


Chapter Six

THE WAR CRIMINALS AND THE RESTORATION OF WEST GERMAN SOVEREIGNTY

 With the last executions of war criminals on German soil accomplished, by the fall of 1951, talks about the complete restoration of West German sovereignty were well under way. Once again, the continued incarceration of war criminals proved to be a very difficult point of contention between Americans and West German leaders. In October, the attorneys of the Heidelberg *Juristenkreis* approached Carlo Schmid, chairman of the *Bundestag*'s subcommittee on POWs, with a proposal for a solution to the war crimes problem.¹ On October 26, former Nuremberg defense attorney Otto Kranzbühler met with the Bundestag's POW committee and outlined a plan to reject the legal validity of all Allied war crimes trials. Under Kränzbühler's plan, the West German government would simply and steadfastly refuse to recognize the trials' legal validity.² In November, Schmid passed Kranzbühler's plan on to Konrad Adenauer with the additional demand that all the prisoners who had served one third of their sentences should be released. On November 19, the committee on POWs offered a resolution calling for an amnesty on war crimes and a transfer of the prisoners to West German custody.³

While the Americans were eager to turn the war criminals over to German authorities, it was not that simple. The State Department was fully aware that if the West German government wanted to assume physical custody of the convicts, they would have to recognize the legal validity of the original sentences—which was extremely unlikely. This point was made in a State Department cable to Washington: “This solution wld require recognition by Gers of Nuremberg and similar judgments, which wld be difficult politically as Gers have heretofore consistently contested their validity.”⁴ It was illogical to assume that the Federal Republic would stand by the American war crimes courts’ findings once they obtained custody of the convicts: “they wld probably use their authority to effect release, extended parole or other differential treatment, thus negating effect of sentences.”⁵ The second approach proposed by the Bundestag committee involved sending the war criminals to “territory of the Allies or another power,” but this was rejected due to the potential “violent political repercussions in Germany.” Third and fourth options allowed for the war criminals’ continued incarceration in Germany: one plan called for Allied control, while the other called for international custody.

The German Foreign Office was alarmed by the implications of the Bundestag committee’s resolution because it went way beyond Adenauer’s proposal and raised difficult questions. Could the Allies transfer the war criminals into West German custody if the Adenauer administration refused to recognize the validity of the original sentences? In late December 1951, Chancellor Adenauer met with the recently reelected British Prime Minister, Winston Churchill. Although Churchill offered to turn the British prisoners over to the Federal Republic, he made it very clear that if the Germans wanted to assume custody, they would have to acknowledge the legal validity of the sentences handed down by the Allied war crimes court. Another State Department cable reported: “Brit propose Gers should be given custody when contractual arrangements go into effect. Gers will be required to recognize validity of sentences. Clemency will be exercised by an advisory clemency tribunal composed of one Ger, one neutral, and one Allied rep.” Once again, the Americans tried to rule questions about the Nuremberg trials’ legal validity off limits: “Tribunal will have no (rpt no) power to question validity of sentences.”⁶ British High Commissioner Ivonne Kirkpatrick reduced the British parole requirements and immediately released twenty-five convicted war criminals from British custody in Werl Prison. Kirkpatrick proposed that

the Germans should be given custody of the remaining war criminals once the contractual arrangements went into effect in 1952.⁷

On December 21, High Commissioner McCloy met with Chancellor Adenauer to discuss the war crimes question. The High Commissioner asked the West German leader if he had any new proposals: "I recalled his promise to give his personal attention to this subj and to let us have his suggestions at an early date." Adenauer described his meetings with Churchill and Eden in London and endorsed the plan for a mixed clemency board with a neutral chairman. "He indicated he wld be prepared to accept this solution providing Ger was not thereby required to recognize Nuremberg judgments."⁸ McCloy asked who would take control of the German prisoners once the contractual agreements went into effect. When Adenauer said that West Germany could, McCloy believed that the Chancellor had "not fully thought this through. When I pointed out to him the difficulty of finding justification under Ger law to hold these individuals in custody, without recognition of validity of these sentences, he offered no (rpt no) solution but thought some way might be found."⁹

By early 1952, the German Foreign Office realized the implications of a custody transfer, as historian Frank Buscher has noted: "this would be tantamount to an official German recognition of the judgments and the verdicts. This, the agency felt, should be avoided at all costs."¹⁰ In conversations with German politicians, Adenauer stated firmly that he would refuse to recognize the Allied verdicts and that he would demand another sentence review board.¹¹

The contractual agreements (Bonn Agreements) restored West German sovereignty and did away with the remaining vestiges of the occupation government. Although Konrad Adenauer supported the Heidelberg Juristenkreis plan for an international clemency board composed of Germans and Americans, a number of problems remained, the most prominent of which was the growing duality in American war crimes policy. While John McCloy was able to prevent the uproar over the Landsberg decisions from derailing American foreign policy, the State Department's strategic legalism was beginning to look increasingly pale in the stark light of the Cold War. Many West Germans found it odd that the United States was now excitedly making provisions for a new German army while military leaders like Erich von Manstein, Wilhelm List, Walter Kuntze, Hermann Reincke, Erhard Milch, Herman Hoth, Georg von Kuechler, Hans von Salmuth, and Walter Warlimont remained in prison.¹²

In March 1952, State Department officer Charles Thayer wrote a secret report concerning the ongoing and serious problem posed by the continued imprisonment of German soldiers. "One of the neuralgic points in the relationship between the Germans and the Allied High Commission is the problem of the war criminals in Landsberg and Werl. The case of the top-ranking generals, in particular, seems to enter into almost all discussions of a German defense contribution." He concluded, "It is expected that the case of the German war criminals will assume increased importance in the months to come in connection with more extended public discussion."¹³ If anything, the Landsberg decisions demonstrated that the Americans were growing increasingly flexible on the war crimes question. This lack of resolve led many West Germans to demand an amnesty on war crimes as the precondition for rearmament. Thayer wrote, "Release of war criminals is frequently stated to be condition for any German participation in a defense effort, and release of prisoners who are held for alleged war crimes is a condition for defense participation posed by the government coalition in the Bundestag debate on February 8."¹⁴ Thayer anticipated "the case of the German war criminals will assume increased importance in the months to come in connection with more extended public discussion of a German defense contribution."¹⁵

Soviet leader Josef Stalin made an attempt to prevent German rearmament on March 10, 1952 when he offered to withdraw the Red Army from East Germany, reunify Germany, and hold free elections. Although the Soviet leader did not succeed in his effort to block the passage of the Bonn Agreements, he did strengthen the West German position in its discussions with the United States. As the ratification process neared, the Heidelberg Juristenkreis worked to devise a way for the West German government to reject the legal validity of the Allied war crimes trials.¹⁶ Kranzbühler described their plan: "There was a treaty settling matters of war and occupation. In this, all the acts of the military government were recognized by the German government. In the document that we prepared for the central German government there was a recommendation that the war crimes trials should not be recognized." To Frank Buscher, the debate over sentence validity provides further evidence that the American re-education efforts had failed. "The philosophy of the *Bundestag* was that the inmates of Landsberg, Werl, and Wittlich were almost exclusively honorable soldiers, who had merely followed orders. Such

views, held by the Federal Republic's political elites, were bound to influence the thinking of the general public sooner or later."¹⁷ Kranzbühler urged Konrad Adenauer and the German Foreign Office to act so "that the principles of these trials would not be recognized by the coming German government."¹⁸ According to Kranzbühler, in a private meeting with Adenauer, he and Edward Wahl "convinced Adenauer . . . that it was about accepting war guilt or not—accepting special law only for Germans and not for anybody else which no government could really do. Adenauer agreed with that and it was astonishing."¹⁹ The contractual agreements restoring German sovereignty were signed by the Allies on May 26 and 27, 1952, in Bonn and thus came to be known as the Bonn Agreements. West Germany's official position on the legal validity of the Allied war crimes tribunals can be found in articles 6 and 7 of the treaty's "Convention on the Settlement of Matters Arising out of the War and Occupation."

Article 6 established a six-man committee, composed of one representative from each Allied power and three Germans, to make further parole and clemency recommendations "without calling into question the validity of the convictions." Article 7, section 1 appears to be a straightforward endorsement of the legal validity of all the Allied war crimes trials: "All judgments and decisions in criminal matters heretofore or hereafter rendered in Germany by any tribunal or judicial authority of the Three Powers or any of them shall remain final and valid for all purposes under German law and shall be treated as such by German courts and authorities." However, buried in Article 6, section 11 is an exception: "The provisions of Article 7 of this Chapter shall not apply to matters dealt with in this Article."²⁰ In other words, the Article 6 clemency board did not have to accept the validity of the courts' decisions. According to Kranzbühler, "It was drafted after we had a conference with Adenauer. A good lawyer would never do it that way, to put the exception in a different place than the rule. But it was intended to conceal. Nobody took notice of it, no press mentioned it." Buscher argues that the confusion created by the "Convention on the Settlement of Matters Arising out of the War and Occupation" created a "constitutional gray zone that made it possible for the lawmakers to couch their obvious biases in legalistic terms. As a result, they could freely attack the Allies for allegedly violating the provisions of the Federal Republic's constitution when extraditing and executing German citizens."²¹

Walter Donnelly replaced John McCloy as High Commissioner in August 1952. During McCloy's final press conference as High Commissioner, he claimed to be optimistic about West German democracy. However, he warned his audience that the United States would not trade war criminals for German rearmament: "If you are asking if there is to be a jail delivery to get ratification through, the answer is no."²² Despite his stern words, West German veterans continued to hammer away at the new High Commissioner. On July 14, 1952, more than two million German veterans adopted a resolution calling for a war crimes amnesty.²³ It declared that "no German can be expected to don a military uniform again until the question of 'war criminals' had been satisfactorily settled." On August 10, High Commissioner Donnelly received a copy of a letter written by Gottfried Hansen, the chairman of the Union of German Ex-Soldiers, to U.S. General Matthew Ridgeway, calling for a "speedy and satisfactory solution" to the war crimes problem in the form of a "general amnesty granted to the prisoners."

But what is oppressing humanity as a whole now is the curse called down at Tehran, Yalta, and Potsdam. It . . . is against this curse that the Western world is struggling. Are Nuremberg and all that followed to become a similar curse? Is this curse to stand in the way of the Western forces being welded into one true force of defense, united by comradeship and respect?²⁴

The veterans' resolution was adopted by members of important German groups like the Association of Former Fighter Pilots, the Air Force Circle, German Association of War Wounded, Association of German Soldiers, Association of Former Members of the German Africa Corps, and others. Hansen announced that "The undersigned associations note with satisfaction that Theodor Blank [Adenauer's Security Advisor] . . . has adopted their view that no German can be expected to don a Military uniform again until the question of 'war criminals' has been satisfactorily settled."²⁵

In early September, U.S. General Mathew Ridgeway spoke with Konrad Adenauer in Bonn. This account of the meeting in a Bonn daily was telling: "The General's attention was drawn yesterday to the fact that in the eyes of a large part of the German public this problem is the most serious political obstacle to German defense participation."²⁶ Jörg

Friedrich describes how the rearmament question fundamentally altered America's relationship with the Federal Republic of Germany: "They could not be allies and prison guards at the same time. There was no choice but to pardon and integrate the convicted." Germany's old elites "had to be rehabilitated for reuse."²⁷

Eli Debevoise, General Counsel for the U.S. High Commission, issued a secret report on the problems posed by the war criminals on September 6, 1952. "Whether we like it or not, the German politicians and press are making the subject of the war criminals an important factor at this time." The report described the German critics' attacks on the validity of the original sentences: "To the extent that attacks bear analysis, develop along one or more or combinations of the following: (a) There were no crimes and therefore no legal basis for the trials." The German press had erased all distinctions among the various categories of war criminals: "Through the device of lumping all prisoners into the category of soldiers and all common crimes as 'war crimes,' the press has been able to thoroughly mislead and confuse the German public." The report concluded: "It seems clear enough that a German campaign is aimed at unraveling loose threads in the fabric of action taken by the Allies on war criminals, and thus progressively unraveling the fabric."²⁸ High Commissioner Donnelly shared these sentiments and began to fear for Adenauer's political future. In a cable to Secretary of State Acheson, Donnelly realized that "the problem will not end (rpt not) end with ratification. On the contrary, it will affect both the wholeheartedness of the Ger def effort and the Chancellor's chances of success at the polls in the early summer of 1953 unless problem has been both rapidly and finally solved after EDC comes into effect, and not (rpt not) so soon before the election as to look contrived."²⁹ Even as early as 1952, Nuremberg critics in Germany were succeeding in shifting the debate away from the crimes of the defendants and back to the legal validity of the Allied trials.

On September 16, High Commissioner Donnelly announced the latest and most depressing German public opinion poll to date. According to the State Department's August survey, only 10 percent of West Germans approved of the handling of the war criminal issue, while 59 percent disapproved. Those screaming the loudest were not the ill-informed and the downtrodden: "Most widely disapproving are opinion leading population elements—men, better educated, and economically better situated." West Germany's social leaders now demanded an amnesty: "Outright release

of the Ger generals now held prisoner by Western powers is the remedy most frequently suggested by those disapproving of the present treatment.”³⁰ The biggest short-term problem facing the Americans was putting the Mixed Clemency Board created by Article 6 of the Bonn Agreements into action. The agreements had to be ratified by all three EDC powers, but it did not look like France would, and the West German government was becoming agitated because the clemency board had not yet been established.

On September 17, the Bundestag debated the war crimes question for more than two hours, with West German lawmakers vociferously attacking Allied policy.³¹ They maintained that the trials had served political rather than judicial ends. Ironically, the Communists were the only party that did not attack the trials.³² Despite German dissatisfaction over prisoner releases, the number of war criminals in Allied custody was declining steadily. In one year (December 15, 1951 to September 13, 1952), the population of Landsberg Prison was reduced by 25 percent, from 458 to 338.³³ Because the establishment of the Article 6 Mixed Board was held up by the ratification of the EDC Treaty in the French Assembly, the Heidelberg Juristenkreis proposed the creation of an interim board to review cases until the Article 6 Board could be convened.³⁴

In a secret letter to High Commissioner Donnelly, James Riddleberger, director of the State Department’s Office of Political Affairs, considered the problem posed by the conflicting goals of American war crimes policy: “Our main objective is to keep the German agitation and resentment on this subject from interfering with ratification. At the same time, we do not wish to take any steps inconsistent with the principle of the war crimes trials, or with the statement made to the President.”³⁵ The State Department officer saw an interim parole board as “a good device” that “made things easier” for Germany and allowed the United States to maintain “all the basic elements of our position.” He anticipated trouble from the German board members: “The fact that the Board will not be able to question the validity of the war crimes judgments will be a continuing objection to it in the German view.” Riddleberger advised the High Commissioner that the United States had “little to offer” by way of further concessions for convicted war criminals, and to “be careful not to offer it too soon, because we might be pressed for more at a later and more awkward stage.”³⁶

Rearmament plans gained new momentum when General Dwight

David Eisenhower was elected President of the United States in November 1952. His choice for Secretary of State, John Foster Dulles, would have great implications for Germany. Dulles was another third-generation American lawyer-statesman, the grandson of American diplomat John Foster, the nephew of Secretary of State Robert Lansing, and the brother of American spymaster Allen Dulles. The new Secretary of State was well acquainted with international law; while still a college student, he had served as a recording secretary at the 1907 Hague Convention.³⁷ Like his hero and uncle, Robert “Bert” Lansing, Dulles was a member of a prestigious Wall Street law firm (Sullivan and Cromwell). In 1911, during World War I, John Foster Dulles joined the State Department as an expert on political and economic affairs. In 1919, at the tender age of thirty-one, he was appointed to the American delegation during the Paris Peace Conference. Dulles served as an assistant in German war reparations, mainly dealing with financial questions.³⁸ At the Paris Peace Conference, Lansing rejected all efforts to punish suspected war criminals and was especially hostile to the introduction of “the laws of humanity” into the discussion. Thus John Foster Dulles came to his conservatism quite naturally, and his appointment would have a profound impact on the future treatment of German war criminals. McCloy made this observation: “Dulles had very definite views about Germany. He’d spent a good bit of time in Germany, had a number of German clients and he was deeply interested in it.”³⁹ A month later, his brother, Allen Dulles, was appointed director of the CIA.

In his final weeks as U.S. Secretary of State, Dean Acheson observed that the war criminals had become a “highly emotional and political problem of considerable proportions.”⁴⁰ On December 22, 1952, the High Commissioner (now James Conant) received a report from the State Department’s Office of Political Affairs suggesting a “political” solution to the German war crimes question. This sparked a major internal debate within the U.S. State Department. The Political Affairs report outlined the ways in which the war criminals could adversely affect American policy in Germany: “(1) It will affect the political strength of the Chancellor and his party and thus the chances for continuation of present German foreign policy course (2) it will affect the development of the EDC, both in terms of German popular support, and the more specific problem of recruiting experienced officer material for the German contingent of the EDC.” The final recommendation was neither new nor groundbreaking:

"We would suggest further that a more lenient system of reduction of sentence and parole be adopted. . . . An alternative which is posed for possible consideration is the use of a large scale clemency device."⁴¹ The report recommended a third review of the Nuremberg and Dachau sentences by a parole board that would have even looser requirements than the previous two. The suggestions were based solely on political expediency: "The memorandum has limited itself to considering the problem as a political one, and not as a juridicial or moral one. . . . The memo is undoubtedly one sided and it is realized that other points of view will have to be considered."⁴²

State Department Assistant Legal Advisor John Raymond was among the first to register his dissatisfaction with the proposed use of parole and clemency as a "device" to free war criminals. Raymond been intimately involved with the Nuremberg trials since 1945, he had also served on General Clay's original sentence review board. Raymond was not impressed by the memo and stated plainly, "It seems to me, however, that there are certain basic fallacies in the discussion which I should like to point out." He believed that the proposal "unwittingly accepts the very German psychology which it criticizes. . . . I am satisfied that the thinking behind the dispatch is quite erroneous in the respects above outlined. There are other matters of detail with which I do not agree but these I think are the basic difficulties. They lead to a wholly unsound conclusion as to the course of action to be pursued." He suggested that the authors of the memo had bought into the German logic on war crimes: "The fallacy lies with the basic premise that because they were German soldiers they were tried and convicted. The true premise is that because they committed crimes of murder, atrocities, etc., they were tried and convicted."⁴³

Less than a week later, State Department International Relations Officer John Auchincloss also weighed in against a political solution to what he considered to be a judicial question. Auchincloss would emerge as one of the Nuremberg trials' few defenders within the State Department. "The paper advanced a political solution of the war crimes problem, and it might be well to point out certain objections which would apply to any solution of that kind," he argued. Asserting that a political solution would have a corrosive effect on the legacy of Nuremberg, he warned: "Why should others think more highly of them than we? The solution proposed would remove all legal basis for the trials by showing what little respect we

have for them; it would discredit everything the Allies have done in this field.” Auchincloss was especially irritated by the Political Affairs report’s description of clemency as a “device”: “The solution recommended in the paper is admittedly a political solution. That is to say, it is designed to meet political requirements and intended to accomplish a political result, rather than to accord with the facts in the individual cases. The solution would not be a true exercise of clemency (the despatch even speaks of clemency as a ‘device’).”⁴⁴

The State Department officer conceded that “The Germans do not want to be grateful to us, and they do not accept any of the principles behind the war crimes trials.” He believed that political clemencies would lower American prestige in Germany and be viewed as an abandonment of America’s postwar reform policies outlined in JCS 1067. Auchincloss enumerated the ways in which more releases would discredit and contradict America’s radical post–World War II war crimes policy:

There is so much background to this question—the Moscow Declaration of 1943 issued by President Roosevelt, Mr. Churchill, and Stalin; the trials themselves, with the wide expectation that they would serve the ends of justice and also create new principles of law; the international acceptance of these principles by the adherence of other nations to the Charter of the International Military Tribunal, and by the General Assembly resolution of December 11, 1946 affirming the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal—that an American yielding to a German demand for the release of war criminals would be a concession of uncommon significance.⁴⁵

Most important, Auchincloss warned, “While any political solution will be attended with great difficulty, the particular vice of the one recently suggested is that it is a political solution which pretends to be something else.” His warning would prove quite prophetic: “I believe this is one subject on which we have no chance of fooling other people, and we had better not try, or we shall fool only ourselves.”⁴⁶

In early February 1953, Secretary of State John Foster Dulles traveled to Bonn to meet with German leaders. The State Department’s Division of Political Affairs prepared a series of briefing papers for him. “Political Brief No. 5” described “Political Aspects of the War Crimes Question.”

By 1953, the State Department conceded that the Nuremberg trials had failed to “reeducate” West Germans: “From the political point of view, the crux of the war criminals problem in Germany is the refusal of a large number of Germans to accept the principles underlying the trials or the findings of the trials. . . . In spite of all the Western powers have said to the contrary, the trials are generally portrayed as acts of political retribution without firm legal basis.”⁴⁷ “Political Brief No. 5” warned that the “problem cannot be eradicated, or perhaps even treated effectively, by rational arguments”⁴⁸ and predicted that the war criminals would “act as one more constant irritant in the relations of Germany with the United States as well as England. . . . As time goes on, the fundamental, if unavoidable, contradiction between the role of the United States as Germany’s ally and friend can be exhibited by unfriendly German politicians and publicists to the detriment of German-American relations.”⁴⁹

On May 15, State Department legal advisor John Raymond warned the Department of Defense to limit the jurisdiction of any proposed parole board “to matters of parole (not clemency) and exclude any basis for attempt by German member to reopen cases or question original convictions. Similar precautions should be taken with respect provisions for parole supervision, in which we suppose Germans will also participate, so that we shall have nearest possible equivalent to explicit recognition by Germans of validity war crimes judgments.”⁵⁰

German Chancellor Konrad Adenauer traveled to the United States in April 1953 to attend the Washington Foreign Ministers Conference. The State Department knew that he intended to press for the release of more war criminals. A preconference memo described the American policy initiative: “To keep German feeling on the subject of war criminals from adversely affecting U.S.-German relations or a German defense contribution.”⁵¹ The memo also acknowledged that “the lessons of Nuremberg” had been lost on the vast majority of postwar Germans: “The German attitude towards the war crimes trials and the confinement of criminals has constituted a problem of continuous difficulty ever since the trials were held. The Germans have not accepted the underlying principles of the trials and do not believe in the guilt of those who have been convicted.”⁵² According to the memo, rationality and empirical facts meant little in this debate: “Their attitude is strongly emotional and is not influenced by argument or by objective presentation of the facts. They

persist in believing . . . that most war criminals are soldiers who have been punished for doing what all soldiers do or may be ordered to do in time of war, and that only a small minority of the prisoners are guilty of atrocities or common crimes." Finally and most important, the memo warned that the war criminals were a problem that "may interfere with good relations between this country and the Federal Republic, which may cause difficulties for the parties of the Chancellor's coalition in the election this year."⁵³

In the first meeting of the Foreign Ministers Conference on April 8, Adenauer "pointed out that there were considerable psychological and public opinion problems in Germany connected with the war criminal issue."⁵⁴ In the second meeting, the Americans appeared eager to facilitate the Heidelberg Juristenkreis plan: "Ambassador Conant said that the US would hope to have either a mixed board or some new procedure . . . in the near future, and certainly before the September elections in Germany. He suggested that little publicity be given to these plans and that public references be made in only general terms."⁵⁵ Secretary of State John Foster Dulles went even further; he "reiterated to the Chancellor that the U.S. would review the policies of its military authorities with a view to a more liberal treatment of war criminals. . . . Returning to the parole board question, he reassured the Chancellor that we anticipated the establishment of the joint parole board or commission prior to general EDC ratification."⁵⁶ After the meetings, Chancellor Adenauer announced that he was "extraordinarily satisfied" with the progress made.⁵⁷

During the summer of 1953, the State Department was concerned that the war crimes issue would negatively affect Konrad Adenauer's 1953 reelection campaign. A State Department memo warned that the continued imprisonment of convicted war criminals could hurt Adenauer's CDU (Christlich-Demokratische Union/Christian Democratic Union) Party in the election, not to mention have an "adverse effect upon a German defense contribution."⁵⁸ In a secret memo to the U.S. Secretary of State, High Commissioner James Conant wrote: "Chancellor attaches great importance to some accomplishment as regards war criminals for political reasons."⁵⁹ Because the EDC Treaty faced an uncertain future in the French Assembly, the Mixed Board still remained unconvened.

A June 4 "Memorandum Regarding Proposed Parole Board for German War Criminals," penned by State Department officers John Raymond and John Auchincloss, warned that the "German war criminal

problem has become a serious political issue in the Federal Republic of Germany.” While the memo described Chancellor Adenauer as “moderate in his demands,” it pointed to the trouble being made by “other political parties, veterans’ groups, editors of newspapers.” Raymond and Auchincloss warned that “A solution by exercise of clemency is no longer practicable. Reviews of the cases for clemency have been conducted over and over again.”⁶⁰ They believed that the clemency process was fast becoming farcical under American administration: “Unless a new situation develops in a particular case, such as serious physical condition of the prisoner, it would be a mockery of clemency to strain it further to bring about releases of prisoners or modification of sentences.”⁶¹ The memo suggested the creation of an interim parole board composed of Allied and German members. While it was “politically desirable to play up German participation to the maximum extent possible, ultimate control must remain with the United States”⁶² to ensure “no compromise whatsoever with the legality of the war crimes program, the validity of the judgments or the propriety of the sentences.”⁶³ Raymond and Auchincloss flatly rejected the political solution that many Germans were screaming for: “it would take the form of a release of prisoners without consideration of individual guilt. . . . It is also the German approach. A solution of a political character would certainly be construed as an admission of original error in the convictions, would greatly impair the value of whatever principles and precedents may have been established in the war crimes trials, and would be a highly undesirable solution.”⁶⁴

The U.S. Army also opposed the parole system endorsed by the State Department and the Adenauer administration. In a June 9, 1953 memo, John Auchincloss wrote: “The Army is opposed to this plan, but has not specified the grounds for its objections. It is unlikely that further progress can be made unless the matter is discussed between the Secretaries of State and Defense, or even by the two Secretaries with the President.”⁶⁵ Auchincloss believed that the disagreement was a basic one: “we want a parole system and the Army does not.” Once again, he warned against a political solution to the war crimes problem: “The appearance of a political solution would have, in effect, the same disadvantages as a real political solution, and we should not underestimate what these disadvantages would be.”⁶⁶ He cut through the legalism that was beginning to cloud the issues: “The United States Government would have put itself in the position of disregarding the principles involved in the original trials, and this

would undermine, in retrospect, the entire war crimes program.”⁶⁷ His memo asked that Secretary of State John Foster Dulles and Secretary of Defense Charles Wilson discuss the war crimes problem, “so that they might jointly put the matter before the President, in order to obtain his authorization for a proposal in which he will be interested, and which has been the subject of doubt and misunderstanding that he can properly be asked to resolve.”⁶⁸

Above all, the White House and the German Chancellor wanted a parole board before the September 1953 elections in Germany. In June, the State Department’s director of Political Affairs James Riddleberger wrote Secretary of State Dulles a memo from Bonn to alert him about “a difference of view which has arisen between the State Department and the Defense Department regarding the institution of a parole system for the German war criminals held in American custody.”⁶⁹ Riddleberger asked that “this difficulty be resolved either by yourself and Secretary Wilson, or by a decision of the President.” Once again, the memo pointed to the political importance of the war crimes question in German domestic politics: “German resentment over the trial and continued confinement of war criminals has been causing difficulty in Allied-German relations for several years. It would help the Chancellor greatly if some way could be found to improve this situation before the elections in Germany this autumn.”⁷⁰

James Riddleberger reported that Adenauer was “strongly in favor” of the proposed parole system for war criminals and was very specific about the validity question: “The parole system would have nothing to do with clemency or with any matters involving the validity of the original proceedings or the guilt of the accused.”⁷¹ Although he believed that prisoner releases might “have a useful political effect,” he warned that “releasing prisoners selected by the Germans . . . would be a purely political action, which would have no relation to the circumstances of any individual case, which would show that the United States had no interest in the principles involved in the trials, and which would therefore wholly discredit the war crimes program.”⁷² The memo suggested that the Secretary of State meet with the Secretary of Defense and “convince him” of the merits of the proposed parole plan. However, if Wilson could not be swayed, the two secretaries should “submit the question to the White House. . . . The President is already aware of the general problem and the need of a solution, and it is believed that the advantages of the

proposed parole system are of sufficient importance to justify asking him to approve it.”⁷³

On June 19, 1953, the State Department’s director of Political Affairs wrote Secretary of State Dulles a memo prior to his conference with Secretary of Defense Wilson: “Ambassador Conant has stressed to you the political reasons why a solution of this problem is necessary.” Riddleberger considered a parole system for German war criminals “fully justified on its own merits.” The memo erroneously assumed that the Germans would recognize the difference between amnesty and parole. The Americans would try “a new approach which would apply to the German cases the same modern penalogical concepts and practices which are used with respect to all federal prisoners in the United States.”⁷⁴ “The proposed action on our part would be of material assistance to Adenauer in the election campaign and would bring about an improvement in public relations from which the entire American element in Germany, civilian and military, would benefit.”⁷⁵ The director of Political Affairs reported Auchincloss’s statement that “The Army appears also to believe that the institution of a parole system would reflect in some way on the conduct of the trials. We do not however think that this point is valid, for parole does not involve a re-examination of the original proceedings.”⁷⁶ On June 23, 1953, Secretary of State Dulles sent a secret telegram to the High Commission in Bonn. “War criminals problem discussed . . . with President. . . . One more attempt to be made Bermuda persuade French accept creation now repeat now of Mixed Board provided in contractuals. If as expected this move fails, parole system to be established for German war criminals in American custody.”⁷⁷

On June 26, as the Americans were beginning to plan their new parole system, Dulles sent a secret cable to the U.S. embassy. The cable, drafted by John Auchincloss, warned, “Board’s terms of reference must be carefully defined so as to limit its jurisdiction to matters of parole (not clemency) and exclude any basis for attempt by German member to reopen cases or question original convictions.” The West German government was still unwilling to recognize the legal validity of the original convictions. German participation on the parole board would “provide nearest possible equivalent to explicit recognition by Germans of validity war crimes judgments. Such recognition has been and presumably still is politically impossible for Germans to give.”⁷⁸

On July 7, 1953, one week before the Allied Foreign Ministers met in

Washington, D.C., the French High Commissioner offered a way around the ratification impasse. André Francois-Poncet suggested that each Allied nation create temporary boards modeled on the Article 6 Mixed Board to review their respective sentences. The three powers agreed to the plan on July 11.⁷⁹ On October 14, less than a week before the German elections, the Interim Mixed Parole and Clemency Board (IMPAC) was convened to rule on American war crimes cases until the treaties establishing the Mixed Board were ratified. The IMPAC Board had been created by a joint order of the U.S. High Commission for Germany and the Supreme Commander of the U.S. Army in Europe on August 31, 1953.⁸⁰ It consisted of three Americans and two Germans; it did not function like the Peck Panel of 1950 but more like a traditional parole board before which prisoners were allowed to plead their cases twice a year. The chairman was an attorney from Boston (Henry Lee Shattuck), and the other two Americans were an Army Major General (Joseph Muller) and a career State Department officer (Edwin Plitt). Both German representatives (Emil Lersb and Hans Meuschel) were former German high court judges.⁸¹

New nonjudicial mechanisms helped further loosen parole standards; credit for time served was again increased and the parameters for medical parole were broadened with new provisions for physical health, mental health, old age, and the condition of the prisoner's family.⁸² Eligibility for parole on life and death sentences was reduced to fifteen years from the day of arrest.⁸³ The board's mandate was very explicit: "The Board is authorized, without questioning the validity of the convictions and sentences, to make recommendations to the competent U.S. authorities for the termination or reduction of sentences or for the parole of persons convicted by the War Crimes Tribunals." When the Interim Board was established in the summer of 1953, 312 prisoners remained in Landsberg Prison; 281 were under army jurisdiction, and 71 of those were serving life sentences. Only 31 of the war criminals convicted by the United States at Nuremberg remained in custody.⁸⁴

These bold moves on war crimes were timed to cast a favorable light on Konrad Adenauer during the final days of his election campaign. Adenauer took a firm stand on the subject, demanding the release of all those in Allied custody. Several bills were pushed through the Bundestag granting economic benefits to former SS members and Nazi officials.⁸⁵ The Chancellor realized the importance of being on the "right" side of

the issue. He even visited Werl Prison (where prisoners tried and convicted by the British were jailed) in the summer of 1953. Adenauer shook hands with the prisoners and assured them that he was doing his best to get them released.⁸⁶ Just as the Americans had not been content with only a military victory after World War II, the Germans wanted vindication of their new status as an ally. The Chancellor's active commitment to the German war criminals and application of unrelenting pressure on the U.S. government won him the support of his nation's veterans. Representatives of the military organizations urged all former military men to support the CDU Party. Adenauer received more than 12 million votes in the 1953 election.⁸⁷

After the German leaders produced the political results their American patrons desired, they sought compensation. In a letter to American war crimes officials, Dr. Friedrich Middelhauve, vice president of the Free Democratic Party (FDP), made it clear that now the time had come for the United States to cooperate on the subject of war criminals:

The Free Democratic Party of West Germany is the motor of German-American teamwork. It constitutes a strong bulwark against Communist infiltration, radicalism from the left and the right. It helped democracy win in West Germany on September 6, 1953 by 3,000,000 votes. Say action should be taken, you can't afford delay: Let your congressman awaken through you—so act to-day! **YOUR POSITIVE DECISION—A BLOW TO BOLSHEVISM.**⁸⁸

By 1953, the main concern of American officials in charge of implementing war crimes policy in Germany was to keep the parole action as quiet as possible. Chief U.S. Parole Officer Paul Gernert reported to High Commissioner Conant that the German press had helped by not publicizing the release of prominent convicted war criminals: "No problems have been reported, and the German press has been cooperative in avoiding any publicity concerning parolees or their release. . . . There is no evidence of any organized efforts to exploit the war criminal prisoners' problems or to pressure for their release."⁸⁹

In January 1954, the U.S. ambassador to Japan reopened the entire war crimes debate by suggesting a general amnesty for lower-level Japanese war criminals. Although the two war crimes programs had been very different, they were inextricably connected. It was ironic, but Japanese war

crimes policy now threatened to determine the course of German war crimes policy. According to historian John Dower, the war crimes trials did not serve to reform and reeducate the Japanese population. Much like the German war criminals during the 1950s, the Japanese war criminals were embraced by their countrymen. "Defendants who had been convicted and sentenced to imprisonment became openly regarded as victims rather than victimizers, their prison stays within Japan made as pleasant and entertaining as possible," wrote Dower. In 1952 alone, there were 114 performances staged for the convicts' entertainment at Sugamo Prison. Ambassador John Allison was suggesting for Japan what State Department legal advisors John Raymond and John Auchincloss had been warning against all along—a political solution to the war crimes problem. If that proved impossible, Allison suggested "an accelerated parole process to ensure the release of those prisoners within two years."⁹⁰

In a secret memo to Geoffrey Lewis at the U.S. embassy in Bonn, Auchincloss stated his now familiar argument. "I am attaching a copy of Tokyo's telegram No. 1821 of January 26, 1954, in case you should want to read it. This is the one which contains Ambassador Allison's recommendations for a general amnesty for class B and C war criminals or, failing that, an accelerated parole process to ensure the release of these prisoners in two years." Auchincloss pointed out, "whatever is done on these lines in Japan will have extensive repercussions in Germany," and predicted three very negative side effects. First, such a major concession would cast a dark shadow over the legacy of Nuremberg: "It would derogate retroactively from the war crimes program as a whole." The State Department felt that in addition to bolstering the far right in Germany, an amnesty would cause "a Congressional problem and also a problem of public opinion."⁹¹ Auchincloss warned his superiors that "The appearance of a political solution would have, in effect, the same disadvantages of a real political solution, and we should not underestimate what these disadvantages would be. The United States would have put itself in the position of disregarding the principles involved in the original trials, and this would undermine, in retrospect, the entire war crimes program."⁹²

For John Auchincloss, there was a difference between legal guilt and moral guilt. He dissented from the traditional position of American lawyer-statesmen. He did not believe that what could be justified legally did not have to be justified morally. The State Department advisor raised a question that had traditionally been taboo to American lawyer-

statesmen: "More important than any of these is the question of principle, and I do not think we should hesitate to raise it, even if some people are likely to find it abstract and uncomfortable." Auchincloss considered broad-ranging paroles, under any pretext, to be both an abandonment of and an affront to the original Nuremberg decisions: "The men now serving sentences for war crimes are doing so because we believed at one time that they deserved to be punished for what they did. Do we still believe this, or do we not? If we do not, then we should release the men as soon as possible." Finally, he sought a clarification of American war crimes policy and added an ominous warning: "We should reexamine our basic position in order to see whether we believe in what we have done, before we proceed to undo it. If we believe in it, we should stick to it, for to act against it would be cynical, if our purpose were to gain a political advantage, or weak, if our purpose were to avoid political pressure."⁹³ A meeting between the State Department legal advisors and Ambassador John Allison was scheduled in Washington for the coming weeks.

The State Department officers drafted a preconference memo arguing strongly against a political solution in Asia because of the dramatic repercussions it would have in Germany. "The Germans have never accepted the principles of the war crimes trials and do not believe in the guilt of those still in confinement. Because of the similarity of the two situations, it is apparent that an amnesty in Japan would inevitably lead to an amnesty in Germany, and EUR should emphasize strongly that an amnesty ought not be granted in Japan."⁹⁴ The German Office felt that this action would be seen as pandering to the worst elements of the West German political spectrum: "We should take into account the possibility that the Germans, or at least some of them, would interpret an amnesty as an example of Allied weakness in the face of German pressure."⁹⁵ An amnesty would serve as "an indication that the war crimes trials were wrong in principle; such an interpretation would provide a vindication of the convicted men and a justification for evading any sense of responsibility for the war and the atrocities committed in its course."⁹⁶

On February 16, 1954, a war crimes summit was held at the State Department in Washington, D.C. The attendees included Ambassador Allison, State Department legal advisors John Raymond and John Auchincloss, former Peck Panel member Conrad Snow, and legal advisors from both Germany and Japan. Ambassador Allison opened the meeting with the shocking admission that "the question of war criminals in Japan

was becoming a farce in view of the Japanese Government's laxity of control over the prisoners who were permitted to attend baseball games and other activities in Tokyo." Allison conceded that an amnesty would cause problems in Germany and asked "if it would be possible to take some action less than amnesty with respect to Japanese war criminals." Conrad Snow pointed out that those still in prison had been convicted of "particularly heinous crimes" and would not be eligible for parole until 1960 or 1961. Snow offered a solution to the dilemma, noting "that it would be possible for the Board to change the 'ground rules' so as to make lifers eligible for parole after serving 10 instead of 15 years."⁹⁷ However, "Mr. Raymond indicated that Mr. Phleger felt strongly that a grant of amnesty would undermine the entire legal basis of the war crime trials in that an amnesty or pardon had the effect of wiping out the crime. He indicated that the grant of parole or clemency fell into a different category and did not necessarily prejudice the legal basis of the trials."⁹⁸ Secretary of State John Foster Dulles officially rejected the proposed amnesty on May 26, 1954: "In view of serious nature crimes committed by remaining war criminals and fact 145 out of 293 have life sentences and 30 have sentences of over 30 years, impossible release any sizeable bloc per your recommendation."⁹⁹ However, the Secretary of State did agree to "change the ground rules" by reducing parole eligibility for those war criminals originally sentenced to death from fifteen to ten years.

By May of 1954, the Interim Mixed Parole and Clemency Board was busily reviewing cases and parole plans. Geoffrey Lewis, the director of the State Department's Office of German Affairs in Washington, wrote American IMPAC board member Edwin Plitt to congratulate him on the board's "remarkably fine job," which Lewis attributed to "the hard work and tactful handling by the American employees, particularly, I suspect, yourself." For the moment, the IMPAC board had quieted the controversy: "The fact that we in Washington hear nothing about the War Criminal 'problem' anymore is an indication of your effectiveness."¹⁰⁰ In early June, HICOG Records Officer Richard Hagan sent State Department legal advisor John Raymond an update and informed him of the incoming parole applications. Hagan described "the formula" for keeping the news of war criminal paroles quiet: "no general disclosure of individual parolees' names; no disclosure of the fact of parole release to a person having personal connection with and legitimate interest in any particular person about whom he inquires."¹⁰¹

In August, the French National Assembly killed the EDC Treaty and the Allies had to find another way to rearm West Germany. Winston Churchill urged President Eisenhower to absorb the new German army into the NATO forces.¹⁰² Meanwhile, German veterans' groups like the *Stahlhelm* continued to argue that West Germany should refuse to rearm until all the war criminals had been set free. On August 29 in Recklinghausen, former German Field Marshal Albert Kesselring oversaw a Stahlhelm meeting wearing the now outlawed gray uniform and jack boots of the *Wehrmacht*. FDP leader Eric Mende stated that as a former German officer, he personally could not support ratification and rearmament until German military leaders like Field Marshal Eric von Manstein were released from Allied prisons.¹⁰³ The Paris Treaties, incorporating Articles 6 and 7 of the Bonn Agreements, would outline the new Allied-German plan. Western leaders signed the conventions in Paris in October 1954. In late December, Chancellor Adenauer wrote U.S. High Commissioner James Conant, requesting a Christmas amnesty for German war criminals. Conant refused on the ground that it "would largely negate what we are trying to accomplish."¹⁰⁴

On January 18, 1955, *Deutsche Partei* leader Hans Joachim von Merkatz and Admiral Heye, a Bundestag deputy in the CDU Party, met with State Department officials to discuss the continued imprisonment of war criminals on German soil. Admiral Heye argued that the provisions of the Paris Treaties "which reserve Allied sovereignty on the war criminals' issue are a great mistake."¹⁰⁵ Heye believed that the "unresolved issue of war criminals would deter many individuals with a strong sense of honor and duty from volunteering for the new armed forces." Although the admiral was willing to admit that "many of the remaining prisoners had committed criminal acts and deserved punishment," he rejected their sentences' legal validity: "the principle of their guilt could be maintained and, at the same time, the untenable legal position governing their continued imprisonment could be resolved if a general amnesty were extended."¹⁰⁶ Van Merkatz also attacked the war crimes trials "in a very emotional manner." He stated that "many of the trials had not been conducted in accordance with established legal procedure . . . and maintained that the whole sorry episode of war criminals should be concluded by an amnesty for those remaining." The State Department noted that this was the first time in recent months that German politicians had raised the question of an amnesty for war criminals.¹⁰⁷

The Bundestag debated the subject of the "German Prisoners of War" on February 17, 1955. German State Secretary Hallstein answered questions from Bundestag members. While some, like Countess Finckenstein of the DP (Deutsche Partei/German Party), still called for "a general amnesty to make a clean sweep for all prisoners of war," the State Secretary was more moderate. Hallstein appeared impressed by the American willingness to free convicted war criminals: "These numerous efforts of the Federal Government have met with great understanding. The subsequent releases for which I have quoted figures, have proved that."¹⁰⁸ The State Secretary counseled the German politicians to wait a few months, until the tenth anniversary of the armistice, then "once more to appeal to the custodial powers, but not without expressing appreciation for the understanding and willingness with which they have fulfilled many wishes and proposals of the Federal Government." When asked if the Federal Republic was prepared to assume custody of the war criminals, Hallstein was very coy and did not offer a clear response: "I do not want to make a conclusive statement on this question, but I would like to point out that apart from difficulties resulting from legal provisions in the custodial countries, the German legal authorities will be confronted with perhaps nearly insoluble difficulties by the necessity of carrying out such a big number of proceedings under existing circumstances."¹⁰⁹

U.S. High Commissioner James Conant had already anticipated the problems of transferring the prisoners to German custody. In a January 22, 1955 secret telegram, he wrote to Secretary of State Dulles warning that mass paroles in Japan would "have a most unfortunate and drastic effect here." Conant pointed out that "Federal Government does not wish to recognize sentences of Nuremberg tribunals, on which ultimate analysis parole would be based, as court orders within meaning of basic law and Federal Government would therefore lack legal authority to enforce parole restrictions by re-arrest or otherwise."¹¹⁰ The German disdain for the Nuremberg trials and the "vindictive" occupation policies of JCS 1067 had hardened by 1955. In a letter to State Department legal advisor John Raymond, HICOG's head of Prisons, Richard Hagan, reported his conversation with a former Nuremberg defense lawyer and a representative from a German POW group: "I obtained an admission from the two gentlemen that, were all prisoners to be released, there would be no end to the war criminal problem until in the German mind each act has been justified."¹¹¹

The Federal Republic of Germany regained its sovereignty on May 5,

1955, when the Paris Treaties took effect. What that translated to in clear language was that men sentenced to death in 1948 would soon be eligible for parole. Yet America's lenient war crimes policy won no goodwill from West German politicians. On July 25, Eric Mende, one of the most powerful members of Adenauer's coalition, announced that it would be impossible to recruit decent officers for the new German army "unless a substantial number of war criminals are released." Mende was echoing the views of former Wehrmacht generals like Hans Speidel and Adolf von Heusinger—who had both served as military advisors to the Federal Republic of Germany.¹¹² According to Frank Buscher, instead of accepting responsibility for Nazi Germany's atrocities, "legislators of almost all parties portrayed the Allies as the villains and the violators of the law."¹¹³

The parole of German war criminals was further accelerated by yet another revision of parole requirements in July 1955. On July 21, HICOG in Bonn received a cable from the Secretary of State announcing the new requirements: "FYI President has approved recommendation Clemency with sentences over 30 years including life sentences be considered eligible for parole after serving ten repeat ten years."¹¹⁴ As of March 1, 1955, the United States held 88 war crimes prisoners at Landsberg Prison.¹¹⁵ By July 11, 1955, only 10 Nuremberg convicts remained in Landsberg.¹¹⁶ When the Interim Mixed Parole and Clemency Board ceased functioning on August 1, 1955, the United States had released almost 90 percent of the convicted war criminals in its custody and the European Allies were not far behind with clemency programs of their own.¹¹⁷

State Department legal advisor John Raymond asked Richard Hagan of HICOG to prepare a statement about the remaining prisoners, or as they had come to be known, the "hardcore" prisoners, that justified their continued incarceration. On April 19, Hagan wrote back that he would prepare reports on the cases of "the really 'hard core' ones." The parole officer offered an anecdote that illustrated how intractable the war crimes problem had become. He described a conversation with two German lawyers lobbying for the continued release of war criminals: "I obtained an admission from the two gentlemen that, were all prisoners to be released, there would be no end to the war criminal problem until in the German mind each act has been justified."¹¹⁸

There was an impending crisis over the pending parole of Malmedy Massacre convict Sepp Dietrich. Because he had been tried by the U.S. Army, he was their prisoner and there was little the State Department could

do. Ambassador Conant had always followed the IMPAC Board's recommendations, but when it came to the German soldiers involved in the Malmedy Massacre, U.S. Army leaders had consistently refused to consider early releases. It is important to remember that General McAuliffe, the man in charge of the American prisoners, had been surrounded by German soldiers in 1944 at Bastogne and had refused to surrender.¹¹⁹ State Department legal advisor Knox Lamb cabled Secretary of State Dulles on August 3 to inform him of an impending problem: "The most conspicuous case is that of ex-General Dietrich. The board has twice unanimously recommended that he be paroled and both recommendations were turned down—once by General Hoge and once by General McAuliffe."¹²⁰ In a conversation with Ambassador Conant, "General McAuliffe felt that he had a personal responsibility in these cases and that he was not called upon to follow the Board's recommendation if he disagreed with it."¹²¹

Although General McAuliffe was prepared to reject a third recommendation for Dietrich's parole, it sounded as if the decision to parole Dietrich had already been made: "the U.S. member of the new Board will be as lenient as is appropriate in dealing with the remaining U.S. cases and . . . the British and French members and, of course, the German members will not vote against him on any recommendation for clemency. It is therefore likely that any majority vote will be a unanimous vote."¹²² The U.S. Army was the last obstacle to accelerating the war criminal parole program. Knox Lamb stressed the importance of leniency: "if a case should arise where a majority's recommendation is rejected it would undoubtedly have an adverse affect on our relations with the Germans. Therefore we think the recommendations of a majority of the new Board should be accepted."¹²³

After the Paris Treaties went into effect in 1955, West Germany regained national sovereignty and the first military legislation was introduced in the Bundestag. According to a State Department memo, "The restoration of German sovereignty through the coming into effect of the Paris Treaties . . . and the introduction of the first military legislation in the Bundestag have strongly revived political and public interest in the question of war criminals imprisoned in the Federal Republic and elsewhere."¹²⁴ The memo pointed out the unpleasant fact that most of the West German political and religious elites were now more intent than ever on an unconditional war crimes amnesty even though only a handful of Nazi Germany's most notorious war criminals remained in prison.

Representatives of Germany's political parties (CDU, FDP [Freie Demokratische Partei/Free Democratic Party], BHE, and DP) "made strong appeals during the first reading of the Volunteer's Law to the former occupation powers to release the prisoners they still hold."¹²⁵ The leaders of Germany's Catholic and Protestant churches also called for an amnesty. The memo predicted that "the German public will become increasingly sensitive about their status as a sovereign country and the inconsistency between their positions as allies of the United States and the continued existence of the war criminals problem to an extent which will make our efforts to bind Germany to the West more difficult the longer the prisoners are held."¹²⁶ By 1955, it was clear that in order to resolve the contradiction of the "occupying ally," the United States would release the remaining "hard core" war criminals.

On August 11, 1955, the long-awaited and much-anticipated Mixed Clemency Board was established. The Mixed Board (also referred to as the Article 6 Board) was responsible for reviewing the parole applications of the remaining forty-four "hard core" war criminals in Landsberg Prison. The six-man board was composed of three Germans and one member from each of the Allied countries. Career State Department officer Edwin Plitt was appointed the American member; he had also served on the Interim Board.¹²⁷ The Mixed Board was supposed to be an independent judicial body, and each Allied representative was supposed to rule according to his conscience. The Mixed Board's first major crisis erupted in late 1955, when Malmedy Massacre convict Sepp Dietrich, who had originally been sentenced to death, was granted parole. When word of this symbolically significant release reached the United States, there was a major public outcry.¹²⁸

On November 3, Senator Estes Kefauver called Sepp Dietrich's release a "serious error" and called for a Senate investigation. The State Department in Bonn was startled by the implications of an inquiry into American war crimes policy. Ambassador Conant immediately attempted to contain the public relations damage and wrote Secretary of State John Foster Dulles that "U.S. public reaction Re Dietrich case has reached a point where it may endanger American-German relations to such a degree that I am bringing the matter to your personal attention." The State Department believed that "Any Senate investigation of this case, which would necessarily bring into question Allied policy on war criminals, could do great damage." Conant felt "it essential that a full

message be sent to Senator Kefauver. . . . Same statement should be to other Senators who have indicated interest.”¹²⁹ A November 7 memo from the State Department’s European Office recommended that “an officer of the Department, perhaps Mr. Murphy or the Acting Legal Advisor, should get in touch with Senator Kefauver’s office and offer to explain the foregoing considerations to the Senator before he takes further action towards an investigation of the Dietrich case.”¹³⁰ On November 8, Senator Kefauver wrote Secretary of State Dulles, “It is my firm conviction that a serious error has been made in the release of General Sepp Dietrich (Josef). I would urge to propose reconsideration of the matter while there is time yet to rectify the mistake.” It appeared that the State Department would be unable to head off this growing controversy: “I am sending an identical letter and reports mentioned to the Secretary of Defense and to the Chairman of the Armed Services asking that they look into the matter.”¹³¹

While the second phase of American war crimes policy failed to appease German veterans, it succeeded in infuriating many former American soldiers. Veterans of Foreign Wars Commander Joseph Lombardo supported Senator Kefauver’s call for a Senate investigation. More troubling, Lombardo called for the resignation of American Mixed Board Member Edwin Plitt and an investigation into why he had voted in favor of Dietrich’s early release: “It is the thought of this office that the reasons of the American member of the Mixed Board for voting favorably on the release of the Hitlerite Killer should be investigated and his resignation immediately forthcoming to wipe out the dishonor to the memory of our murdered comrades at Malmedy.”¹³² This request was especially problematic because the decisions of the Mixed Board, when unanimous, were final and not subject to the instructions of the members’ respective governments. By November 28, the controversy over Dietrich’s release was further fueled by American Legion National Commander J. Addington Wagner’s call for Edwin Plitt’s resignation.¹³³

Above all, the State Department wanted to avoid a public inquiry into the inner workings of the Mixed Board. Legal advisor John Raymond made this point in a November 29, 1955 memo. He offered to help sharpen the official justification for Dietrich’s release and urged the State Department to stress the independence of the American member: “I think the end of that paragraph should read substantially as follows: ‘The United States member of the Mixed Board is career minister Edwin Plitt,

a veteran Foreign Service officer. The members of the Board act independently in formulating their recommendations and are not subject to the instructions of their governments.’”¹³⁴ Once again, American war crimes policy was losing a two-front public relations battle and once again, an American diplomat was caught in the crossfire.

Ambassador Conant wrote to Secretary of State John Foster Dulles asking for his “personal attention” on the war crimes problem. According to Conant, the ongoing controversy surrounding the vote of the American member Edwin Plitt “has made effective functioning board difficult and is also damaging German-American relations.” The ambassador recommended that Dulles personally put this fire out with “Serious effort through personal conversation or otherwise to convince Wagner, American Legion, Murphy of VFW and Senator Kefauver that their criticism is unjustified.” Plitt’s role in the parole of Dietrich was “in accord with the policy of the U.S. Government.”¹³⁵ Conant sensed an impending blowback and believed that the United States had lost a great deal of face due to their mishandling of the war crimes question: “A failure to bring this fact out clearly in previous statements from Washington as well as failure to emphasize nature of parole and unfortunate first statement tending to place the blame on the Army has seriously embarrassed U.S. member of Mixed Board and thus embarrassed U.S. Government in its relation to the French, British as well as the Federal Republic.”¹³⁶ The duality in American war crimes policy was fast becoming indefensible.

In early December, a State Department brief on Dietrich’s parole was prepared for Secretary of State John Foster Dulles. The defense would not be based on the details of the individual case; instead, it would stress that parole, unlike clemency, is a conditional release. As State Department legal advisor John Raymond suggested earlier, Dulles would stress that the Mixed Board was “an independent body” whose rulings, when unanimous, were binding. If asked about the possibility of Plitt resigning, he would offer the following reply: “He was appointed like the other members, to exercise his judgment in formulating the Board’s recommendations, without being subject to governmental instructions.” Again, the Secretary of State was instructed to keep his responses general and stress the “independence” of the Mixed Board.¹³⁷

On December 10, 1955, Livingston Merchant, the State Department’s Assistant Secretary of State for European Affairs, wrote a secret letter to Ambassador Conant about the ongoing controversy over Dietrich’s

release. "We have been very much concerned about the public reaction in this country to the release of Dietrich. . . . It has, in fact, preoccupied a considerable number of us. We have been troubled, of course, about the effect of this controversy on our relations with the Germans and also about the attacks on Ed Plitt." Merchant argued that the State Department should "rest our defense of what we do about war criminals essentially on the procedures involved"—in other words, shift the debate away from the facts and stress the law and procedure upon which the decisions were based. According to Merchant, "The defense we are making of the Board has come down essentially that it is an independent body of men who make judgments on the basis of such considerations as seem wise to them in the circumstances. We are in no position to defend, or even to state, the criteria on which the board operates or the considerations which have been taken into account in a particular case such as the Dietrich case."¹³⁸ However, this defense was problematic in Edwin Plitt's case because he was a career employee of the agency responsible for American war crimes policy. Merchant recognized that "The very fact of his being a Foreign Service Officer to some extent opens up the way to a charge that, whatever the Convention says about his not being subject to instructions from this Government, he will in fact as a Foreign Service Officer carry out our political policy towards Germany and therefore be governed, in the absence of any demonstration that other factors are guiding his judgment, by our political policies towards Germany."¹³⁹ Merchant believed that "This fact and the German membership on the Board seems to us to open the way to an attack on the Board and the entire system as being nothing but a mechanism for carrying out a political policy of releasing war criminals, rather than for the administration of justice."¹⁴⁰ The Assistant Secretary of State warned the State Department to prepare for a Senate investigation.

On December 27, 1955, State Department legal advisor John Raymond advised Ambassador Conant not to go before the Senate Foreign Relations Committee to discuss American war crimes policy. The outcry over Dietrich had not died down, and the possible release of his comrade Joachim Peiper would soon compound the State Department's problems.¹⁴¹ On December 30, Merchant wrote Conant, "We were unaware that the Peiper case was already up for consideration and the leaks of the possibility of Peiper's release have now intensified the controversy greatly." Merchant conceded that the Dietrich release had gone very badly

from a public relations point of view—"Looking back, it seems clear that we have not put our best foot forward on the subject"—and warned that the Peiper parole would probably be opposed by the army: "While our relations with the people most directly concerned with the problem at the legal and public information level is good, I should be frank to say that there are people at the higher levels in the Pentagon who are not very sympathetic with the program, which may eventually be a source of difficulty."¹⁴² Merchant informed Ambassador Conant that during an upcoming trip to Washington, they should meet to discuss the ongoing war crimes problem. He also requested that the conversation be held behind closed doors—off the record. "The meeting which is being arranged with members of the interested Committees in substitution for a statement before the Appropriations Committee will provide one occasion to deal with this matter." Conant would also meet with the leaders of America's veteran groups in an effort to quiet them down.¹⁴³

The controversy over Sepp Dietrich's release dragged on into 1956 as the calls for Edwin Plitt's dismissal grew even louder. On January 3, Timothy Murphy, commander of the Veterans of Foreign Wars, called for Plitt's removal. Ironically, now the American Mixed Board member was being defended by prominent German Nuremberg critics like the Papal Nuncio, Bishop Fargo, who lavishly praised him in a letter to Secretary of State John Foster Dulles. "Having discussed this case on a number of occasions with Mr. Plitt, allow me to say that I have learned to admire him for his moral integrity and for his conscientious grasp of the issues involved." Urging the Secretary of State not to cave in to the growing pressure to remove Plitt, the Bishop wrote that he trusted "sincerely that pressure groups will not prevail in their demands. . . . In writing you in this matter I do so with the sole thought that injustice be not done to a red-blooded American such as I know Mr. Plitt to be."¹⁴⁴ Despite Plitt's popularity in Germany, the criticism of his actions in the United States continued to intensify.

On January 6, Minnesota Senator Hubert Humphrey asked Secretary of State Dulles to explain why the U.S. government had failed to prevent the release of Sepp Dietrich. Humphrey also protested the rumor of the impending release of Joachim Peiper. He pointed out that these beneficiaries of American generosity were among the Third Reich's worst war criminals: "When we come to consider murder, torture and general brutality, it is an entirely different matter, and it is the persons guilty of those

acts who are now benefitting from what amounts to a general jail delivery approved by the United States Government.”¹⁴⁵

On January 18, the State Department took notice of a small article entitled “The Problem of the Western Prisoners,” written by a CDU Deputy Hoefler and published in the CDU’s official press service, *Deutschland-Union Dienst*.¹⁴⁶ The article asked for the release of all German war criminals from foreign-controlled prisons. Although moderate in tone, it marked a new direction for Adenauer’s normally centrist party: “the CDU has up to now maintained considerable reticence on the general question of war criminals.” To Elim O’Shaughnessy in the U.S. embassy in Bonn, “The fact that the CDU has taken the initiative in the matter, in contrast to the usual practice of waiting to be pushed into it, is an index of the political importance which the party attaches to the question.”¹⁴⁷

On January 20, 1956, the British Foreign Office weighed in on the war crimes question. The British hoped to avoid another fiasco like the Sepp Dietrich parole: “Her Majesty’s Government wish to do everything possible to assist the Board in meeting public criticism, but they do not believe that the inner workings of the Board, which is an independent body, should be revealed.” The British felt that the publication of information justifying the paroles would further undermine the legal validity of the war crimes convictions: “Publication of the considerations underlying a recommendation of the Board could scarcely avoid the casting of doubt on the validity of the original convictions; this is expressly forbidden by the terms of the Bonn Conventions.”¹⁴⁸ The State Department continued to refuse to release the details of the Board’s decisions arguing that the Mixed Board was not an arm of the State Department, but rather “a quasi-judicial body, and that the purpose of giving its members freedom of action was to enable them to exercise an objective judgment based on the facts of the individual case.”¹⁴⁹

These legalistic justifications did little to dispel the impression that the Mixed Board was another strategic legalist shakeout mechanism. State Department International Relations Officer John Auchincloss’s suggested answer to critic Max Meron was very telling: “Here I would say that the Board is an independent body, that the members are not subject to instructions from their governments, and that there is no provision in the applicable procedures for the American authorities to approve or disapprove a unanimous recommendation of the Board.”¹⁵⁰ The State Department’s

legal justifications remained unconvincing to many Americans, and by early 1956, American war crimes policy needed a scapegoat. Mixed Board member Edwin Plitt would serve nicely. On January 24, 1956, the State Department announced that Plitt would be replaced on the Mixed Board by former New Hampshire judge and Senator Robert Upton.

The replacement of Plitt with a prominent jurist helped to restore some of the Mixed Board's credibility in the United States, but it had the opposite effect in West Germany, where Edwin Plitt had been regarded highly by his German colleagues. And why not? Plitt had certainly proved willing to carry out an accelerated parole system designed to release German war criminals. When the three West German members of the Mixed Board got word of his removal, they proposed protesting to Ambassador Conant: "The said members expressed the feeling that the action in transferring Mr. Plitt had been taken because . . . he had voted to transfer Dietrich from prison to parole status and that Plitt's removal was a reflection on the entire membership of the Board." The Germans were calmed by the British Board member, who advised them that any such protest would be "improper" without consulting their respective governments.¹⁵¹

In early March, the legal advisors from the State Department began to prepare for another public outcry over the release of Joachim Peiper. In a letter to John Auchincloss about their official position, State Department legal advisor John Raymond wrote, "I have a feeling we do not point up as precisely and emphatically as we should the difficulty in the situation." Raymond considered how to handle the public inquiries: "We cannot possibly tell others it is none of their business to ask such questions nor can we refer them to the Board for an answer. Perhaps we should even stress the fact that if such information is not forthcoming and if further decisions are rendered which cannot be explained and which have a violent reaction in this country, it may jeopardize the whole program."¹⁵²

Senator Robert Upton arrived in Germany in late March 1956 to assume Edwin Plitt's seat on the Mixed Board. Things got off to a bad start for the senator from New Hampshire. Once the Mixed Board reconvened, Upton was shocked to learn that his colleagues had already granted Joachim Peiper parole six months earlier (on October 5, 1955). The only thing standing between Peiper and his freedom was the Mixed Board's approval of his parole plan. Although Senator Upton accepted Peiper's release as a *fait accompli*, he immediately set about distancing himself from the decision. In a letter to State Department legal advisor John Raymond,

Upton commented, "on examining the records . . . the Board had unanimously voted that Peiper be declared eligible for parole now and that he be released upon the submission to the Board of an acceptable parole plan." He made it very clear to the State Department that he would not assume responsibility for Peiper's release: "In any press release by the Department concerning this case I expect you to make it clear that the action authorizing the parole of Peiper was taken before I became a member of the Board." More ominously, Senator Upton expressed strong misgivings about the Mixed Board's view of the parole process: "The other members of the Board have had no experience with parole as it is not recognized in their countries." He believed that his European colleagues saw parole for what it was, a "device" created to release war criminals.¹⁵³

Senator Upton requested some instructions from the State Department on these questions. Legal advisor John Raymond appears to have been startled by the news that Peiper would soon be released. In a letter to John Auchincloss, Raymond wrote, "The attached letter from Senator Upton gives me much concern. Apparently Peiper may be released any day." He "had hoped that the action had not gone so far but Senator Upton could stop it, but apparently he feels precluded from raising any objection." Raymond also expressed his irritation with Edwin Plitt's recent statements to the press that he thought Peiper was the one responsible for the Malmedy Massacre: "I am not clear how he reconciles that with his action in voting for his parole. I wonder if he forgot that the nature of the offense is one of the elements to be considered in connection with granting parole."¹⁵⁴

Conrad Snow, the former member of McCloy's Peck Panel, was now serving as State Department legal advisor for the Far East, and he was responsible for the Japanese war criminals that remained in U.S. custody. On April 10, Snow responded to Senator Upton's query about parole procedure; he agreed that "the nature of the crime was the most important single element in passing on the question of parole" and believed that "some of the offenses before us have been so heinous that we have not as yet brought ourselves up to granting any parole at all. Maybe we shall change our minds, as time passes on, for we make no unalterable negative decisions, but for the present at least, they are in the 'hard core.'"¹⁵⁵ Although the State Department had sought an independent jurist to boost the Mixed Board's reputation, the new American member was turning out to be more than it had bargained for.

To further complicate matters, on April 12, 1956, the U.S. Army expressed deep misgivings about Joachim Peiper's parole. Army Assistant Judge Advocate General, Major General Claude Mickelwait, took grave exception not only to Peiper's release but also to Edwin Plitt's statements about the U.S. Army's conduct in the Dachau trials: "We are somewhat concerned over certain comments made by Mr. Plitt therein since we believe it reflects unjustly on the Dachau War Crimes Program."¹⁵⁶ Mickelwait charged that both Plitt and the Mixed Board had exceeded the scope of their legal mandate in the Malmedy cases: "While carefully avoiding any direct admission, Mr. Plitt leaves no doubt that the Interim Mixed Board weighed the evidence adduced at the trial, in direct violation of its charter." Finally, the Assistant Judge Advocate General leveled his most serious charge—that the Mixed Board had acted like an appellate or review court. "Mr. Plitt is not only admitting that the Interim Mixed Board illegally constituted itself as an appellate court, but also arrogating to the board an unwarranted conscience, while clearly implying lack of competence and justice on the part of the trial courts." He pointed out that this was "a favorite tactic of those who have found it expedient to attack the German war crimes program."¹⁵⁷ Although the State Department vigorously denied the army's charges, they were preparing for the fallout over Peiper's imminent release.

Because Joachim Peiper had now served ten years, he could be released on parole due to the recent ruling that granted parole on a death sentence after ten years' imprisonment. In mid-April 1956, the Mixed Board received Peiper's parole application—he had been offered a job by Porsche, the German automotive company. His parole plan was approved by the Mixed Board by a vote of five to one, the lone dissenting vote coming from the American member, Robert Upton. He stated his reasons in a letter to State Department legal advisor John Raymond: "I objected to the granting of parole on the ground that such action would be premature. The Board approved the parole plan and recommended that parole be granted by a vote of 5:1. I have completed the minority report and will forward you a copy as soon as the reports in this case are forwarded to the Competent Authority."¹⁵⁸ In his minority report, Senator Upton wrote: "I began an intensive study of the case from which I concluded that Col. Peiper ought not presently to be granted parole. The records before me clearly established that the shooting down of prisoners of war and civilians during the Ardennes offensive was confined to the combat group

commanded by Colonel Peiper.”¹⁵⁹ Upton cited the opinion of Army General Thomas Handy: “My review of the case leads to the same general conclusions. In my opinion Col. Peiper must be held primarily responsible for the violations of the laws and customs of warfare committed by his combat group. Consequently I am convinced that his release on parole at this time would be premature.”¹⁶⁰ The new American Mixed Board member also objected to the specifics of Peiper’s parole plan: “The plan calls for his employment in the sales department of the Porsche Company. . . . Because of the widespread and intense feeling for and against Col. Peiper, it is inadvisable that he be employed in a position where he may be in contact with the general public including foreign customers of the Porsche Co.”¹⁶¹ Joachim Peiper’s case history provides a telling barometer of the changes in American war crimes policy:

July 16, 1946—sentenced to death. May 18, 1948—Supreme Court denied petition for a Writ of Habeas Corpus. Apr. 8, 1949—death sentence confirmed. Aug. 29, 1950—commutation of death sentence denied. Jan. 30, 1951—death sentence reduced to life imprisonment. May 12, 1954—life sentence reduced to 35 years. Dec. 9, 1954—clemency denied. Oct. 5, 1955—clemency denied, but Mixed Board voted unanimously that Peiper be declared eligible for parole, his release pending the Board’s approval of his parole plan.¹⁶²

On May 8, 1956, Senator Upton wrote State Department legal advisor John Raymond to discuss the progress of the Mixed Board. Upton continued to express dismay over the Mixed Board’s parole procedure—“I have abandoned any hope of formulating rules of procedure acceptable to the Board.” Senator Upton objected to his colleagues’ use of the parole procedure as a mechanism to release war criminals irrespective of their deeds. “A majority of the Board apparently are disposed to hold that on applications for parole by a war criminal eligible for parole the nature of the offense is not considered in determining whether, if parole is granted, the applicant would have been sufficiently punished. In other words, these members hold that if eligible for parole a war criminal has expiated his crime.” Robert Upton rejected this as absolutely improper: “This is contrary to the procedure of Parole Boards generally, but probably conforms to the procedure which was here in the Interim Mixed Board.” Senator Upton was not optimistic: “We are making rather slow progress

and, as you will see, there have been few unanimous recommendations."¹⁶³ On May 10, John Raymond wrote Senator Upton for another progress report, which he passed on to International Relations Officer John Auchincloss: "He was able to make use of this information—of course without attributing it to you or the Board—in a way that I hope will dispose of the inquiry."¹⁶⁴

Earlier in May, Senator Upton had informed the State Department that Edwin Plitt's removal had increased "the pressure on Adenauer for action looking to the release of all war criminals." According to Upton, there were now only 33 inmates left in Landsberg Prison, and "These constitute a 'hard core,' the release of whom, either through clemency or parole, is likely to extend over years. We also have now 190 parolees, the majority of whom will not be entitled to a conditional release before 1960."¹⁶⁵ Although the Allies had granted broad concessions to Konrad Adenauer on the war crimes question, he was still not content. Between January 31, 1953 and January 31, 1955, the United States had released 82 percent of the convicts in Landsberg Prison, and the European Allies were pursuing clemency programs of their own.

TABLE I German War Criminals in Captivity¹⁶⁶

<i>In Confinement</i>	<i>8/31/53</i>	<i>1/31/55</i>	<i>% Released</i>
U.S. Army	281	34	87.9
U.S. Embassy (Nuremberg)	31	7	77.4
British (Werl)	82	27	67.0
French	72	18	75.0

Prior to West German Chancellor Konrad Adenauer's visit to Washington in June 1956, the State Department reported a conversation with the West German Foreign Minister, who informed them that Adenauer wanted the United States to "speed up releases from Landsberg and (2) Relaxation conditions those now on parole." The German diplomat "mentioned the shock felt German Circles when Plitt removed; thought Plitt's government should have supported him; said removal under pressure home politics had seriously undermined confidence in independence of Board." It was now clear that the West German government would not rest until all war criminals in Western captivity were released. Even though the United States had released all but a handful of war criminals, the foreign minister claimed to

be "gravely concerned" over the "slow progress Mixed Board; at present rate problem will last many years."¹⁶⁷

Anticipating Chancellor Adenauer's request for more war criminal releases, State Department officers John Raymond and John Auchincloss prepared a position paper entitled "German War Criminals Held By the United States." The State Department suggested that the United States take the position that the Mixed Board should review each war crimes case on an individual basis. Of the thirty-two war criminals left in American custody, twenty-six were under the control of the U.S. Army, and only six were under State Department control. While the State Department was prepared to release more war criminals, they ruled out an unconditional amnesty because it would "require a revision of the Settlement Convention [Articles 6 and 7 of the Bonn Agreements, relating to war criminal sentence validity]. Considering the feeling in Congress last winter about the parole of Dietrich and the possible parole of Peiper, it is hardly likely that there would be any support in the Senate or the House for such a revision."¹⁶⁸ However, it was the resignation of Senator Robert Upton that opened the way for a new approach to the war crimes question.

On June 11, 1956, Robert Upton announced his resignation after less than three months on the Mixed Board. "While the number of war criminals convicted by American tribunals now held at Landsberg is relatively small, it is unlikely that they will be released by 1960, especially as some are serving life sentences." In Upton's opinion, the United States would be overseeing German war criminals for years to come: "many parolees will not be entitled to conditional release until 1962 or later."¹⁶⁹ Once again, he expressed dissatisfaction with the German Mixed Board members' view of the parole process as a shake-out mechanism: "A majority of the Board apparently are disposed to hold that on applications for parole by a war criminal eligible for . . . parole the nature of the offense is not to be considered in determining whether . . . the applicant would have been sufficiently punished."¹⁷⁰ Robert Upton made it clear that the State Department's description of the Mixed Board as a traditional parole board was very inaccurate: "These members hold that if eligible for parole a war criminal has expiated his crime. This is contrary to the procedure of Parole Boards generally. . . . In Germany the Board has come to be regarded as an instrumentality for the release of war criminals rather than an agency for the exercise of clemency or parole in deserving

cases. This view has to some extent been reflected in the attitude of the German members of the Board.”¹⁷¹ According to Senator Upton, this “resulted in frequent disagreements among the members of the Board.”¹⁷²

When news of Senator Upton’s resignation reached the United States, the American Legion loudly protested. J. Addington Wagner, the Legion’s National Commander, wrote Secretary of State John Foster Dulles: “To the very great credit of Senator Upton, he is reported to have cast the single negative vote which blocked the release of Peiper. Now Senator Upton, unfortunately from the American standpoint, has terminated his service on the Board.” Wagner warned that the Secretary of State should exercise “great care” in selecting the new Mixed Board member. In closing, the American Legion Commander reminded Dulles of some basic facts that were being obscured by legalistic debates over parole procedure: “Those who may be inclined to sympathize with Peiper would do well to recall that the American soldiers at Malmedy were afforded no trial and no opportunity to defend themselves. They cannot appeal the sentence given them by Peiper’s command.”¹⁷³

In late July 1956, Senator Upton met with State Department legal advisor John Raymond to discuss the future of American war crimes policy. Upton offered a plan that would rid the United States of the war crimes problem once and for all by marrying a clemency program to the existing parole program. Once paroled prisoners demonstrated “that they are once again law-abiding citizens able to behave themselves,” their sentences would be reduced to time served. The former Mixed Board member saw the program as “one of gradual parole for prisoners, and gradual clemency for those on parole.” He “thought it was important for his successor to understand a situation that has developed and which will certainly be a problem with which he will be confronted.” Raymond admitted that both the IMPAC Board and the Mixed Board were following a flawed parole procedure: “Apparently the Interim Board and the present Board prior to the arrival of Senator Upton proceeded on the theory either that the nature of the offense had no bearing on parole or that it had a bearing merely as reflecting the character of the prisoner and his ability to readjust in society.” Although Senator Upton had aggressively argued against this view, he regretfully informed the State Department that he could not convince the other Mixed Board members to revise their procedure: “he has been unable to convert any of the members of

the Board to this point of view, but he believes it is absolutely sound and should be held by the U.S. member."¹⁷⁴

On July 31, Robert Upton met with State Department officers John Raymond and John Auchincloss and the new American Mixed Board member, Spencer Phenix, in Washington. This time the Americans were taking no chances. Phenix was a veteran State Department officer who would prove to be a master of strategic legalism. From the very beginning, Phenix stated that American war crimes policy needed a scapegoat and he was happy to serve. "Mr. Phenix emphasized that, since the members of the Mixed Board were independent of government instructions, there was an arm's length relationship between the Department and the American member of the Board." Phenix suggested that the State Department should "refer inquiries to him," and "should say little, if anything, in answer to inquiries which it might receive." Phenix understood that the objective of the final phase of American war crimes policy was to release the remaining war criminals. He was prepared to go to far greater lengths to free war criminals than his predecessor Robert Upton and even Edwin Plitt.¹⁷⁵ On September 7, 1956, Senator Upton spoke to his replacement about "the problems which troubled me." Upton wrote: "I left with feelings of regret, but I would not choose to continue as a member of the Mixed Board reviewing the same cases again and again, especially as the work would lose interest for me." He hoped that eventually "the German government will decide to assume responsibility for these prisoners upon terms acceptable to us."¹⁷⁶ However, this would be nearly impossible without reopening the question of the war crimes trials' legal validity.

The Japanese section of the State Department continued to press Washington to release the remaining Japanese war criminals in American custody. However, Ambassador Allison's 1954 proposal for a political solution to the war crimes question in Japan had been rejected by Secretary of State John Foster Dulles, with help from State Department legal advisors John Raymond and John Auchincloss. A November 9 memo defined the problem: "How can what the Japanese desk considers the serious damage done to Japanese-United States relations by the continued U.S. retention of Japanese war criminals be eliminated in such a way that United States relations with West Germany . . . will not be adversely affected?"¹⁷⁷ Once again, the State Department's Japanese bureau proposed that President Eisenhower parole the remaining ninety Japanese war criminals in Amer-

ican custody after each had completed ten years of his sentence. Although Ambassador Conant recommended that "the United States divest itself of the custody of the German war criminals as soon as possible," he warned that "the German war criminal issue is still a highly explosive political question"; any preferential treatment accorded to Japanese war criminals would create a "problem of the first magnitude in U.S.-German relations." Conant pointed out that accelerated releases would require a Presidential recommendation.¹⁷⁸

The State Department's Office of Political Affairs in Bonn issued a confidential memo on the objectives of the final phase of American war crimes policy on December 12, 1956. The memo assumed that "steps should be taken to eliminate the difficulties which the war criminal situation is causing in our relations with the Federal Republic of Germany and with Japan" and offered two types of solutions, those "to which no legal barriers exist" and those that "could not be put into effect without formal amendment of existing agreements and treaties." While the American President could unilaterally release war criminals in Japan, the State Department noted that legally, things were not quite so simple in Germany: "The Settlement Convention provides rather elaborate machinery . . . for dealing with war criminals while the Japanese Peace Treaty merely reserves to the United States, as sentencing authority, the right to decide upon recommendation of the Japanese Government." Any changes in the Settlement Convention would require the consent of both the Allies and the U.S. Senate, and "To obtain approval of the Senate would present difficulties of such consequence that it seems desirable to adopt a course of action not predicated on such requirement."¹⁷⁹ The State Department memo concluded that if the United States wanted to be protected from domestic criticism "and preserve our position that the trial and sentencing of these criminals was eminently justified then the emphasis may shift from end result to method with a consequent necessity for as similar procedures as possible in order to avoid any dispute" that either Japan or Germany received "a procedure more favorable to one of the two countries concerned."¹⁸⁰ The United States would continue to review the sentences on a case-by-case basis, and those pressing hardest for a war crimes amnesty would be reminded that the remaining prisoners were "the hard core . . . found guilty of heinous crimes."¹⁸¹ The memo made the point that under the Mixed Board, the terms of parole for war criminals were extremely favorable; "They would not in general be considered eligible for parole or release if normal standards were applied."¹⁸²

On February 8, 1957, newly appointed American Mixed Board member Spencer Phenix offered his appraisal of American war crimes policy in two memos. Memo A, "a statement of the present position as I see it," pointed out that while the United States had reduced the number of war criminals to 23, they were still responsible for overseeing the ongoing paroles of 198 others. Although many had been freed, these had been conditional, probationary releases. The French and British war criminal releases were far less conditional and did not require either nation to provide ongoing parole supervision. But in keeping with America's "modern penalogical principles," "the Board would continue in operation until the deaths of the six individuals serving life terms, or, barring prior death, until 1985." Phenix saw nothing to be gained by such a "dull and profitless operation" as the continued incarceration of *Einsatzkommandos* and other major war criminals originally sentenced to death: "It is not easy to see what political, practical or sociological advantage would be realized by continuing so empty an operation until say 1985." Although Phenix considered turning the prisoners over to the Federal Republic, he pointed back to the sentence validity question, "the German Government has not yet recognized the validity of the convictions of those persons and that non-recognition has constituted a bar to the transfer of any penal responsibility to the German authorities." Memo A recommended that "the time has come to re-examine the present parole procedure with a view to its termination within a reasonable period."¹⁸³

Spencer Phenix's Memo B was an example of strategic legalism *par excellence*, or as he put it, "a statement of what I am prepared to do as the American member of the Mixed Board to facilitate a relatively prompt settlement of the problem." With that Phenix called for the "rapid liquidation of the war crimes problem" and suggested the continued reliance on the strategic legalists' favorite post-trial, nonjudicial "device"—yet another reduction in the parole requirements. If that failed to win approval, he suggested transferring authority over the prisoners to the Federal Republic of Germany.¹⁸⁴ If the Germans' only objection to accepting custody of the prisoners was the sentence validity question, Phenix devised a way around this longstanding impasse that allowed both nations to save face: "it should not be difficult to incorporate in any exchange of notes recording agreement between the two governments some saving paragraph which would cover that point."

Phenix, an old hand at the strategic legalist game, offered an illustra-

tion of what he meant by a “saving paragraph”: “Many years ago I negotiated the settlement agreement between British and American Governments covering the ‘Disposal of Certain Pecuniary Claims Arising out of the Recent War’, signed 19 May 1927. The discussions centered around cargo and ship seizure, detentions and confiscation. . . . In those negotiations the British Government found the subject matter at least as sensitive as the German Government finds the war criminal problem.” To get around this impasse, Phenix “drafted notes exchanged recording the agreement. . . . These provided that ‘the right of each government to maintain in the future such a position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to claims covered by the immediately preceding paragraph is fully reserved, it being specifically understood that the juridical position of neither government is prejudiced by the present agreement.’ ” At the time, the British believed that this solution provided them with “sufficient political insurance, and I do not see why the German Government could not accept a similar paragraph for the same purpose.”¹⁸⁵ In other words, both West Germany and the United States could justify the final war criminal releases however they saw fit.

If the Germans proved unwilling to take custody of the war criminals, Memo B suggested hiring German prison authorities to oversee the remainder of the sentences. Phenix believed this “would enable the Germans to accept physical custody during ‘*Untersuchungshaft*’ without admitting the validity of the convictions of the American military courts but it is a cumbersome procedure and the least attractive of the alternatives I have been able to think of.”¹⁸⁶ In Memo B, the new American Mixed Board member stated very plainly, “I am prepared to suggest to the Mixed Board the adoption of the following procedure for the rapid liquidation of the war crimes problem as it affects the 296 persons for whom the United States is still responsible.” Under the Phenix plan, once the Mixed Board received “an appropriate ‘petition by or on behalf of a person’ now on good conduct time release,” the Mixed Board could recommend “the reduction of the sentence of such person to actual time served in prison, on parole, and on good conduct time.” The Mixed Board would then terminate the sentence “as of the date when the Competent Authority acts pursuant to the Board’s recommendations.” Phenix believed that the German Government “will be so pleased with the almost immediate termination of the sentences of 204 of the persons now on parole and good con-

duct time release that they will be willing to accept without further argument or discussion responsibility for the 'custody and carrying out of the sentences' of the remaining 92."¹⁸⁷

In a cover letter attached to the two memos, the American Mixed Board member stated very plainly that he was prepared to shoulder any and all blame and responsibility for his action: "I feel that the Department, in its own interest, should keep its hands officially out of the war criminal problem and treat it as within the exclusive jurisdiction of the Mixed Board" and "disclaim all responsibility for the decisions of the American member, scrupulously refraining from attempting to explain or justify his action." Phenix noted that although the Mixed Board members were supposed to serve as independent jurists "expressly not subject to the instructions of their governments," he believed that "there is nothing in the Convention or in good sense which prohibits agreement between the government and its appointee." He would be returning to Washington soon, and he requested a meeting with State Department legal advisor John Raymond so that, "Without in any way passing the buck of responsibility back to the Department . . . I could be given an informal indication that the procedure I have suggested in Memorandum 'B' is not unacceptable per se or inconsistent with the Department's basic policies. . . . I hope I can answer all your questions and that between us we can reach substantial agreement on what can and should be done to get this bothersome problem quietly out of the way where it will no longer complicate international relations."¹⁸⁸ Raymond attached a handwritten note to the memo: "Very interesting food for thought. My preliminary reaction is to agree with the first three pages of Memo B."¹⁸⁹

On March 11 and 12, Spencer Phenix met with John Raymond and State Department officers Raymond Lisle, Robert Creel, Richard Kearney, and Knox Lamb in Washington to discuss speeding the release of the war criminals according to the plan outlined in Memo B. In the memorandum of their meeting, Phenix pointed to the difference in Allied and American parole standards. Under the British and French systems, the prisoners were more or less unconditionally released after ten years in prison. Under the American system, parolees followed designated plans and maintained contact with their parole officers. If the parolee failed to meet the terms of his release, he was supposed to be subject to rearrest. The American Mixed Board member believed that the United States should modify its parole standards to match those of the British and

French. The United States would quickly and quietly end their war crimes program on an especially inauspicious note, "by reducing the sentences of the parolees after they had spent sufficient time on parole to establish the fact of their rehabilitation." Phenix informed the State Department officials that it was "his intention to propose to the Board" yet another plan to offer parolees new opportunities to have their sentences reduced to time served.¹⁹⁰

The latest strategic legalist mechanism came in the form of "an appropriate petition" stating that the "ultra hardcore" convicts had been "rehabilitated." Although the standards were supposed to vary according to each prisoner's legal status, under Spencer Phenix's direction, the Mixed Board would reserve the right to "recommend reduction of the sentence of such person to actual time served in prison and on parole." Phenix closed the discussions by stating "that in view of his independent status as a member of the Mixed Board he was not seeking the Department's agreement or consent to these plans." However, Phenix did ask for a wink and a nod, "so as to avoid causing any conflict with policy which the Department might have under consideration." After some discussion of the "mechanics by which the plans of Mr. Phenix would be put into operation," the State Department representatives would neither "approve nor disapprove the proposed plans." However, they added "that the plans did not appear to give rise to any conflict with Departmental policies."¹⁹¹

The German Foreign Office had already informally raised the question of the war criminals with an American State Department officer in Bonn in February 1957. Richard Balkan of the German Foreign Office asked Robert Creel of the State Department if the United States was "considering any steps to resolve this problem from our own standpoint" and told him that they had received reports that the British and French would release their last war criminals in a matter of weeks. When Creel asked the German diplomat "whether he was bringing this matter up on his own initiative or under instructions from a higher authority," Balkan replied that "the Embassy had received a communication from the Foreign Office suggesting that the matter be discussed informally with the Department on the basis of certain specific points." He handed Creel a typed memorandum from the German Foreign Office entitled, "War Criminals still in custody of the American authorities in Landsberg." The memo stated that the British and French would soon release their last prisoners and presumed that "the US government has also a certain

interest in bringing the whole problem of the prisoners to a satisfactory solution, which would relieve the relations between the American and the German peoples from a certain burden still existing." The Germans proposed that the United States "shorten or dissolve the whole parole system at a proper time by bi-lateral negotiations, in order to abolish an institution which is not in accordance with German law" and requested a "general pardone [sic.] for all German prisoners in American custody or a transfer of all prisoners to the German legal authorities could now be taken into serious consideration."¹⁹²

From Germany, Spencer Phenix wrote to State Department legal advisor John Raymond in Washington on April 17, 1957 to inform him of "developments since I was in Washington last month . . . everything seems to be proceeding smoothly in the directions I indicated." During the Mixed Board's April 10 meeting, Phenix had presented his plan to the German members: "On the 11th, after very minor modifications in the suggested procedures, the Board unanimously adopted the resolutions necessary for the implementation of the plan." He was "entirely satisfied by the action taken by the Board which, I feel, has now done its part in pointing the way to a practicable solution of the problem."¹⁹³

Spencer Phenix was a one-man war crimes fixer. Anticipating criticism from the U.S. Army, Phenix spoke to Army Judge Advocate General Rieger about the Mixed Board's unanimous decision to release Joachim Peiper. "In this controversial area I dislike to quote anyone, but I can safely say that I found no opposition to the action taken by the Board." Phenix believed that the army, like the State Department, would be happy to have a scapegoat: "I think the Board's action was something of a relief since being unanimous it has the result of confronting them with recommendations which, under the terms of the Bonn Convention, are binding on the Commander-in-Chief, thereby relieving him of all responsibility." Again, Phenix offered to take the fall if necessary. "They agreed that the Board, as a Board, and particularly I myself as the U.S. member, had shouldered a considerable responsibility however, but we are all hopeful that no controversial publicity will develop."¹⁹⁴

The American Mixed Board member also met with representatives of the Heidelberg Juristenkreis, the war crimes lobbying group led by Eduard Wahl and Otto Kranzbühler. "What really concerns the Heidelberg authorities seems to be their continued responsibility for the Landsberg prisoners," he wrote. "The Heidelberg Group expressed the opinion

that if the Germans refused to accept unqualified custody the next best solution would be to negotiate an agreement whereunder Germany assumed all operational responsibility for the non-paroled prisoners.” Phenix told John Raymond that the Mixed Board would make no public announcement of Joachim Peiper’s release and “expressed the hope that the Foreign Office will also refrain from publicity at this time. The disadvantages of publicity were pointed out to me by the Heidelberg authorities who quickly agreed and, I am sure, the Department is of the same opinion.”¹⁹⁵

In late April, Richard Hagan, the U.S. parole official in Germany, wrote to the State Department legal advisor to report that there were only 18 prisoners remaining in Landsberg Prison and 193 on parole. Hagan believed that “This problem is well within manageable proportions although much work remains e.g. Drafting orders to carry out the recently adopted policies of the Mixed Board with reference to parole terminations and ending of good conduct status.”¹⁹⁶ On May 13, 1957, Spencer Phenix reported to John Raymond that the sentences of 74 individuals paroled on good conduct release had been “reduced to time already served.” On July 2, Phenix updated the legal advisor on the Mixed Board’s progress. Under his Memo B plan, the United States had reduced their case load from 300 to 148; “Of the 148 remaining American cases 15 are confined in Landsberg, four are on medical parole, one is on good conduct release and 128 are on parole.” Phenix estimated that “the number of ‘hard core’ cases is nine.”¹⁹⁷

In December 1957, President Eisenhower abolished the Japanese war crimes parole and clemency board and transferred authority to the U.S. ambassador in Tokyo and a “responsible non-political Japanese Board to review application for parole of prisoners now in confinement.” According to a secret State Department cable, a similar offer had been made to the West German government: “Chapter 1, Article 6, paras 4 and 5 Settlement Convention contemplate transfer of custody of war criminals to German authorities and US is prepared to make immediate transfer if Germans will accept custody. . . . If Germans wish, we would be prepared to raise with other signatories Bonn Conventions possibility amending Settlement Convention by abolishing Mixed Board and replacing it with a German Board along the lines proposed for Japanese.” However, once again, the validity question posed a stumbling block: “US cannot agree to any course of action which would bring into question validity of trials of

war criminals or sentences imposed on them.”¹⁹⁸ The State Department in Bonn responded with a secret cable to the Secretary of State. The ambassador did not believe that the action in Japan would have much of an impact on the situation in Germany. By the end of 1957, only 4 convicts remained in Landsberg and 36 remained on parole. “The four remaining prisoners constitute the ultimate hard core and Phenix believes it highly improbable Board will ever unanimously recommend parole for them.”¹⁹⁹ However, Phenix would find a way to release the “ultimate hardcore” by the spring of 1958.

The last four German war criminals remaining in U.S. custody were not ordinary war criminals; in fact, they made the men of *Kampfgruppe* Peiper look like choirboys. During their trial, the prosecution took only two days to present its case, which consisted entirely of the execution squads’ reports from the Soviet Union. A former Lutheran clergyman, Ernst Biberstein headed Sonderkommando 6 (part of Einsatzgruppen C). While serving in the Soviet Union, Biberstein admitted, “I personally superintended an execution in Rostov which was performed by means of a gas truck. . . . The truck was then driven to a place outside the town where members of my kommando had already dug mass graves.” Adolf Ott was equally candid: “I have already said . . . every Jew who was apprehended had to be shot. Never whether he was a perpetrator or not.”²⁰⁰ On April 14, 1948, Ernst Biberstein, Klingelhoef, and Adolf Ott were sentenced to death. The Peck Panel spared their lives and reduced their sentences to life in prison during their 1951 review of the *Einsatzgruppen* case.²⁰¹

On April 30, 1958, Spencer Phenix wrote to State Department legal advisor John Raymond to inform him of the Mixed Board’s recent action in the four “ultimate hardcore” American war crimes cases. Due to the extreme nature of the defendants’ crimes, the Mixed Board could not easily grant them parole. However, because the prisoners had served more than ten years, they were officially eligible for parole under the newly reduced criteria. During the April 29, 1958 meeting of the Mixed Board, the German Foreign Office presented parole requests for the final four prisoners at Landsberg. While the Mixed Board “unanimously decided to deny the parole requests,” they did move “to approve the individual clemency requests with the result that it was recommended unanimously that the sentences of the four be reduced to time served.” The Mixed Board submitted their formal recommendations to the U.S.

ambassador and the U.S. Army. Phenix informed Raymond that the United States had only 31 parolees left under American jurisdiction. The Mixed Board had already received the “appropriate petitions” from 269 convicts and reduced their sentences to time served.²⁰²

On May 6, Secretary of State John Foster Dulles received a cable from the U.S. Embassy in Bonn announcing that “As a result of unanimous recommendations by Mixed Board, sentences of four remaining prisoners confined Landsberg (three Embassy Biberstein, Ott, Sandberger, one Army Brinkmann) have been commuted to time served. Planned release prisoners May 9. Following statement will be issued to press 1600 May 9. Begin Text: ‘The last four prisoners confined at the war crimes prison at Landsberg were released today following clemency action.’ ” On May 7, John Raymond wrote to offer Phenix “congratulations on the conclusion of a fine job.”²⁰³ The State Department legal advisor added that the United States had also reduced the number of war criminals imprisoned in Japan from 50 in 1957 to 18 in 1958.

On May 9, 1958, the gates of Landsberg prison swung open for the final time as the last four German war criminals in American custody were released.²⁰⁴ On May 13, Spencer Phenix reported to John Raymond: “It is only fair to say that circumstances played a more significant part than I did. In any case it is pleasant to feel that this diplomatic pebble has been removed from the State Department’s shoes.”²⁰⁵ A few weeks later, Raymond offered Phenix “his sincere congratulations on the very capable manner in which you have discharged an exceedingly difficult and delicate assignment.”²⁰⁶ Spencer Phenix had found the final solution to the American war crimes problem.