight instigated by the *Jewish* World Parasite against us as his strongest enemy."[102] Berger was one of Himmler's favored "twelve apostles." He would have the most difficulty distancing himself from his unofficial sponsorship of his old comrade, Oskar Dirlewanger. Berger interceded to have Dirlewanger released from prison in 1939 to serve under General Franco in the Spanish Civil War. When Dirlewanger returned to Germany, Berger reinstated him as an SS colonel. In 1940, Dirlewanger began to train a regiment of convicted game poachers and criminals to wage antipartisan warfare in Eastern Europe.

Even Heinrich Himmler was moved to comment on their brutality: "I told Dirlewanger to choose men from the concentration camps and habitual criminals. The tone in the regiment is, I may say, in many cases a medieval one with cudgels and such things. If anyone expresses doubts about winning the war he is likely to fall dead from the table."[103] In 1942, after an SS police judge advocate named Conrad Morgen noticed a staggeringly high number of convictions for looting and assault among members of the Dirlewanger regiment, he inquired further. Morgen heard stories of Oskar Dirlewanger entertaining his men by injecting Jewish women with strychnine in the officers' mess hall and watching their death struggles.[104] Morgen issued a warrant for Dirlewanger's arrest, but once again his guardian angel, Gottlob Berger, intervened. Berger wrote Himmler in June of 1942, "Better to shoot two Poles too many than two too few. A savage country cannot be governed in a decent manner." Adolf Hitler concurred with Berger's view: "As it is, a poacher kills a hare and goes to prison for three months. Personally, I would take the fellow and put him in one of the guerrilla companies of the SS." Dirlewanger was awarded the Knight's Cross and given a second battalion so that by 1943, he commanded a brigade of approximately 4,000 men.[105]

Walter Schellenberg was a Waffen SS and former Police Brigadier General who went on to become the head of the military intelligence service of the SS and the Chief of Prisoner of War Activities on the eastern front. Schellenberg was a close personal friend and advisor of Heinrich Himmler until the end of the war. A fervent proponent of the Final Solution, he oversaw the capture of thousands of French Jews who were sent to Auschwitz. Schellenberg was also one of the few Nazis to mention "The Final Solution" in writing.[106] He had played an active role in the enforcement of the Commissar Order, as German historian Gerald Reitlinger writes: "it was found that the liquidation of Russian spies was handled by one of those pleasant little one-room offices of the RSHA and that this office came under Schellenberg's own foreign Intelligence service, AMT IV."[107] Although Schellenberg had gone out of his way to save a number of Jews from certain death in the last days of the war, would this mitigate his guilt?

Ministries case defendant Edmund Veesenmayer would have a very difficult time defending his wartime activities. Although he began in the Foreign Office, as the war progressed, he became a specialist in the deportation of Jews in nations occupied by the Third Reich. In September 1941, he signed a report recommending the deportation of Serbian Jews and then moved on to conduct similar operations in both Slovakia and Hungary. Veesenmayer was appointed Germany's Plenipotentiary in Hungary; he reported to both Ribbentrop in the German Foreign Office and Hans Kaltenbrunner in the Reich Main Security Office.[108] His main job between April and June 1944 was organizing the successful deportation of 381,600 Hungarian Jews to Auschwitz and other concentration camps.[109]

Unlike other contemporary examples of political justice, the Nuremberg trials worked from an unprecedented evidentiary base. Prosecutor Robert Kempner explained, "We had the documents and I had educated young officers, since 1941, on how to find the documents. This was very important from a political point of view because after the First World War the Allies had no documents."[110] Judge Maguire was struck by the quality of the evidence: "Our case is becoming very interesting, we are seeing the pages of history roll out from the confidential records made before the events occurred, and made by the main actors themselves."[111] As in the vast majority of the American Nuremberg trials, documentary evidence alone built a daunting *prima facie* case. The defense would have

to raise doubts about the meaning of diplomatic correspondence in a dictatorship.

After the first week of the proceedings, Judges Maguire and Powers drove to Berchtesgaden. At their hotel, they were greeted by Hitler's court jester, "Putzi" Hafenstangel. Just as he had courted Hitler, Hafenstangel regaled his high-ranking audience with ribald tales of greed and decadence beyond their imagination.[112] The next morning the two judges made their way up the mountain in an army jeep, sloshing through mud and snow to Hitler's "Eagle's Nest" at Obersalzburg. Their tour guide was one of Hitler's former bodyguards, a battle-hardened SS veteran. Maguire wrote, "He had been in the German Army since he was fifteen, had won the Iron Cross in France and was transferred to the Waffen S.S. and for the last year of the war was a member of Hitler's bodyguard. He was a handsome youngster over six feet tall, spoke excellent English, and we enjoyed him very much."[113]

When the two judges reached Hitler's compound, they were struck by its opulence. Robert Maguire was moved to comment on the internal contradictions of National Socialism. "For a gentleman who was avowedly working for the good of the common people . . . he and his fellow workers did themselves very well indeed. There was a luxurious home for Hitler, one for Mussolini, one for Martin Bormann, another for Goering, and others for other top dogs; tremendous barracks for the bodyguard, covering acres of ground."[114] The Americans were more impressed by security provisions than by the structure itself. "I am of the opinion," Maguire reflected, "that if my efforts to save my countrymen necessitated bodyguards, tunnels, machine guns and the like to protect me from their enthusiasm, I would just let them stew in their own fat and go to perdition by their own road, free from interference on my part."[115] But Maguire's most important encounter with the remnants of the Third Reich was yet to come.

Among the first witnesses presented by the prosecution was Milada Radlova, daughter of Czechoslovakian President Emil Hacha. When President Hacha was summoned to Berlin in 1939 to discuss the future of Czech territory (Bohemia and Moravia), Radlova traveled to Berlin with him. She described an ominous late-night meeting with Hitler and Goering in the Reich Chancellory. According to Radlova, the Nazi leaders threatened to destroy Prague if Hacha did not capitulate. *The New York Times* described her testimony in the Ministries case:

> Adolf Hitler and Hermann Goering shouted and threatened M. Hacha until, exhausted, he capitulated. . . . On his return at 5 A.M. the Czech was a broken man, pale and exhausted, the witness said. He informed her that he capitulated after Hitler had ranted and shouted for hours and Goering had assured him as an alternative to a signing of the proffered papers he would leave immediately and order the destruction of Prague by the Luftwaffe to demonstrate its efficiency to the Western powers.[116]

Further evidence on the pattern of German conquest was provided by the officials forced out during the Anschluss. Besides giving valuable evidence, these witnesses humanized the events. Theodore Hornbostel was head of the political division of the Austrian Foreign Office at the time of the Nazi takeover. Hornbostel refused to collaborate and as a result spent five years in a concentration camp. Judge Maguire was impressed by his somber demeanor: "He was very restrained in his testimony and his narration of what must have been most dramatic and tragic days of early March 1938."[117]

Next, the tribunal flew to Vienna, in the Russian zone of occupation, to take the deposition of former Austrian President Wilhelm Milkas, who was too sick and frail to travel to Nuremberg. Maguire was impressed by "the dramatic and tragic story of the fall of Austria, the delivery of the ultimatum, the actions of Keppler who was Hitler and Goering's agent in the affair, the forced resignation of Schuschnigg . . . the forced appointment of Seyss-Inquart."[118] In Austria, the Nazis coupled diplomatic demands with threats of force and Hitler staged a bloodless coup. But again, was this "aggression"? There was neither significant resistance nor actual military conflict. Did war crimes require actual combat? The fate of the aggression charges hinged on basic questions like these. The defense would contend that subversive diplomats like Ernst von Weizsäcker prevented war on the ground and should be viewed as heroes. Although they could not forestall the political takeover of nations like Austria and Czechoslovakia, they at least prevented their physical destruction.[119]

Encounters with men like Hornbostel and Milkas influenced the tribunal. These men had not supported the Nazi program until the eleventh hour and then, as the ship was sinking, joined the resistance. They had opposed Hitler from the beginning until the end. Maguire wrote, "Milkas

is evidentially [sic] a man of high courage, he never resigned, he refused to recognize the Nazis, and he spoke with well justified bitterness of Austria's abandonment by the other nations."[120] What Milkas and Hornbostel provided for Maguire were standards against which to measure subsequent claims of resistance. The prosecution did not complete their cases until March. All of the participants at Nuremberg were distracted by the tumultuous political events of early 1948.

February 1948 marked yet another intensification in the Cold War. Two important events occurred that had a major impact on America's postwar foreign policy. The first was the Soviet takeover of Czechoslovakia. Up until 1948, the small nation was not clearly in the grasp of the Soviet Union. In mid-February, Klement Gottwald, leader of the Czech Communist Party, eliminated all opposition political parties. He then strengthened his hold on the government by filling the cabinet with fellow communists.[121] Military resistance was discouraged by the Red Army divisions poised on the border with the U.S.S.R. President Edward Benes and Foreign Minister Jan Masaryk were forced to surrender when a delegation of Soviet officials arrived in Prague. Two weeks later, Masaryk was dead; official Czech sources claimed he had committed suicide. Most people in the West believed that he had been murdered.[122]

A second major event occurred in late February: the Soviet Military Governor issued an order preventing access to Berlin. General Clay objected on the ground that this was a violation of the American right to access that had been assured by Marshal Zhukov. The next day the Soviets prevented freight from leaving Berlin.[123]

Lucius Clay had worked more closely with the Soviets than any other American official. Even as late as 1947, General Clay and Secretary of State James Byrnes remained convinced that cooperation with the Russians was possible. But Washington was moving in a different direction and expected General Clay to follow.[124] As the State Department became more and more involved in the affairs of Germany, Clay grew less and less comfortable with the direction of American policy. He attempted to resign in July 1947, writing in a letter to General Eisenhower, "I feel that State Department wants a negative personality in Germany. As you know, I can carry out policy wholeheartedly or not at all and there is no question left in my mind but that my views relative to Germany do not coincide with present policies."[125] Eisenhower shamed his old friend into staying on. According to Jean Smith, editor of General Clay's papers, "Clay

got the message; henceforth, he realized that U.S. policy in Germany would march to a different drummer."[126]

Former Nazi spy Reinhard Gehlen and his operatives were still providing the Americans with estimates of Soviet military capabilities and intentions.[127] Gehlen was playing the Cold War to his advantage by making the United States rely so heavily on his organization for intelligence on the Soviet Union. The CIA's former head Soviet military analyst, Victor Marchetti, explained, "The agency [CIA] loved Gehlen because he fed us what we wanted to hear. . . . We used his stuff constantly, and we fed it to everybody else: the Pentagon; the White House; the newspapers. They loved it too. But it was hyped up Russian bogeyman junk, and it did a lot of damage to this country."[128] One can safely say that Gehlen's estimates were exaggerations, although that was not immediately obvious in 1948.

After these events, the Truman administration decided to reinstate the draft. Without an imminent threat to American national security, it was difficult to gain public support. Director of Army Intelligence Stephen Chamberlin met with General Clay in Berlin. Clay recalled, "He told me that the Army was having trouble getting the draft reinstated, and they needed a strong message from me that they could use in congressional testimony. So I wrote out this cable. I sent it directly to Chamberlin and told him to use it as he saw fit."[129] On March 5, the Director of Intelligence received General Clay's top-secret cable:

> For many months, based on logical analysis, I have felt and held that war was unlikely for at least ten years. Within the last few weeks, I have felt a sudden change in Soviet attitudes which I cannot define but which now gives me a feeling that it may come with dramatic suddenness. I cannot support this change in my own thinking with any data or outward evidence in relationships other than to describe it as a feeling of a new tenseness in every Soviet individual with whom we have official relation. I am unable to submit any official report in the absence of supporting data but my feeling is real. You may advise the chief of staff [Bradley] of this for what it is worth if you feel it is advisable.[130]

Clay was shocked and dismayed when the secret message was torn from context and leaked to the media (a portion of the cable first appeared in the *Saturday Evening Post*). He later recalled: "I assumed they would use it in

closed session. I certainly had no idea they would make it public. If I had, I would not have sent it." But it was too late—the cable had had its desired effect. There was panic and alarm among civilians and officials; needless to say, the money for rearmament was allocated.[131] Historian Michael Howard later observed that a leaked "secret cable" became a new means by which American government officials could influence public opinion. This "was not to be the last occasion on which the American military were to try to influence congressional opinion by an inflated estimate of Soviet intentions and capabilities, but it may well have been the first and most significant."[132]

In its annual assessment of U.S. foreign policy, the State Department's Policy Planning Staff, headed by George Kennan, argued that America's reform and reeducation efforts in Germany had been a failure. The 1948 "Review of Current Trends in American Foreign Policy" declared: "we must recognize the bankruptcy of our moral influence on the Germans, and we must make plans for the earliest possible termination of those actions and policies on our part which have been psychologically unfortunate." The report also singled out the Nuremberg trials as a particular source of irritation and urged an end to them: "we must terminate as rapidly as possible those forms of activity (denazification, re-education, and above all the Nuremberg Trials) which tend to set us up as mentors and judges over internal German problems."

On June 18, 1948, President Truman approved George Kennan and his Policy Planning Staff's NSC Directive 10/2. The duality in American foreign policy was growing quickly.

> Political warfare is the logical application of Clausewitz's doctrine in time of peace . . . employment of all the means at a nation's command, short of war, to achieve its national objectives. Such operations are both covert and overt. They range from such overt actions as political alliances, economic measures . . . and "white" propaganda, to such covert operations as clandestine support of "friendly" foreign elements, "black" psychological warfare and even encouragement of underground resistance in hostile states.[133]

The Nuremberg trials' broadened conception of international criminality was challenged on February 19, 1948, when the tribunal in *U.S. v. Wilhelm List et al.* (the Hostage case) handed down their extremely conser-

vative opinion. The Hostage case (Seven) and High Command case (Twelve) charged German generals with violations of the traditional laws of war (Case Twelve included aggressive war and conspiracy charges). The Hostage case accused senior Wehrmacht officers, including Field Marshal Wilhelm List and Lieutenant General Walter Kuntze, both of whom had commanded the Wehrmacht's Twelfth Army in Yugoslavia and Greece. Also charged was the head of the Second Panzer Army in Yugoslavia during 1942–43, General Lothar Rendulic. The other defendants were high-ranking German officers involved in atrocities against civilians in Yugoslavia, Albania, Norway, and Greece.[134] The court would examine the legality of defendant Maximilian von Weichs's 1941 "Hostage Order," which declared that one hundred Serbs would be shot for every German soldier harmed by partisans.[135] Accordingly, entire villages were burned while all the inhabitants were rounded up and slaughtered. Were these reprisals "proportional" to the crimes they sought to punish?

The four-count indictment charged German military leaders with traditional violations of the customary laws of war—the murder and mistreatment of civilians and the destruction of their property. Prosecutor Telford Taylor made the point that this was the first time since the IMT that German officers had been "charged with capital crimes committed in a strictly military capacity."[136] General Taylor admitted that in certain instances, reprisals were justified by the laws of war: "We may concede for purposes of argument that the execution of hostages may under some circumstances be justified, harshly as those words may ring in our ears." However, on the question of proportionality, the Germans had, in Telford Taylor's eyes, gone too far: "the law must be spared the shame of condoning the torrent of senseless death which these men let loose in southeastern Europe."[137]

Harry Wennerstrum, formerly of the Iowa Supreme Court, presided; all of the judges on the tribunal were midwesterners. This geographic distinction proved important, as the majority of the conservative judges came from the Midwest and the two most outspoken conservatives came from Iowa. Just as Judge Brand's opinion in the Justice case provided a model for those sympathetic to a broader view of international criminality, the opinion in the Hostage case became a model for conservative jurists at Nuremberg. The tribunal prefaced their judgment by explicitly narrowing their legal mandate—"it is not our province to write interna-

tional law as we would have it,—we must apply it as we find it."[138] With many qualifications, the court rejected the idea that partisan or guerrilla forces were protected by the laws of war, and unanimously agreed that these groups fall into the same legal category as spies: "Just as a spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such." Finally, the tribunal ruled: "a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender."[139]

Much to the chagrin of those nations occupied by the Third Reich, the tribunal, like the Lieber Code, defined "reprisal" very broadly: "The idea that an innocent person may be killed for the criminal act of another is abhorrent to every natural law. We condemn the injustice of any such rule as a relic of ancient times."[140] With this and other significant qualifications, the court concluded: "The occupant may properly insist upon compliance with regulations necessary to the security of occupying forces and for the maintenance of law and order. In accomplishment of this objective, the occupant may, only as a last resort, take and execute hostages."[141] The opinion in the Hostage case branded partisans "*franc-tireurs*" and provided few options for legitimate resistance under military occupation. "We think the rule is established that a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal under the laws of war."[142]

The tribunal sentenced Field Marshal Wilhelm List and his successor, Lieutenant General Walter Kuntze, to life in prison; two defendants were acquitted, while the others were given terms of twenty years or less.[143] The court attempted to address the question of leniency in their opinion: "mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than defense. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the court with reference to the degree of magnitude of the crime."[144] Although the decisions in the Hostage case were very conservative, it would be wrong to assume that they were the result of political pressure. Members of the

American military seemed to sympathize with the plight of their German brethren. The once vindictive General Dwight Eisenhower testified in an affidavit that the German practice was not unique. The French had a similar decree "directing the shooting of five German hostages for every French soldier shot by snipers." These hostages were also shot without a trial.[145]

The judgment in the Hostage case marked a shift at Nuremberg. More courts began to adopt a conservative reading of Control Council Law No. 10. Politically, it was the safe thing to do because it was in line with America's overall German policy. A conservative position grounded in a positive reading of the laws of war was fast becoming the domain of midwestern judges. By 1948, the tension between some of them and the prosecutors and courtroom staff was growing. The prosecution team consisted of many Harvard Law School graduates and liberal New Dealers. Many in the courtroom staff (translators, etc.) were European, and some were Jewish. Some of the judges were suspicious and considered these individuals "vindictive." Years later, General Lucius Clay discussed this issue in his oral history:

> The British and French didn't have the same feeling towards the Nazis that we did. Neither one had a huge Jewish population that had developed a hatred you could well understand, which was true in this country. I'm not critical of it at all because I can understand how it developed. . . . Well, they went too far in their demands for denazification.

Clay described the American reconstruction program as "on the whole too vindictive a directive to have long suited the American people, because we're not a vindictive people."[146]

During the Hostage case there were some contentious exchanges between the prosecution and the bench. Although the issues tended to be trivial, the tone belied something deeper.[147] These long-simmering differences came to an ugly head on February 23, 1948, when the headline of the conservative *Chicago Tribune* read: IOWAN, WAR CRIMES JUDGE, FEELS JUSTICE DENIED NAZIS. Harry Wennerstrum, the presiding judge in the Hostage case, condemned the trial over which he had just presided as a "victor's justice" and placed the blame on the prosecution staff. Wennerstrum charged that "The high ideals announced as the motives for creat-

ing these tribunals have not been evident . . . the prosecution has failed to maintain objectivity aloof from vindictiveness, aloof from personal ambitions for convictions."[148] He went on to claim that the defendants were prevented from having a full and fair hearing because documents were not placed at the disposal of defense attorneys. Wennerstrum concluded by saying that if he had been aware of the character of the trials, he "would have never come."[149]

Although "vindictive" probably referred to Robert Kempner, the implicit target of this attack was Telford Taylor. Typically, the forty-year-old Brigadier General was a model of professional decorum; this time, he had been pushed too far. Although there had been strife between the prosecution and the judges during the proceedings, the presiding judge never made his deep reservations known. Wennerstrum waited until the day of his departure before granting an interview to Hal Faust of the *Tribune*. A friend of Taylor's in the U.S. Military Government's Press Office gave him the text of the article before wiring it to the United States for publication.[150] Ironically, General Taylor's response appeared in *The New York Times* on the same day as Wennerstrum's attack in the *Chicago Tribune*.

Brigadier General Taylor countered with a series of well-placed jabs. "If you in fact held the opinions you are quoted as expressing, you were guilty of grave misconduct in continuing to act in the case at all. In giving vent to these baseless slanders you have now fouled your own nest and sought to discredit the very judgment which you and your two distinguished colleagues have just rendered." Taylor took special offense at the charge that the trials were a victor's justice because the final task of rendering judgment was in the tribunal's hands:

> Your statement that these trials are teaching the Germans only that they lost the war to tough conquerors would be laughable if its consequences were not so likely to be deplorable. Your own tribunal, thanks to the wisdom, patience and judicial detachment of your colleagues, accorded the defendants a trial which can be an outstanding and sadly needed lesson to the Germans in respect to the rights of an accused person, and an unshakable demonstration that the Nuremberg trials are for justice, not for vengeance. The one great obstacle to your trial having this effect is the wanton, reckless nonsense which you yourself are quoted as uttering.[151]

The Chief Counsel pointed out the weakness of Wennerstrum's *ad hominem* attack: "Instead of making any constructive moves while you were here, you have chosen to give out a baseless, malicious attack during the last hours of your eight-month stay and then leave town rather than confront those whom you have so outrageously slandered." Taylor ended on a more personal note: "I would have used stronger language if it did not appear that your behavior arises out of a warped, psychopathic mental attitude. It is indeed fortunate that your unreasoning bias is so clearly on behalf of the defendants since, in that sense, it tends to reinforce the verdict of your tribunal rather than undermine it."[152]

This heated exchange reminded many Americans of the trials dragging on in their name. In Congress, Republican Representatives John Taber, Harold Knutson, Francis Case, and William Langer all believed that America's punitive war crimes policies were getting in the way of German reconstruction. Representative Taber contended that when he visited Germany, he found that "700,000 of their most active business people . . . were refused an opportunity to work because they were alleged to be Nazis." The Congressman's anti-Semitism was thinly veiled: "the trouble is that they have too many of these people who are not American citizens mixed up in those trials, and they are very hostile to Germans." Congressman Knutson asked, "Is it not just possible that these aliens who are employed by the Government to prosecute these cases do not want to let go of a good thing?" Taber agreed and added, "There is no question about that. On top of that, they do not have the right kind of disposition to create good will and get rid of the attitude that some of these people have had."[153] It was in Germany where the public American dispute over war crimes policy was read with the most interest and was perceived as a further indication of American "doubt" about their own war crimes program. General Taylor's prediction that Wennerstrum's charges "will be used by all the worst elements in Germany against the best" proved correct. A growing number of Germans viewed the second generation of critics' political attacks on the Nuremberg and Dachau trials as a sign that the Americans were abandoning their reform policies.[154]

It is telling that Wennerstrum's charges first appeared in the *Chicago Tribune*, while Taylor's response appeared in *The New York Times*. Diplomatic historian Thomas Schwartz notes the significance of this geographic distinction:

> The conservative *Chicago Tribune*, with the remarks of Judge Charles Wennerstrum . . . made itself the mouthpiece of the critics of the Nuremberg trials. Wennerstrum's remark that 'some of the Nuremberg prosecutors had become Americans only in the last few years' provided further flammable material. This not subtle reference to the role which Jewish immigrants played in the prosecution apparently found its confirmation when it was reported Kempner had tried to intimidate a witness in the Ministries Case.[155]

War crimes historian Frank Buscher writes: "Wennerstrum's remarks to the *Chicago Tribune* were welcomed by German opponents of the war crimes program. Wennerstrum's action, primarily aimed at an American audience, kindled further German, anti-Nuremberg sentiments. For those Germans opposed to the trials, the fact that Americans were publicly debating these trials seemed to indicate a decreasing U.S. commitment to the proceedings."[156]

Proponents of the American Nuremberg trials were fortunate to have a spokesman as able as Telford Taylor. In the coming years he would be called upon numerous times to set the record straight. But more important, neither he nor General Clay caved in to growing political pressure to cut the proceedings short. Despite February's tumultuous events, the Ministries case moved forward at full speed. The prosecution presented its case throughout January, February, and March, introducing 3,442 documentary exhibits and the testimony of 70 witnesses. Because of external pressure, the court did its best to speed the proceedings. At one point, Maguire presided in order to ease Judge Christianson's burden. The tribunal also held night and weekend sessions.[157] When Robert Maguire was not in court, he was at home reading documents.

Despite the geopolitical shifts, Judge Maguire remained unswayed: "The object of these cases is not to take revenge on a defeated enemy, but it is to make clear to the world that those who plan and start aggressive wars and invasions of other countries and who inflict untold sorrow and loss to their neighbors cannot do so without being held personally responsible for these wrongs."[158] In words that could have come from Robert Jackson himself, Maguire wrote: "The goal sought is to set out by judicial process standards of International law and justice which it is hoped will be listened to and form finally an enlightened world opinion which will tend to prevent others from doing these things which we all know to be

wrong." The conservative Republican remained unconvinced by the anti-Soviet siren song. He wrote in late March 1948, "I don't think Russia wants war, nor do I believe that for a sizable number of years, she could wage war, but that short of going to war she will do everything she can to get everything she can."[159] This view was not shared by all of the tribunal's members.

The first sign of a divergence of opinion within the tribunal came when Dr. Kubuschok of the defense offered a motion to dismiss Count 4 of the indictment (Crimes Against German Nationals 1933–1939) on the ground that it fell outside the court's jurisdiction. This was a major challenge, a test to see how this individual tribunal intended to interpret Control Council Law No. 10. In the Justice case, the court broadened the laws of war to include these acts. Their opinion read:

> It no longer can be said that violations of the laws of war are the only offenses recognized by common international law. The force of circumstance, the grim fact of world-wide interdependence, and the moral pressure of public opinion have resulted in recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.[160]

However, according to a "positivist" reading of the laws of war, the Nazi persecution of German Jews was not a war crime because it did not occur during wartime and the acts were committed by Germans against their own nationals. They may have been violations of German constitutional law, but they were not violations of a conservative reading of the laws of war.

Though opposed by the other two members of the tribunal, Judge Maguire did not want to dismiss the charge. He wrote to James Brand, the presiding judge in the Justice case, about the disagreement. Brand wrote back and urged his friend not to abandon his position: "I am especially glad to hear that you did not go along with your colleagues in their narrow construction of crimes against humanity committed by a government against its own nationals."[161] As he had done in the opinion of the Justice case, Brand shrugged off the charges of retroactivity: "I believe that it is too late in history for anyone to claim that governmentally organized persecution on racial, religious, or political grounds may not

become a matter of international concern justifying punishment."[162] Judge Maguire was ultimately outnumbered and overruled; on March 26, 1948, Count 4 was dismissed. This was only a preview of the legal battles to come.

By the time the prosecution finished presenting their case, it was obvious that Judge Powers viewed his role and that of the court differently from Judge Maguire. If James Brand was Robert Maguire's role model, Harry Wennerstrum was Leon Powers's role model. During the debate over Count 4, Powers maintained that the acts of persecution had taken place prior to the outbreak of war; thus, they were not war crimes. Former prosecution counsel Walter Rockler was a young attorney who had served with the marines in the Pacific. He recalled, "There was another judge on the court—Powers—of whom I have a totally different view. . . . He thought maybe you could convict a man for outright murder at the point of a pistol, but everybody else was innocent." The prosecution rested its case on March 29, 1948, as the defense prepared to counter the numerous documentary exhibits introduced.[163]

By the time the Ministries case reconvened, a verdict had been rendered in Nuremberg's most sensational trial, the *Einsatzgruppen* case. These units were among the most brutal to fall under the black rubric of the SS. The twenty-four defendants were accused of killing more than one million people.[164] The prosecution's entire case consisted of captured documents that were among the most incriminating documentary evidence presented in any of the trials. This report from Minsk, Russia was typical: "In the city of Minsk, about 10,000 Jews were liquidated on 28 and 29 July, 6,500 of whom were Russian Jews—mainly old people, women and children." Waldemar Klingelhoefer reported from the Soviet Union in 1944: "Nebe ordered me to go from Smolensk to Tatarsk and Mstislavl to get furs for the German troops and liquidate part of the Jews there. The Jews had already been arrested by order of the *Hauptsturmfuehrer* Egon Noack. The executions proper were carried out by Noack under my supervision."[165] The weight of the evidence was such that the prosecution called no witnesses. Prosecutor Ben Ferencz took only two days to present 253 captured documents.[166] The political tides might be turning, but there were certain Nazi acts that were considered crimes under any circumstances.

Defendant Otto Ohlendorf gained a great deal of notoriety after his appearance at the IMT. When asked how many Jews his troops killed in

Crimea and the Ukraine, Ohlendorf calmly admitted, "Ninety thousand." Ohlendorf claimed that the killings were committed out of military necessity: "I believe that it is very simple to explain if one starts from the fact that this order did not only try to achieve security but also a permanent security for the reason that the children were people who would grow up and surely, being the children of parents who had been killed, they would constitute a danger no smaller than the parents."[167] When defendant Walter Blume was asked whether he knew the killing of civilians was contrary to the laws of war, he replied, "I already stated that for me the directive was the Fuehrer Order. That was my war law." Blume added a Cold War–inspired dig: "I was also fully convinced and am so even now, that Jewry in Soviet Russia played an important part and still does play an important part, and it has the especial [*sic*] support of the Bolshevistic dictatorship."[168]

In his closing statement, Telford Taylor outlined the five common defense arguments (reprisals, superior orders, no personal participation, military necessity, and the obsolescence of the laws of war).[169] Judge Musmanno's voice was charged with emotion as he read the verdict: "Although the principal accusation is murder and, unhappily, man has been killing man ever since the days of Cain, the charge of purposeful homicide in this case reaches such fantastic proportions and surpasses such credible limits that believability must be bolstered with assurances a hundred times repeated."[170] The court deemed the atrocities "so beyond the experience of normal man and the range of man-made phenomena that only the most exhaustive trial . . . could verify and confirm them."[171] The tribunal handed down the sternest rulings of all the American Nuremberg trials: thirteen death sentences, two life terms, five prison sentences, and one acquittal. The judges seemed especially incensed by the fact that cultured Europeans, like the former economist Otto Ohlendorf, were capable of such horrifying acts and offered a cultural justification for the severity of the sentences: "The defendants are not untutored aborigines incapable of appreciation of the finer values of life and living. Each man at the bar has had the benefit of considerable schooling. Eight are lawyers, one a university professor. . . . One, as an opera singer, gave concerts throughout Germany before he began his tour of Russia with the *Einsatzkommandos*."[172]

The court also addressed the Cold War–inspired defense arguments that equated the Allied city bombing with the crimes of the Einsatzgrup-

pen. "Then it was charged that the defendants must be exonerated from the charge of killing civilian populations since every Allied nation brought about the death of non-combatants through the instrumentality of bombing." According to the opinion, whatever suffering German civilians had been subjected to was unfortunate collateral damage: "Any person, who, without cause, strikes another may not later complain if the other in repelling the attack uses sufficient force to overcome the original adversary. That is a fundamental law between nations as well."[173] The tribunal pointed out an important fact that clearly distinguished U.S. atrocities from those of the Third Reich—when Germany and Japan surrendered, the killing from above stopped. "The one and only purpose of the bombing is to effect the surrender of the bombed nation. The people of the nation through their representatives may surrender and with surrender, the bombing ceases, the killing is ended." In the case of the Third Reich, in most instances, with surrender, the numbers of civilians killed increased. "With the Jews it was entirely different. Even if the nation surrendered they still were killed as individuals."[174] An important objective of the Nuremberg trials was to create an irrefutable record of Nazi atrocities, and the American trials seemed to be on their way to accomplishing this. However, few of the war crimes were as clear cut as those of the Einsatzgruppen.

The case of Ernst von Weizsäcker was anything but clear. When German legal theorist Carl Schmitt was being interrogated at Nuremberg, he was asked by Robert Kempner what he thought of the fact that von Weizsäcker's initials appeared on so many incriminating documents. Schmitt appeared genuinely surprised:

> Kempner: *How do you explain that a diplomat like von Weizsaecker, as a state secretary, signed hundreds of such things?*
> Schmitt: *I would like to give you a nice answer. The question has great significance, a distinguished man like von Weizsaecker. . . . Only I must protect myself.*[175]

Ernst von Weizsäcker's lawyers claimed that the former State Secretary was "a Christian, an honest diplomat, a true patriot." They did not contest the fact that his initials were on a number of incriminating documents and instead argued that "political conditions under the Hitler dictatorship diminish the value of documentary evidence."[176] Under this

reading of the law, things meant the exact opposite of what they appeared to mean. The defense contended that "a diplomatic document cannot be understood without expert interpretation and full knowledge of the historical and political facts." The prosecution derided the strategy as the "Dr. Jekyll and Mr. Hyde" defense.[177] With the exception of Alfried Krupp, Ernst von Weizsäcker launched the most sophisticated defense effort of the Nuremberg trials. The German diplomat's five-man team was led by Helmutt Becker and American Warren Magee. They were aided by Albrecht von Kessel, formerly of the German Foreign Office; Sigismund von Braun; and the defendant's son, Richard von Weizsäcker, the future President of the Federal Republic of Germany. The defense would contend that von Weizsäcker accepted the job of State Secretary as a "nonenrolled member" of the active German resistance.[178]

In 1938, Ernst von Weizsäcker reached a personal and professional crossroads when he was offered the job of State Secretary, officially second only to Joachim von Ribbentrop in the foreign policy establishment. Attorney Helmutt Becker attempted to portray his client as a leading member of the "political resistance" who used his position in the Foreign Office to soften the blow of Hitler's policies. This was done through the power of appointment and by leaking information about Hitler's plans to diplomats from other nations. Through the power of appointment, von Weizsäcker was also able to provide a safe harbor for officials conspiring against the Nazis.[179] The diplomat's defense team rejected the prosecution's narrow definition of resistance:

> 1). A resister is someone with a political philosophy, which, whatever it may be, is clearly and honestly opposed to the philosophy and ideology of Nazism. 2). Resistance requires active intent to remove Nazism from power and influence by revolutionary action or active participation in, incitement to, or preparation for such action. This would usually, if not necessarily, include political planning or preparation of a policy which is to replace the removed one. 3). Active prevention and/or sabotage of such measures and propaganda which made Nazism what it is.[180]

The defense faced a dilemma: some of the strongest evidence supporting von Weizsäcker's claims of resistance was the testimony of the members of the British Foreign Office with whom he claimed to have

negotiated in 1938–39. According to Richard von Weizsäcker, "But now the British foreign office ordered these men to keep silent. Most of them obeyed to our detriment."[181] One British diplomat who stepped forward to defend von Weizsäcker was Lord Halifax, the former British Foreign Secretary.

The former State Secretary claimed that he accepted a promotion to State Secretary in an attempt to gain a better position to work from within. According to German diplomatic historian Klemens von Klemperer, "Weizsäcker no doubt pursued what Hans Ruthfels called a *Sonderpolitik* designed to protect the integrity of the Foreign Service and especially to counteract the aggressive plans of the Foreign Minister, von Ribbentrop, and thus prevent the great war."[182] Von Weizsäcker stated that more than anything else, he had wanted to prevent the outbreak of war. His son would later ask, "What price must a man pay for deciding not to abandon his post—and thus collaborate—in order to exert some influence from his position so as to change policy into something more acceptable and bring about change, or at least to prevent worse?"[183] In the end, the defense would concede that Ernst von Weizsäcker failed in his effort to preserve the peace but argued that he should be judged by his intentions.

The former State Secretary had played a central role in the German takeover of Czechoslovakia in 1939,[184] demanding concessions from the Czechoslovakian government for that nation's German population. At the same time, he instructed the leader of the Sudeten German Party, Konrad Heinlen, to reject the government's overtures in order to provide the Nazis with a pretext for intervening. When President Emil Hacha was summoned to Berlin, he was ordered to sign an agreement incorporating Bohemia and Moravia into the Reich. If Hacha refused, Czechoslovakia faced invasion.[185]

The defense would have the most difficult time with the charges under the rubric of crimes against humanity. The evidence consisted of a March 9, 1942 letter from Heinrich Himmler informing the Foreign Office of his intention to deport a thousand French Jews to Auschwitz. Von Weizsäcker was asked, point-blank, whether he had any objections—he had none. Two days later, a second request, to send another five thousand French Jews, arrived. The German embassy in Paris replied again, "no objection," and the response was initialed by defendants von Weizsäcker and Ernst Woermann. Ernst von Weizsäcker commented on

the plight of Europe's Jews during cross-examination: "Hitler's persecution of the Jews was considered by me from its inception to be a violation of all the rules and laws of Christianity. . . . As far as I was concerned, it was always a higher aim and interest which was of decisive importance; that is to work within the office in favor of peace and to overthrow the Hitler regime, because without peace and without the overthrow of the Hitler regime, the Jews could not be saved anyway."[186]

When the Nazis occupied Rome in 1943, Ernst von Weizsäcker was named ambassador to the Vatican. His main duty was to preserve a Faustian pact between the Third Reich and the Pope: the Nazis would respect the Vatican's "extraterritoriality" if the Pope remained silent about the Final Solution.[187] This pact was tested in the fall of 1943 when the SS began to round up Rome's Jews for deportation to Auschwitz. Ernst von Weizsäcker wrote Berlin in late October 1943 to report on the deportation:

> The Pope, although under pressure from all sides, has not permitted himself to be pushed into a demonstrative censure of the deportation of the Jews of Rome. Although he must know that such an attitude will be used against him by our adversaries . . . he has nonetheless done everything possible even in this delicate matter in order not to strain relations with the German government and the German authorities in Rome. As there apparently will be no further German action taken on the Jewish question here, it may be said that this matter, so unpleasant as it regards German-Vatican relations, has been liquidated.[188]

Did Ernst von Weizsäcker cross an ethical point of no return? How far could the defense of necessity stretch?

The majority of the defendants charged with crimes against peace were members of the Foreign Office. Weizsäcker and Woermann were stationed in the main office, while Keppler, Veesenmayer, Ritter, and Erdmannsdorf served as their field operatives. The latter group did the advance work for nearly all of the German invasions. What made the aggression charges relevant in Case Eleven was that the Nazis had gone to great pains to provide pretexts justifying each invasion. As Telford Taylor remarked in his opening statement, "These German diplomats of aggression, however, wore the mantle of diplomacy to cloak nefarious

policies which were solely directed towards the realization of the criminal aims of the Third Reich. Their conduct violated every cardinal principle of diplomacy."[189]

Austrian Nazi leader Seyss-Inquart was furnished with a telegram asking the Germans to "send troops to put down disorder."[190] The takeover of Czechoslovakia was done in the name of the violated civil rights of Sudeten Germans. The invasion of Poland was justified by similar claims of aiding oppressed Germans and reclaiming long-lost territory. Once again, staged border incidents made it appear as if the Nazis were coming to the aid of beleaguered German ethnic minorities in foreign countries. Belgium, Holland, Luxembourg, and France were all accused of violations of neutrality.[191] The invasion of Russia was described as a preventative war. It was not as if the Germans had announced their intention to dominate Europe and employed only brute military force to achieve that end. The Nazis coupled bad-faith diplomacy with military force; the result was a brutally effective foreign policy.

By far Ernst von Weizsäcker's strongest support came in the form of testimony and depositions from credible character witnesses who claimed that the State Secretary had been in touch with Admiral Wilhelm Canaris and other resistance leaders. Hans Gisevius submitted an affidavit claiming the State Secretary spoke with General Beck, Lord Mayor Goerdeler, Admiral Canaris, General Oster, and Ambassador Ulrich von Hassell about the "overthrow of the regime."[192] Other dignitaries who testified on Ernst von Weizsäcker's behalf included Neils Bohr, Karl Barth, and General Canaris's widow. One witness who had a great impact on the tribunal was Bishop Eivind Bergrav, a leader of the Norwegian resistance. Bergrav had been captured and imprisoned by the SS; despite a terminal illness, he came to Nuremberg to testify in strong support of the former State Secretary:

> I know that Weizsaecker fought to preserve peace. I know that he remained in office, as I said, in an effort to prevent Nazi excesses and to bring about a just peace. I did this because of my strong feeling of the duty of helping the Tribunal to create full justice toward this man, and because it is my conviction that he is a man who has always been as much opposed to the Nazi regime as I myself have been.[193]

The trial was again interrupted by the Cold War on June 24, 1948, when the Soviets cut all access to Berlin. For several weeks it seemed that the United States and the U.S.S.R. might go to war. On July 19, General Clay sent a top-secret cable to Theodore Draper. The Military Governor no longer needed to be convinced of a Soviet threat. He reflected that "the world is now facing the most vital issue that has developed since Hitler placed his political aggression under way. In fact the Soviet government has a greater strength under its immediate control than Hitler had to carry out his purpose. Under the circumstances which exist today, only we can exert world leadership. Only we have the strength to halt this aggressive policy here and now."[194]

The blockade affected the trial in two ways. First, there was continued pressure from the War Department to bring the proceedings to a close. But by 1948, the Cold War had entered the courtroom. Visiting American politicians applied direct pressure on trial officials. Prosecutor William Caming recalled that

> Visiting Congressmen clearly conveyed the sentiment to the politically sensitive Military Government of the U.S. Zone under General Lucius Clay. That sentiment was also bluntly asserted to the prosecution staff and to the judges in private conversations and in the form of regret that the real enemy, Russia, was growing stronger and the trials were further weakening efforts to restore Germany to the necessary economic viability that would permit her to serve as a bulwark against communism.

Caming also mentioned a change in "the prosecutory climate": "The defendants and their counsel harped on the themes that the USA had made a grave mistake in intervening before Germany destroyed Russia; Bolshevism and its enmity to the West were the real threats."[195] After the Berlin blockade, the final resting place of many defense arguments was a combination of *tu quoque* and "we told you so." However, by 1948 these arguments had more resonance than similar objections leveled at the IMT in 1946. The Cold War rhetoric, coming from "responsible American statesmen," confirmed the darkest suspicions of German nationalists and die-hard Nazis. The Germans were masterfully playing the politics of the Cold War to their short-term advantage, displaying what Jörg Friedrich calls "retroactive opportunism."[196]

Defendant Hans Lammers's lawyer was none other than Alfred Seidl, who had gained notoriety during the IMT for releasing the secret portions of the Hitler-Stalin Pact. He described Lammers as the "notary public" of the Reich; even though the defendant's signature appeared on the Enabling Act and other important pieces of Nazi legislation, this meant little. It was an inversion of the *respondeat superior* defense. Seidl maintained that Lammers was not an "active" participant in the enforcement of these decrees, only the author.[197] Seidl made the most of the opportunities provided by the escalating Cold War, offering a revisionist interpretation of Operation Barbarossa:

> All these documents permit the conclusion, at least, that the Chief of the Reich Chancellory could be personally convinced in the year 1941 that the measures being taken by the Russians . . . would make necessary and would justify precautionary measures by the Germans. The development of international relations after the conclusion of World War II . . . has proved, in a way that could have hardly been expected or seemed possible, how justified Dr. Lammers was in his assumption.[198]

The Chief of Prisoner-of-War Activities, Gottlob Berger, had a difficult time covering up his wartime actions. Under cross-examination, Berger claimed that he had not heard of the Final Solution until after his capture. When the prosecution placed him at Posen in 1943 (during Himmler's speech on the Final Solution), his counsel offered the excuse that "he does not think the word 'extermination' was used with regard to Jews."[199] His attorney asked rhetorically: "Was it really only a craze for the 'master race' which claimed the blood of millions of people? Are there not still forces at work, the same as there were ten years ago—ideology which, in conjunction with military power of a dimension not even recognized today, are stretching out their claws to pull down everything in the turmoil of wild chaos?"[200] Berger's lawyer invoked the Cold War as a factor mitigating German guilt: "The struggle against Bolshevism was the leading motive of Berger's SS policy and it is on these grounds that the American prosecutor-in-chief is today indicting him on the charge of crimes against humanity. Perhaps the prosecution is unaware of the weakness of its position, but it may not be aware of the entire foundation on which it bases this charge, and events may take place tomorrow that

force the prosecutor's own land to tread the same path in the near future."[201]

Those who had not violated the traditional laws of war had a much easier time defending themselves. Although former Propaganda Minister Otto Dietrich had led a "Campaign against world Jewry" on the radio, his attorney attributed this action to "wartime passions."[202] Von Krosigk, Puhl, and Rasche—the bankers who had helped finance the German rearmament and war effort—used a similar strategy. They admitted that they had aided the rearmament but questioned whether this was a crime. Even though Karl Rasche had been the chairman of the board of the Dresdner Bank and a member of Himmler's "Circle of Friends" who had actively participated in the economic plunder of Czech banks, his defense attorneys completely rejected the idea of a criminal conspiracy and assumed that the court would do the same. The fates of these three seemed more secure than those of any other defendants.[203] The IMT acquitted banker Hjalmar Schacht in the American trials, and the white-collar criminals received light sentences (in the Flick and Farben cases, and to a lesser extent in the Krupp case).[204]

Of all the American Nuremberg trials, the Flick (Five), Farben (Six), and Krupp (Ten) cases were the most dependent on a broadened conception of international criminality. The directors of the industrial companies were charged with playing a vital role in the German rearmament effort. The most conventional charge was mistreating slave labor, which the Hague Conventions expressly prohibited.[205] The entire board of directors (*Vorstand*) and its chairman, Hermann Schmitz, were indicted in the Farben case. In addition to the novel crimes against peace charge, the twenty-three industrialists were charged with plunder and spoliation, slavery and mass murder, conspiracy, and membership in a criminal organization.

Defendant Carl Krauch had been a confidant of and important advisor to Hermann Goering.[206] The I. G. Farben Company constructed and operated a "Buna," or synthetic rubber plant, on the premises of Auschwitz. The defendants sat on the board of directors and played integral roles in Germany's rearmament and the Four-Year Plan. The prosecution maintained that the "Four-Year Plan was a 75 percent Farben project."[207] Other defendants included the chairman of the board, Hermann Schmitz, and other board members, Georg von Schnitzler and Fitz Ter Meer.[208] The prosecution attempted to prove that most of the defendants

had visited the I. G. Farben factory at Auschwitz and knew that inmates were being systematically killed and horribly mistreated. Defendants Ambros, Buetefisch, and Duerrfeld were all involved in the planning and execution of the Farben Auschwitz project. Defendant Ter Meer regularly discussed the allocation of slave labor with Auschwitz commandant Rudolf Hoess. Ernst Struss, the secretary of the I. G. Farben board, testified that he had heard from Farben's chief engineer at the Auschwitz plant "that before the burning, they were gassed."[209] A British POW who had survived Auschwitz provided especially dramatic testimony: "The population of Auschwitz was fully aware that people were being gassed and burned. On one occasion they complained about the stench of burning bodies." The witness found it laughable that the defendants were now claiming that they knew and saw nothing. "Of course, all of the Farben people knew what was going on. Nobody could live in Auschwitz and work in the plant, or even come down to the plant without knowing what was common knowledge to everybody."[210] This testimony undercut the defense claims of defendants like Otto Ambros, who visited the Auschwitz plant eighteen times yet maintained that he had no idea what was going on at the death camp. Further damning evidence was the testimony of the head of Farben's internal security, who claimed that in the final days of the war, he burned more than fifteen tons of incriminating documents.[211]

Counsel for the accused also offered the defense of necessity. Both Field Marshal Erhard Milch and industrialist Friedrich Flick testified that in Hitler's Third Reich, one had to utilize slave labor to meet production quotas or face the death sentence of "undermining fighting spirit."[212] This argument was most successful when the defense sought to portray their clients as white-collar executives: "Replace I. G. by I.C.I. for England, or DuPont for America, or Montecatini for Italy and at once the similarity will become clear to you."[213] The attorney for defendant Carl Krauch believed that the Cold War proved "How right Hitler was in this outline of his policy." Again, the defense offered a Cold War–inspired *tu quoque* argument, that the correctness of Hitler's policies was "confirmed by the political situation which has developed in recent months in Europe."[214]

The trial ended on May 12, 1948, and the tribunal was left to weigh 16,000 pages of transcripts, the testimony of 189 witnesses, and 2800 affidavits. It became clear that the decision would be split when Judge

Hebert asked for extra time to file a dissenting opinion.[215] When the judgment was handed down on July 29, 1948, the tribunal split along geographic lines, and once again the conservative push came from midwestern jurists. Judge Curtis Shake, former member of the Indiana Supreme Court, and Judge James Morris, former member of the North Dakota Supreme Court, were unconvinced by the evidence and acquitted all the defendants on the crimes against peace and conspiracy to commit crimes against peace charges. The tribunal majority imposed extremely light sentences[216] and rejected the aggression and conspiracy counts (1 and 4): "The prosecution, however, is confronted with the difficulty of establishing knowledge on the part of the defendants, not only of the rearmament of Germany but also that the purpose of rearmament was to wage aggressive war. In this sphere, the evidence degenerates from proof to mere conjecture."[217] The majority also accepted the defense of necessity: "There can be little doubt that the defiant refusal of a Farben executive to carry out the Reich production schedule or to use slave labor to achieve that end would have been treated as treasonous sabotage and would have resulted in prompt and drastic retaliation."[218]

The dean of the Louisiana State University Law School, Paul Hebert, concurred with most of the court's findings, but only in deference to the rulings of the IMT. Hebert accused the majority of having "misread the record in too complete an exoneration and an exculpation even of moral guilt to a degree which I consider unwarranted."[219] He carefully qualified his dissenting opinion:

> I do not agree with the majority's conclusion that the evidence presented in this case falls so short of sufficiency as the Tribunal's opinion would seem to indicate. The issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because of the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler's aggressions possible.[220]

Judge Hebert believed that the defendants took "a consenting part in the commission of war crimes and crimes against humanity," reasoning that I.G. Farben Industries "has been shown to have been an ugly record which went, in its sympathy and identity with the Nazi regime, far beyond the activities of . . . normal business." He believed all the defendants to be

guilty under Count 3: "In my view, the Auschwitz project would not have been carried out had it not been authorized and approved by the other defendants, who participated in the corporate approval of the project knowing that concentration-camp inmates and other slave labor would be employed in the construction and other work."[221] Judge Hebert pointed to the defendants' clear violation of even the customary laws of war: "Under the evidence it is clear that the defendants in utilizing slave labor which is conceded to be a war crime (in the case of non-German nationals) and a crime against humanity, did not, as they assert, in fact, act exclusively because of the compulsion or coercion of the existing Governmental regulations and policies."[222] The sentences in the Farben cases were, as prosecutor Josiah DuBois said, "light enough to please a chicken thief." Not only did the tribunal acquit ten of the twenty-three defendants, none of the convicted were sentenced to more than eight years.[223]

Industrialist Alfried Krupp and executives from his company faced similar charges. On November 12, 1943, the forty-year-old Krupp was named sole owner of the Krupp Armament Works of Essen by a Reich decree called the "Lex Krupp." He and eleven other company executives, including Ewald Loeser, Eduard Houdremont, and Erich Mueller, were also indicted for leading the "secret and illegal rearmament of Germany for foreign conquests."[224] As in the Farben case, this indictment included crimes against peace and conspiracy counts in addition to the spoliation and forced labor charges.[225] The prosecution contended that the Krupp works had played an important role in Hitler's secret rearmament plan. Once the prosecution rested, the defense introduced a motion to drop Counts 1 and 4—crimes against peace and conspiracy to commit crimes against peace.[226] A few weeks later, the tribunal acquitted all the defendants of these counts, following the IMT's acquittal of Schact and Speer on the same charges. This was yet another blow to the aggression precedent. Judge Wilkins wrote: "Giving the defendants the benefit of what might be called a slight doubt, and although the evidence with respect to some of them was extraordinarily strong, I concurred that, in view of Gustav Krupp's overriding authority in the Krupp enterprises, the extent of the actual influence of the present defendants was not as substantial as to warrant finding them guilty of Crimes Against Peace."[227] Judge Anderson of Tennessee agreed, contending that the crimes against peace charge was only for "leaders and policy makers," not "private citizens . . . who participate in the war

effort." The defendants argued that they had mistreated slave labor only out of military necessity. The court rejected the doctrine of necessity on the ground that the defendants were not "acting under compulsion or coercion exercised by the Reich authorities within the meaning of the law of necessity," although it acknowledged that the defendants were "guilty of constant, widespread and flagrant violations of the laws of war relating to the employment of POWs."[228]

The tribunal sentenced Alfried Krupp to twelve years in prison and forced him to forfeit all his personal property, while sentencing the other nine defendants to less than ten years each and acquitting one. Judge Anderson filed a dissenting opinion and claimed that the sentences were too severe.[229] After February 1948, the sentences handed down at Nuremberg grew increasingly lenient. This was due to a combination of Cold War pressure and legitimate discomfort with the radical implications of Control Council Law No. 10.

Robert Maguire had assumed that his Nuremberg stay would be no longer than six months. By the summer of 1948, he had been in Germany for nine months, the end was nowhere in sight, and the novelty of Nuremberg had worn off. "Our case moves on but so slowly. We are doing everything we can to hurry it but even so we are not moving or making as much progress as I could wish. However, we go ahead and perhaps we will be able to get it completed someday,"[230] he wrote. When the trial finally ended, the transcript ran to more than twenty-eight thousand pages, with more than nine thousand documentary exhibits.[231] The Ministries case finished with the majority of the courtroom portion of the case on October 7, 1948.

On November 12, while the Ministries case was in recess, the International Military Tribunal for the Far East handed down the verdicts in the Tokyo trial. After an acrimonious two-and-a-half-year proceeding, the eleven-man court handed down yet another split decision. The Cold War had also made an impact on the IMTFE. As early as February 1948, the State Department's George Kennan had warned American leaders that the United States needed to protect Japan from the "penetration and domination" of communism. Kennan was as strongly against the Tokyo trial as he had been against the Nuremberg trials. After a March 1948 visit to Japan, he considered the trials "profoundly misconceived from the start." In a secret report to the Policy Planning Staff, he described the trials as "*procedurally* correct, according to our concepts of justice, and at no

time in history have conquerors conferred upon the vanquished such elaborate opportunities for the public defense and for vindication of their military acts." However, to Kennan, like the Nuremberg trials, these were "political trials . . . not law."[232] Soviet and American relations were much worse during the Tokyo trial than they had been during the IMT. The official Soviet news organ, *Pravda*, opined that "Wall Street and its agents, who direct U.S. policy, are resurrecting militarism in Japan and converting the country into a base for the promotion of their insenate plans of world domination."[233]

Again the IMTFE was forced to confront the unresolved issues that lay at the heart of the London Agreement Charter. By 1948, this was an old debate with new players. The points of contention (with some slight deviations) were basically the same as those debated inconclusively in Washington and London in 1944 and 1945 and in Nuremberg from 1945 to 1949 (conspiracy to commit aggression, individual responsibility for acts of state, the criminality of aggressive war, the *ex post facto* character of the law, and the existence of negative criminality). By a majority of eight to three, the IMTFE sentenced seven to death and sixteen to life in prison, two to lesser prison terms, and acquitted none.[234]

All three dissenters agreed that the trial's integrity was compromised by the failure to indict Emperor Hirohito. As John Dower points out in *Embracing Defeat*, the defendants went to great pains to protect the emperor. France's Justice Bernard was very critical of Hirohito's nonindictment and concluded that "a verdict reached by a Tribunal after a defective procedure cannot be a valid one."[235] Although Webb concurred with the majority opinion, he wrote, "the leader of the crime, though available for trial, had been granted immunity. . . . The Emperor's authority was required for war. If he did not want war he should have withheld his authority." Justice Bernard argued that it was unfair to judge Emperor Hirohito "by a different standard," believing that "the present Defendants could only be considered as accomplices."[236]

Justice Röling questioned the validity of the Kellogg-Briand Pact as a precedent for criminalizing aggression. Although he did not reject the aggressive war charges, the Dutch jurist argued that "no capital punishment should be given to anyone guilty of crimes against peace only."[237] Röling stated, "No soldier should ever be found guilty of the crime of waging an aggressive war simply for the reason that he performed a strictly military function. Aggression is a political concept and the crime of

aggression should be limited to those who take part in the relevant political decisions."[238]

The most extreme argument of all the war crimes decisions of the post–World War II period came from Justice Radhabinod Pal of India in the IMTFE. He accepted the contention that Japanese foreign policy of the 1930s and 1940s constituted self-defense. Based on this and a radical interpretation of the laws of war, Pal found all of the accused not guilty on every count of the indictment.[239] The implicit and explicit target of Pal's attack was the victorious Allied powers. He believed the word "aggressors" was a "chameleonic" international legal device used to justify a successful war. The Indian judge had spent most of his adult life opposing British colonial rule at home and believed that the international political status quo was inherently unjust because it was established and maintained by force and the oppression of indigenous people. To Pal, the real crime was not totalitarianism, it was imperialism: "The part of humanity which has been lucky enough to enjoy political freedom can now well afford to have the deterministic ascetic outlook of life, and may think of peace in terms of the political status quo."[240]

Pal took up the cause of the peoples that had been traditionally labeled "barbarian" or "savage" and slaughtered like infected livestock: "every part of humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is faced with not only the menace of totalitarianism but the ACTUAL PLAGUE of imperialism."[241] As for the conspiracy to commit aggressive war, he felt that "the story here has been pushed, perhaps, to give it a place in the Hitler series."[242] He considered the Bataan Death March and Rape of Nanking "isolated incidents." If killing civilians was a war crime, then what was the legal status of Curtis LeMay, who knowingly ordered the deaths of hundreds of thousands of Japanese civilians? According to Pal,

> In the Pacific war under our consideration, if there was anything approaching what is indicated in the above letter of the German emperor, it is the decision coming from the Allied powers to use the atom bomb. Future generations will judge this dire decision. . . . It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only

> near approach to the directives of the German Emperor during the First World War and of the Nazi leaders during the Second World War. Nothing like this could be traced to the credit of the present accused.[243]

Judge Pal's strongly anti-Western dissent argued that "natural law" was a Western notion, totally irrelevant to Asian defendants.[244] He viewed the Allied attempt to criminalize aggression as a means by which they could maintain the status quo, or in his words, "repent of their violence and permanently profit by it."[245] The duality in the American-inspired standards of international law was obvious to Pal: "I would only like to observe once again that the so-called Western interests in the Eastern Hemisphere were mostly founded on the past success of these Western people in 'transmitting military violence into commercial profit.' " The Indian judge pointed to the duality in U.S. policy: "As a program of aggrandizement of a nation we do not like, we may deny to it the terms like 'manifest destiny', 'the protection of vital interests', 'national honour' or a term coined on the footing of 'the white man's burden', and may give it the name 'aggressive aggrandizement' pure and simple."[246]

Hideki Tojo accepted his death sentence with the same stoic indifference that Yamashita had exhibited in Manila. Like the Sioux braves in Minnesota who sang and chanted on their way to the gallows, the Japanese officers faced death as warriors. War to them was not a matter of winning or losing, it was a matter of living or dying. In his final statement, Tojo confirmed, "The sentence so far as I am concerned is as deserved." He apologized if his testimony had implicated anyone else—"I am sorry though, that I brought my colleagues trouble. I sincerely regret it"—and made it clear that he was happy to sacrifice his life for Emperor Hirohito: "At least, through the trial, nothing was carried up to the Emperor and on that point I am being comforted." On the day of sentencing, the American prosecutor Joseph Keenan enjoyed a three-hour lunch with Emperor Hirohito.[247]

After a two-week break, the Ministries case reconvened on November 9, 1948, to hear two weeks of final arguments. The High Command case had finished in late October; the Ministries case was the final trial, the last vestige of a bygone era.[248] Robert Maguire anticipated returning to Portland in January 1949, but once the court adjourned and the judges began to debate the verdicts, it was evident that the division between Powers and

the other two judges would manifest itself in the tribunal opinion. To match the extent and vigor of Judge Powers's dissent, the majority opinion had to be fortified. This extra labor added several months to Maguire's stay in Europe. His wife, Ruth, mentioned the setbacks in a letter: "Bob says things are moving along now but there have been many discouraging circumstances that have delayed matters."[249] If the tribunal planned to convict any of the five defendants charged with aggression, their opinion would need to be strongly reasoned because it was sure to come under fire.

Though the Nuremberg trials were no longer front-page news in 1949, curiosity was growing about the last trial. On April 12, the defendants entered the courtroom of the Palace of Justice. The first verdicts read concerned the controversial crimes against peace (aggression) charge. There had been no convictions for crimes against peace since the IMT; moreover, the charge had been rejected in the Farben, Krupp, and High Command cases. This was the prosecution's last hope to gain a conviction to bolster the IMT's weak precedent.[250] When Judge Christianson began to read the majority opinion, *Stars and Stripes* reported, "there was a sensation in the courtroom."[251] Even before he got to the charges against the individual defendants, it was obvious that the court had taken the broadest reading of their mandate. Because this was the final trial, there was evidence available to the court (the minutes of the Wansee Conference, the records of the Einsatzgruppen, the Four-Year Plan, and the German Foreign Office) that painted a more graphic picture. The majority opinion began on this point:

> Hundreds of captured official documents were offered, received and considered, which were unavailable at the trial before the International Military Tribunal, which were not offered in any of the previous cases before United States Military Tribunals, and the record here presents, more fully and completely than in any other case, the story of the Nazi regime, its program, its acts.[252]

The majority opinion was that deliberate policies of conquest had long been violations of the customary rules of war. They traced precedents back to Caesar, Frederick the Great of Prussia, Philip II of Spain, Edward I of England, Louis XIV of France, and the colonial powers of the nineteenth and twentieth centuries. According to Maguire and

Christianson, "Every and all of the attackers followed the same time-worn practice. The white, the blue, the yellow, black and red books had only one purpose, namely, to justify that which was otherwise unjustifiable."[253] The judges asked an important question that highlighted the weakness of the defense arguments: "But if aggressive invasions and wars were lawful and did not constitute a breach of international law and duty, why take the trouble to explain and justify? Why inform neutral nations that war was inevitable and excusable and based on high notions of morality, if aggressive war was not essentially wrong and breach of law?"[254]

The majority rejected the pleas of superior orders and sovereign immunity. "To permit such immunity is to shroud international law in a mist of unreality. We reject it and hold that those who plan, prepare, initiate, and wage aggressive wars and invasions . . . may be tried, convicted and punished for their acts."[255] The opinion also went to special pains to reject the many Cold War–inspired *tu quoque* arguments. The tribunal conceded that the Soviets had been fully complicit in the invasion of Poland, but this in no way exonerated Germany:

> But if we assume, *arguendo*, that Russia's action was wholly untenable and its guilt as deep as the Third Reich, nevertheless, this cannot, in law, avail the defendants of the guilt of those of the Third Reich who were themselves responsible. . . . It has never been suggested that a law duly passed becomes ineffective when it transpires that one of the legislators whose vote enacted it was himself guilty of the same practice.[256]

In keeping with this broad reading of Control Council Law No. 10, the court found five men guilty of crimes against peace. These were the first convictions for aggression since the IMT.[257]

Despite the efforts of his five attorneys and high-profile character witnesses, Ernst von Weizsäcker had, in Christianson and Maguire's judgment, crossed an ethical point of no return. They conceded that the diplomat, in his own mind, might have resisted, but that his efforts were too little, too late. The majority asked "how a decent man could continue to hold office under a regime which carried out and planned wholesale barbarities of this kind?"[258] There were a number of factors that undermined the former State Secretary's credibility. Maguire and Christianson

were unconvinced by von Weizsäcker's "Jekyll and Hyde" strategy: "The defense that things are not what they seem, and that one gave lip service but was secretly engaged in rendering even this service ineffective . . . is a defense readily available to the most guilty, and is not novel, either here or in other jurisdictions."[259]

The majority opinion found von Weizsäcker's failure to mention his affiliation with the resistance until 1948 "suspicious." The defendant's performance on the witness stand also damaged his case. Although the former diplomat had expertly summarized the details of the Hitler-Stalin Pact from memory during the IMT, when his own trial began, his memory began to falter. This irony was not lost on the tribunal majority: "The exceeding caution observed by the defendant on cross-examination and his claims of lack of recollection of events of importance, which by no stretch of the imagination could be deemed routine, his insistence he be confronted with documents before testifying about such incidents, were not calculated to create an impression of frankness and candor."[260] Maguire and Christianson were unswayed by his repeated claims of resistance, remarking that "he was not a mere bystander, but acted affirmatively, and himself conducted the diplomatic negotiations both with victims and the interested powers, doing this with full knowledge of the facts; silent disapproval is not a defense to action."[261]

Finally, the court ruled that good intentions did not "render innocent that which is otherwise criminal, and which asserts that one may with impunity commit serious crimes, because he hopes thereby to prevent others, or that general benevolence towards individuals is a cloak or justification for participation in crimes against the unknown many."[262] Judges Maguire and Christianson gave an example of the defendant's dishonesty on the stand: his statement that "he thought Auschwitz was merely a camp where laborers were interned, we believe tells only part of what he knew, and what he had good reason to believe."[263] The majority pointed out that the German diplomats were aware of the Einsatzgruppen's activities—"The Foreign Office regularly received reports of the Einsatzgruppen operations in the occupied territories. Many of these were initialled by Weizsaecker and Woermann. They revealed the clearing of entire areas of Jewish population by mass murder, and the bloody butchery of the helpless and the innocent, the shooting of hostages in numbers wholly disproportionate to the alleged offenses against German armed forces; the murder of captured Russian officials and a reign of terrorism carried

on with calculated ferocity, all told in the crisp, unimaginative language of military reports."[264]

Ernst von Weizsäcker and Ernst Woermann were found guilty of crimes against peace for their roles in the Nazi takeover of Czechoslovakia. Wilhelm Keppler was convicted for his participation in the invasions of Austria and Czechoslovakia, Woermann for aiding the invasion of Poland, and Koerner for his role in the war against the Soviets. The tribunal majority rejected the defense argument that America's Cold War policy justified Operation Barbarossa. "The plans for the economic exploitation of the Soviet Union, for the removal of the masses of the population, for the murders of the commissars and political leaders, were all part of a carefully prepared scheme launched on June 22 without warning of any kind, and without the shadow of a legal excuse. It was plain aggression."[265] Hans Lammers was the only nondiplomat found guilty of aggression for his role in the invasions of Czechoslovakia, Poland, Norway, Holland, Belgium, Luxembourg, and the Soviet Union. The defendants found guilty of crimes against peace were the type of fifth columnists that the authors of the Nuremberg indictment had had in mind when they broadened the definition of war crimes.[266]

When his turn to read a portion of the majority opinion came, Judge Powers began: "Before resuming the reading, it seems to me appropriate to say that my participation in the reading is merely for the purpose of helping out with the physical task of reading this opinion. It should not be construed as anything so far as my approval is concerned."[267] In his dissent Judge Powers made a conservative interpretation of the court's mandate: "I violently disagree with the opinion that we are engaged in enforcing International law which has not been codified, and that we have an obligation to lay down rules of conduct for nations of the future. . . . It is not for us to say what things should be condemned as crimes and what things should not. That has all been done by the lawmaking authority."[268]

The standard by which Judge Powers measured individual guilt favored the defendants; he wrote, "to establish personal guilt it must appear that the individual defendant must have performed some act which has a causal connection with the crimes charged, and must have performed it with the intention of committing a crime." Powers dissented on all the crimes against peace convictions on the ground that the violations did not occur during wars: "We will have to exclude invasions, because there was no possible basis for claiming that a mere invasion was

contrary to international law."[269] Based on this reading, von Weizsäcker was not guilty for two reasons: "One, the invasion of Czechoslovakia was not a crime against peace. Two, he took no part in bringing about or initiating such an invasion." The dissent also cleared Keppler, Lammers, Woermann, and Koerner of any criminal wrongdoing.[270]

For the next two days the verdicts on the various counts of crimes against humanity (3 through 8) were read. The tribunal majority found 14 defendants guilty under at least one count.[271] Ernst von Weizsäcker was found guilty of crimes against humanity for his failure to object to Himmler about the deportation of 6,000 French Jews to Poland. Judge Powers argued that von Weizsäcker and Woermann had not been able to protest because "No grounds, therefore, based on foreign politics existed for objection." He accepted the defense of necessity and mocked the majority's logic: "So the so-called consent of WEIZSAECKER and of Woermann was merely recognition of the fact that conditions were absent which gave them a right to object on the grounds of foreign politics. But the Opinion seems to hold, especially as to WEIZSAECKER, that even in such a situation, he should have taken advantage of the opportunity to deliver a lecture to Ribbentrop on International Law and on morality."[272]

SS General Gottlob Berger was found guilty under Count 3 (war crimes) for the execution of French General Mesny, a reprisal for a German general killed by French underground forces. The tribunal majority accused Berger of lying in his courtroom testimony: "In view of the documents it seems impossible to believe Berger's testimony that he knew nothing of the plans to destroy the Jews or that he never heard of the 'final solution' until after the war." However, the court accepted the defendant's plea that during the final months of the war, "Berger was the means of saving the lives of American, British, and Allied officers and men whose safety was gravely imperiled by orders of Hitler that they be liquidated or held as hostages. Berger disobeyed the orders and intervened on their behalf and in doing so placed himself in a position of hazard."[273] Gottlob Berger was found guilty of transporting Hungarian Jews to concentration camps and recruiting concentration camp guards. Finally, Walter Schellenberg was found guilty of helping create the Einsatzgruppen. In 1941, Schellenberg prevented Jewish immigration to Belgium "in view of the final solution which is sure to come."[274]

Like the defendants in the Justice case, Hans Lammers was convicted

for drafting and implementing Nazi legal policies. The majority opinion stated, "Lammers was not a mere postman, but acted solely without objection as a responsible Reichminister carrying out the function of his office. We find that Lammers knew of the policy, approved of it, and took an active, consenting and implementing part in its execution."[275] Edmund Veesenmayer was convicted for war crimes, crimes against humanity, and slave labor for forcing the Hungarian government to deport more than 300,000 Hungarian Jews to concentration camps like Auschwitz.[276] Otto Dietrich was found guilty for providing the anti-Semitic byline that justified the German campaign against the Jews. Steengracht von Moyland was convicted for preventing Jewish immigration and aiding in the extermination of Hungarian Jews. Wilhelm Keppler and Hans Kehrl were found guilty of "resettling" Jews to make room for ethnic Germans, and Richard Darré for removing thousands of Polish and Jewish farmers.[277] Bankers Schwerin von Krosigk and Emil Puhl were convicted of laundering confiscated property and financing the construction of the concentration camps. Regarding Puhl's guilt, the tribunal majority wrote, "The defendant contends that stealing the personal property of Jews and other concentration camp inmates is not a crime against humanity. But under the circumstances which we have here related, this plea is and must be rejected."[278]

Judge Powers dissented on many of the crimes against humanity convictions: "Where a finding of guilt is justified, the opinion so exaggerates the guilt, that I cannot concur in it."[279] He argued that the defendants were guilty of association rather than personal action. The dissent once again cleared diplomats von Weizsäcker and Woermann of criminal wrongdoing because they did not personally commit crimes. Similarly, Powers rejected the convictions of von Moyland, Dietrich, Veesenmayer, von Krosigk, and Puhl. His reasoning for dissenting on von Krosigk's conviction was indicative: "Many of the acts such as Jewish fines took place before the war began and are not within our jurisdiction. It cannot be a crime against humanity because merely depriving people of their property is not such a crime."[280] By the time the tribunal finished handing down their decisions, Judge Powers had dissented on 37 of the 49 convictions. His 124-page opinion opposed all the guilty verdicts other than those for the use of slave labor and membership in the criminal organizations. The Iowan jurist argued that the convictions were a gross misapplication of international law and that it was better to free high-ranking Nazis than to establish misleading precedents.[281]

On April 15, 1949, the sentences were handed down. Once again, they did not match the tone of the opinion. They were not as lenient as those of the Farben and Flick cases, but given the status of the defendants and the body of evidence, the sentences were light. The record was as follows:

Ernst von Weizsäcker: 7 years.
Steengracht von Moyland: 7 years.
Wilhelm Keppler: 10 years.
Ernst Bohle: 5 years.
Ernst Woermann: 7 years.
Karl Ritter: 4 years.
Otto von Erdmannsdorff: Acquitted.
Edmund Veesenmayer: 20 years.
Hans Lammers: 20 years.
Wilhelm Stuckart: Acquitted due to illness.
Richard Darré: 7 years.
Otto Meissner: Acquitted.
Otto Dietrich: 7 years.
Gottlob Berger: 25 years.
Walter Schellenberg: 6 years.
Schwerin von Krosigk: 10 years.
Emil Puhl: 5 years.
Karl Rasche: 7 years.
Paul Koerner: 15 years.
Paul Pleiger: 15 years.
Hans Kehrl: 15 years.[282]

It appeared that the tribunal majority rejected von Weizsäcker's defense of necessity; however, the question was reopened after the judgment was read; the tribunal allowed all of the convicted to file "Motions for the Correction of Alleged Errors of Fact and Law." Among other things, the motion attacked the court's legal legitimacy. "The Tribunal as a whole was never legally established and its said decision and judgment constitutes an arbitrary exercise of military power over each of the said defendants, in violation of the laws of nations and agreements made by the belligerent powers and other countries appertaining thereto."[283]

Because of the court's split decision, the Ministries case was hailed by trial supporters and critics alike. For Brigadier General Telford Taylor,

the final year had been a long one; the decisions in the Ministries case provided a limited measure of vindication. Impressed by the strongly reasoned 835-page tribunal opinion, he praised the resolve of the court's concurring members, asserting that "today's judgment, more severe than many of those which have been handed down previously, is perhaps more important than those which went before. It was decided long after the excitement of the war which ended nearly four years ago."[284] The Chief Counsel believed that the trial was both important and redemptive because it "proves that we still mean in 1949 what we meant in 1945."[285] There was also praise for the judge from Iowa. August von Knieriem, general counsel for I. G. Farben and former Nuremberg defendant, described Powers's dissenting opinion as "extensive and carefully motivated." Carl Haensel, a leading Nuremberg defense counsel, viewed the dissent as the high point of the Ministries case: "The leading event of the day of judgment was the news of Judge Powers' Dissenting Opinion. Judge Powers declared that in his Opinion the majority of the defendants should be acquitted."[286]

Ernst von Weizsäcker

All photos courtesy of Constance and Joseph Wilson.

Ernst von Weizsäcker with Adolf Hitler.

Ernst von Weizsäcker (second from right).

Ernst von Weizsäcker discusses the details of the Munich Agreement with British Prime Minister Neville Chamberlain, Berchtesgaden, 1938.

State Secretary Von Weizsäcker greeting Japanese officials in 1941.

Adolf Hitler awards a medal to a German sailor, as defendant Bohle looks on.

Hermann Goering

Tribunal IV. *Left to right*: Leon Powers, William Christianson, Robert F. Maguire.

Ernst von Weizsäcker confers with his defense team.

Ministries Case defendants: *(left to right, front row)* Ernst von Weizsäcker, Steengracht von Moyland, Wilhelm Keppler, Ernst Wilhelm Bohle, Ernst Woermann, Karl Ritter, Otto von Erdmannsdorf, Edmund Veesenmayer, Hans Lammers, Wilhelm Stuckart, Richard Darré; *(second row)* Otto Dietrich, Gottlob Berger, Walter Schellenberg, Schwerin von Krosigk, Emil Puhl, Karl Rasche, Paul Koerner, Paul Pleiger, Hans Kehrl.