Universiteit
Leiden
The Netherlands

The Nuremberg Military Tribunals and the origins of International Criminal Law

Heller, K.J.

Citation
Heller, K. J. (2011, June 16). *The Nuremberg Military Tribunals and the origins of International Criminal Law*. Retrieved from https://hdl.handle.net/1887/17757

Version:	Not Applicable (or Unknown)
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/17757

Note: To cite this publication please use the final published version (if applicable).

Chapter 15: Aftermath

INTRODUCTION

Peter Maguire has written that 1949 inaugurated a "second phase" of U.S. war-crimes policy, one in which "American and West German leaders fashioned two American policies— one public and one private. The public policy was designed to defend the legal validity of the American trials from widespread German attack, while the private policy sought to release war criminals as quickly and quietly as the political and legal circumstances would allow."[1] As this chapter explains, that "private policy" led to what can only be described as the complete collapse of the U.S.'s commitment to the NMT trials. When those trials drew to a close in April 1949, many of the 142 convicted defendants were facing execution or significant prison sentences: 24 had been sentenced to death; 20 had been sentenced to life; and 18 had been sentenced to more than 20 years. A mere six years later, however, only 12 of the 25 death sentences had been carried out and only seven of the prisoners serving sentences of 20+ years remained in prison. Indeed, the last NMT defendant would walk out of Landsberg Prison a free man in 1958.

The chapter is divided into three sections. Section 1 recounts the events that preceded John J. McCloy's appointment as High Commission of Germany in June 1949, focusing on General Clay's review of the NMT convictions, the deactivation of the OCC, and Tribunal IV's surprising decision to reconsider its judgment in *Ministries*. Section 2 then discusses McCloy's creation of the Advisory Board on War Criminals, which likely violated Control Council Law No. 10, and his decision in mid-1951 to grant clemency to the overwhelming majority of the convicted NMT defendants. Finally, Section 3 explores the events that followed McCloy's clemency decisions, focusing on the work of the U.S.-German Interim Mixed Parole and Clemency Board and its permanent successor.

I. EVENTS PRECEDING MCCLOY'S APPOINTMENT AS HIGH COMMISSIONER

A. General Clay's Review

As discussed in Chapter 7, Article XV of Ordinance No. 7 provided that "[t]he judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review." Ordinance No. 7 did, however, vest considerable discretion in the Military Governor – General Clay – to modify a convicted defendant's sentence. Article XVII(a) gave the Military Governor "the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal," as long as he did not "increase the severity thereof." And Article XVIII provided that "[n]o sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor."

Between November 1947 and March 1949, General Clay reviewed the sentences in all of the NMT cases except *Ministries*, whose judgment was still not final when

[1] MAGUIRE, 210.

OMGUS was terminated and McCloy was appointed High Commissioner of Germany (HICOG). Clay confirmed all of the sentences imposed in eight of the 11 cases he reviewed: *Medical*, *Milch*, *Justice*, *Flick*, *Hostage*, *RuSHA*, *Einsatzgruppen*, and *High Command*. In each of the other three cases, he confirmed all of the sentences except one. In *Pohl*, he reduced Karl Sommer's death sentence to life imprisonment. In *Farben*, he reduced Paul Haefliger's two-year sentence to time served because his time in confinement had been incorrectly calculated. And in *Krupp* he made a very slight modification to the forfeiture order imposed on Alfried Krupp, clarifying that the order applied only to Krupp's real and personal property on the date of the Tribunal's judgment and sentence.[2]

Although Clay confirmed 23 of the 24 death sentences he reviewed, in each case he stayed the executions "[p]ending actions on petitions filed by the defendant with authorities other than the Office of Military Government for Germany"[3] – a reference to the fact that the condemned defendants in the three trials involving death sentences (*Medical*, *Pohl*, and *Einsatzgruppen*) immediately filed petitions for habeas corpus with the U.S. Supreme Court. On 16 February 1948, with Justice Jackson not participating and with Justices Black, Murphy and Rutledge "of the opinion that the petitions should be set for hearing on the question of the jurisdiction of this court," the Supreme Court denied the petitions filed by the defendants in the *Medical* case. Clay lifted the stays of execution on May 14 and the sentences were carried out on June 2.[4] The following year, on 2 May 1949, the Supreme Court denied the defendants in *Pohl* and *Einsatzgruppen* leave to file their habeas petitions; the vote was 4-4, with Chief Justice Vinson and Justices Reed, Frankfurter, and Burton concluding that "there is want of jurisdiction," and Justices Black, Douglas, Murphy, and Rutledge arguing that "argument should be heard… in order to settle what remedy, if any, the petitioners have."[5] As discussed below, because he was set to resign as Military Governor less than two weeks later, Clay never lifted the stays of execution in *Pohl* and *Einsatzgruppen*, turning that responsibility over to McCloy.

B. Attacks on the War Crimes Program

In late 1948, Clay confessed regret that his lot as Military Governor was "to have… to sign many death warrants and to approve many life imprisonments."[6] His willingness to confirm nearly all of the NMT sentences is thus particularly remarkable, because opposition to the U.S. war-crimes program – from Germans and Americans – had become particularly acute by early 1948, when he began to review them.

Attacks on the war-crimes program were, of course, nothing new. In America, Chief Justice Harlan Fiske Stone had famously denounced the IMT in January 1946 as a "high-grade lynching party in Nuremberg" that presented a "false façade of legality,"[7] and in July 1947 Congressman Dondero had attacked Patterson, the Secretary of War

---

[2] XV TWC 1144-45.
[3] Id. at 1145.
[4] II TWC 330.
[5] V TWC 1256. Justice Jackson once again did not participate in the decision.
[6] Quoted in BUSCHER, 39.
[7] Quoted in Gary Jonathan Bass, *War Crimes and the Limits of Legalism*, 97 MICH. L. REV. 2103, 2105 (1999).

at the time, for failing to prevent "Communist sympathizers" from infiltrating the Army.[8] Meanwhile, in Germany, church leaders like Hans Meiser, the Evangelical *Landesbishop* of Bavaria, had spent much of 1947 agitating about supposed flaws in the Dachau trials.[9]

That said, 1948 proved to be a banner year for war-crimes critics. On February 11, Senator William Langer, a Republican from North Dakota, cabled Clay that he intended to introduce a resolution authorizing the Senate Judiciary Committee to investigate whether the Army's "conduct of trials and treatment of prisoners… have been in accordance with American concepts of justice."[10] Senate Resolution 39 – which Langer would not formally submit to the Senate until the following January – was specifically directed at the Malmedy trial, a Dachau trial in which 73 members of the SS had been convicted of murdering nearly 90 American POWs during the Battle of the Bulge in 1944. A number of the defendants had alleged during the two-month trial, which ran from May to July 1946, that their American captors had tortured them into confessing. Those allegations had been amplified by Willis M. Everett, Jr., the defendants' court-appointed American attorney, who claimed in 1947 that more than 80% of the confessions had been obtained illegally.[11]

By the time he received Langer's cable, General Clay was already mired in the Malmedy controversy. Indeed, the cable arrived just as two Army review boards were completing very different reports on the trial. Three days earlier, on February 8, a review board created by the Theater Judge Advocate, James L. Harbaugh, had submitted a very critical report, finding "much evidence" of improper investigative techniques, including the use of mock trials, and condemning procedural rulings by the tribunal that had limited the defense's ability to examine witnesses.[12] By contrast, three days after Langer's cable, on February 14, Clay's own Administration of Justice Review Board, which he had created in August 1947 to review the work of U.S. military courts,[13] submitted a report that largely exonerated the Malmedy trial. The Review Board acknowledged that mock trials, violence, and "stool pigeons" had occasionally been used to convince defendants to confess, but it "blamed this more on the tough caliber of the defendants than the intentions of the American investigators." It also found no evidence to support any of the other allegations of prosecutorial misconduct.[14]

Langer's cable, which included a request that Clay stay executions pending Senate consideration of Resolution 39, forced Clay to make a decision on the fate of the Malmedy prisoners. On March 20, he commuted 31 of the 43 death sentences to life

[8] See Chapter 2.
[9] FREI, 99.
[10] Quoted in JAMES J. WEINGARTNER, CROSSROADS OF DEATH: THE STORY OF THE MALMEDY MASSACRE AND TRIAL 198 (1979).
[11] BUSCHER, 38.
[12] WEINGARTNER,180-81.
[13] ANDREW SZANAJDA, THE RESTORATION OF JUSTICE IN POSTWAR HESSE, 1945-1949, 98 (2007).
[14] BUSCHER, 39-40.

imprisonment, released 13 prisoners, and reduced the sentences of most of the others.[15]

February 1948 also witnessed an attack more specifically directed at the NMT trials: Judge Charles Wennstrum's interview with the *Chicago Tribune*, discussed in Chapter 4, in which he denounced the trials as "victor's justice." Although Wennstrum's criticisms were ably rebutted by Taylor, they nevertheless "inevitably kindled further German anti-Nuremberg sentiment. For those Germans opposed to the trial program, the fact that the Americans were publicly debating these trials seemed to indicate decreasing U.S. commitment to the proceedings."[16] Indeed, German critics immediately stepped up their attacks on the NMT and Dachau trials. On March 25, Johannes Neuhausler, the Auxiliary Bishop of Munich who had spent time in a concentration camp during the war, wrote to various members of Congress complaining about the alleged mistreatment of the Malmedy prisoners and asking them to launch additional investigations of the trial.[17] A month later, Bishop Wurm, the chairman of Germany's Protestant Church Council, launched a "massive and sweeping attack" on the war-crimes program, claiming in an open letter to the OCC's Kempner – who had taken Wurm on a tour of the Nuremberg prison on Easter 1948 – that "in trial preparations in those cases thus far ending with death sentences, criminal methods and repellent tortures have been applied in order to extort statements and confessions."[18] Wurm's political motivations were particularly evident, because he had admitted to Kempner after the tour that his "fears that the care and treatment of the prisoners was cause for great concern were groundless."[19]

The next major attack came on 20 May 1948, when a group of Evangelical church leaders in the American zone, led by Bishop Wurm, submitted a "chilly" anti-NMT petition to Charles LaFollette, the former OCC prosecutor who was now the head of Wurttemberg-Baden's military government. The petition contained a potpourri of complaints about the NMT trials: that the working conditions of the German defense attorneys were inadequate; that witness detention was foreign to German law; that the law being applied was *ex post facto*; that military instead of civilian judges should have been used, particularly in the *High Command* trial; and so forth. But most important – because it initiated a critical theme that would persist for the next five years – the petition claimed that there was an "undeniable need" to create either an American or an international appellate court empowered to review war-crimes convictions.[20] In fact, Wurm repeated that criticism twice in the next two weeks. On June 1, Wurm cabled Clay to demand that the Dachau death sentences be stayed "until the definite clearance through an appointed court of appeals."[21] And on June 5, Wurm wrote to Kempner claiming that, **"**[w]hen taking into consideration the

[15] WEINGARTNER,185.
[16] BUSCHER, 36.
[17] Cited in id. at 93.
[18] Quoted in FREI, 108.
[19] Cited in id.
[20] Cited in id. at 105.
[21] Cited in BUSCHER, 98.

importance of the findings for international law and their serious consequences for the inflicted persons, such an appeal becomes an imperative demand."[22]

LaFollette forwarded Wurm's petition to Clay on June 8, along with a five-page letter rebutting the Evangelicals' criticisms of the war-crimes program. He was particularly adamant in his rejection of the need for an appellate court, contending that the existing procedures for granting clemency were sufficient and pointing out that the creation of an appellate court would undoubtedly be seen by the Germans as a tacit admission that the NMT and Dachau trials were procedurally flawed.[23]

LaFollette's letter greatly influenced Clay's reaction to the petition. Clay zealously defended the NMT trials and the absence of appellate review in a June 19 letter to Wurm, insisting that "[n]ever in history has evidence so convicted those in high places for their actions. It is difficult to understand how any review of the evidence of those yet to be sentenced could provide a basis for sentimental sympathy for those who brought suffering and anguish to untold millions." Clay was particularly incensed by the attacks on the *High Command* trial, which he described – correctly – as designed "to discredit a court which with high intent is endeavoring to establish precedents in international law which may serve to prevent again a world being plunged into chaos."[24]

Perhaps anticipating a negative response, Wurm did not wait to hear from Clay before launching a new round of attacks on the Malmedy trial. Further embellishing earlier claims, Wurm now began to refer to the Army's treatment of the SS defendants as a "crime against humanity" and to insist that many of the convicted defendants were actually innocent.[25] Wurm's strategy was obvious: "to link reproaches aimed at Nuremberg with those aimed at Dachau in order to demand a review of all sentences by a review body."[26] But it was also very intelligent, because it was all too easy for American officials to lose sight of the fact that the NMT trials were far more procedurally sound than the Dachau trials.[27] Indeed, "[t]he accusations surrounding the Dachau trials made some Nuremberg personnel nervous that they also would be marked with the same taint." Sprecher, for example, would later describe German attempts to blur the lines between the two sets of trials as "a good strategy."[28]

C. The Simpson Commission

Wurm's efforts quickly paid off. In mid-July 1948, General Clay ordered his Administration of Justice Review Board to once again investigate the Malmedy trial.[29] Even more dramatically, on July 30, Royall not only stayed the execution of all the Dachau prisoners sentenced to death – including the 12 Malmedy prisoners whose sentences Clay had affirmed in March – he announced that he was appointing

---

[22] Letter from Bishop Wurm to Kempner, 5 June 1948, in WURM MEMORANDUM, 25.
[23] Cited in FREI, 106.
[24] Cited in id. at 107.
[25] Id. at 109.
[26] Id.
[27] HEBERT, HITLER'S GENERALS, 53.
[28] Id.
[29] BUSCHER, 38.

Gordon Simpson, a member of the Texas Supreme Court, to review all of the Dachau trials.[30]

If Clay and Royall believed that their actions would defuse criticism of the war-crimes program, they were mistaken. Bishop Neuhausler responded by expanding his attacks beyond Malmedy, alleging that American prosecutors had relied on "professional witnesses" in a number of the Dachau trials and demanding that Clay create a review board that would have the power to overturn the verdicts issued by both the Dachau and the NMT tribunals.[31] Neuhausler's demand for an appellate court was seconded on August 26 by the Fulda Bishops Conference, which meant that – as Buscher points out – "the fight against American war crimes trials was now the official policy of the German Catholic Church."[32]

On September 14, the Simpson Commission released its report on the Dachau trials. The Report was a mixed bag for the critics. The Commission found "no general or systematic use of improper methods to secure prosecution evidence for use at the trials" and concluded that the 12 remaining Malmedy death sentences were justified. But it also condemned the use of mock trials to obtain confessions and recommended, in light of the procedural irregularities in the Malmedy trial, that the death sentences be commuted to life imprisonment.[33]

Royall responded to the Simpson Commission's report by lifting – no doubt reluctantly, because he had long since lost faith in the war-crimes program[34] – the stays of execution that he had ordered in July.[35] His decision was met with immediate outrage by the Bishops, who launched a "large-scale political-journalistic offensive" against the executions, one that featured a new rhetorical innovation: referring to the convicted defendants as "war criminals," in quotation marks, instead of simply as war criminals.[36] The Bishops also received support from an unlikely source: Edward Van Roden, a Pennsylvania judge who had served on the Simpson Commission. A few days before executions resumed on October 15, Van Roden told reporters in the United States that Gordon Simpson had suppressed evidence the Commission had found that the Malmedy defendants had, in fact, been physically abused by Army interrogators. The German press immediately republished his statements throughout Germany.[37]

D. Lansberg Prison and the Baldwin Commission

Faced with renewed controversy, Clay stayed the 12 remaining Malmedy death sentences on October 25.[38] As before, however, his concession simply emboldened his critics. In early December, Bishop Neuhausler orchestrated a letter-writing

[30] EARL, 274.
[31] BUSCHER, 94.
[32] Id.
[33] Cited in FREI, 111-12.
[34] Id. at 112.
[35] Id.
[36] Id. at 113.
[37] Id. at 112.
[38] BUSCHER, 94.

campaign to Clay about the living conditions and treatment of the inmates at Landsberg prison,[39] where all of the defendants convicted in the NMT and Dachau trials were now being held.[40] Clay responded to the campaign by asking Taylor to investigate the situation at Landsberg Prison. After visiting Landsberg on February 14, Taylor reported back to Clay that, in his opinion, the prison was "fairly and efficiently administered and that (given the general circumstances which prevail throughout Germany at the present time) conditions at Landsberg are generally satisfactory."[41]

Clay was evidently convinced by Taylor's report, because on two separate occasions in March 1949 he asked Royall to permit him to lift the stays of execution he had imposed the previous October. That was a remarkably selfless request, because – as noted earlier – Clay had long since tired of signing death warrants. He nevertheless felt obligated not to bequeath the responsibility for approving executions to his successor. "I would not like to have a mass execution," he wrote, "and yet I do want to free my successor from this thankless task to give him a clearer and more constructive task."[42] Clay also recognized that the "punitive" phase of the occupation was rapidly giving way to the "constructive" phase, which would mean that the pressure on his successor to commute the remaining death sentences would only increase.[43]

Royall, however, refused to let Clay execute the remaining Malmedy prisoners. Between Clay's two requests, the Senate Armed Services Committee had authorized yet another review of the Malmedy trial, this time in the form of a three-person Subcommittee headed by Raymond Baldwin, a Republican senator from Connecticut. Both Baldwin and another member of the Subcommittee, Estes Kefauver, a Democrat from Tennessee, had ties to individuals involved in the Malmedy trial through their law firms, so a fourth Senator was soon added – Joseph McCarthy, the infamous red-baiting Republican Senator from Wisconsin, who viewed the Baldwin Subcommittee as an opportunity to thrust himself further into the national spotlight.[44] The Subcommittee's creation provided Royall with a ready-made excuse to prevent Clay from carrying out the remaining executions before he stepped down as Military Governor.

E. The *Ministries* Dissent

While the Baldwin Subcommittee prepared for its public hearings, a new development diverted German and U.S. attention from the Malmedy trial: Judge Powers angrily dissented from the majority's judgment in the *Ministries* case. In his view, most of the convictions in the case – particularly those for crimes against peace – were "incomprehensible," devoid of legal reasoning, and "not justified by the law or

---

[39] EARL, 273 n. 42.
[40] TAYLOR, FINAL REPORT, 97-98.
[41] Id. at 98.
[42] Quoted in THOMAS ALAN SCHWARTZ, AMERICA'S GERMANY: JOHN J. MCCLOY AND THE FEDERAL REPUBLIC OF GERMANY 158 (1991).
[43] Id. at 158-59.
[44] FREI, 116.

the facts."[45] Even worse, according to Judge Powers, the prosecution's entire theory of the case had been predicated on a retrograde notion of collective responsibility:

> These attitudes reflect impatience with the idea that these defendants, as individuals, must be shown to have personally committed crimes according to the usual and customary standards or tests. They may also indicate a realization that the evidence in many instances is insufficient to establish guilt by such standards. They represent a concept of mass or collective guilt, under which men should be found guilty of a crime even though they knew nothing about it when it occurred, and it was committed by people over whom they had no responsibility or control.[46]

Judge Powers was not the first judge to dissent during the trials: Judge O'Connell had dissented from the sentences of a number of defendants in *RuSHA*, and Judge Hebert had dissented from the overly-lenient judgment in *Farben*. But no judge had ever questioned the propriety of one of the NMTs' convictions, so it was not surprising that Judge Powers' words were "more than enough evidence to convince the German clergy that along with the Army's proceedings, all war crimes trials carried out by the United States, including the Subsequent Nuremberg Proceedings, were tainted."[47] Within weeks, Bishops Wurm and Meiser flooded Clay's office with petitions attacking the NMT trials and demanding that the convicted defendants – particularly von Weizsaecker and Schwerin von Krosigk – be released.[48]

Powers' dissent also emboldened Joseph McCarthy to use the Baldwin Subcommittee, whose mandate was limited to the Malmedy trial, to attack the NMTs. Indeed, McCarthy opened the Subcommittee's first public session on May 4 by savagely attacking Judge Maguire and Judge Christianson's majority opinion in *Ministries*, particularly with regard to von Weizsaecker's conviction. McCarthy insisted that von Weizsaecker's good-motives defense was legitimate, claiming that it was "uncontradicted" that he "was the most valuable undercover man which the Allies had in Germany, starting in 1936." McCarthy also demanded that the panel force Maguire and Christianson to testify, arguing that "I think this committee should see what type of morons – and I use that term advisedly – are running the military court over there."[49]

Eleven days later, on May 15, General Clay's tenure as Military Governor came to an end. The death sentences against six Malmedy defendants were still pending, as were the sixteen death sentences in *Pohl* and *Einsatzgruppen*, the Supreme Court having denied the condemned NMT defendants' habeas petitions on May 2. Clay would later

---

[45] XIV TWC 877-78.
[46] Id. at 874.
[47] EARL, 275.
[48] HEBERT, HITLER'S GENERALS, 54.
[49] MAGUIRE, 205.

apologize to McCloy for saddling him with the unpleasant responsibility, as High Commissioner, of deciding the fates of those men.[50]

F. The Deactivation of the OCC

It was in this toxic environment that the OCC was formally deactivated on 20 June 1949. The Central Secretariat remained in existence to deal with the paperwork associated with McCloy's impending review of the convictions in *Ministries*; it would be dissolved on November 15.[51]

On August 15, Taylor submitted his Final Report to Royall, the Secretary of the Army. In the "Unfinished Business" section, he emphasized the need to ensure that three categories of major war criminals whom the OCC had not been able to prosecute did not escape punishment entirely. First, there were the "high-ranking Reich officials who were closely connected with the program for extermination of Jews whom he had declined to include in the *Ministries* case. [52] Second, there were the individuals whom the OCC would have indicted but for the fact that it had been unable to extradite them from one of the occupied countries. As an example, Taylor mentioned General Hans Felber, the chief military commander in Serbia in 1943 and 1944, whom the OCC had wanted to include in the *Hostage* case.[53] Third, there were the five individuals who had been indicted in Nuremberg but never stood trial. Two of the five could not be tried: Gustav Krupp remained mentally unfit, and Otto Rasch, who had been indicted in *Einsatzgruppen*, had since died. Taylor considered a third, Max Brueggeman, a *Farben* indictee with a heart problem, to be relatively unimportant. But Taylor insisted that two others – Karl Engert and Field Marshal von Weichs – "should certainly stand trial if in the future their physical conditions permits." Engert, who had been indicted in the *Justice* case, had been Chief of the Penal Administration Division in the Reich Ministry of Justice and a Vice President of the infamous Peoples' Court. Von Weichs, who had been indicted in *High Command*, had been the head of all the German armed forces in the Balkans from 1943-45 and thus "the commanding officer of Generals Rendulic, Felmy, Lanz, Dehner, von Leyser, and Speidel, all of whom were convicted and sentenced to long prison terms for transgressions of the laws of war."[54]

Taylor was understandably skeptical that these individuals would ever be brought to justice. He knew that it was too late to form additional tribunals, and he believed that Engert and von Weichs' crimes were too serious to be dealt with by denazification tribunals. That left German tribunals as the only option – and Taylor was fully aware that German opposition to the war-crimes program made prosecutions unlikely. He nevertheless urged Royall to push the German government anyway, cannily recognizing that the failure to prosecute would have its own didactic value:

---

[50] Thomas Alan Schwartz, *John J. McCloy and the Landsberg Cases*, in AMERICAN POLICY AND THE RECONSTRUCTION OF WEST GERMANY 433, 436 (Hartmut Lehmann ed., 1993).
[51] TAYLOR, FINAL REPORT, 94.
[52] Id.
[53] Id.
[54] Id. at 95.

> It is true that the prevailing trend and climate of political opinion in Germany makes it quite unlikely that the German authorities will eagerly pursue this course of action. But if the situation in Germany is indeed such that the Germans will not bring to trial men such as those who were deeply implicated in the extermination of European Jewry, the sooner that fact is apparent and generally understood the better it will be for all concerned.[55]

There is no evidence that Royall ever heeded Taylor's advice.

II. JOHN J. MCCLOY AND THE ADVISORY BOARD ON WAR CRIMINALS

A. McCloy's Appointment

On 2 September 1949, McCloy became the High Commissioner for Germany. McCloy, a graduate of Harvard Law School, had spent the war as an Assistant Secretary in the War Department, a position in which he had dealt with some of the most difficult – and most controversial – military issues of the day. On some of those issues, he had been quite progressive. His Advisory Committee on Negro Troop Policies (the "McCloy Committee"), for example, had ultimately concluded that the use of segregated units undermined "military efficiency" and recommended, in March 1944, that black soldiers be used in combat.[56] On other issues, however, his views had been retrograde – with painful consequences. He had supported President Roosevelt's decision to intern the Japanese and had helped administer the program, notoriously telling Attorney General Biddle in early 1942 that "if it is a question of the safety of our country [and] the constitution why the constitution is just a scrap of paper to me."[57] He had also rejected the plaintive requests of Jewish groups to bomb Auschwitz, insisting – inaccurately, as more recent research has shown – that such an attack was "impracticable" and would divert resources from "decisive operations elsewhere."[58]

McCloy had also been deeply involved in the war-crimes program and the post-war reconstruction of Germany. McCloy had turned down the position of High Commissioner in 1945, because he believed that a soldier was better suited to the role that would eventually become Military Governor; he had recommended that FDR appoint General Clay instead.[59] He had also played an important role in the promulgation of JCS 1067/6, ensuring that it was neither too punitive nor too lenient and that "denazification and demilitarization" were essential components of U.S. policy.[60] McCloy had then later traveled to London to lobby the British to drop their desire to summarily execute the major war criminals.[61]

---

[55] Id.
[56] SCHWARTZ, AMERICA'S GERMANY, 14.
[57] Id. at 15-16.
[58] Id. at 17.
[59] Id. at 21.
[60] Id.
[61] Id. at 21-22.

By the time McCloy assumed office, commuting the Dachau and NMT death sentences and freeing all of the remaining war criminals had become the official policy of the German government: the Federal Republic of Germany had been formed out of the French, British, and American occupation zones in May 1949, and one of the new Adenauer government's first acts was to publicly announce its intention to "propose an amnesty" for defendants whose crimes were "committed in the confusion and economic distress."[62] The Adenauer government did not have the authority, however, to enact such an amnesty itself: the Occupation Statute of Germany, signed on 12 May 1949, had specifically reserved to the occupying powers "control of the care and treatment in German prisons of persons charged before or sentenced by the courts or tribunals of the occupying Powers or occupation authorities; over the carrying out of sentences imposed on them; and over questions of amnesty, pardon or release in relation to them."[63] The fate of the NMT and Dachau defendants thus remained in American hands.

The German government and the German church leaders almost immediately began to lobby McCloy to commute the NMT death sentences – unlike Clay, McCloy had jurisdiction only over the defendants convicted by the NMTs; General Thomas Handy, the Commander-in-Chief of the United States European Command (EUCOM) and Clay's successor, had jurisdiction over the defendants convicted in the Dachau trials.[64] Adenauer personally appealed to McCloy, citing the length of time the *Pohl* and *Einsatzgruppen* defendants had been awaiting execution – which was, of course, due largely to German lobbying – and the fact that Germany's new Basic Law, adopted on May 8, prohibited the death penalty.[65] Adenauer's appeals were echoed by his coalition partners, the Free Democrats and the German Party, and by Cardinal Joseph Frings, the head of the Fulda Bishops Conference, who insisted that the actions of the condemned prisoners did "not stem from a criminal disposition."[66]

Publicly, McCloy took a hard line on the Germans' requests, insisting that a general amnesty for the NMT defendants would "be taken as an abandonment of the principles established in the trials" and would imply that "those crimes have… been sufficiently atoned for [and] that the German people should be allowed to forget them."[67] Privately, though, McCloy believed that a "solution" to the war-criminals program was necessary, because the growing Soviet threat to Europe put a premium on improved German-American relations.[68]

McCloy was far from alone in that belief among U.S. authorities. Between early 1948 and late 1949, fear of the Soviet Union had grown exponentially: Czechoslovakia had fallen in a shockingly brutal Soviet-backed coup in March 1948; the Soviets had withdrawn from the Control Council shortly thereafter; and – most dramatically – the Soviets had blockaded Berlin for nearly a year. At the same time, American

---

[62] Letter from the German Federal Government to the High Commissioner, undated, cited in EARL, 278.
[63] Occupation Statute, art. 2(i).
[64] See Executive Order No. 10144, 21 July 1950.
[65] SCHWARTZ, AMERICA'S GERMANY, 159.
[66] Schwartz, *McCloy and Landsberg*, 438.
[67] Cited in SCHWARTZ, AMERICA'S GERMANY, 160.
[68] EARL, 278.

sympathy toward the Germans was growing as the public became aware that there had been significant, if ultimately futile, resistance to the Nazis within Germany.[69] Even Clay, who was far more uncompromising than McCloy, acknowledged that OMGUS's "growing awareness" of the resistance movement "tended to create a greater respect toward the German people and therefore a greater disposition to accelerate a revival of German governmental controls."[70]

In this climate, the temptation to use parole and clemency programs as a means of improving American-German relations was nearly overwhelming. But the new willingness to consider such programs was not merely strategic: occupation authorities also sincerely believed that "efforts to ensure fairness in trying and sentencing war criminals" would also re-educate and democratize ordinary Germans by demonstrating "the superior moral standards of a democratic society."[71] That was a tragic miscalculation.

B. Creation of the War Crimes Modification Board

Formal efforts to consider clemency began in July 1949 on the EUCOM side, with a committee of the War Crimes Branch recommending the creation of a five-member War Crimes Modification Board that would have the authority to "equalize" the sentences imposed in the Dachau trials – precisely what the Simpson Commission had recommended months earlier – and to grant medical parole, where appropriate, to seriously ill prisoners. The committee emphasized that the board would need to avoid undue leniency: "sentences should be reduced to minimum levels consistent with maintaining respect for the occupying powers who represent the victorious United Nations; penalties as reduced must still be severe enough to act as punishment for the offenders and to deter future would-be violators of the rules of warfare."[72] And it insisted that the board must not function, overtly or covertly, as an appellate court: although "defense counsel and counsel representing the Government" could be heard, "[t]he case will not be retried" and "[n]o new witnesses will be heard or other evidence submitted. The re-argument will be made on the record of the case as it now exists."[73]

Even that limited mandate troubled some officials in the Theater Judge Advocate's Office. Lt. Col. John Awtry, the Assistant Chief of the War Crimes Branch, believed that it was "illogical and unsound" to create different clemency boards for the Dachau and Nuremberg prisoners and that it was unwise for the U.S. to review sentences unilaterally, without consulting the French and the British, given that the war-crimes program had always been an inter-allied undertaking.[74] Similarly, Awtry's superior in the War Crimes Branch, Colonel Wade M. Fleischer, believed that releasing Dachau prisoners would not promote democratization and re-education, because those

[69] SCHWARTZ, AMERICA'S GERMANY, 158.
[70] Cited in id. at 158 n. 3.
[71] BUSCHER, 50.
[72] Memo from Awtry to Chief, War Crimes Division, 1 June 1949, NA-549-2236-3, at 1-2.
[73] Memo from Awtry to Fleischer, 10 May 1949, NA-549-2236-3, at 1.
[74] Memo from Awtry to Record, 28 July 1949, NA-549-2236-3, at 2.

individuals would "undoubtedly commence to work against the occupation authorities in Western Germany."[75]

Fleischer's concern was echoed by the Baldwin Subcommittee's final report, which it released on October 13. The Subcommittee acknowledged – as had been found by previous investigations – that mock trials and physical force had occasionally been used to convince defendants to confess, but it concluded that there was absolutely no evidence that any of the defendants had been tortured.[76] More dramatically, the Subcommittee insisted that "attacks on the war-crimes trials in general and the Malmedy trial in particular" were motivated, in large part, by the desire to revive German nationalism and to discredit the American occupation of Germany.[77] Indeed, ironically turning the tables on its former member, Joseph McCarthy, the Subcommittee claimed that "[t]here is evidence that at least a part of this effort is attempting to establish a close liaison with Communist Russia" – a "sensational thesis" that Frei insists was "by no means as absurd as public opinion would have had it."[78]

None of these concerns, however, were enough to derail American plans to offer clemency to the Dachau prisoners. On November 28, EUCOM formally created the War Crimes Modification Board.[79] EUCOM avoided using the word "clemency" in the name of the board "to prevent erroneous impression that all prisoners may anticipate substantial reduction or remission of all or part of their sentences."[80]

C. McCloy's Advisory Board for War Criminals

The creation of the War Crimes Modification Board for the Dachau prisoners made it nearly inevitable that a similar review mechanism would be created for the NMT prisoners – as reflected by Awtry's comment, both EUCOM and HICOG were sensitive to the criticism that differential treatment of the two would evoke.[81] That development, however, was still a few months away. In the interim, on December 20, McCloy and Handy created a good-conduct program for both the Dachau and NMT prisoners that reduced sentences 5 days per month.[82] McCloy insisted that the program was "in no sense an indication of any attitude of unwarranted leniency on my part towards war criminals," but it meant that sixty prisoners would be released before Christmas, including at least five NMT defendants: Josef Alstoetter from *Justice*, Georg von Schnitzler from *Farben*, Ernst-Wilhelm Bohle and Emil Puhl from *Ministries*, and Karl Hollidt from *High Command*.[83] McCloy would later increase the reduction to 10 days per month, leading to the release of nearly all of the remaining

---

[75] Cited in BUSCHER, 59.
[76] FREI, 117.
[77] Id. at 118.
[78] Id.
[79] BUSCHER, 59.
[80] Memo from Johnson to Secretary of Army, Washington, 14 Dec. 1949, NA-549-2236-3, at 1.
[81] Id.
[82] Id. at 60.
[83] OCCWC, List of Defendants of the United States Tribunals, Nuernberg, With Disposition Made in Each Case, undated, NA-238-213-1.

Flick and *Farben* defendants by September 1950[84] – an act that caused such controversy that even the State Department, which had enthusiastically supported EUCOM and HICOG's clemency programs, told McCloy to warn it before releasing any additional NMT prisoners.[85]

Once the good-conduct program was in place, McCloy began to push for a full-fledged NMT clemency program. His efforts were no doubt furthered by Tribunal IV's decision, discussed in Chapter 4, to set aside von Weiszaecker and Woermann's convictions for crimes against peace and Steengrach von Moyland's conviction for the war crimes of murder and mistreatment of prisoners of war.[86] Judge Christianson dissented from all three decisions, insisting that the evidence was more than sufficient to sustain their convictions. Indeed, he stated that "[a] re-examination of the evidence with respect to the actions of defendant von Weizsaecker in connection with the aggression against Czechoslovakia deepens my conviction that said defendant is guilty under said count one."[87]

Judge Powers had originally dissented from the convictions, so the decision to set them aside indicated that Judge Maguire had changed his mind at some point between April 11, when the judgment was released, and December 12, when the convictions were set aside. William Caming, one of the prosecutors in *Ministries*, would write decades later that "Judge Maguire's Memorandum Opinion is embarrassingly vague and devoid of any rationale for his change of heart. I can only surmise what the impelling personal factors were."[88] Peter Maguire, the Judge's grandson, suspects that the "personal factors" included a desire "to appease the right wing of the Republican Party" – Judge Maguire had decided to run for the Oregon Supreme Court as a Republican in the fall of 1949.[89] (He lost.)

A week after the reconsideration of *Ministries* and the predictable Germany rejection of von Weizsaecker's continued imprisonment – Theo Kordt, a leader of the German resistance, immediately described von Weiszaecker's situation as "a new Dreyfus case"[90] – McCloy urged General Handy to expand the jurisdiction of the War Crimes Modification Board to include the NMT prisoners. That effort failed, however, because Dean Acheson, the Secretary to State, opposed it. Acheson insisted that the nature of the Dachau and NMT trials were too different to justify a joint clemency board and that a joint board would facilitate German efforts to use the problems with the Malmedy trial to taint the NMT trials.[91]

McCloy was undeterred. Although he continued to publicly criticize German attempts to discredit the war-crimes and their demands for a general amnesty,[92] he privately promised Cardinal Frings that he would create a board to review all of the

---

[84] Schwartz, *McCloy and Landsberg*, 439.
[85] Id. at 439 n. 28.
[86] XIV TWC 946.
[87] Id. at 960.
[88] Cited in MAGUIRE, 208.
[89] Id.
[90] Id.
[91] Memo from Acheson to McCloy, 9 Feb. 1950., NA-549-2237-2, at 1.
[92] BUSCHER, 60.

NMT sentences and "prepare a practical solution."[93] He made good on that promise in February 1950, when he convinced a reluctant Acheson to give him permission to create his own "War Crimes Clemency Board." Acheson was particularly worried that that "individual groups" would misunderstand the decision to create the Board – "a veiled reference to their concern that Jewish organizations would criticize any further review" of the NMT sentences.[94] McCloy thus promised to take "special precautions" to avoid negative publicity.[95]

McCloy officially established his review board – officially named the Advisory Board on Clemency for War Criminals, ignoring EUCOM's conclusion that referring to clemency would inflate German expectations – on July 18. Unfortunately, his public announcement betrayed a fundamental uncertainty about the Advisory Board's mandate. On the one hand, McCloy pointed out that "[t]he availability to the individual defendant of an appeal to executive clemency is a salutary part of the administration of justice" – a justification that reflected the traditional conception of clemency as an "act of grace." But on the other hand, he insisted that "[i]t is particularly appropriate that the cases of defendants convicted of war crimes be given an executive review because no appellate court review has been provided."[96] It was thus unclear from the Advisory Board's inception whether it was intended to function as a clemency board, as an appellate court, or as both – a lack of clarity that would have disastrous consequences.

The Board's mandate was further muddied by McCloy's staffing decisions. After Vinson refused to allow him to recruit federal judges, McCloy appointed David W. Peck as the Board's chairman. At the time, Peck was serving as the Presiding Justice of the New York Supreme Court's Appellate Division – a strange choice for a Board that was not supposed to function as an appellate body. McCloy then rounded out the "Peck Panel" by appointed Conrad Snow, an Assistant Legal Advisor to the State Department who had served on an earlier War Department clemency board for U.S. soldiers, and Frederick A. Moran, who was the chairman of the New York State Board of Parole.[97] Moran had a background in social work and was a fervent believer in parole as "an instrument of rehabilitation."[98]

McCloy's decision to create the Peck Panel outraged the OCC. Reacting to the possibility that McCloy would commute the death sentences of the 16 "red jackets" in Landsberg Prison – the name given to the condemned NMT defendants on account of the distinctive jackets they wore[99] – Taylor angrily (and presciently) complained to a reporter for the *New York Post* that "[t]he retreat from Nuremberg is on. I fear such a review would work to the benefit of those who have wealthy and powerful influences behind them."[100] Nor was the outrage limited to the prosecution. Michael Musmanno, the presiding judge in *Einsatzgruppen*, told the same reporter that the

---

[93] Cited in id.
[94] SCHWARTZ, AMERICA'S GERMANY, 160-61.
[95] Schwartz, *McCloy and Landsberg*, 441.
[96] Cited in MAGUIRE, 212.
[97] SCHWARTZ, AMERICA'S GERMANY, 162.
[98] MAGUIRE, 216.
[99] EARL, 278.
[100] John Hohenberg, *Stalling Baffles U.S. Prosecutor*, NEW YORK POST, Feb. 3 1950, A2.

death sentences imposed in the case were "eminently just and proper" and insisted that the tribunal had "leaned over backwards to give the defendants every possible opportunity" to prove their innocence.[101]

D. The Work of the Advisory Board

McCloy set out the parameters of the Advisory Board's authority in a July 18 memo – the same day that he announced the Board's creation. The memo made clear that the Board could not review the defendants' convictions: the Panel was prohibited from considering either "questions relating to the jurisdiction or composition of the Tribunals before which the defendants were tried" or the tribunals' decisions on "questions of law and fact."[102] What the Board *could* do, however, was far more uncertain. On the one hand, it was authorized "to consider disparities among sentences for comparable offenses and such other facts as tend to show that the sentence imposed on the defendant was excessive" – a vague mandate that was somewhat akin to traditional clemency review. But it was also authorized to take into account "the physical condition and family situation of the particular defendant" – a power that "came dangerously close to a parole board function."[103]

The Board officially began work in Munich on July 11. Over the next six weeks, Peck, Snow, and Moran "heard 50 counsel representing 90 of the defendants" and "read the judgments (over 3,000 pages) in the cases of 104 defendants now in confinement as a result of the [NMT] trials, the appeals filed by counsel, the petitions for clemency and all supporting documents."[104] The Board also received recommendations from a panel of eight German consultants appointed by the West German Federal Ministry of Justice who were given access to the same documents.[105] The hearings themselves, which began on August 4, unfolded "at a dizzying pace": counsel for the defendants were given thirty minutes to speak, and then the Board deliberated for fifteen minutes before reaching a decision. Neither the oral arguments nor the deliberations were transcribed.[106]

There were a number of problems with the Board's operating procedure. Most obviously, although the Board considered the views of both the lawyers for the defendants and the German consultants, it never heard – either orally or in writing – from the judges or the prosecution.[107] In fact, the Board simply ignored Ben Ferencz's offer to consult with it, even though Ferencz was still in Germany.[108] Had the Board reviewed the trial transcripts and the evidence considered by the judges, that failure might not have been so problematic. By the Board's own admission,

---

[101] John Hohenberg, *Nuremberg Judge Upholds Doom on 16 Nazis Who Killed Million Jews*, NEW YORK POST, Feb. 3, 1950, A2.
[102] McCloy, Establishment of Advisory Board on Clemency, 18 July 1950, NA-238-213-1.
[103] BUSCHER, 62.
[104] Review of Sentences by Military Governor and U.S. High Commissioner for Germany, XV TWC 1157.
[105] HEBERT, HITLER'S GENERALS, 161.
[106] Cited in id.
[107] Goetz, 672.
[108] KAI BIRD, THE CHAIRMAN: JOHN J. MCCLOY AND THE MAKING OF THE AMERICAN ESTABLISHMENT 365 (1992).

though, it nearly every case it limited itself to reading the judgments, which contained only a fraction of the evidence that supported the convictions.[109] Nothing prevented the Board from conducting a more thorough review; as Ferencz later pointed out, the records of the *Einstazgruppen* trial were stored in the basement of the same house in Munich in which the Board met throughout the hearings.[110] The Board's failure to go beyond the judgments was thus indefensible, particularly given that – as we will see below – the Board's "clemency" decisions were often based on its disagreement with the judges' assessment of the strength of the prosecution's evidence.

E. The Advisory Board's Recommendations

The Advisory Board submitted its report to McCloy on August 28. Not surprisingly, the Board disagreed with the vast majority of the sentences imposed by the tribunals and affirmed by General Clay, recommending that McCloy commute the sentences of 7 of the 15 defendants sentenced to death and reduce the sentences of 77 of the 90 defendants sentenced to terms of imprisonment.[111] Many of the suggested reductions were significant, such as the Board's recommendation that McCloy reduce Milch's sentence from life to 15 years[112] and Gerhard Nosske's sentence – imposed because the Einsatzkommando he commanded had executed hundreds of Jews – from life to 10 years. Even more dramatically, the Board recommended that McCloy commute Heinz Schubert and Willy Siebert's death sentences to time served.[113] Both Siebert and Schubert (a descendant of the legendary composer) were high-ranking officers in Ohlendorf's Einsatzgruppe D, which Ohlendorf admitted had killed more than 90,000 Jews.

The Advisory Board's recommendations met significant resistance from U.S. officials involved in the war-crimes program. John Raymond, a State Department official who had been one of Clay's legal advisers for the sentence reviews, believed that the proposed reductions were so lenient – particularly Siebert and Schubert's – that they would undermine the legitimacy of the NMTs.[114] Robert Bowie, HICOG's general counsel and McCloy's trusted advisor, was even more critical. He agreed with Raymond about the potential impact of the report: "certain statements by the Board suggest that they have striven to be as lenient as possible, and I am concerned lest the report as a whole create the impression of a repudiation of the Nuremberg trials." He was particularly incensed by the Board's recommendation of clemency for Hermann Reinecke, Walter Warlimont, and Georg von Kuechler, defendants in *High Command*, because of their "alleged subordinate positions" – as he pointed out, von Kuechler was a Field Marshal and Warlimont and Reinecke were Lieutenant Generals.[115] And he was so disturbed by the Board's soft-pedaling of the crimes committed by the defendants in the *Medical* case and *Einsatzgruppen* that he directed

---

[109] SCHWARTZ, AMERICA'S GERMANY, 164. The Board referred to the trial record "in only two or three instances." Schwartz, *McCloy and Landsberg*, 446.
[110] BOWER, 370-71.
[111] Cited in HEBERT, HITLER'S GENERALS, 163.
[112] Advisory Board on Clemency Report, 28 Aug. 1950, TTP-5-3-2-11, at 3.
[113] EARL, 283.
[114] Quoted in MAGUIRE, 218.
[115] Schwartz, *McCloy and Landsberg*, 446.

his staff to prepare their own reports for McCloy explaining why the defendants did not deserve significant sentence reductions.[116]

Raymond and Bowie's concerns were valid, because the Board's approach to sentence equalization was no less flawed than its operating procedures. The Board justified equalization reductions for a number of high-ranking defendants by arguing that "although their titles may have sounded impressive… in reality they were little more than common members of a criminal organization."[117] To reach that conclusion, the Board grouped all of the petitioners together and then placed them "in proper relation to each other and the programs in which they participated," ostensibly revealing the "differences in authority and action" between them.[118] That procedure inevitably understated the culpability of the defendants at the bottom of the pyramid, no matter how grave their crimes: as Schwartz points out, "[w]hen compared with men like Otto Ohlendorf or Paul Blobel, who supervised and directed thousands of murders, the bureaucrats and industrialists seemed far less criminal and deserving of punishment."[119]

To be sure, it was appropriate for the Board to compare the defendants horizontally, ensuring that defendants who committed the same crimes received roughly similar sentences. That is what Tribunal II did in *Pohl* when it concluded that Georg Loerner and August Frank deserved equal sentences in light of their "similarity in length of service with WVHA, and as deputy to Pohl, a consideration of their respective ranks, and of the counts on which they were found guilty."[120] The Board, however, could not have made accurate horizontal comparisons simply by reading the judgments; as the *Einsatzgruppen* tribunal made clear, because the evidence against many of the defendants went far beyond what was needed to convict, the judgments did not need to recount all of a defendant's criminal acts:

> [W]hile emphasis throughout the trial has been on the subject of murder, the defendants are charged also in counts one and two with crimes against humanity and violations of laws or customs of war which include but are not limited to atrocities, enslavement, deportation, imprisonment, torture, and other inhumane acts committed against civilian populations. Thus, if and where a conclusion of guilt is reached, such conclusion is not based alone on the charge of murder but on all committed acts coming within the purview of crimes against humanity and war crimes. In each adjudication, without its being stated, the verdict is based upon the entire record.[121]

The Board's equalization procedure also led to excessively lenient sentences even when defendants were similarly situated. The Board recommended reducing the sentences in *Krupp*, for example, because they were considerably longer than the

---

[116] Id.
[117] Advisory Board on Clemency Report, 12.
[118] Cited in SCHWARTZ, AMERICA'S GERMANY, 163-64.
[119] Id. at 164.
[120] Pohl, Supplemental Judgment, V TWC 1183.
[121] Einsatzgruppen, IV TWC 509-10.

sentences in *Farben* and *Flick*. But the *Krupp* sentences were not the problem – the problem was that the *Farben* and *Flick* sentences were far too lenient, because the tribunals had acquitted the defendants of crimes they had clearly committed. Nevertheless, because the Board was not empowered to increase sentences, "equalization" required it to reduce the *Krupp* sentences to match the ones in *Farben* and *Flick*.

In addition to adopting flawed equalization procedures, the Board also ignored its mandate not to reconsider the tribunals' decisions on "questions of law and fact." Time and again, the Board concluded "that the facts as stated in the judgments themselves are not sufficient to establish beyond a reasonable doubt the defendant's responsibility for specific crimes."[122] Its treatment of Franz Six, convicted of war crimes and crimes against humanity in *Einsatzgruppen* for his role as Chief of Vorkommando Moskow, is a striking example: the Board justified its recommendation that his sentence be reduced from 20 years to time served by arguing the war crimes and crimes against humanity charges were "not proved beyond a reasonable doubt."[123] How the Board convinced itself of that fact is a mystery, given that – as Earl notes – "they neither reviewed the trial transcript nor any of the evidence submitted by the prosecution in reaching their decision." Instead, the Board simply relied on Tribunal II's discussion of Six's guilt, which ran all of five pages in the *Einsatzgruppen* judgment.

The Advisory Board's willingness to reweigh the evidence was based on the Board's curious interpretation of its mandate. Although it acknowledged that it was required to accept the tribunal's "judgments on the law or the facts," the Board nevertheless claimed "that the authority to review sentences required a differentiation between specific facts found and established in the evidence and conclusions that may have been drawn therefrom. We have considered ourselves bound by the former but not by the latter."[124] In other words, the Board believed that it was required to accept a tribunal's factual findings (such as that a defendant personally executed Jews) and legal conclusions (that executing Jews was a war crime or crime against humanity), but was nevertheless free to reject the tribunal's conclusion that the facts and applicable law meant that the defendant was guilty. But that was nonsensical: the only way to acquit a defendant in such a situation was to either reject the facts (insisting that the evidence did not prove that the defendant personally executed Jews) or reject the law (that executing Jews was not necessarily a war crime or crime against humanity) – precisely what the Board's mandate prohibited.

F. McCloy's Clemency Decisions

Although McCloy created the Advisory Board in February 1950 and received its report that August, he did not make final decisions on clemency until the end of January 1951. Much had changed in the interim. Most obviously, on June 25, North Korean troops had launched an "all-out offensive" against the Republic of South

---

[122] Cited in Schwartz, *McCloy and Landsberg*, 444.
[123] EARL, 284.
[124] Advisory Board on Clemency Report, 3.

Korea, an aggressive act that, by September, led to a "full-scale war" involving American troops.[125]

The outbreak of the Korean War had a profound effect on McCloy, convincing him to drop his long-standing opposition to German rearmament.[126] It had a similar effect on the U.S and its allies in the West,[127] who responded to North Korea's aggression – supported, of course, by Russia and China – by developing plans for consolidating the military forces of Western European states, including Germany, into a European Defense Community (EDC). Such a community, they hoped, would be able to rearm Germany while preventing it from acting on any imperial ambitions it might still possess.[128]

Western Europe's plans for an EDC doomed the war-crimes program. The U.S. and its allies needed Germany now more than ever – and the German government knew it, rarely missing an opportunity to remind McCloy that its willingness to contribute "to the defense of the West" might depend upon the U.S.'s willingness to free the NMT and Dachau prisoners, particularly those facing execution. Adenauer's chief advisers on rearmament, Generals Adolf Heusinger and Hans Speidel (the brother of Wilhelm Speidel, convicted in the *Hostage* case), told McCloy's liaision in Bonn that "if the prisoners at Landsberg were hanged, Germany as an armed ally against the East was an illusion."[129] That claim was echoed by a group from the Bundestag that represented all of Germany's important non-communist political parties, who insisted to McCloy in early January that the West's desire for a military alliance with Germany justified commuting the death sentences.[130]

McCloy responded to the German pressure – which included death threats that forced him to have bodyguards assigned to his children[131] – with admirable openness, traveling around Germany to speak ordinary people about the cases, considering evidence and petitions no matter their source, even meeting personally with some of the NMT prisoners in Landsberg.[132] At the same time, however, he expressed frustration at the Germans' repeated attempts to delegitimize the war-crimes program. In the meeting with the Bundestag deputies mentioned above, for example, McCloy reminded the group that the NMT and Dachau trials were reactions to the Nazis'

---

125 MAGUIRE, 216.

126 Schwartz, *McCloy and Landsberg*, 444.

127 Taylor was one of the leading dissenters from this view. As he wrote in a 1950 issue of *Harper's Magazine*, "[s]urely the withdrawal of American troops from Germany would open up to the Russians opportunities beyond their wildest present imaginings, and this would be so whether or not we were to leave behind us a West German 'army'. For the Russians are not to be frightened by five or ten or even twenty German divisions. They are presently held in check by fear of war with the United States and our allies." Telford Taylor, *Arms and the Germans*, HARPER'S, Mar. 1950, at 23, 25-26.

128 HEBERT, HITLER'S GENERALS, 164-65.

129 Cited in Schwartz, *McCloy and Landsberg*, 445.

130 Cited in id.

131 SCHWARTZ, AMERICA'S GERMANY, 166.

132 Id. at 167.

"spasm of criminality" and decried the desire "to put things under the carpet and refuse to acknowledge what really happened."[133]

At the end of January, McCloy retreated to his home to "wrestl[e] with his soul and his heart" about the clemency decisions.[134] Finally, on January 31 – one day after Heusinger and Speidel visited him to make a last-ditch plea for clemency– McCloy went public with his decisions. Claiming that he had "striven to temper justice with mercy," he released the following statement:

> Sentences have been reduced in a very large number of cases. They have been reduced wherever there appeared a legitimate basis for clemency. Such reductions have been granted where the sentence was out of line with sentences for crimes of similar gravity in other cases; where the reduction appeared justified on the ground of the relatively subordinate authority and responsibility of the defendants; where new evidence, not available to the court, supported such clemency…. In certain cases my decision to grant clemency has been influenced by the acute illness of the prisoner or other special circumstances of a similar nature.[135]

All in all, McCloy reduced the sentences of 77 of the 89 defendants who had submitted clemency petitions. (15 defendants considered by the Advisory Board has since been released through the good-conduct program.[136]) Of the 69 petitioners sentenced to terms of imprisonment, only five were denied clemency: Wilhelm List and Walter Kuntze in the *Hostage* case, both of whom McCloy suggested might be eligible for medical parole[137]; and Hermann Reinecke, Hermann Hoth, and Hans Reinhardt in *High Command*. Of the 15 petitioners sentenced to death, only five were denied commutation: Otto Ohlendorf, Paul Blobel, Werner Braune, and Erich Naumann in *Einsatzgruppen*, and Oswald Pohl.

The most striking aspect of McCloy's "Landsberg Report" is that, with very few exceptions, he avoided explaining individual clemency decisions in favor of general comments about each of the 10 NMT cases he considered.[138] Indeed, perhaps revealing his biases, McCloy spent far more time discussing why he had decided *not* to grant clemency to the five defendants sentenced to death. A complete accounting of McCloy's decisions can be found in Appendix A. What follows is an overview of his most important – and often quite problematic – decisions in each case:

Medical. There was nothing McCloy could do for the seven condemned defendants, because they had already been executed. But he reduced the sentences of all nine

---

[133] Quoted in HEBERT, HITLER'S GENERALS, 166.
[134] Id. at 167.
[135] Statement of McCloy, 31 Jan. 1951, TTP-5-3-2-11, at 2.
[136] Telford Taylor, *The Nazis Go Free*, THE NATION, 24 Feb. 1951, at 170, 171.
[137] McCloy Clemency Decisions, 31 Jan. 1951, TTP-5-3-2-11, at 7. McCloy directed that medical examinations be conducted on the two men. Why he had not previously done so is unclear, because he was willing to immediately release Schlegelberger on medical parole. Id. at 4.
[138] All of the defendants in *Flick* and *Farben* had either been released or were already eligible for parole. Id. at 6.

petitioners, noting that although it was "difficult to find room for clemency," he agreed with the Advisory Board's finding that "lack of primary responsibility, age, and limited participation" justified the reductions.[139] Some of the reductions were quite significant: Oskar Schroeder's life sentence was reduced to 15 years, despite Tribunal I finding that he had used his position as Chief of the Luftwaffe's Medical Service to initiate the sea-water experiments and promote the typhoid experiments at Dachau[140]; and Gerhard Rose's life sentence was reduced to 15 years even though the Tribunal had found that he had instigated and directly participated in the typhus experiments conducted at Buchenwald and Natzweiler.[141]

Milch. The Advisory Board had recommended reducing Milch's life sentence to 15 years because of his "instability of temperament due to nervous strain, aggravated by a head injury." McCloy acknowledged Milch's "almost violent advocacy of and pressure for slave labor and disregard for the life and health of workers," but nevertheless agreed with the Board's "sharp reduction."[142]

Justice. McCloy "had difficulty in finding a justification for clemency in any of these cases." He nevertheless significantly reduced the sentences of all seven petitioners "for reasons such as limited responsibility": three from life to 20 years; one from life to immediate release for medical reasons; and three from 10 years to time served. Two of the life-sentence decisions are particularly notable. McCloy reduced Oswald Rothaug's sentence to 20 years – the same Oswald Rothaug who, according to Tribunal III, had "identified himself" with and "gave himself utterly to" the Nazi program of racial persecution and had "participated in the crime of genocide."[143] And he released Franz Schlegelberger, who bore "primary responsibility" for the Night and Fog decree,[144] on medical parole.

Pohl. As noted, McCloy found "no basis" for commuting Oswald Pohl's death sentence. But he did reduce the 14 other sentences, including one from death to nine years, four from life to either 15 or 20 years, and seven from 10, 15, or 20 years to time served. McCloy acknowledged that reducing Franz Eirenschmalz's sentence from death to nine years was a "radical commutation," but he insisted that the reduction was warranted "due to the introduction of new evidence dissociating him from the offenses on which the original death sentence was chiefly based," which had rendered "his individual connection with exterminations… remote."[145] McCloy never disclosed the new evidence – nor did he explain how it undercut Tribunal II's conclusion that Eirenschmalz ordered and supervised the construction of concentration-camp crematoria despite knowing that they would be used to carry out the Final Solution.[146]

---

[139] Id. at 2.
[140] Medical, II TWC 210-16.
[141] Id. at 267-71.
[142] McCloy Clemency Decisions, 3.
[143] Justice, III TWC 1156.
[144] Id. at 1083.
[145] McCloy Clemency Decisions, 5.
[146] Pohl, V TWC 1030-31.

Hostage. Although McCloy refused to reduce the sentences given to List and Kuntze, he reduced all of the other sentences on the ground that the "other officers charged with excessive reprisals… had lesser responsibility or, in some cases, showed evidence of humane considerations."[147] Both rationales were questionable. Wilhelm Speidel received the most significant reduction, from 20 years to time served, despite Tribunal V's conclusion that he was responsible, as Military Governor of Greece, for more than 1,000 illegal executions[148] – a stunning act of clemency that at least one commenter attributed not to "lesser responsibility" or "humane considerations," but to the fact that Speidel was the brother of Hans Speidel, the Adenauer advisor who was then involved in negotiating German rearmament with the Allies.[149] Ernst Dehner also had his sentence reduced from seven years to time served, even though his soldiers had executed hundreds of civilians.[150] Dehner's sentence was already lenient, given the gravity of his crimes; a further reduction on the ground of "lesser responsibility" was hardly warranted. Moreover, although there were, in fact, "human considerations" justifying a lesser sentence – Dehner had attempted to mitigate the harshness of some of the orders he received from his superiors – Tribunal V had already taken them into account.[151] In fact, the Tribunal made clear that it had taken mitigating factors such as "humane considerations" into account for all of the defendants.[152]

RuSHA. McCloy significantly reduced the sentences of all six petitioners, in three instances from 10 or 15 years to time served, based on "the relatively restricted nature of the relationship of these defendants to the crimes, their relatively subordinate roles, and certain other extenuating circumstances."[153] It is unfortunate that McCloy did not discuss his specific decisions, because it is difficult to see why – to take only one example – Heinz Brueckner deserved to have his 15-year sentence reduced to time served. Tribunal I found that Brueckner, who was the Chief of the VOMI department dedicated to "Safeguarding German Folkdom in the Reich," had "in the course of the immense VOMI operations bec[o]me deeply involved in measures carried out under the Germanization program," including forced evacuation and resettlement, Germanization, and the use of slave labor.[154]

Einsatzgruppen. As noted above, McCloy commuted 10 of the 15 death sentences – four to life imprisonment, one to 25 years, one to 20 years, two to 15 years, and two to ten years. In doing so – and allegedly "with difficulty" – McCloy went beyond the recommendations of the Advisory Board and commuted three death sentences that the Board had recommended confirming: Waldemar Klingelhofer, Adolf Ott, and Martin Sandberger.[155] McCloy did, however, reject the Board's recommendation that Siebert

147 McCloy Clemency Decisions, 8.
148 Hostage, XI TWC 1315-17.
149 Anatole Goldstein, The Burial of Nuremberg, Institute of Jewish Affairs, Records of the World Jewish Congress, subseries 1, box 121, document 17, at 6.
150 Hostage, XI TWC 1297-98.
151 Id. at 1299.
152 Id. at 1317.
153 McCloy Clemency Decisions, 8.
154 RuSHA, V TWC 140, 159-60.
155 EARL, 287.

and Schubert's death sentences be commuted to time served; they received 15 and ten years, respectively.

Once again, McCloy relied on undisclosed "new evidence" to justify his clemency decisions. McCloy claimed, for example, that "injustice would be done" by executing Haensch and Steimle, because "new and persuasive evidence which has recently been made available" substantially lessened "the directness of their connection with the crimes." He thus commuted Haensch's death sentence to 15 years and Steimle's death sentence to 20 years.[156]

Krupp. McCloy's most dramatic clemency decisions benefited the seven *Krupp* petitioners: he not only reduced all of the sentences to time served, he also – echoing Judge Anderson's dissenting opinion[157] – countermanded the confiscation of Alfried Krupp's property. In defense of those reductions, McCloy insisted that Tribunal III's judgment made it "extremely difficult to allocate individual guilt among the respective defendants" and argued that "whatever guilt these defendants may have shared for having taken a consenting part in either offense, it was no greater in these cases than that involved in the *Farben* and *Flick* cases."[158]

The problem with the latter rationale was discussed earlier: the *Krupp* sentences were not too tough; the *Farben* and *Flick* judgments were too lenient because the defendants had been wrongly acquitted of a number of crimes. The former rationale, however, was even less persuasive. The most significant problem with McCloy's "allocation of guilt" rationale was that Tribunal III's sentences were based on the evidence presented at trial, whereas McCloy – like the Advisory Board before him – reviewed only the Tribunal's judgment. Moreover, the judgment itself was anything but ambiguous: although the indictment discussed the crimes of the Krupp firm as a whole, the 122-page judgment provided a comprehensive and detailed accounting of each defendant's responsibility for the Krupp firm's crimes. Indeed, the Tribunal specifically held that "[t]he mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient" for criminal responsibility[159] and insisted – in the final paragraph of the judgment – that "[t]he nature and extent" of the defendants' participation "was not the same in all cases and therefore these differences will be taken into consideration in the imposition of the sentences upon them."[160]

McCloy defended returning Alfried Krupp's property on two grounds. First, he argued that, because "even those guilty of participation in the most heinous crimes have not suffered confiscation of their property," he believed that "confiscation in this single case constitutes discrimination against this defendant unjustified by any considerations attaching peculiarly to him." Second, he noted that confiscation of property "is repugnant to American concepts of justice."[161]

---

[156] McCloy Clemency Decisions, 10.
[157] Krupp, Anderson Dissent, IX TWC 1453.
[158] McCloy Clemency Decisions, 13.
[159] Krupp, IX TWC 1448.
[160] Id. at 1449.
[161] McCloy Clemency Decisions, 14.

The first ground was literally correct, although it conveniently overlooked the difference between confiscating the property of an industrialist and confiscating the property of a soldier or government official. But the second ground was irrelevant. As discussed in Chapter 5, U.S. law did not apply to the NMT trials and Law No. 10 specifically empowered the tribunals to order the "forfeiture of property."[162] Invoking U.S. law to trump a specific provision of Law No. 10 was thus *ultra vires*.

The Krupp petitioners, it is worth noting, expected to be granted clemency. As Bower points out, they knew full well what German rearmament meant for them:

> A room had been set aside at Landsberg for the Krupp directors to discuss corporate business, and directors and officials would come from Essen with the necessary documents to plan the company's programme for rapid expansion to meet Western demands in Korea. Eating and drinking the best food and wines available, Alfried and his fellow convicts took pleasure in insulting the very people who put them there.[163]

The return of Krupp's fortune also benefited Earl Carroll, the lawyer Tribunal IIII had refused to permit Alfried to hire prior to trial. Carroll worked with Krupp's German attorney, Otto Kranzbuehler, on Alfried's petition for clemency. According to William Manchester, "[t]he terms of Caroll's employment were simple. He was to get Krupp out of prison and get his property restored. The fee was to be 5 percent of everything he could recover. Carroll got Krupp out and his fortune returned, receiving for his five-year job a fee of, roughly, $25 million."[164]

Ministries. McCloy followed the recommendations of the Advisory Board and reduced the sentences of all the petitioners, including three 10 and 15 year sentences to time served. Gottlob Berger's reduction from 25 to 10 years is particularly illuminating, because McCloy openly admitted that he believed he had the authority to provide appellate review of the tribunals' judgments, disapproving convictions with which he disagreed. Berger's sentence was based in part on the murder of a French General, Gustave-Marie-Maurice Mesny, while in transit between two POW camps. Tribunal IV discussed Berger's responsibility for the murder at length, concluding that Berger, as the Chief of POW affairs, had jurisdiction over Mesny at the time of the murder, knew that the murder was being planned by his subordinates, and yet did nothing to prevent it[165] – a classic case of command responsibility. McCloy nevertheless decided to "eliminate entirely from the consideration of the weight of his sentence any participation in the Mesny murder," because he had concluded that "Berger appears to have been unjustly convicted of participation in the murder."[166] McCloy did not bother to explain how he could reach that conclusion without examining the evidence on which the Tribunal relied, nor did he explain how disregarding that one incident and crediting Berger with attempting to save Allied

---

[162] Law No. 10, art. II(3)(c).
[163] BOWER, 372.
[164] WILKINS, 222.
[165] Ministries, XIV TWC 447-54.
[166] McCloy Clemency Decisions, 15.

officers at the end of the war – acts for which the Tribunal had already given him credit[167] – justified dramatically reducing the sentence of the man who had created the Dirlewanger Brigade, whose viciousness "shocked even Nazi commissioner's and Rosenberg's Ministry for the Eastern Territories, for the specific purpose of committing crimes against humanity.[168]

High Command. As noted above, McCloy refused to modify Hermann Reinecke's life sentence or Hans Reinhardt and Hermann Hoth's 15-year sentences. He did, however, grant clemency to the other three petitioners as a result of "more detached responsibility and other extenuating circumstances brought out mainly since the trials."[169] The result represented a split decision for Robert Bowie, who had angrily protested the Board's decision to recommend clemency for Reinecke, Walter Warlimont, and Georg von Kuechler because of their "alleged subordinate positions": although McCloy deviated from the Board concerning Reinecke, he ignored Bowie and reduced Warlimont's life sentence to 18 years and von Kuechler and 20-year sentence to 12 years. McCloy specifically noted that he reduced the 70-year-old von Kuechler's sentence "so as to give [him], with time served and time off for good behavior, a chance of release of prison during his lifetime."[170]

G. Were the Good Conduct and Clemency Programs *Ultra Vires*?

McCloy created the good-conduct program and the Advisory Board for War Criminals on the basis of a legal opinion by the HICOG General Counsel that he had the authority to reduce the sentences imposed by the NMTs.[171] It is far from clear, though, whether that opinion was correct. First, Law No. 10 may not have authorized General Clay's review of the NMT sentences, much less McCloy's good-conduct and clemency programs. Second, it is unlikely that McCloy had the right to create those programs without the assent of the High Commission as a whole.

1. Ordinance No. 7

Article XVII(a) of Ordinance No. 7 specifically authorized the Military Governor "to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof." That provision was adopted pursuant to Article III(2) of Law No. 10, which provided that "[t]he tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Conmmander for his respective Zone." But did the latter justify the former?

There are two problems here, one narrow and one broad. The narrow problem is that it is unclear whether the Control Council intended Article III(2) to authorize zone commanders to review the sentences imposed by the tribunals they created. It seems unlikely, given that Article III(5) of Law No. 10 specifically prohibited zone commanders from deferring "the execution of death sentences" by more than one

[167] Ministries, XIV TWC 552.
[168] Id. at 546.
[169] McCloy Clemency Decisions, 17.
[170] Id. at 18.
[171] SCHWARTZ, AMERICA'S GERMANY, 160.

month "after the sentence ha[d] become final." Article III(5) seems to suggest that the Control Council did not view rules permitting sentence modifications as the kind of rule or procedure that Article III(2) permitted zone commanders to adopt.

The broader problem involves the relationship between Law No. 10 and the IMT Charter. As noted in Chapter 10**,** Tribunal IV held in *Ministries* that Law No. 10 could not extend the jurisdiction of the NMTs beyond the Charter's provisions – to include crimes against humanity that did not satisfy the nexus requirement, for example – because Law No. 10 stated in its preamble that it was enacted "to give effect to the terms of the London Agreement of 8 August 1945."[172] The London Charter made the "Control Council for Germany" as a whole responsible for modifying sentences of defendants convicted by the IMT; individual Allies had no such authority. The logic of *Ministries* thus suggests that insofar as the Control Council wanted to authorize individual Allies to modify the sentences imposed in their zonal trials, it had to condition such modifications on the agreement of all four Allies. Such a limitation would have been procedurally cumbersome, but it would not have been irrational – after all, Law No. 10 was specifically enacted "to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal."[173] Giving each Ally the unlimited and unreviewable right to release defendants convicted in Control Council trials was obviously inconsistent with that goal.

2. The High Commission

Even if General Clay did have the authority to modify the NMT sentences as Military Governor, that does not mean *McCloy* had the authority to create the good-conduct and clemency programs. Indeed, Joseph L. Haefle, a Major in EUCOM's Office of the Judge Advocate, expressly rejected that idea in a 1949 memo to the Judge Advocate himself. Haefle pointed out that McCloy was not the Military Governor when he created the programs in December 1949 and July 1950, respectively; that position had been abolished with the creation of HICOG the previous September. The question, therefore, was whether McCloy's decision to create the good-conduct and clemency programs were justified "by the succession of a High Commissioner to certain of the powers and authority previously exercised by General Clay as Military Governor and representative of the United States Government on the Allied Control Council."[174]

Haefle concluded that they were not. The problem, in his view, was that the authority to modify the sentences imposed by tribunals established pursuant to Law No. 10 belonged not to the individual High Commissioners, but to the Allied High Commission – as the successor to the Allied Control Council – as a whole. The High Commission, which had been created by the U.S., Britain, and France on 8 April 1949,[175] was responsible for exercising the powers that the Allies had reserved in the

[172] Ministries, Order & Memorandum of the Tribunal Dismissing Count Four, XIV TWC 114.
[173] Law No. 10, Preamble.
[174] Memo from Haefele to Judge Advocate, European Command, 22 Aug. 1949, NA-549-2237-2, at 1-2.
[175] Agreement as to Tripartite Controls, 8 Apr. 1949, para. 1.

Occupation Statute.[176] One of those powers, as discussed earlier, was "control over… questions of amnesty, pardon or release in relation to" sentences imposed by "courts or tribunals of the occupying powers." The Agreement, however, did not authorize individual High Commissioners to exercise the reserved powers – on the contrary, Article 9 provided that "[a]ll powers of the Allied High Commission shall be uniformly exercised in accordance with tripartite policies and directives," and Article 6 provided that, on all matters other than amending Germany's Federal Constitution (which required unanimity), "action shall be a majority vote."[177]

Because all decisions concerning "amnesty, pardon, or release" required the majority vote of the High Commission, Haefle insisted that McCloy could not create the good-conduct and clemency programs unilaterally:

> In essence then, there must be further agreement by the body most nearly comparable to the Allied Control Commission and having authority to legislate in this field, which body is the High Commission, as successor to the Allied Control Council in the Western Zones of Germany, to which is specifically reserved the authority with reference to disposition of war criminals. It is considered the directives to the High Commission by their governments preclude unilateral action on this subject by any one of the High Commissioners, at least until the procedures for joint agreement have been exhausted.[178]

Haefle submitted his memo on 22 August 1949, before McCloy created the good-conduct and clemency programs. He thus recommended that "assent to the proposed program[s] be obtained from the High Commission to whom the matter should be presented under the provisions of the 'Tripartite Agreement'."[179] McCloy ignored his recommendation.

H. The Response to the Decisions

The Allied response to McCloy's decisions was overwhelmingly negative. Some attacked McCloy's overall approach to clemency, such as Hartley Shawcross, the IMT prosecutor who had become the British Attorney General, who claimed that the decisions reflected McCloy's "mistaken ideas of political expediency or… the wholly false view that these sentences were no more than vengeance wreaked by the victors upon the vanquished."[180] Others focused on specific decisions – in particular McCloy's decision to release Alfried Krupp and restore his property. Atlee and Churchill each condemned Alfried release on the floor of Parliament.[181] Ben Ferencz attributed McCloy's excessive sympathy for Krupp to his background as a

---

[176] Id. at para. 2.
[177] Article II(1) of the Charter of the Allied High Commission, enacted on 22 June 1949, specifically required the High Commission to "reach its decisions" concerning reserved powers "in accordance with the provisions of the Agreement as to Tripartite Controls."
[178] Memo from Haefele to Judge Advocate, 22 Aug. 1949, at 9.
[179] Id. at 10.
[180] MAGUIRE, 232-33.
[181] BOWER, 373. According to Bower, McCloy thought that Atlee and Churchill were being hypocritical, given Britain's reluctance to avoid trying Krupp itself. Id.

Wall Street lawyer.[182] And William Wilkins, one of the judges in the *Krupp* case, wrote an angry letter to McCloy protesting Alfried's release.[183] In Wilkins' view, McCloy's decisions were dictated solely by "political expediency" and had the effect of "recogniz[ing] Hitler's Lex Krupp decree as valid." Wilkins also insisted that McCloy did not have the authority to restore Krupp's fortune, because the return of property did not fall within "the category of clemency."[184]

The most incisive attack on McCloy's clemency decisions, however, came from Telford Taylor himself. On March 24, Taylor published an article in *The Nation* entitled "The Nazis Go Free." Echoing Shawcross, Taylor condemned McCloy's report as nothing more than

> the embodiment of political expediency, distorted by a thoroughly unsound approach to the law and the facts, to say nothing of the realities of contemporary world politics. Mr. McCloy paints his action as an effort to iron out discrepancies in severity and to consider individual circumstances justifying clemency. Analysis shows, however, that what he has done approximates blanket commutation of sentences.[185]

Taylor was incensed by much of McCloy's report, particularly its patently false claim that although Krupp plants had used and mistreated vast number of slave laborers, "the industrial concern and its management were not primarily responsible for this treatment"[186] – an idea that Taylor described as "bad logic and worse law."[187] More importantly, though, Taylor insisted that the clemency decisions dealt a severe blow both to the legitimacy of the U.S. war-crimes program and to the development of international criminal law:

> It appears to me that Mr. McCloy has been deluded into the belief that the Germans will regard his "clemency" as a demonstration of American fairness and good-will. We shall soon see how wide of the mark he has shot. True democrats in Germany will not applaud the release of Krupp directors and S.S. concentration-camp administrators. Nor will German nationalist sentiment be appeased. For the ultra-nationalists, Nurnberg has become an invaluable whipping boy. These commutations will be seized upon as tantamount to a confession that the trials were the product of Allied vengeance and hate rather than the embodiment of law.[188]

McCloy was evidently stung by such criticism, but his attempts to defend himself only deepened skepticism toward his decisions. McCloy published an open letter to Eleanor Roosevelt, for example, in which he claimed the clemency program was

---

[182] MAGUIRE, 231.
[183] WILKINS, 217.
[184] Id. at 218.
[185] Taylor, *The Nazis Go Free*, 171.
[186] McCloy Clemency Decisions, 12-13.
[187] Taylor, *The Nazis Go Free*, 171-72.
[188] Id. at 172.

justified because "unlike criminal cases in the U.S. and England there was no provision for further court review of these cases for possible errors of law or fact after the court of first instance passed on them"[189] – an open admission that he saw himself as entitled to provide the NMT prisoners with appellate review. McCloy's letter prompted a personal response from Taylor, who pointed out its "numerous inaccuracies" – such as McCloy's contention that General Clay "for one reason or another had been unable to dispose of [the cases] finally"[190] – and reminded Roosevelt that, contrary to U.S. clemency practice, McCloy and the Advisory Board had made its decisions without ever soliciting input from the prosecution.[191] McCloy also doubled down on his defense of Alfried Krupp, describing him as a "playboy" who "hadn't had much responsibility" for the decisions of the firm,[192] despite all the evidence to the contrary. Finally, McCloy attempted to rebut the idea that his decisions were driven by the need to convince the Germans to rearm by claiming that he "received the [Advisory] Board's conclusion… many months before there was any question of German rearmament." As Schwartz points out, that was simply untrue: the Board submitted its final report two weeks before the New York Conference at which U.S, British, and French representatives agreed to support rearming Germany.[193]

The German reaction to McCloy's decisions was equally disappointing, although for a very different reason. As Taylor predicted, the decisions failed utterly to legitimize the NMT trials or the war-crimes program in the eyes of ordinary Germans. A State Department survey conducted in Bavaria in early February concluded that "[a] fairly general public view seems to be that all the decisions were a political maneuver rather than an expression of American justice."[194] The following month, a HICOG survey of public opinion in all four occupation zones found that "the legal considerations motivating the American decisions in the Landsberg cases, apparently completely failed to impress the German public." Instead, most of the Germans surveyed believed that the U.S. authorities had been so lenient because "[t]hey realize the injustice of the trials."[195] Similar attitudes were also exhibited by German officials: a March survey of Burgermeisters throughout Germany found that "[t]he prevailing interpretations are either that the basic injustice of Nuremberg is now being conceded, or that the revisions were prompted by a desire to win German allegiance." More than 90% of those mayors also believed that Alfried Krupp had done "no more than war industrialists in other countries"[196] – an opinion that no doubt helps explain why Krupp "was greeted as a returning national hero" upon his release.[197]

The Germans also continued to advocate on behalf of the NMT prisoners McCloy did not release, particularly the five men whose death sentences he confirmed. McCloy

---

189 Id.
190 General Clay had, of course, reviewed all of the NMT sentences except those in *Ministries*.
191 Letter from Taylor to Eleanor Roosevelt, 19 June 1951, TTP-14-4-3-53, at 1.
192 Quoted in BOWER, 373.
193 SCHWARTZ, AMERICA'S GERMANY, 165.
194 Cited in MAGUIRE, 229.
195 Id.
196 Quoted in id.
197 BOWER, 373.

received more than 1,000 letters in the five weeks after he announced his decision, nearly all of which asked him to stay the executions which were scheduled for February 16.[198] More proactively, the Federal Republic's Main Office for the Legal Protection of War Criminals, which was headed by the attorney who had defended Erich Naumann in the *Einsatzgruppen* trial, hired Warren Magee, von Weizsaecker's attorney in *Ministries*, to challenge the executions in the U.S.

On February 14, two days before the executions, Magee filed habeas petitions on behalf of the five men in the United States District Court for the District of Columbia. McCloy refused to stay the executions pending the disposition of the petitions, even after Adenauer personally requested that he do so. Nevertheless, the executions did not take place on time: a few hours before they were set to begin, Secretary of State Acheson informed McCloy that he "should not proceed with executions until further advised."[199] The stays elicited a new round of lobbying by the Germans. Letters continued to stream into McCloy's office asking for clemency for the condemned men, and he received a petition for clemency signed by more than 600,000 Germans.[200] McCloy was unmoved, however, because he believed that commuting the death sentences would "further undermine the moral and legal principles established at the Nuremberg Trials" and would "strike another blow at the prospects for a democratic Germany, provide the communists with a powerful propaganda weapon to use against us and make a mockery of American standards of justice and law."[201]

Magee was no more successful on the legal front. The District Court rejected the habeas petitions not long after he filed them, and when he appealed "the U.S. Solicitor General, the Assistant Solicitor General, the Judge Advocate General of the Army and legal counsel for the State Department all showed up at the Court of Appeals to oppose his motion"[202] – an impressive, and all too rare, show of support for the NMT trials. Magee lost again, and the Supreme Court denied his petition for certiorari on May 22. McCloy then – with Acheson's permission – lifted the stays of execution and ordered the executions take place on May 25.[203]

Magee still refused to give up. He filed another petition in federal district court, this one seeking a permanent injunction against the executions on the ground that the Federal Republic's Basic Law prohibited capital punishment – an argument that the Germans had been making since the Law was enacted in May 1949. That petition convinced the judge to stay the executions until June 5, but the judge ultimately denied Magee's petition on jurisdictional grounds. Magee appealed, but the U.S. Court of Appeals for the D.C. Circuit affirmed the district court. The Supreme Court then refused to grant certiorari or extend the stay of execution on June 4.[204]

The condemned men were now out of options – and on June 7, after saying goodbye to their wives the night before, Pohl, Ohlendorf, Naumann, Blobel, and Braun were

---

198 EARL, 288.
199 Id. at 289.
200 Id. at 290.
201 Quoted in id.
202 EARL, 289.
203 Id. at 291.
204 Id.

hanged at Landsberg Prison. According to Maguire, "[w]hen Ohlendorf was lowered into the grave, the mourners gave the Nazi salute."[205]

III. THE CLEMENCY BOARDS

McCloy's clemency decisions ushered in a new phase of the U.S. war-crimes program, one in which the "problem" of the remaining NMT and Dachau prisoners "was now seen purely as a political one, in which the U.S. government sought to appease German demands while not unduly aggravating its own public opinion."[206] The new goal was straightforward: release the remaining prisoners as quickly and as quietly as possible.

German critics, of course, were anything but quiet. After Pohl and the *Einsatzgruppen* defendants were executed, the critics shifted their attention to a new cause – the ten German generals still in Landsberg, six of whom had been convicted in the NMT trials: Walter Kuntze (*Hostage*) Hermann Hoth, Georg-Hans Reinhardt, Hans van Salmuth, Hermann Reinecke, and Walter Warlimont (*High Command*). Time and again, the defense of the generals sounded a common theme: that the civilian judges who presided over the NMT and Dachau trials had no understanding of what was necessary during war – especially one involving a ruthless "Bolshevistic enemy" who routinely violated the laws and customs of war. Lieutenant Colonel Gerhard Matzky, for example, wrote on behalf of an association of German soldiers employed by the U.S Army that the "non-war experienced" judges had been unable to appreciate the "conscientiousness and seriousness" the German generals had shown during the war, because they "were lacking experience with an enemy whose complete recklessness they only very recently had an opportunity to feel for themselves."[207] As Hebert points out, Matkzy was making "veiled reference" to alleged American war crimes commited against communist partisans fighting in the Korean War, which continued to rage. Other critics were less subtle: in a February 2 letter to McCloy Bishop Wurm justified further sentence reductions for the generals on the ground that "[r]eports on the warfare in Korea raise the question in many instances whether the first sentences passed upon the generals were not perhaps based on insufficient knowledge of present-day partisan warfare."[208]

To his credit, McCloy rejected the Korean analogy, reminding Wurm that "[t]here was no military reason behind the slaughter of Jews as such" and that he could be certain "no 'Fuehrer' order was issued in Korea."[209] The constant comparisons nevertheless further delegitimized the war-crimes program in the eyes of ordinary Germans. A 1952 poll found that only 37% believed that the incarcerated generals were guilty and that only 10% supported the war-crimes program.[210]

The continued erosion of German support created a significant problem for the Allies, who were in the process of negotiating the "Convention on the Settlement of Matters

---

[205] MAGUIRE, 234.
[206] Schwartz, *McCloy and Landsberg*, 453.
[207] Quoted in HEBERT, HITLER'S GENERALS, 171.
[208] Quoted in id. at 172.
[209] Quoted in id.
[210] SELLARS, 25.

Arising out of the War and Occupation" with the Adenauer government. With the support of nearly all of Germany's political parties, Adenauer conditioned Germany's contribution to the EDC upon the release of all of the remaining war-prisoners in Allied custody. The Allies responded by giving Adenauer a choice: the German government could take custody of the prisoners, provided that they recognized the legitimacy of their convictions and guaranteed that they would serve the remainder of their sentences; or the prisoners could remain in Allied custody while a mixed German-Allied clemency board addressed the possibility of further sentence reductions. Adenauer desperately wanted control over the prisoners, but he was unwilling to guarantee that the German government would not review their sentences.[211] As a result, when the Convention was signed on 26 May 1952, Article VI specifically established a "Mixed Board" whose mandate would be, "without calling in question the validity of the convictions, to make recommendations for the termination or reduction of sentences, or for parole, in respect of persons convicted by a tribunal of an allied power… and confined the the Three Powers in prisons in the Federal Republic."[212]

The Mixed Board failed to satisfy the German critics, who condemned the Convention and continued to agitate for a general amnesty. A coalition of 11 POW and veterans organizations submitted a petition to HICOG that insisted "no German can be expected to don a military uniform again until the question of 'war criminals' has been satisfactorily settled"; the petition was signed by more than 2,000,000 Germans.[213] German newspapers published editorial after editorial insisting (seemingly without recognizing the contradiction) that no war crimes had been committed during the war and that the prisoners had just followed orders.[214] Most dramatically – and most indicative of how little the Germans had learned from their recent past – the Foreign Ministry condemned the Mixed Board on the ground that it was not an *Endlosung*, a Final Solution, to the war-criminals problem.[215]

A. The Interim Mixed Parole and Clemency Board

Although HICOG officials were no more impressed by these arguments than before, by the end of 1952 they believed that German demands for a general amnesty threatened both the Bundestag's ratification of the Convention and the re-election of the Adenauer government, which was set to face the electorate in September 1953 and was under relentless attack for accepting the Mixed Board.[216] The officials also realized that the Mixed Board would not solve the war-criminals problem even if the Convention was signed by Germany, because Allied ratification would require at least another couple of years – and France was already intimating that it might not sign the Convention at all.[217]

---

[211] MAGUIRE, 236-37.
[212] Convention on the Settlement of Matters Arising out of the War and Occupation, 26 May 1952, art. VI.
[213] MAGUIRE, 240.
[214] HEBERT, HITLER'S GENERALS, 176.
[215] FREI, 190.
[216] BUSCHER, 106-08.
[217] MAGUIRE, 242.

The State Department's solution was to acknowledge the obvious: that there was no way to address the political problem created by Landsberg Prison without abandoning the principles upon which the war-crimes program was based. Department officials thus recommended creating an interim mixed board, one that would release all of the remaining war criminals within nine months by administering "a more lenient system of sentence reduction and parole" than previous boards. The officials did not pretend that the interim board would be anything other than a political solution to a political problem; indeed, they openly stated that the board should begin by releasing prisoners – the generals convicted in *High Command* foremost among them – "whose retention will continue to occasion major outcry."[218]

The State Department's recommendation encountered significant opposition. John Raymond argued that it "unwittingly accept[ed] the very German psychology which it criticizes" – namely, the idea that the prisoners were convicted because they were soldiers, not because they were murderers. Similarly, John Auchincloss, an international relations officer in the State Department, suggested that the solution "would remove all legal basis for the trials by showing what little respect we have for them."[219] Both men additionally believed – not without reason – that the creation of yet another clemency board, even a "more lenient" one, would not satisfy German demands that the U.S. acknowledge that the NMT and Dachau prisoners had been unjustly convicted.[220]

Raymond and Auchincloss's concerns, however, went unheeded: on 31 August 1953, James B. Conant, the new High Commissioner – McCloy had stepped down a year earlier[221] – formally created the Interim Mixed Parole and Clemency Board. The five-person Interim Board consisted of three Americans and two Germans and was chaired by Henry Shattuck, a Harvard Law School graduate who had served in the House of Representatives from 1942-48. The Interm Board's mandate was based on the proposed mandate for the Mixed Board: "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."[222] In terms of clemency, the Board would consider the number of the prisoner's crimes; his position when he committed them; the existence of superior orders; and disparities between sentence and sentences imposed on similarly-situated offenders. In terms of parole, the Board would take into account the prisoner's age, health, and "overall character." New evidence would be considered, but only insofar as it provided "insight into the character of the applicant and the likelihood of his successful integration into society."[223]

---

[218] Quoted in HEBERT, HITLER'S GENERALS, 186.
[219] Quoted in MAGUIRE, 244-45.
[220] Id. at 248.
[221] One of McCloy's final acts regarding the NMT prisoners was to release Hans Reinhardt. Reinhardt's daughter tried to commit suicide in November 1950, perhaps as a reaction to her father's imprisonment, and thereafter Reinhardt applied for compassionate parole. McCloy granted the application in June 1952, although the warned his subordinates at HICOG that "there should be no publicity" about Reinhardt's release. HEBERT, HITLER'S GENERALS, 190.
[222] Quoted in MAGUIRE, 251.
[223] HEBERT, HITLER'S GENERALS, 189.

When the Interim Board began work on 27 October 1953, there were 431 war criminals in U.S. custody: 312 in Landsberg, including 31 who had been convicted in the NMT trials, and 119 elsewhere. Between October 27 and 11 August 1955, when the Mixed Board replaced it, the Interim Board recommended parole or clemency for 347 of those prisoners – 239 of the 259 who applied for parole, and 108 of the 172 who applied for clemency. EUCOM approved all but six of the parole recommendations and all but eight of the clemency recommendations. As summarized by undated HICOG memo, "practically all of the war criminal convicts… who could show any mitigating factor in connection with the commission of the crimes for which they were convicted, had their sentences reduced and were released on parole."[224]

B. The Mixed Parole and Clemency Board

As specified by Article 6 the Convention on the Settlement of Matters Arising out of the War and the Occupation, the Mixed Parole and Clemency Board consisted of six people, three Germans and one representative from each of the Three Powers. The American representative was Edwin Plitt, a career officer in the State Department who had also served on the Interim Board. Unlike the Interim Board, the Mixed Board was a quasi-judicial body whose parole and clemency decisions were binding when unanimous.[225]

When the Mixed Board began work, 34 Dachau defendants and 10 NMT defendants remained in Landsberg Prison – the "hard-core" war criminals, as they were known. Almost immediately, the Board was plunged into controversy: in late 1955, a unanimous vote of the Board led to the parole of Sepp Dietrich, the commander of the SS units involved in the Malmedy Massacre. Dietrich's release infuriated veterans groups and important politicians in the U.S., particularly Senator Kefauver, who had been a member of the Baldwin Commission. Kefauver denounced Dietrich's release as a "serious mistake" and demanded a Senate investigation. The State Department attempted to defuse the controvery by emphasizing the Board's independence and the conditional nature of parole, but such legalistic considerations were no more persuasive to the Americans than they had been in other contexts to the Germans.[226]

The fallout from the Dietrich controversy ultimately cost Plitt his position on the board; the State Department blamed him for casting the vote that made the parole decision unanimous and thus binding. Unfortunately, Plitt's replacement, Senator Robert Upton of New Hampshire, proved no more successful: after casting the lone vote against the parole plan the Board had approved the previous October for Joachim Peiper, whose *Kampfgruppe* had personally carried out the Malmedy massacre, Upton resigned from the Mixed Board in June 1956, less than three months after he had joined it. Explaining his decision to quit so suddenly, Upton claimed that the Mixed Board was functioning not as a genuine parole board, but as a "device" for releasing war criminals as quickly and as efficiently as possible. He was particularly aggrieved

[224] Summary of U.S. War Crimes Program in Germany, undated, NA-549-2236-3, at 4.
[225] Settlement of Matters Convention, art. 6(3)(b).
[226] MAGUIRE, 265.

by his fellow Board members' insistence that the gravity of a prisoner's crimes had no bearing on whether he should be granted parole.[227]

Once Upton resigned, it was only a matter of time before the Mixed Board emptied Landsberg Prison completely. His replacement, Spencer Phenix – a State Department lifer who had helped draft the Kellogg-Briand Pact of 1928 – fully understood "that the objective of the final phase of American war crimes policy was to release the remaining war criminals" and was happy to be the scapegoat for the anger of U.S. veterans and politicians like Kefauver by pretending that he was making decisions without the approval of the State Department.[228] Not long after he was appointed, Phenix submitted two memos to the Department concerning the remaining Landsberg prisoners. Memo A pointed out that maintaining the Mixed Board's current approach to parole would mean that it "would continue in operation until the deaths of the six individuals serving life terms, or, barring prior death, until 1985." Not surprisingly, Phenix opposed that option, seeing no "political, practical, or sociological advantage" for the U.S. to keep the worst of the worst in prison that long.[229] Memo B thus detailed his "preferred method" for the "rapid liquidation of the war crimes problem": reducing the number of years a prisoner had to serve before he was eligible for parole; eliminating the cumbersome oversight of parolees that went far beyond what the French or British required; and quietly commuting the parolees' sentences to time served after they were released.

The State Department – including John Raymond, who had evidently tired of fighting a losing battle on behalf of the NMT and Dachau trials – enthusiastically supported Phenix's solution. The German Foreign Office then "coincidentally" recommended a very similar proposal to the State Department. Phenix took the plan to the Mixed Board on 10 April 1957, and the Board unanimously approved the plan the following day.

By the end of 1957, all but four of the Landsberg prisoners had been released under the relaxed parole requirements, including Joachim Peiper. The remaining prisoners were the "ultimate hard core" and included, not surprisingly, three of the *Einsatzgruppen* defendants who had been originally sentenced to death: Adolf Ott, Ernst Biberstein, and Martin Sandberger. The Mixed Board refused to grant parole to those men, but it was willing "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" – thereby achieving the same result. On 9 May 1958, Ott, Biberstein, Sandberger walked out of Lansdberg Prison as free men.[230] The U.S. war-crimes program was officially over.

---

[227] Id. at 272.
[228] Id. at 273.
[229] Quoted in id. at 275.
[230] Id. at 281-82.