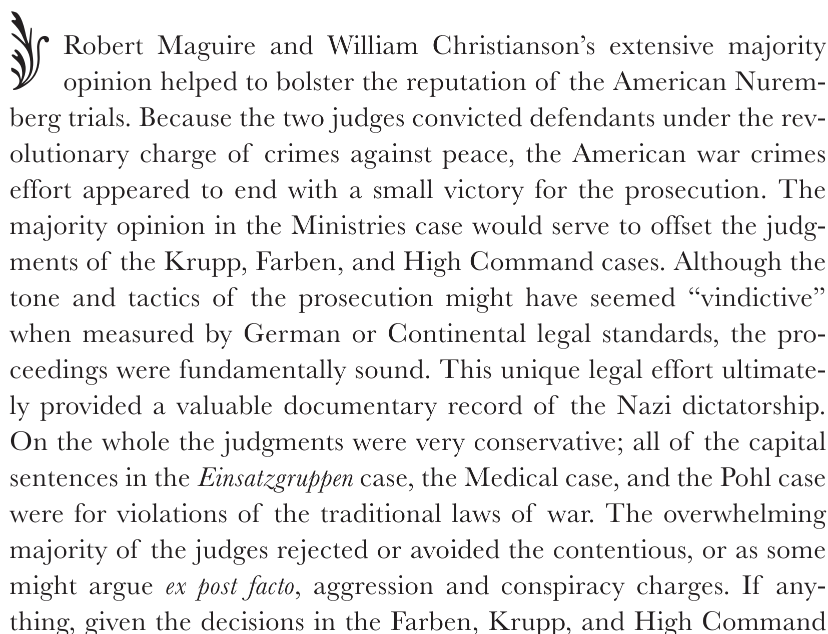
Chapter Five

NUREMBERG: A COLD WAR CONFLICT OF INTEREST



Robert Maguire and William Christianson's extensive majority opinion helped to bolster the reputation of the American Nuremberg trials. Because the two judges convicted defendants under the revolutionary charge of crimes against peace, the American war crimes effort appeared to end with a small victory for the prosecution. The majority opinion in the Ministries case would serve to offset the judgments of the Krupp, Farben, and High Command cases. Although the tone and tactics of the prosecution might have seemed "vindictive" when measured by German or Continental legal standards, the proceedings were fundamentally sound. This unique legal effort ultimately provided a valuable documentary record of the Nazi dictatorship. On the whole the judgments were very conservative; all of the capital sentences in the *Einsatzgruppen* case, the Medical case, and the Pohl case were for violations of the traditional laws of war. The overwhelming majority of the judges rejected or avoided the contentious, or as some might argue *ex post facto*, aggression and conspiracy charges. If anything, given the decisions in the Farben, Krupp, and High Command

cases, the original sentences in the American Nuremberg trials appear quite lenient in retrospect.

The guilt or innocence of Ernst von Weizsäcker has continued to be debated until this day. Despite his high-level character witnesses, many questions remained. Had von Weizsäcker, whatever his intentions, crossed an ethical point of no return due to his actions? His son, former West German President Richard von Weizsäcker, recently blamed the failure of his father's complicated defense on the provincial American judges who, he claimed, "were not even familiar with the details of European and German history." However, the loyal son went too far by declaring that his father has been absolved by modern historians: "Since then, the extensive literature on the contemporary history of both Germany and the rest of the world has left little serious doubt about the appropriateness of the charges against my father."[1] But is it that simple? While German diplomatic historian Klemens von Klemperer agrees that Ernst von Weizsäcker may have been part of the resistance, he describes the former State Secretary's behavior as "that of a tired servant of the old school rather than that of an outraged man of principle; it was resistance devoid of firm resolve and conviction"—Klemperer describes it as "social refusal" rather than resistance. German historian Marion Thielenhaus examines the period 1938–41 and portrays Ernst von Weizsäcker as an "ultranationalist" trying to keep the German Foreign Office from being absorbed by the National Socialists and to prevent a larger war from breaking out. Thielenhaus also shows the State Secretary to have been both anti-Czech and anti-Polish. As in Richard von Weizsäcker's recent book, there is no discussion, let alone mention, of the role that Ernst von Weizsäcker played in the deportation of European Jews, or the fact that the State Secretary regularly reviewed the reports of the Einsatzgruppen.[2]

German historian Jörg Friedrich remains totally unconvinced by von Weizsäcker's repeated claims of resistance: "Diplomats had deported foreign Jews because they did not want the Nazis to suspect them of subversion and undermine their position in clandestine peace talks. . . . Aside from the fact that they lied to the courts, those who offered such testimony demonstrated their submission to the victors' value system, exhibiting retroactive opportunism."[3] As for the Roman Jews that Ernst von Weizsäcker helped to deport, on October 18, 1943, approximately 1,200 Italian Jews were packed into railroad cars at Rome's Tiburtina station.

Five days later the train reached its destination—the Auschwitz concentration camp. One hundred forty-nine men and 47 women were retained for slave labor; the remaining 1,060 were killed. Only 14 men and one woman from the deportation survived World War II.[4]

The Ernst von Weizsäcker case took a strange twist in May 1949, when a Senate Armed Services Committee began to "conduct a full and complete study and investigation of the action of the Army with respect to the trial of those persons responsible for the massacre of American soldiers which occurred during the Battle of the Bulge near Malmedy, Belgium." The investigation was a result of Senate Resolution 42 (January 20, 1949).[5] Connecticut Senator Raymond Baldwin headed the hearing. Much to the delight of his German-American constituency, freshman Senator Joe McCarthy of Wisconsin offered his services to the Senate investigation.[6]

When the committee opened their first session on May 4, 1949, Senator McCarthy attacked the conviction of Ernst von Weizsäcker and the opinion of judges Maguire and Christianson: "Before there is any testimony, there is a matter which has come to my attention which I think this committee should go into, and I believe it is of tremendous importance." According to McCarthy, von Weizsäcker's innocence was a well-established fact: "Apparently the evidence is all uncontradicted, there is no question about it. It was to the effect that this was the most valuable undercover man which the Allies had in Germany, starting in 1936." McCarthy argued that the sentences would "do tremendous damage" to the American position in Germany: "If they keep this up, they will make it impossible for us to have any kind of intelligence in the prospective opposition of other nations, potential enemies." Senator McCarthy called for an investigation into the Ministries case and wanted to call Judges Maguire and Christianson before the panel: "I think this committee should see what type of morons—and I use that term advisedly—are running the military court over there. There is something completely beyond conception, and I would like to ask the Chair to go into the matter, and in effect notify the world at this time that the American people are not in approval of this complete imbecility in that area."[7]

In a strategy that later brought McCarthy both fame and censure, the senator claimed to be on the verge of exposing a massive cover-up. He said that the members of *Kampfegruppe* Peiper had been severely beaten by

American captors. McCarthy asked that U.S. Army interrogators Perl, Thon, and Kirchbaum all be subjected to lie-detector tests. He said to Lieutenant Perl, "I think you are lying. I do not think you can fool the lie detector. You may be able to fool us." Perl, a lawyer himself, responded caustically, "If it is so reliable, we should have used it from the beginning. Why a trial at all? Get the guys, and put the lie detector on them. 'Did you kill this man?' The lie detector says, 'Yes.' Go to the scaffold. If it says, 'No,' back to Bavaria."[8]

In the end, the former Wisconsin judge heatedly accused Army prosecutor Burton Ellis of "whitewashing" the "Gestapo and OPGU" interrogation techniques of the U.S. Army:[9] "This committee is not concerned with getting the facts. Further, this committee is afraid of the facts, and is sitting here solely for the purpose of a whitewash of the Army and that phase of the military government in charge of the trials." McCarthy's dramatic attack of the Baldwin committee drew much attention, especially in Germany. Although the subcommittee upheld the convictions resulting from the Malmedy trials, their final report concluded that there had been some minor judicial abuses.[10] The report came down hardest on the trial critics. Historian Frank Buscher describes the report: "More at stake than the Army's conduct in this particular matter, the subcommittee warned . . . that the 'attacks' on the war-crimes trials in general and the Malmedy case in particular were meant to revive German nationalism and to cast doubt upon the U.S. occupation of Germany as a whole."[11] The clamor over the Malmedy trials had a catalyzing effect on many Germans, who saw these exchanges as a green light of sorts. It was now permissible to attack American war crimes policy in a more inflammatory way with the justification that they were merely emulating the tactics of "responsible American statesmen."[12]

Once Germany became the fulcrum of the American plan for the reconstruction of Europe, the question of Landsberg Prison and the fate of the war criminals took on new significance. By 1949, conservative American politicians like Francis Case, Harold Knutsen, John Taber, William Langer, and John Rankin were concluding that alleged improprieties in the Malmedy trial discredited the findings of all the American war crimes tribunals. According to Frank Buscher, by the end of the 1940s, these conservative Republicans had succeeded in establishing "a new Nuremberg philosophy." Many in the United States "had come to accept the conservative argument that the convicted Nazi perpetrators

were not criminals, but instead were the victims of the Allied war crimes program."[13]

The dispute in the U.S. Senate over the Malmedy trials gave German nationalists badly needed political ammunition. The tone of their letters to the High Commissioner began to change. Franz Bleucher, the chairman of the right-wing Free Democratic Party, offered a typical expression of "doubt":

> The German public is very much perturbed by the fact that death sentences passed on German Nationals by Allied Special Courts will be executed on German soil six years after the termination of hostilities. The main committee of the Free Democratic Party is definitely of the opinion that crimes committed during the time of the Nazi Terror Regime should be punished, however the committee believes that some of the death sentences were based on trials which were not properly conducted.[14]

On December 12, 1949, judges Maguire, Christianson, and Powers ruled on a series of post-trial defense motions and rejected all but three of them. "The assertion that the Tribunal considered evidence which the defense has never seen, if true, would constitute a grave breach of judicial duty. It is, however, wholly without foundation." Whether this was a result of McCarthy's attack or Maguire's own political candidacy, it is impossible to say. In any case, Judge Maguire reversed his position on the most significant verdict of the Ministries case and joined Judge Powers in opposing the convictions of Ernst von Weizsäcker and Ernst Woermann under the radical charge of crimes against peace. The new tribunal majority of Maguire and Powers announced, "After a careful examination of the entire record concerning his conviction with the aggression against Czechoslovakia, we are convinced that our finding of guilt as to that crime is erroneous. We are glad to correct it. The judgment of guilt against the defendant von Weizsaecker as to Count I is hereby set aside and he is hereby acquitted under Count I."[15] Presiding Judge William Christianson vehemently dissented from the modification of Ernst von Weizsäcker's sentence from seven to five years, not to mention the reversal of a precedent like his aggression conviction: "I cannot agree that the majority of the Tribunal in the original judgment erroneously evaluated the evidence with respect to the said matter as is now indicated to be the

view of my colleagues with respect to the defendant von Weizsaecker's conviction under said count one. A re-examination of the evidence with respect to the actions of defendant von Weizsaecker in connection with the aggression against Czechoslovakia deepens my conviction that said defendant is guilty under said count one." Ministries case prosecutor William Caming had a high regard for the judge from Oregon, but to this day remains baffled by his post-trial action. Caming wrote, "Judge Maguire, without plausible explanation reversed his position, joining Judge Powers in setting aside their convictions under Count One. . . . Judge Maguire's Memorandum Opinion is embarrassingly vague and devoid of any rationale for his change of heart. I can only surmise what the impelling personal factors were."[16] Although it is impossible to determine Robert Maguire's motives, his action cast a cloud of doubt over the conviction of Ernst von Weizsäcker.

The pressure to release von Weizsäcker only increased after his aggression conviction was dropped. Former German resistance leader Theo Kordt wrote Lord Halifax on December 13, 1949, calling the von Weizsäcker case "a new Dreyfuss case . . . on an international level." He strongly supported von Weizsäcker's claim that he had accepted the job of State Secretary in 1938 in order to prevent war: "My friends and I felt that he was making a personal sacrifice with a view to preserve the peace and bring about the restitution of legal and decent government in Germany." Kordt ended on an emotional note: "All those who gave their lives, most of them personal friends of mine, considered Weizsacker as their example and their spiritual leader."[17]

By the fall of 1949, Robert Maguire had decided to run as a Republican candidate for the Oregon Supreme Court. This would not be an easy feat, as he had been away nearly two years. Moreover, Nuremberg was still controversial, especially despised by conservative Republicans. Did Maguire employ a bit of strategic legalism to appease the right wing of the Republican Party and to help his candidacy? In November 1949, the *American Bar Association Journal* published a speech delivered by Robert Maguire entitled, "The Unknown Art of Making Peace: Are We Sowing the Seeds of World War III?" at an American Bar Association meeting in St. Louis. In the speech, Judge Maguire traced the ill effects of punitive peace treaties on world history; he examined peace treaties from Wellington to Wilson and concluded that vindictive treaties only lead to more war.

The former Nuremberg judge argued that the time for punishment had ended. "There were crimes of aggression and mass horror beyond description or human realization, and that those who are responsible for, committed or participated in mass war crimes should be punished, I think, is beyond reasonable question. Nevertheless, it is just as unreal to proceed upon the basis that all Germans are monsters. . . . The historical fact is that even the mature German had little or no knowledge of those crimes."[18] He warned against punishing the next generation of Germans: "The terms of peace will not be imposed alone upon the guilty, but they will be imposed upon those who had neither knowledge of nor were responsible for the war, upon the women and children, upon the boys and girls, not only of this generation, but those of future generations."[19] Since his return to the United States, Robert Maguire had grown increasingly critical of postwar American diplomacy: "Yalta, Moscow, and Potsdam have already done untold damage. Much of Europe now writhes under unjust discriminations, seizures of land, and power at the expense of the helpless."[20]

From the vantage point of more than half a century later, the judgments in the American Nuremberg trials appear extremely lenient. Years afterward, Robert Maguire wrote, "One thing I think can be said without question, is that so far as the courts were concerned, the attitude was the opposite of emotional, and that they earnestly endeavored, and I think succeeded, in being entirely objective toward the defendants and evidence."[21] If this was one of the "harshest" jurists at Nuremberg, what of the others? Maguire confirmed the trend toward leniency: "I think that it may be fairly said that not only was every attempt made to give the defendants a fair trial and every opportunity to defend themselves, but that the judges in various cases probably leaned backwards in protecting their rights."[22]

Although the "vindictive" policies of the Nuremberg trials and JCS 1067 summoned memories of Versailles, the analogy between the two settlements was a false one. However, as Jörg Friedrich points out, rationality, law, and facts had little place in this debate—a point that is the key to understanding the second phase of American war crimes policy: "The Nuremberg prosecution, well supplied with documentary evidence, succeeded in refuting these nonsensical excuses and winning convictions. However, the public was not won over." Many Germans simply chose not to believe: "The criminal guilt that was meant to be a wedge between the public and

the defendants turned out to form a link between them."[23] Many Germans found not only the actual punishment, but also the manner in which it came, objectionable. Moral guidance from the upstart Americans was too much to bear. By 1949, there was a deep reservoir of German resentment over the subject of war crimes that had yet to be tapped.

During the second phase of American war crimes policy (1949–53), American and West German leaders fashioned two American policies—one public and one private. The public policy was designed to defend the legal validity of the American trials from widespread German attacks, while the private policy sought to release war criminals as quickly and quietly as the political and legal circumstances would allow. The problematic details surrounding the early releases would occupy the State Department's legal advisors until the last German war criminals were released from Landsberg Prison in the late 1950s. The Germans would prove to be worthy foes at the game of strategic legalism. Ironically, they would now launch the same attacks on the legal validity of the Allied war crimes trials that had been rejected by the IMT under Article 3, in 1945.

The first major step toward the restoration of German sovereignty occurred on September 21, 1949, when the Federal Republic of West Germany was officially established. General Lucius Clay had said earlier in the occupation, prior to handing the task of denazification over to the Germans, that the best way to learn democracy was to live it.[24] The Occupation Statute was replaced by West Germany's Basic Law. The former American governing body, the U.S. Military Government, was replaced by the U.S. High Commission for Germany (HICOG), and Clay was replaced by Stimson's former Assistant Secretary of War, John McCloy. Most significantly, American oversight of West Germany shifted from the U.S. Army to the U.S. State Department, and American war crimes policy would soon reflect this change. Throughout 1945, John McCloy had fought passionately for the creation of the IMT and all that it implied. His "certainty and energy" had bowled over even the skeptical British.[25] However, it was now 1949, and the punitive policies of JCS 1067 were not compatible with the new American program for Germany. More than anything else, John McCloy was true to his roots as a third-generation American lawyer-statesman (who had begun his career in Elihu Root and Henry Stimson's Wall Street law firm).

After the establishment of HICOG in 1949, seventy-three-year-old Konrad Adenauer was elected West Germany's first Chancellor. The

State Department was satisfied that he was a sufficiently pro-American representative for the German people. Although Adenauer was committed to German integration into the West, the problem created by the imprisoned war criminals was growing into what Frank Buscher describes as "a major obstacle to the achievement of his foreign policy goals."[26]

Though there were continued cries for a reunified Germany, the possibility looked out of the question in 1949. East Germany had already been militarized by the Soviet Union; its *Volkspolizei* (People's Police) had more than fifty thousand Soviet-trained members.[27] As early as 1949, some of America's most influential foreign policy makers felt that rearming West Germany was inevitable.[28] Because the United States had demobilized so rapidly after the war, the Soviets had what appeared to be a huge superiority in conventional forces in Europe. The United States had barely twelve army divisions, while the Soviets had twenty-four and another seventy in reserve.[29] German rearmament fulfilled the darkest geopolitical prognostications of right-wing German nationalists and unrepentant Nazis—the Soviet Union was the true enemy of Western civilization.

By 1949, a fast-growing segment of the West German population considered *all* the war crimes trials to be a form of political theater with no basis in either fact or law. The Nuremberg trials had become a hugely important symbolic issue, a contemporary version of the Treaty of Versailles' "shame paragraphs."[30] The attacks on Nuremberg were the same as in 1945, but the international political context had changed; now West German goodwill and cooperation were vital to the American plan for Western Europe.

By 1950, all the war criminals convicted by American courts in Germany were incarcerated in Bavaria's Landsberg Prison.[31] Of the 185 men charged in the American Nuremberg Trials, 177 were tried, 35 acquitted, 24 sentenced to death, 20 sentenced to life, 98 given other prison terms, and four committed suicide. In the Dachau and other concentration camp trials conducted by the U.S. Army, 1,672 were charged, 256 acquitted, 426 sentenced to death, 199 sentenced to life, and 791 given other prison terms. In the United Kingdom trials, 1,085 were charged, 348 acquitted, 240 sentenced to death, 24 sentenced to life, and 473 given other prison terms. In the French trials, 2,107 were charged, 404 acquitted, 104 sentenced to death, 44 sentenced to life, and more than 1,000 given other prison terms. There are only the sketchiest details of the Sovi-

et trials. Of 14,240 who were charged, 142 were acquitted, 138 sentenced to death, and more than 13,000 given other prison terms.[32]

The Nuremberg trials had no appellate court to review the sentences. Rather than create a permanent court for the task, John Raymond, Walter Rockwell, and members of the legal staff of the U.S. Military Government did early sentence reviews on an *ad hoc* basis. This board was responsible for the sentences of both the Nuremberg trials and the Army trials. Up until 1949, General Clay had the final word on the fate of the war criminals. Because the trials were being severely criticized in the United States, he took the sentence confirmation process very seriously. Clay knew that whatever they were, his decisions were going to be attacked.

German trial critics did not merely seek clemency; they wanted an apology to assuage their violated sense of honor. Many German veterans considered the war crimes convicts prisoners of war, whose main crime was losing the war.[33] Due to Langer's Senate investigation, Lucius Clay had been unable to carry out all the Nuremberg death sentences, and they were inherited by John McCloy when he took office as High Commissioner in 1949 (those convicted by the army at Dachau were under the jurisdiction of Army Commander-in-Chief Thomas Handy). German criticism of the American war crimes program weighed heavily on McCloy. From his first day as High Commissioner, he was barraged with thousands of letters, telegrams, and postcards begging clemency for those imprisoned at Landsberg, but his largest problem were the handful of men awaiting execution.[34] These convicts had exhausted all channels of appeal and awaited his final decision.

John McCloy refused to admit that politics influenced his treatment of the German war criminals. Until his death in 1989, he doggedly maintained that these were apolitical "legal" decisions.[35] In a climate of changing political priorities, High Commissioner McCloy established the Advisory Board on Clemency for War Criminals (also referred to as the Peck Panel) in 1950. He provided this justification for his decision to review sentences that already had been both reviewed and confirmed by General Clay: "The availability to the individual defendant of an appeal to executive clemency is a salutary part of the administration of justice. It is particularly appropriate that the cases of defendants convicted of war crimes be given an executive review because no appellate court review has been provided."[36]

It was becoming increasingly clear that by 1950, many West Germans still did not accept the legal validity of the American war crimes trials. Among the first to take up the defense of the war criminals were the leaders of Germany's Catholic and Protestant churches. In a letter responding to a plea for a war crimes amnesty from Bishop Fargo A.J. Muench, the Regent of the German Apostolic Nunciature in Germany, High Commissioner McCloy expressed irritation: "I have been somewhat disturbed, however, in examining these petitions, by what appears to be a persistent tendency to question the legal basis for the prosecutions and the judicial soundness of the judgements." McCloy unequivocally rejected the Bishop's call for a war crimes amnesty: "Anything approaching a general amnesty would, I fear, be taken as an abandonment of the principles established in the trials of the perpetrators of those crimes."[37] Jörg Friedrich points to the irony of the German clergy's new position: "The same bishops who had witnessed the murder of more than 4,000 priests and nuns by Nazi courts and kept silent about the deportation and gassing of Jewish converts, now felt the need to confront the occupation authorities with biblical rigor."[38]

On January 19, 1950, President Truman received a letter on behalf of Ernst von Weizsäcker from Lord Halifax. Even though the former State Secretary's aggression conviction had been overturned, his advocates would not rest until he was released from Landsberg Prison. The former British Foreign Minister told Truman that his appeal was based on the trust that he placed in Theo Kordt's word: "But this appeal from Kordt comes to me with the claim based on what I know to have been his own willingness to incur grave danger in the cause that he believed right—namely trying to check the Nazi movement to war—and after anxious thought, and after consulting the Foreign Office here who raised no objection to my so doing, I have decided to submit it to you." Lord Halifax included a copy of the letter from Kordt and stated, "reconsideration of Weizsacker's case, if you felt able to give it, would be both justified on merits and would exercise a powerful affect on those German quarters, where the conviction prevails today that in his case justice has miscarried."[39]

Kordt's letter described Ernst von Weizsäcker as the "spiritual leader" of the German resistance and claimed that he had accepted the job of State Secretary in order "to prevent the greatest crime that had ever been committed in human history." Kordt contended that von Weizsäcker was

compelled to collaborate with the Nazis due to an " '*ubergesetzlicher Nostand*' or 'superlegal emergency,' which requires a priority of responsible action with regard to supernational interests, e.g. the prevention of aggressive war."[40]

On January 30, 1950, President Truman wrote Lord Halifax, "I appreciate most highly your letter of January fourth, concerning Herr von Weizsacker. I am looking into the matter to determine what steps should be taken to insure that justice prevails in his case."[41] In early February, Secretary of State Dean Acheson presented Truman with a response to Lord Halifax drafted by the State Department's legal advisors. Although it was little more than a brief outline of the case, the President wrote, "the United States High Commissioner for Germany has the power to mitigate the sentence," and "I am having a copy of your letter and the letter from Doctor Kordt forwarded to the United States High Commissioner for Germany for consideration in connection with the petitions for clemency filed in the case of Herr von Weizsacker." Ernst von Weizsäcker would be released in October 1950.[42]

In late January, High Commissioner McCloy set about establishing the Advisory Board on Clemency for War Criminals to consider the petitions of German war criminals convicted by any American courts. In a confidential memo, State Department Assistant Legal Advisor for German Affairs John Raymond agreed that an "impartial board" review would relieve public pressure. However, Raymond was one of the members of General Clay's review board and believed that the vast majority of the death sentences should stand because these men were truly guilty. The convictions were based not on hearsay but on evidence directly linking the individuals to the crimes. General Clay had taken special care in reviewing the death sentences; he explained:

> When you have the responsibility of whether someone is going to die, before you sign a paper you worry about it an awful lot. And I never signed any of those papers without going through the trial record from A to Z. And if there was any doubt, *any doubt*, I commuted the sentence. In terms of procedure, the Nuremberg trials were much easier to follow; it was much easier to determine whether justice had been done. In Dachau, I had some doubt.[43]

The vast majority of the prisoners facing the death penalty had been Einsatzgruppen leaders.[44]

Former Nuremberg prosecutor Telford Taylor challenged the decision to review the sentences in a February 2, 1950 *New York Post* article entitled, "Stalling Baffles U.S. Prosecutor." In an interview from his law office in New York City, Taylor announced, "The retreat from Nuremberg is on. I fear such a review would work to the benefit of those who have wealthy and powerful influences behind them." Taylor called the "whole concept questionable. Where will the people be found who are qualified to do so delicate a job calling for a high degree of wisdom and detachment?"[45] The next day, Michael Musmanno, the judge responsible for the majority of the death sentences, bolstered Taylor's views in another *New York Post* article. The former judge in the Einsatzgruppen case called the death sentences "eminently just and proper" and was quick to remind the public that Otto Ohlendorf and the other twenty-two defendants in that case were responsible for ordering and overseeing a "total number of killings amounting to 1,000,000."[46]

The same day, State Department legal advisor John Raymond discussed the review board with the State Department's Henry Byroade. He warned Byroade against appointing anyone to the board "who had personal convictions against the Nuremberg trial concept." Raymond also cautioned, "We must also watch the religious aspect."[47] They agreed that "a detailed study of fact, or law is not contemplated," and that the review of the war crimes trials should take "sixty days at a maximum."[48]

In a February 8 cable to the High Commissioner, Secretary of State Dean Acheson expressed his doubts about having one board review the sentences of all the war crimes trials. Acheson recognized that the proposed sentence reviews would reopen the debate over the legal legitimacy of the Nuremberg trials: "Army cable to CINCEUR suggests that same individuals deal with both Nuremberg and Dachau death sentences. This seems undesirable in view of different nature of trials." Acheson warned of the negative impression cast by another review: "Boards of the caliber you suggest would be bound to attract attention and might tend to create impression that legal basis, and procedure of Nuremberg trials under review, or at least be construed as indication of doubt RE Pohl and Ohlendorf cases."[49] McCloy heeded Acheson's advice, and by May 1950, two American war crimes clemency boards had been created. The American Nuremberg trials would be reviewed by a three-man committee that would report to John McCloy. The Dachau and Army cases would be reviewed by Texas Supreme Court

Justice Gordon Simpson, who would report to Army Commander-in-Chief General Thomas Handy.[50]

The legal expert for the High Commission's clemency board was former New York Supreme Court Justice David Peck. Questions about parole and incarceration were handled by the former chairman of the New York Board of Parole, Fredrick Moran. It is interesting to note that Moran was trained in social work and was an outspoken advocate of parole as "an instrument of rehabilitation."[51] The third member of the board was State Department legal advisor Conrad Snow. Their official task was to equalize sentence discrepancies between the various Nuremberg tribunals. The board was authorized only to reduce sentences, not to challenge the legal basis of the decisions. The Peck Panel spent the summer of 1950 in Munich, reading the judgments of the various courts.

Questions over German rearmament overshadowed the question of war crimes and led to a deadlock among the Truman administration's policy makers. The President was not blind to the implications of putting weapons back into the hands of German soldiers. He was quick to remind "the experts" that Germany had taken a 100,000-man paramilitary organization and transformed it into the greatest fighting force in modern history.[52] The stalemate over the West German army continued until, once again, "international communism" lived up to American expectations.

During the early morning of June 25, the State Department in Washington received a cable from the U.S. ambassador in Seoul, Korea: "North Korea forces invaded the Republic of Korea territory at several points this morning. . . . It would appear from the nature of the attack and manner in which it was launched that constitutes an all-out offensive against ROK." Initially, North Korean forces overran the South with ninety thousand troops and Soviet-made T-34 tanks.[53] Some of the darker minds in the U.S. government believed that the action had been ordered by Moscow and that once American forces were mired in Korea, the Red Army would launch a Western offensive. President Truman condemned the invasion in the strongest terms, arguing that "Communism was acting in Korea just as Hitler, Mussolini, and the Japanese had acted 10, 15, 20 years earlier. If this was allowed to go unchallenged it would mean a Third World War."[54] By September 1950 the United States had troops in Korea, and the "conflict" had turned into a full-scale war. Truman's decision to back his rhetoric with U.S. ground forces changed the

diplomatic landscape throughout the world, but nowhere more than in Germany. The situation was further complicated by the fact that the West Germans were about to be asked to rearm and possibly fight East Germans.

There was a consensus among the State Department's elite (Acheson, McCloy, Harriman, and Nitze) that Germany needed to be rearmed.[55] High Commissioner McCloy recognized this and, like Clay before him, issued a dramatic warning to Washington. In a "top secret" cable, McCloy warned dramatically, "If no means are held out for Germans to fight in an emergency my view is that we should probably lose Germany politically as well as militarily without hope of regaining. We should also lose, incidentally, a reserve of manpower which may become of great value in event of a real war and could certainly be used by the Soviets against us."[56]

Secretary of State Dean Acheson and High Commissioner John McCloy decided to make Germany part of the Western European Defense Force (EDF), which had been created by representatives of the European powers who had already appointed Dwight Eisenhower Supreme Commander. One of Eisenhower's first assignments was to raise a German army.[57] The man who had once recommended executing the entire German General Staff now actively supported rearmament. Neither England nor France was overly enthusiastic about the idea, but considering the size of the U.S. military commitment in Korea and the amount of American economic aid to Europe, they couldn't afford to voice much opposition. Members of the High Commission met with Chancellor Adenauer to discuss the creation of seven German divisions by the mid-1950s.[58] The Truman administration, the State Department, and Konrad Adenauer were all in favor of rearmament, but both nations had huge domestic obstacles to overcome.[59] They needed the approval of their domestic constituencies and of the governments of Great Britain and France before they could implement any new plan.[60] Once it became official that West Germany would be rearmed, questions pertaining to the war criminals took on new significance as West German leaders from all political parties pointed to America's paradoxical role as occupying ally.

The system of war crimes trial review instituted by the High Commissioner was, like its predecessor, ad hoc. There was little procedure to follow, so the board created their own. Although they were able to review the judgments in each of the twelve American Nuremberg trials, they

could not possibly consider the documentary evidence or the actual trial transcripts. It was an impossible task for three men. The transcripts in the Ministries case alone ran to twenty-eight thousand pages, and there were an additional nine thousand documentary exhibits.[61]

By the summer of 1950, the Peck Panel was hard at work. Review board member Conrad Snow reported "substantial progress" and said that the board was "fortunately, in perfect harmony." The board would finish reading the cases by August 4 and would "hear counsel the following week."[62] Despite the official pronouncements of impartiality, there were very basic ways the review process favored the German war criminals. Fifty lawyers representing the majority of the prisoners were brought before the board. Not only were the judges and prosecutors who had tried the cases conspicuously absent, but they did not even know that the sentences were being reviewed for a second time.[63]

The Peck Panel presented its final report to the High Commissioner on August 28, 1950. The report circulated through the High Commission office, and several members of the HICOG staff expressed reservations about their recommendations. State Department legal advisor John Raymond generally approved but considered some of the individual decisions excessively lenient. He felt that some of the sentence reductions called the original verdicts into question. In a confidential memo to State Department legal advisor Robert Bowie on September 11, 1950, Raymond wrote: "The basic difference in the approach adopted by the Board from the one that we took in reviewing cases is that the Board . . . did not feel bound by the findings drawn as conclusions from the facts, whereas we accepted all the findings of the tribunals." Raymond expressed the reservation that the "reduction from death to eight years is perhaps going too far" in reducing the sentences of former Einsatzgruppen Schubert and Seibert.[64]

Robert Bowie, High Commissioner McCloy's trusted legal advisor, also had serious misgivings about the Peck Panel's final report: "I have carefully reviewed the recommendations of the Board and believe that in a number of cases the reductions recommended are excessive. I have serious doubts as to the validity of the 24 recommendations of the Board which seem to me to fail to give sufficient recognition to the seriousness of the crime for which the individuals concerned were sentenced by Tribunals."[65]

Like Acheson, Bowie realized that the issue had moved beyond the

legal realm. He concurred with Raymond that the clemency board's decisions called the original Nuremberg sentences into question: "certain statements by the Board suggest that they have striven to be as lenient as possible and I am concerned lest the report as a whole create the impression of a repudiation of the Nuremberg trials."[66]

In November, Secretary of State Acheson informed President Truman that some of the death sentences would probably be upheld by John McCloy: "I informed the President of the action which I proposed to take, saying that I did not wish him to assume responsibility in the matter but that he should know about it and that he could instruct me to the contrary if he thought that desirable. The President thought that the action proposed was correct."[67]

By late 1950, word of the impending sentence reviews reached the United States, and John McCloy was attacked from all sides of the political spectrum. On December 18, 1950, Senator Langer compared the Nuremberg trials to Stalin's purge trials: "These war-trials were decided on in Moscow and they were carried on under Moscow principles. These trials were essentially the same as the mass trials held in the 1930s by Stalin when Vyshinsky used treason trials to liquidate his internal enemies. At Nuremberg the Communists used the war crimes trials to liquidate their external enemies. It is the Communists' avowed purpose to destroy the Western World which is based on property rights." Langer added a new dimension to the critique by claiming that the cases against the industrialists were part of a communist plot "aimed directly at property rights. It was intended to try the accused as aggressors, convict them as having started the war, and then confiscate their property as a penalty."

However, under questioning from Senator McCarran of Nevada, Senator Langer made a rather dramatic and embarrasing factual error that exposed his complete ignorance of the American war crimes program that he was so vigorously attacking. When asked to "differentiate between the first Nuremberg trials and the latter Nuremberg trials," Langer replied, "The first Nuremberg trials were tried by Allied courts. . . . The other trials were conducted by American judges and American prosecutors according to American laws specifically enacted for that purpose." Senator Langer stated that the difference between them was like that "between night and day. For the second Nuremberg trials we sent from all over the United States judges to try between two million and

three million Germans who were arrested and tried at what were called the denazification trials."[68]

McCloy spent the remainder of 1950 wrestling with his final decisions as German nationalists continued to lobby for an amnesty on war crimes. Security for McCloy's family was increased, as kidnapping threats were made against his children.[69] In early January the High Commissioner received a secret letter from Henry Byroade objecting to the tone of the clemency board's final report: "While it is an excellent summary of the reasons that led you to order the review . . . the tenor of the statement seems a little more apologetic than it need be or should be." Byroade anticipated a negative reaction to the clemency decision in Germany and believed that "a firm and positive statement will do more to counter the reaction in Germany, which inevitably will be bad."[70]

Of all McCloy's decisions as High Commissioner, these would be the most difficult. On January 9, he met with a West German parlimentary committee for two and a half hours. The delegation included Hermann Ehlers, President of the Bundestag Heinrich Hoefler, Carlos Schmid, Jacob Altmaier, Hans von Merkatz, and Franz Josef Strauss. According to Arthur Krock of *The New York Times,* "Dr. Schmid and his colleagues pointed out the new political developments taking place in Western Germany, said many Germans felt such an amnesty would assuage demands for restoration of the honor of German soldiers."[71] Finally, the West German leaders hit McCloy on a much more vulnerable level by pointing out that West Germany's freshly minted constitution "prohibited the death penalty."[72]

By this time McCloy had lost his patience, and he responded indignantly. The man accused of having a "pathological love for Germany" had been pushed too far.[73] According to *The New York Times,* the High Commissioner stated, "I did not know any good German soldier had lost his honor."[74] McCloy called the West Germans' bluff and reminded them who was holding the cards. "Of this threat Mr. McCloy feels that the Americans would rather not have the Germans if their cooperation depended upon the justification of war crimes or negligence to exact the penalty for them."[75] West German Deputy Minister of Justice Walter Strauss claimed that keeping men on death row for three years was in itself a crime against humanity and presented this paragraph of the Ministries case majority opinion to McCloy: "To permit one sentenced to death to remain for months or even years, without knowledge of his

reprieve and untolerable anxiety and mental stress of not knowing whether the next day would be his last day on earth, is a trait typical of the sadism of the Nazi regime, and if anything could be considered a crime against humanity, such a practice is."[76] With rearmament now certain, unrepentant Nazis like Hitler's former bodyguard, Otto "Scarface" Skorzeny, recognized the new bargaining power the German veterans possessed. The Nazi folk hero threatened the Americans from his luxurious sanctuary in Madrid. "In good faith, even with a certain amount of enthusiasm, we have put ourselves at the disposal of the Americans. Yet I repeat in the name of all German officers who are working for the future victory of the West, if Peiper dies we will no longer lift a finger to help but will yield to the opposing point of view."[77]

President Truman reentered the fray on January 18, 1951, after receiving a letter from a personal friend in Kansas City who protested the outstanding death sentences. Truman passed the correspondence to Dean Acheson and asked that he "take a look at it." State Department legal advisor John Raymond drafted a memo on war crimes for President Truman that was a wholesale reaffirmation of the original Nuremberg and Dachau decisions[78] and an unequivocal argument against amnesty: "It is quite incorrect to consider the death sentences in such cases as part of a plan of vengeance or to intimate that it is anti-German. In fact they were imposed by the tribunals in order to bring to justice those who were responsible for such atrocities. Under these circumstances Mr. McCloy, who is well aware of the political considerations involved, could hardly grant a general amnesty."[79]

On January 31, 1951, HICOG released *Landsberg: A Documentary Report*, which included the statements of the Peck Panel, Judge Simpson, High Commissioner McCloy, and General Thomas Handy. John McCloy followed the majority of the board's recommendations and freed one third of the Nuremberg prisoners immediately. He commuted all but five of the outstanding death sentences to prison terms.[80] The primary beneficiaries of the High Commissioner's generosity were the German industrialists. With one stroke of John McCloy's pen, all of the remaining lawyers, executives, and industrialists convicted in the Farben, Flick, and Krupp trials were released.[81] Ministries case defendant Gottlob Berger had his sentence reduced from twenty-five to ten years.

The most controversial of all John McCloy's decisions came in the case of Alfried Krupp.[82] McCloy accepted the defendant's claims even

though they were not borne out by the facts of the case. After a nine-month trial, Krupp had been found guilty of playing a leading role in running his family's company, which built factories on the grounds of concentration camps and used slave labor provided by the SS. On July 31, 1948, in an otherwise lenient judgment, Krupp was sentenced to twelve years and stripped of all industrial and financial holdings.[83] High Commissioner McCloy expressed his extreme discomfort with the tribunal's command to confiscate Krupp's property: "One feature of this case is unique, namely, the confiscation decree attached to the term sentence of Alfried Krupp. This is the sole case of confiscation decreed against any defendant by the Nuremberg courts." McCloy believed that singling Krupp out "constitutes discrimination against this defendant unjustified by any considerations attaching peculiarly to him. General confiscation of property is not a usual element in our judicial system and is generally repugnant to American concepts of justice."[84]

The duality in American war crimes policy became clear for all to see on February 3, 1951, when Krupp was set free and his property was restored to him. The irony of this convicted war criminal being greeted like a hero and regaining control of his massive empire was too rich and could not be ignored. His release created "the impression" that the United States was slowly but surely reversing its position on war crimes and told the German people that regardless of American rhetoric, it was back to business as usual.[85] Due in part to his high-level lobbying effort, Ernst von Weizsäcker had been out since December 1950; now his sentence was officially reduced to time served. At the time of his release, Nuremberg prosecutor Robert Kempner stated, "In 1924 I warned the Bavarian Government against the release from Landsberg prison of a certain Adolf Hitler and a certain Rudolf Hess. Today I want to go on record with a warning that the premature opening of the Landsberg gates will loose against society totalitarian subversive forces that endanger the free world."[86]

Suffice it to say, the Landsberg decisions had just the effect that Robert Bowie had anticipated. Nazi apologists who had argued all along that the war criminals were political prisoners felt vindicated by the High Commissioner's action. Several segments of the German population stepped up a well-organized campaign for a war crimes amnesty.[87] However, their most pressing concern was the fate of the men awaiting execution. In the capital cases, not even John McCloy could find grounds

for clemency. No amount of strategic legalism could veil the fact that commutations in these capital cases would be viewed with great suspicion. Although High Commissioner McCloy and his army counterpart General Handy spared the lives of twenty-one of the war criminals facing death penalties, seven were still scheduled to hang.[88]

In 1948, General Clay had carefully reviewed the same five death sentences and was absolutely convinced that all the convicts deserved them. The most infamous of those awaiting execution was Otto Ohlendorf, the man who led Einsatzgruppen D into Russia in 1941. In one year, Einsatzgruppen D killed as many as ninety thousand civilians.[89] The tribunal found Paul Blobel responsible for overseeing more than sixty thousand murders.[90] Werner Braune was commander of the unit that committed the Simperpol massacre. Erich Naumann was in charge of a group that operated on the Russian front for sixteen months.[91] The fifth defendant to be executed was Oswald Pohl, the notorious concentration camp administrator. The two convicts under the U.S. Army's jurisdiction (Georg Schallermai and Hans Schmidt) had been particularly sadistic concentration camp guards at Mühldorf and Buchenwald.[92]

The final section of the *Landsberg Report* included the decisions of the U.S. Army in the Malmedy and other trials. General Thomas Handy, Commander-in-Chief of the U.S. Army in Europe, had created a European Command War Crimes Modification Board, headed by Texas Supreme Court Justice Gordon Simpson. Their task, similar to that of the Peck Panel, was to grant clemency where grounds for it existed.[93] The Modification Board reviewed more than four hundred cases. These defendants were soldiers who had violated the laws of war. General Handy stayed the executions of all the perpetrators of the Malmedy Massacre because the acts were committed in the heat of battle: "The commutation has been based upon other facts, which are deemed to mitigate in favor of less severe punishment than death. First, the offenses are associated with the confused fluid and desperate combat action, a attempt to turn the tide of Allied successes. . . . The crimes are definitely distinguishable from the more deliberate killings in concentration camps."[94] However, Handy remained convinced that Kampfegruppe Peiper had committed the atrocities and that Joachim Peiper had ordered them. Handy commuted all of the death sentences to life in prison and reduced 349 of 510 sentences; as a result, 150 men were immediately freed. On the whole, the U.S. Army was reluctant to issue

wide-ranging war crimes amnesties and was significantly less lenient than John McCloy and the State Department.[95] The Modification Board was not so quick to brush the Malmedy Massacre under the rug in the name of political exigency.

American statesmen had hoped that these generous acts of clemency would mollify the German people, but ultimately *The Landsberg Report* had the opposite effect. No amount of strategic legalism could hide the fact that the American retreat from Nuremberg had begun. Acts like the High Commissioner's reduction of Einsatzkommando Heinz Hermann Schubert's death sentence to ten years spoke more loudly than legalistic distinctions between clemency and parole. Instead of accepting guilt for the criminal acts of the Third Reich, German nationalists stepped up their attacks on American war crimes policy. After 1951, they focused on the legal validity of the Nuremberg trials.[96]

John McCloy was caught in a public relations crossfire in both Germany and the United States. Like his American lawyer-statesmen predecessors, McCloy instinctively believed that what could be justified legally did not have to be justified morally. The High Commissioner attempted to treat the war crimes problem as a one-dimensional legal question, and it blew up in his face. Like Elihu Root before him, McCloy would interpret law to suit the needs of a rapidly changing American foreign policy. In the cases of Germany's worst convicted war criminals, any potential civil rights or legal improprieties became matters of the greatest concern for the U.S. government. However, contrast that to the civil rights of Japanese-Americans during World War II, U.S. citizens no less. At the time of the Japanese internment, McCloy described America's most sacred document, the Constitution, as "just a scrap of paper."[97]

The Americans had a worthy foe in the West Germans when it came to strategic legalism. By shifting the focus away from the crimes of the accused and forcing the Americans to defend the basic legal validity of their trials, the German nationalists changed the very nature of the debate. After nearly five years of occupation and reeducation, "Germans refused to make any practical distinction between the treatment of those who deserved and those who did not deserve punishment. The distinction that they did make was purely theoretical, allowing them to argue that those who had been punished by no means deserved it. Thus the public called not for clemency and reintegration, but for amnesty and rehabilitation," Friedrich points out.[98] Ironically, the questions that had been pro-

hibited at Nuremberg by Article 3 of the London Agreement Charter were the ones that American officials would now have to debate with West German lawmakers and politicians.

By the early 1950s the Adenauer administration and the German Foreign Office were trying to reject the legal validity of the Allied war crimes trials and to secure the premature releases of the imprisoned war criminals. The prisoners now had a powerful and well-connected group lobbying on their behalf. The *Heidelberg Juristenkreis* was founded by former Nuremberg prosecutor and Bundestag representative (CDU) Eduard Wahl. He considered Control Council Law No. 10, which had created the Nuremberg tribunals, a violation of existing international law. Wahl did not simply seek the release of the war criminals; he also sought legal pardons.[99] Other important members of the *Kreis* included former Nuremberg defense lawyer Otto Kranzbühler, representatives from Germany's Catholic and Evangelical churches, politicians, and leading German jurists.[100] Kranzbühler described his role: "When the trials were finished in 1949, me and a lot of other lawyers who had taken part in those trials felt the obligation to see to it that the defendants sentenced would get out as soon as possible and that the principles of these trials would not be recognized by the coming German government."[101] Kranzbühler would emerge as the group's most formidable legal tactician. Just as he had evaded the Article 3 ruling and entered Admiral Nimitz's testimony at the IMT, he would find a way to reject the legal validity of the Allied war crimes tribunals.

The Juristenkreis had considerable influence and held regular meetings with both Konrad Adenauer and American officials. The group not only served as a clearinghouse for information but also drafted a proposal for the Adenauer administration on the subject of war crimes.[102] In a strategy meeting, Chancellor Adenauer instructed Kranzbühler to "see to it that the leading politicians of the [German] states will follow your views. You have to see them and instruct them."[103]

The Essen Amnesty Committee was a more radical right-wing war criminal advocacy group with a much different approach. It was led by Ernst Achenbach, another former Nuremberg defense attorney who was now a Bundestag representative in the right-wing Free Democratic Party. Freiburg law professor Friedrich Grimm served as one of the group's leaders. Not only did the Essen Amnesty Committee oppose rearmament and Western integration, they also sought a "tabula rasa" on war crimes

in the form of an unconditional amnesty. John McCloy would later describe some of the committee's members as representatives of Germany's "right-wing lunatic fringe."[104]

By 1951, not only nationalists and neo-Nazis dismissed the American war crimes proceedings as a "victor's justice."[105] Even after the Landsberg decisions of 1951, letters and petitions continued to flood the offices of General Handy and High Commissioner McCloy, urging the American representatives to stay the executions. The powerful and educated appealed to McCloy on the grounds of Christian charity, arguing that those awaiting execution were guilty but that implementing a now outlawed death penalty would send the wrong message to the German people. Princess Helene von Isemberg pleaded to McCloy in the most melodramatic terms: "Jesus Christ has given the high doctrine to mankind: Forgive us our fault, as we forgive our enemies. Please, be a Christ, Sir."[106]

In one of the thousands of letters, a West German postal inspector urged the United States to free all war criminals and captured the spirit of the new debate on war crimes: "West Germany will then be a *reliable and strong friend* of the western countries. The Russians fear *American equipment* and the *German soldier* most of all."[107] Dean Acheson and Robert Bowie had recognized very early that logic and legal concepts would not placate a large segment of the German population. To nationalists, Nazis, and professional military men, the Third Reich had been vindicated by the postwar action of the United States. The Cold War had forced the United States to follow the anti-Bolshevik path originally cleared by Hitler.[108] Former Nazis spoke of Hitler's historic mission to organize the people of Europe and wage the first crusade of a second just war era. At Nuremberg some had argued that Operation Barbarossa had been a justified defensive action. Alfred Seidl, defense attorney for Reich Chancellor Hans Lammers, stated during the Ministries case in 1948:

> 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 hardly have been expected or seemed possible, how justified Dr. Lammers was in his assumption.[109]

In the Bundestag debates of the early 1950s, German lawmakers made an interesting semantic shift. They began to refer to the war criminals (*Kriegsverbrecher*) as "war sentenced" or "sentenced because of war" (*Kriegsverurteiler*).[110]

The Nuremberg trials were also considered an affront to the military honor of the German soldier. There were numerous German veteran organizations whose highest priority in 1951 was to save the men on Landsberg's death row. The veterans considered the Landsberg, Werl, and Wittlich inmates to be prisoners of war. Many former members of the Waffen SS maintained that they had only been soldiers loyally fighting to protect their country. They were especially indignant that membership in the organization had been declared a criminal act at Nuremberg and equated the IMT's action with the Treaty of Versailles' "shame paragraphs." This was part of a larger effort to prove that the German war criminals had been unjustifiably persecuted. Although groups like the *Stahlhelm* were loyal to Bonn, they too were extremely critical of the judicial treatment of Germans in Allied courts.[111] The SS veteran organizations were less numerous and less influential. Membership in the SS had been ruled a criminal offense by the IMT at Nuremberg and the Basic Law ensured that former members were disqualified from obtaining military service pensions.[112]

In 1951, SS General Otto Kumm created an assistance group for former SS members, the Mutual Aid Society (*Hilfsgemeinschaft auf Gegenseitigkeit*).[113] HIAG leaders constantly rallied for the release of German war criminals in Allied custody, proclaiming that as a result of the widespread acts of clemency, the United States had repudiated its war crimes decisions. They stretched this interpretation, arguing that the Nuremberg ruling that the SS was a criminal organization was no longer binding.[114] Both Chancellor Adenauer and High Commissioner McCloy recognized the important swing vote that these seemingly extreme groups would cast.[115] The forty thousand-strong association of ex-soldiers called the *Schutz-Bund Ehemaliger Soldaten* stated in 1951 that the American decision not to grant a general amnesty proved that "the defamation of the German people in the spirit of Morgenthau continues."[116]

Many German veterans felt that American "stupidity" in dealing with the Soviet Union had placed "all of Europe in jeopardy."[117] Former Field Marshall Albert Kesselring became one of the veterans' prominent spokesmen. Originally sentenced to death by a British military court for

reprisals that he ordered carried out against Italians, Kesselring would be released from Werl Prison in 1952. In an appeal to U.S. General Matthew Ridgeway, the German general implored his American counterpart to look beyond petty spites of the politicians and to see the larger issue:

> Sir, as officer to officer, I appeal to you, in whose hands the fate of many Germans lies. Help the German people cooperate enthusiastically in the fulfillment of the European cause so that they may eagerly comply with their inevitable historical obligation. Europe—indeed the whole western world— should not break down as a consequence of contrasts and conflicts with [sic] could be eliminated. You will be convinced as I am, of the fact that politics has its limits in military matters and vice versa, and that the war criminal cases should be separated from political matters and placed under the former uniform jurisdiction.[118]

After twenty months in British custody, German General Otto Remer was released; he founded the far right *Socialist Reich Partei*. Remer not only denied that the Holocaust ever happened but even claimed that the ovens had been built after the war and that the concentration camp films were fakes. Remer derided Adenauer and West Germany's American-inspired "shit democracy" with its "chewing gum" soldiers. He violently opposed the American rearmament plan and offered to show the Soviets the way to the Rhine. He adopted Hermann Goering's deathbed slogan, "*Ohne Mich*!" which loosely translates to "Count me out." SRP deputy Fritz Rossler pointed sarcastically to the duality of America's rapidly changing German policy: "First, we were told that guns and ammunition were poison and now this poison has been changed to sweets which we should eat. But we are not Negroes or idiots to whom they can do whatever they want. It is either they or us who should be committed to the insane asylum."[119]

The State Department's public opinion surveys in the weeks following the Landsberg decisions showed that the much-vaunted "lessons" of Nuremberg had been lost on war-weary Bavarians: "According to Bavarian leaders, the reactions of the man-in-the-street do not seem as favorable as those registered by the press and public officials." Some of the motives people offered for America's recent clemency decisions: "1) The

Americans have missed their chance to make good friends of the Germans. 2) Nuernberg has never been accepted by Germans, partic., in this case where the trial procedures were in many cases doubtful." There was special praise for the American decision to free the "*Stahlkoenig*" (steel king) Alfried Krupp. The survey concluded, "A fairly general public view seems to be that all the decisions were a political maneuver rather than an expression of American justice."[120]

On March 6, 1951, the U.S. High Commission released a confidential report entitled "West German Reactions to the Landsberg Decisions." Residents of German cities were asked their opinions of the American clemency decisions. Public opinion in the four Allied zones of Germany was split nearly 50–50. However, those who approved of the action saw it as a goodwill gesture, not a legal act. The report confirmed that "Finally, the legal considerations motivating the American decisions in the Landsberg cases, apparently completely failed to impress the German public. The principle and implications of judicial review and clemency entirely escape urban West Germans." The primary reason those surveyed gave for American leniency was that "They realize the injustice of the trials."[121]

On March 21, the State Department's Office of Public Affairs announced the results of a survey of German *Buergermeisters*' (mayors') views of the Landsberg decisions. Although 56 percent approved, the report concluded that "They apparently do not appreciably depart from the general urban public in their interpretations of American motivations in moderating the sentences." The most conclusive thing that the public opinion surveys showed was that the "lessons" the West Germans had learned from the Nuremberg trials were not the ones that their American reeducators had hoped to teach: "The prevailing interpretations are either that the basic injustice of Nuremberg is now being conceded, or that the revisions were prompted by a desire to win German allegiance."[122] More than 90 percent of the Buergermeisters agreed with the decision to free Alfried Krupp, whom they believed "did no more than war industrialists in other countries." When asked why the United States was reducing the sentences, 37 percent of those polled said it was because the Americans finally "realize the injustice of the trials."[123] Leo Crespi, head American pollster, concluded, "Whatever the stimulus German Buergermeisters might offer for support in the Landsberg decisions, it seems clear that in the *interpretation* of these actions they are, by and large, propagating views

varying from an alleged American retreat from Nuremberg to outright political expediency."[124] On March 30, Crespi reached the same conclusion after conducting another survey of eight hundred urban West Germans. He wrote: "The public, for the most part, attributes the postponement of the execution of the death sentences pending the appeal of the U.S. Supreme Court to uncertainty, weakness, or ulterior purpose on the part of the U.S."[125]

As early as 1951, legalistic distinctions like the one between amnesty and parole were lost on the majority of West Germans, who interpreted the American review policy as cynical and politically expedient. Besides, it was not as if the German public had ever accepted the decisions of the Nuremberg trials as legally valid in the first place. The State Department would use strategic legalism to ameliorate the original sentences. In this case, the mechanism, or as the State Department legal advisors described it, "device," was an ever-decreasing set of standards for clemency and parole. American authorities were trying to justify the early releases by citing "modern penalogical principles." These justifications fell on deaf ears because they were only partially true.[126]

A number of pamphlets demanding a reversal of the death sentences appeared in 1951. The most dramatic one was entitled "Germany's Dreyfus Affair." In it, former concentration camp administrator and SS General Oswald Pohl, one of the convicts facing the hangman's noose, published a letter to former SS General Karl Wolff. In a plea bargain of sorts, Wolff had surrendered to the Allies in 1945 and worked with the prosecutors at Nuremberg in exchange for immunity from prosecution. Pohl considered his former comrade a traitor: "Through your treasonous activity in Switzerland in April 1945, you gained for yourself an 'honorary' position at Nuremberg with the innocent American examiners." Pohl believed that Wolff could prove his innocence. He wrote, "In this predicament, I feel exactly as innocent as the famous French patriot, Alfred Dreyfus. But you in my eyes, have behaved yourself like the traitor, Esterhazy, who was likewise responsible for Dreyfus' conviction."[127] This pamphlet, as well as "a number of pieces of mimeographed material in defense of Pohl, Ohlendorf, and other Landsberg defendants,"[128] was published by the Universal Union, a pro-amnesty group led by Frederick Wiehl, Oswald Pohl's attorney. However, these crude tactics were far less successful than the more sophisticated efforts of the Heidelberg Juristenkreis.

By 1951, a majority of West Germans had come to reject the social engineering of the American occupation. Adenauer's willingness to join an American-led military alliance was also a contentious issue.[129] Although McCloy was slow to realize it, he finally conceded that no argument would placate certain segments of the German population.[130] Instead of quelling a mounting wave of criticism concerning the treatment of war criminals, the Peck Panel Report created controversies on both continents.

In a February 1951 *Nation* magazine article entitled "Why Are We Freeing the Nazis?" Eleanor Roosevelt called attention to the premature release of prominent war criminals like Alfried Krupp. After the article appeared, the High Commissioner defended his decisions in a letter to the former first lady published in the June 29, 1951 issue of the U.S. High Commission's *Information Bulletin*: "As for the Krupp case. I find it difficult to understand the reaction on any other basis than the effect of a name. After a detailed study of this case, I could not convince myself that he deserved the sentence imposed on him. There was certainly a reasonable doubt that he was responsible for the policies of the Krupp company, in which he in fact occupied a somewhat junior position."[131] John McCloy could see no justification for taking Krupp's property: "No other person had his property confiscated—not even the worst mass murderers. Why then single this man out for a type of punishment which, as Justice Jackson has pointed out, was entirely foreign to American tradition?"[132] It has been widely noted that John McCloy was especially uncomfortable with the original decisions in the Krupp case. Former Nuremberg prosecutor Benjamin Ferencz attributed this to his background as a Wall Street lawyer.[133] McCloy vehemently denied the fact that politics played a role in his decisions: "What really smarts with me is the suggestion that these decisions were the result of 'expediency', i.e. that they were timed to gain a political objective. . . . If we were moved by expediency would it have been reasonable to release a man with such a world resounding name as Krupp."[134] However, his earnest claims were unconvincing to many.

Once again, Telford Taylor was called upon to defend the American Nuremberg trials. The former Chief Counsel responded to McCloy's letter to Eleanor Roosevelt because it "contains numerous inaccuracies, which are extremely damaging to the Nuremberg proceedings, to the judges who sat at the trials, to General Clay, and, incidentally to me. Sev-

eral of these misstatements are so serious that they should not be allowed to stand uncorrected." The High Commissioner had not helped his own case by including basic factual errors. Taylor wrote:

> Mr. McCloy states at the outset of his letter to you 'I inherited these cases from General Clay, who, for one reason or another had been unable to dispose of them finally.' This statement is 87–1/2% incorrect. The judgments pronounced at Nuremberg were to be final, but the sentences were subject to reduction at the discretion of the Military Governor. In eleven of the twelve cases, General Clay exercised his responsibilities, and reviewed the sentences prior to his resignation as Military Governor. In one case, in which the judgment was not rendered until a few months before General Clay's departure, he was unable to take action in the time remaining. This case and only this one case was not 'disposed of finally' at the time Mr. McCloy took office. . . .
>
> Nor was General Clay's review of the sentences in the eleven cases in which he acted in any way perfunctory. General Clay was assisted by a very able legal staff, headed by such men as Judge J. Warren Madden, Alvin Rockwell, and Colonel John Raymond, now Deputy Legal Advisor to the Department of State. To my personal knowledge, this legal staff gave extensive and careful consideration to the records and judgments in the Nuremberg trials, and General Clay gave conscientious and perceptive personal attention to their recommendations before he took action.

The former Chief Counsel pointed out how biased the High Commissioner's review had been:

> He made this review on the basis of a totally one-sided presentation of the law and the facts. . . . The Board read the judgments in all twelve cases (but apparently not the records), and heard fifty lawyers representing the criminals confined at Landsberg Prison. No representative of the prosecution was heard, or invited to appear, before either the Clemency Board or Mr. McCloy.[135]

On March 28, in Great Britain, former Nuremberg prosecutor Sir Hartley Shawcross, now British Attorney General, attacked the Landsberg decisions as "mistaken ideas of political expediency or because of

the wholly false view that these sentences were no more than vengeance wreaked by the victors upon the vanquished." The American clemency action would undermine "the validity of what has been done." Shawcross rejected the argument that the Cold War somehow justified a shift in war crimes policy: "These Nazis were and are no friends of ours simply because they fought against the Russians during the war. Nothing could do a greater disservice to our cause, at a time when Germany is being led back into the international life of Europe, than at the same time to whitewash the Nazis and what they stood for."[136] The U.S. embassy in London cabled a copy of the speech to Secretary of State Dean Acheson with the following message: "In this connection domestic polit import Shawcross speech shld not (rpt not) be overlooked."[137]

High Commissioner McCloy responded to the Shawcross charges on March 30. "Sir Hartley, of course, has a right to his own opinions and to express them as he sees fit." McCloy took grave exception to the charges that the clemency decisions were politically motivated: "as reported in the press, this speech seems to imply that clemency for the war criminals was based on 'political expediency' and reflects on the Nuremberg trials. . . . I must take issue on both points in view of the seriousness of the charges." The High Commissioner offered his standard defense for the clemency action, but was especially irritated by the charge that he was undermining the legacy of Nuremberg: "Furthermore, as is clear from a reading of the statement which accompanied them, my decisions do not (rpt not) reflect on the Nuremberg proceedings. . . . In view of my substantial part in originating the concept of Nuremberg and in setting up the machinery, any suggestion that my decisions reflect any lack of sympathy for the basis of these trials is as incorrect and unfounded as the implication that my decisions were motivated by considerations other than justice and clemency."[138] It was no longer a question of getting the war criminals freed; a steadily growing number of Germans continued to attack the legal validity of the trials themselves. McCloy's decisions were not seen as benevolent acts of clemency within a modern legal system but as the cynical abandonment of a failed policy.

On May 25, 1951, the wives of the condemned German war criminals visited their loved ones for the final time. Some wept openly. Elonora Pohl, the wife of Oswald Pohl, maintained her composure inside Landsberg Prison but collapsed from a nervous breakdown just outside the gates.[139] The State Department ordered the army and the High Commis-

sion to stay the executions for five days so that a U.S. District Court in Washington, D.C. could rule on a last-minute injunction. On June 7, High Commissioner McCloy got the word from Washington, and Blobel, Braune, Naumann, Pohl, Ohlendorf, Schallermaier, and Schmidt were quietly hanged at Landsberg Prison.[140] According to Jörg Friedrich, "This was their final *piece de resistance*. The public uproar over the hanging of these blood tainted butchers underlined Nuremberg's failure."[141] The funeral of Otto Ohlendorf took place a few weeks later in Hoheneggelsen, and representatives of all of Germany's right-wing parties attended. When Ohlendorf was lowered into the grave, the mourners gave the Nazi salute.[142] One wreath bore the slogan, "*Uber Galgen Waechst kein Gras*" ("No grass grows over the gallows"); another said, "*Kein Schoener-er Tod auf dieser Welt als ver vorm Feind erschlagen*" ("No more beautiful death in this world than to be struck down before the enemy").[143]

The early public opinion polls conducted by the State Department's Bureau of Public Affairs after the executions drew the same conclusion as the pre-execution polls. In the press accounts from the Wuerttemberg-Baden area, most of the editorial writers "Voiced considerable reserve in regard to the principles and procedures of the Nuremberg, and especially the Dachau, trials. Many papers argue that the commutation of sentences is proof that something was wrong with the sentences." The Deputy Director for the State Department's Bureau of German Affairs, Geoffrey Lewis, predicted that West Germans would continue to use this issue in the coming years: "One must also be prepared for the possibility that right-wing political circles, ranging from the CDU and DVP to the utmost extreme, may warm this issue up if released by international and domestic political situation."[144]