

Americans on the Defense Team in the Tokyo War Crimes Trials, 1946–1948: Understanding the Mentality Behind Defending the “Enemy”

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The International Military Tribunal for the Far East (IMTFE), also known as the Tokyo War Crimes Trials or Tribunal, has many layers that highlight the ambiguities and complexities of international law and prosecution of war criminals. The Tribunal took place in Allied occupied Japan post-World War II and dealt with Japanese Class A war criminals.¹ It convened on April 29, 1946, and adjourned on November 12, 1948. Upon the request of the Japanese in early 1946, General Douglas MacArthur ordered Americans to be recruited as defense lawyers for the Trials to ensure that the defendants had adequate and fair representation. This was due to the fact that the international trial procedures were based on Anglo-American judicial practices.² These American lawyers defended the same people accused of masterminding vicious atrocities during the war. Primary sources such as oral histories, essays, legal documents, and personal letters provide a glimpse into the mindset of the American defense team. Georgetown University Law Library’s Special Collections houses an extensive collection of letters that John Brannon, one of the American lawyers, wrote to his brother. These letters illustrate Brannon’s thoughts and beliefs on the Tribunal in Japan and were especially useful in analyzing the shifts in

¹ Japanese Class A war criminals were those accused of planning and starting war. Class B and C war criminals were tried in their own trials separate from the IMTFE. These classes covered conventional war crimes and crimes against humanity. Class B and C war criminals included high-ranking officers and military personnel. Class A war criminals included Japan’s top leaders.

² Carrington Williams, “The Tokyo War Crimes Trials Before the International Military Tribunal for the Far East,” in *International Humanitarian Law: Origins, Challenges, Prospects*, ed. John Carey, William V. Dunlap, R. John Pritchard (Ardsey, NY: Transnational Publishers, Inc., 2003), 113. “The Japanese requested the American lawyers because this was basically an Anglo-American trial with procedures foreign to them.”

Brannon's approach to his role. They allowed me to follow the journey of an American defense lawyer and gain access to Brannon's inner thoughts and changing mentality over the course of his time working for the defense.

Although the Americans and the Japanese were enemies during World War II, a change in the mindset of the defense team enabled them to defend those accused of committing such crimes as the bombing of Pearl Harbor, the massacres in Nanking and Manila, and the mistreatment of Allied prisoners of war (POWs) and civilian internees. Two questions arise: why did the U.S. feel the need to put American lawyers on the defense team at the Tokyo War Crimes Trials, and how did Americans come to Japan's defense following a war during which their clients were seen as the enemy? The desire to spread American democracy and values to Japan in the aftermath of World War II was one of the driving forces behind the Allied occupation of Japan. This desire prompted Americans to try and prove the merit of the American system to non-democratic nations through, for instance, the implementation of the Anglo-American judicial system. Approaching the Tribunal with this mentality led Americans to work passionately and diligently for the defense team, allowing them to view the defendants no longer as the "enemy" but instead as the "client," and in many cases as genuine friends worthy of justice.

The battle between the Axis and Allied powers during World War II caused an outpouring of nationalistic propaganda and a surge in nationalism on both sides. The Allied victory paved the way for Allied nations like the United States to promote the superiority of democratic governments over totalitarian or fascist, militaristic governments to establish and ensure future peace in the aftermath of an international war. By the end of the war, the U.S. military, led by American General Douglas MacArthur as the Supreme Commander for the Allied Powers (SCAP) or General Headquarters (GHQ), had begun occupying Japan. As a part of the occupation effort, the United States and other Allied powers took measures to prosecute German and Japanese war criminals. In addition to Class A war criminals, the U.S. also tried Class B and C war criminals during the Yokohama War Crimes Trials.³ Prior to the Tokyo Tribunal, MacArthur set up military tribunals in Manila to prosecute General Homma Masaharu and General Yamashita Tomoyuki, his combatants in the Philippines; both generals were executed.⁴ Afterward, MacArthur's superiors in Washington advised him to create an international tribunal for Class A criminals to avoid the perception that the U.S. alone was using justice as a means to seek revenge. The charter for the International Military Tribunal for the Far East was issued on January 19, 1946, and was modeled after the Nuremberg Charter. The trials in

³ The United States primarily handled the Class B and C war trials in Yokohama, but many of the Allies held their own Class B and C trials at various points from 1946 to 1949.

⁴ In this paper, all Japanese names from those in Asia will follow the traditional Japanese name order, which is the surname first followed by the given name.

Tokyo followed similar procedures to those in Germany. Initially, 28 Class A war criminals were selected for trial.⁵ When the Tribunal opened, judges were only from Allied nations. Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the United Kingdom, the United States, and the Soviet Union decided the fate of the defendants.⁶ The Tribunal was a tool for the Allied nations to further promote democracy in an attempt to create a new westernized ally in Japan.

The United States used the Occupation not only for convicting war criminals, but also in the hopes of demilitarizing and democratizing Japan. Much of the Occupation concentrated on establishing more democratic foundations in Japan stemming from American constitutional principles. Initially, the Occupation was essentially a United States operation in its execution. It was not until early 1946 that other Allied nations were officially represented in the Occupation effort through the creation of the Far Eastern Commission and the Allied Council for Japan.⁷ The Department of the Army recruited American civilian personnel to work with the offices of SCAP, which contained special staff sections that centered on aspects of labor, health, government/political, and education reform, as well as sections that handled censorship and intelligence. For example, there was a government section, which prepared a model draft constitution for a post-war Japan. It contained key democratic values and phrases such as “we the people” and “life, liberty, and the pursuit of happiness” that are present in the U.S. Constitution and the Declaration of Independence. The Japanese Constitution went into effect on May 3, 1947, and remains Japan’s constitution to this day. It also included provisions for suffrage, direct elections, and freedoms of speech, religion, and the press. The United States inserted its own ideologies into the development of Japan’s postwar society.

In a similar fashion, the Tribunal was implemented in part to determine international precedent for war crimes prosecution based on Anglo-American judicial values in particular. SCAP’s legal section concentrated on Japan’s alleged war criminals for the IMTFE and was an instrument to help further democratize Japan. John Dower argues in his 1999

⁵ Eiji Taekema, *Inside GHQ: The Allied Occupation of Japan and its Legacy* (New York, NY: Continuum, 2002), 243-4. Also, Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit in the Wake of World War II* (Cambridge, MA: Harvard University Asia Center, 2008), 25, 43-77. The choice of whom to put on trial was quite controversial. A series of interrogations took place to make the determination. The Allied Powers were unsure if they should charge Emperor Hirohito. SCAP ultimately decided not to try him.

⁶ Initially, the Tribunal had nine representative judges from the Allied nations. Later, justices representing India and Philippines joined the court.

⁷ General Staff of Douglas MacArthur, ed., *Reports of General MacArthur: MacArthur in Japan: The Occupation: Military Phase: Volume 1 Supplement* (Facsimile Reprint, 1994), <http://www.history.army.mil/books/wwii/MacArthur%20Reports/MacArthur%20V1%20Sup/Index.htm#cont>.

book, *Embracing Defeat*, that, “to American reformers, much of the almost sensual excitement involved in promoting their democratic revolution from above derived from the feeling that this involved denaturing an Oriental adversary and turning it into at least an approximation of an acceptable, healthy, westernized nation.”⁸ This sentiment permeated the Occupation and encouraged a sense of pride in spreading democratic principles. In his opening statement, the prosecution’s Chief Counsel, Joseph B. Keenan, a Harvard-trained lawyer, stated, “They [the Japanese war criminals] declared war on civilization. They made the rules and defined the issues. They were determined to destroy democracy and its essential basis – freedom and respect of human personality.”⁹ Keenan maintained that the defendants had engaged in aggressive warfare, arguing the Japanese had aimed to disrupt international objectives toward peace. In his controversial yet highly influential work on the Trials, *Victor’s Justice*, Richard Minear argues, “The trial was a kind of morality play, a reaffirmation of a world view that had been one factor in the making of World War II.”¹⁰ This supports the idea of the Tribunal as a means for the U.S. in particular to prosecute war criminals as an extension of its wish to promote democratic values on an international scale.

Many of the civilian workers within SCAP were aware of the U.S. goal to democratize Japan and gained a unique perspective by living in Japan while being a part of the Occupation. The Gordon W. Prange Collection at the University of Maryland, College Park, contains a collection of over 100 oral histories that provide recollections from various American players of the Occupation. Several of these oral histories give further insight into the defense mindset as well as the perception of the U.S.’s role in Japan from those outside the defense section. For example, Luella Moffett, secretary for the Legal and Government Section of SCAP, was asked what America’s goal was with occupying Japan. She replied, “Well, she [America] was trying to, I should say, turn Japan into a friend rather than an ex-enemy.”¹¹ Donald Ritchie, film critic for the Pacific *Stars and Stripes* newspaper, said, “Yes, I remember democracy was a great thing because that was on all Japanese tongues at that point.”¹² Others discussed their view of the Japanese during

⁸ John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York, NY: W. W. Norton and Company, 1999), 80.

⁹ University of Virginia (UVA) School of Law, “Prosecution Opening Statement,” *The Tokyo War Crimes Trials: Digital Collection*, <http://imtfelaw.virginia.edu/collections/morgan/3/4/prosecution-opening-statement> (2016).

¹⁰ Richard H. Minear, *Victor’s Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971), 179.

¹¹ Luella Moffett Oral History, Marlene J. Mayo Oral Histories, Gordon W. Prange Collection, University of Maryland Libraries, Virginia Beach, Virginia, September 11, 1979, 20. Hereafter, Name, Mayo Oral Histories, location of interview, date of interview, page.

¹² Donald Ritchie, Mayo Oral Histories, Tokyo, May 18, 1981, 9.

the War and the Tribunal. Herbert Greer, a Colonel judge advocate and member of the 24th Division, commented, “Well, I had no personal feeling about it [the Tribunal]. I thought it was proper. I don’t know how else you would feel about a thing like that. They [the Japanese] were cruel. I’d known many who’d been and had many friends who’d been prisoners [of the Japanese], and of course I didn’t take kindly to the treatment they’d received.”¹³ Many of the American occupiers were aware that a goal of the Occupation was to somehow reorient Japan based on the ideals of the U.S. version of democracy. This rested on the belief that democratic values fostered a more just and functional way of governing and that the Occupation would turn Japan into a fully democratic nation and future ally.

The American defense team arrived in Japan with hopes of showcasing the superiority of the Anglo-American way in line with the Occupation’s aims. They felt justified because they understood the Trials as aiding in the American mission of promoting democracy through employing American legal ideals. In the case of Elaine Fischel, the secretary for two of the lawyers, John Brannon and William Logan, she initially wished to work for the prosecution team and was disappointed to be placed with the defense.¹⁴ However, that feeling changed as she spent more time working on the defense cases and being around the defendants as well as exploring Japan and socializing with the Japanese. In her 2008 memoir, she included personal photographs and letters from the time she was on the defense team. She says, reflecting on her time in Japan working as an Army civilian, “There was no way to get around the fact that for the past two and a half years, I helped defend ‘the enemy.’”¹⁵ Fischel’s memoir offers some answers as she recounts her time assisting with the cases for Kido Kōichi and members of the Japanese Navy under Logan and Brannon.¹⁶ In her introduction, she states, “Like so many other Americans [during the War], I judged

¹³ Herbert Greer, Mayo Oral Histories, Norfolk, Virginia, September 12, 1979, 7-8.

¹⁴ She was interested in attending law school prior to going to Japan. When she learned of an opening for a secretarial position at the Tokyo War Crimes Trials, she believed it would be good preparation for the legal profession and took the job.

¹⁵ Elaine B. Fischel, *Defending the Enemy: Justice for the WWII War Criminals* (Minneapolis, MN: Bascom Hills Books, 2009), 292. Hereafter, Fischel, page.

¹⁶ Kido Kōichi was the Lord Keeper of the Privy Seal and the closest advisor to Emperor Hirohito during the War. He offered his 5,000-page diary to the prosecution, thinking it would help his defense. He was sentenced to life imprisonment. He served six years before being released in 1953. The members of the Japanese Navy included: Nagano Osami, admiral, former Navy minister, and chief of General Naval Staff. He was known for being the leader of the Pearl Harbor attack. He passed away during the Tribunal in 1947; Shimada Shigetarō, admiral and Navy minister. He was sentenced to life imprisonment, but was released on parole in 1955; Oka Takasumi, admiral and chief of the General and Military Affairs Bureau of the Navy Ministry. He was sentenced to life imprisonment, but granted provisional release in 1954.

Japanese people by the horrific hallmark event that took place at Pearl Harbor... to me, the Japanese were evil, subhuman people."¹⁷ However, she ends her introduction, saying, "When I finally came home [from Japan], I had a completely different perspective of these people and their culture."¹⁸ She began to challenge her pre-established, engrained beliefs.

The American defense team believed they were upholding American democratic values by promoting Anglo-American common law standards in the courtroom. Approaching the Tribunal in this way led the American lawyers to wholeheartedly defend people accused of committing malicious acts toward their nation during the war and causing the deaths of their neighbors and loved ones. Carrington Williams, the American defense lawyer for Hoshino Naoki, shared his reaction after being offered to join the defense.¹⁹ He said, "The prospect of defending the Japanese enemy did not attract me; I was a strong believer in our wartime crusade as I saw it, fighting aggression and dictatorship. This almost seemed like changing sides. However [...] Japan was an exciting place to be as the Allied Occupation tried to reform it from being a military terror into a democracy."²⁰ Williams justified his job as a way to assist the American effort postwar.

Upon hearing that they would be joining the defense team, many of the other lawyers reacted similarly to Williams. On December 19, 1947, Brannon wrote to his brother, nicknamed Sonny, "I want to contribute to the establishment of future international law predicated on American concepts of justice."²¹ Almost a year before, however, he had written, "I am an American first and a lawyer second."²² Along the same vein, George Furness said, "Some people... in America used to come and say when I went back there during the trial, 'I assume you're doing as bad a job as you can.' I'd say, 'Of course not. I'm a lawyer and I'm very glad to defend them.'"²³ And Owen Cunningham, defense lawyer for the ambassador to Germany, Ōshima Hiroshi, said, "My role was to see that justice as understood in Anglo-Saxon countries was fairly and impartially administered."²⁴

¹⁷ Fischel, xiii.

¹⁸ *Ibid.*, xv.

¹⁹ Hoshino Naoki was a politician who was involved in the drug trafficking in Manchuria. He was sentenced to life imprisonment but released from prison in 1958.

²⁰ Williams, *The Tokyo War Crimes Trials*, 111.

²¹ Brannon, December 19, 1947.

²² Brannon, February 26, 1947.

²³ George Furness Part 2, Mayo Oral Histories, Tokyo, May 18, 1981, 13.

²⁴ Ōshima Hiroshi was an Army officer as well as ambassador to Germany from 1938-39. He was sentenced to life in prison, but was paroled in 1955 and granted clemency three years later.

²⁵ The lawyers understood it as their duty as *American* attorneys to view the defendants solely as clients without influence from the war and home front attitudes. They viewed the Tribunal as a way to represent the functionality of their judicial process, categorizing the defendants purely as clients seeking rightful justice.

American lawyers worked closely with the Japanese lawyers, becoming acquainted with various Japanese mentalities, nuances in language, and customs.²⁶ The Tribunal was set up to follow an Anglo-American adversarial system, foreign to many of the Japanese.²⁷ Americans were added to the defense team to work with the Japanese lawyers and ensure a fair trial.²⁸ However, the defense team contained no other Allied representatives beside Americans. George Furness, defense lawyer for Shigemitsu Mamoru, the defendant who received the lightest sentence of seven years in prison, said that many of the Japanese defense lawyers were diplomats and not aware of the workings of Anglo-American law.²⁹ Other Japanese lawyers felt frustrated with the language barrier and the trial setup. In one of his letters, John Brannon described his shock in discovering that the Japanese lawyers were not fully versed in Anglo-American principles and procedures of law. He explained, “They beg to learn and plead for explanations.”³⁰ Some of the Japanese attorneys were quite well-versed in these judicial practices, but even they expressed frustrations about the Tribunal’s setup. Chief Defense Counsel, Takayanagi Kenzō, a University of Tokyo professor who had studied law at Harvard, was considered Japan’s leading authority on Anglo-American law.³¹ In one of his legal arguments, he noted that Japanese defense lawyers could not correctly interpret the concept of “conspiracy,” one of the charges, within the Anglo-American legal context because it was

²⁵ Owen Cunningham, “The Major Evils of the Tokyo Trials” (Address to be delivered, Seattle, Washington, September 7, 1948), Gordon W. Prange Collection, University of Maryland Libraries, 1.

²⁶ Unfortunately, there is a gap in Western scholarship on the Japanese defense lawyers. Therefore, information has been drawn from primary source material and the pieces of information available in scholarship that do mention the Japanese lawyers.

²⁷ Totani, *The Tokyo War Crimes Trial*, 125. “...most of them [the Japanese defense lawyers] had little training in the adversarial system and did not fully understand how to carry cross-examinations effectively.”

²⁸ Fischel, 25. “To ensure a fair trial, guidance from the Allied nations was essential.”

²⁹ Shigemitsu Mamoru was a former diplomat and foreign minister. He received the lightest sentence of seven years in prison. He was paroled in 1950 and went on to become Deputy Prime Minister of Japan.

³⁰ Georgetown Law Library, “John G. Brannon Papers”, August 8, 1948. Hereafter, Brannon, date. The collection contains letters from John to Sonny from November 1946 through July 1950. One letter dates earlier to December 1, 1945.

³¹ Taekema, *Inside GHQ*, 244.

beyond their legal education.³² The interaction of American and Japanese defense lawyers fostered a diffusion of knowledge and culture.

American defense lawyers were exposed to Japanese customs and traditions through these interactions, alerting them to Japanese approaches to the world that differed from those common to the U.S. The defense even argued that the prosecuting Allied nations perhaps misunderstood the Japanese and their motivations during the War when determining the indictments. For example, in one of the Defense Opening Statements, the team claimed that the prosecution had misunderstood the Japanese phrase *hakkō ichiu*. The phrase, included in the preamble of the Tripartite Pact of 1940, means conceptually that the Japanese were seeking a universal brotherhood, yet it was more literally translated to, “Eight corners of the world under one roof.” The prosecution focused on the translated meaning rather than the conceptual one, interpreting the phrase as proof that Japan consciously intended to conquer the world in cooperation with Germany and Italy.³³ The defense responded that the prosecution based their claims on false evidence due to ignorance of the Japanese and their language. Working directly with Japanese defense lawyers offered the American attorneys a way to better understand the Japanese mentality and worldview, helping them to develop a sincere defense.

The defense team was able to detach itself from the anti-Japanese propaganda and bias, allowing them to devote their time toward providing the best possible defense. They became engrossed in their work, believing in their clients’ innocence and questioning the fairness of the Tribunal. Minear heavily criticized the Tribunal, calling it a “showpiece” “designed not only to punish wrongdoers but also to justify the right side, our [the U.S.’s] side.”³⁴ ³⁵ Dower agrees, arguing that, “Class A trials were fundamentally an exercise in revenge.”³⁶ Yet, some contemporary scholars have contended against this consensus. Yuma Totani claims that the Tribunal correctly followed the international law precedent set forth by The Hague Conventions and the Kellogg-Briand Pact of 1928, which denounced aggressive warfare as a sufficient instrument of national policy. She also maintains that the Tribunal was modeled after the Nuremberg Trial, and the indictments in the IMTFE were considered international crimes at

³² UVA School of Law, “Conspiracy Article by Kenzo Takayanagi,” *The Tokyo War Crimes Trials: Digital Collection*, <http://imtfe.law.virginia.edu/collections/carrington-williams/2/3/conspiracy-article-kenzo-takayanagi> (2016).

³³ Kobori Keiichiro, *The Tokyo Trials: The Unheard Defense: English Edition* (Rockport, ME: New England History Press, 2003), 57.

³⁴ Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971), 6.

³⁵ Minear, *Victor's Justice*, 13.

³⁶ Dower, *Embracing Defeat*, 252.

Nuremberg.³⁷ Similarly, historian Tim Maga disputes that despite its attachments to popular labels such as “racism” and “vengeance,” the Tribunal exercised proper legal practices and validly sought justice against acts of evil.³⁸ Although existing scholarship continues to debate the legitimacy of the charges against the Japanese war criminals, the defense team adamantly argued that their clients were innocent and that the Tribunal was, from the start, working against the defendants.

Many of the defense lawyers began to see the Tribunal as inherently unjust, which accelerated the intensity of their desire to defend their clients. This is exemplified in one of Brannon’s letters from December 1947, in which he wrote, “It is my contention that until an impartial international judicial body is established to hear such matters as have engaged us here for two years, there will be no hope for the writing of sane and just international law whose objective is to prevent wars – not to avenge the wounds of the conquerors.”³⁹ One month prior, he wrote, “...that I gave my all for the preservation of international justice. Honestly, I think we [the defense team] have performed a service to the whole world in proving how ridiculous it is to attempt to convict a group of men on purely political charges.”⁴⁰ A year later, Brannon told Sonny, “Never let it be said that this trial does not have many of the aspects of American justice. But at the same time it must be recognized that it is basically non American, [displacing] so many of our most cherished principles of justice.”⁴¹ Brannon clearly articulated his growing discontent with the Trials. His letters show the shift in his perspective from someone supporting the American cause to someone who questioned it.

Early in his time in Japan, Brannon struggled with balancing allegiance to his country and maintaining impartiality as a lawyer.⁴² A few months after arriving in Japan, Brannon expressed to Sonny his inner conflict. “To do this job I would have to blast the American Navy and its planning for war as well as the state department. Shall I? Is it worth it? Would it do more harm than good? Shall I fake a sincere defense and protect the U.S.

³⁷ Totani, *The Tokyo War Crimes Trial*, 78-87.

³⁸ Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (Lexington, KY: The University Press of Kentucky, 2001), ix-xiv.

³⁹ Brannon, December 19, 1947.

⁴⁰ Brannon, November 14, 1947.

⁴¹ Brannon, September 16, 1948.

⁴² Brannon wrote to Sonny on December 19, 1947: “The fallacy of your thinking in regard to these alleged war criminals here is a perfect example [of] narrow minded American and elsewhere thinking. And by this I do not criticize you personally. ‘There is Pearl Harbor to avenge,’ you write... I’m afraid the characterization you put on it is generally accepted by the allied countries and their people. And you say, ‘just remember if we lost the war I rather imagine, etc.’ Of course that is true. If we had lost the war, these Japs wouldn’t even give us a trial. They would have raped America. But that isn’t the reason I am here...”

or shall I go all out?" Brannon wondered.⁴³ Toward the end of the Tribunal, Brannon also offered Sonny his thoughts on American hypocrisy in regards to the War Crimes Trials and the treatment of the defendants. When writing of how the indicted war criminals remained locked up in Sugamo Prison for three years during trial, Brannon asked Sonny, "Is this American justice or just plain hypocrisy?" Over the course of his two years in Japan, Brannon's correspondence maps a drastic change in mindset. He began questioning the American way because of his ability to view his clients as purely clients. They were no longer enemies, no longer criminals. They were legally innocent in the eyes of Brannon, and soon Brannon began to view the United States as more of the wrongdoer.⁴⁴

Americans on the defense team accumulated suspicions concerning the Tribunal's intentions. The notion that the Allies were prosecuting Japanese leaders for their part in wartime atrocities, even though the Allies themselves had committed comparable acts, namely the U.S. atomic bombings on Hiroshima and Nagasaki, led American lawyers to switch their focus away from promoting the superiority of the American judicial way toward protecting the defendants.⁴⁵ Minear called this hypocrisy of the trial, "victor's justice," of which the American defense team became acutely aware.⁴⁶ Only those nations that won the war were represented on the court and they were to decide the fate of their former war enemies. However, many of the indictments against the war criminals were crimes of which the Allies, too, were guilty. Brannon and the other lawyers exploited this unfairness as a part of their defense, increasingly becoming frustrated that their clients were on trial to be potentially executed or imprisoned for life for violating fundamentally *ex post facto* laws. George Furness criticized that it was "not a fair trial at all" since the Japanese were to be judged by

⁴³ Brannon, December 14, 1946.

⁴⁴ In an undated letter to Sonny housed in the Harry S. Truman Library Archives, Brannon wrote, "For some time, I have been wanting to write you concerning the legal aspects... so that you might better understand the many difficulties entailed in producing a defense that is plausible, if not adequate... In the first place, we, as an American counsel, serving our government and particularly the War Department, must exercise some discretion... Believe me, it is apparent among many of the America defense lawyers that there has been a gradual change during the past six months from the idea that Japan was responsible for this war to a field of thought where it is actually believed that America and Great Britain forced the issue and produced the result."

⁴⁵ Defense arguments that mentioned the atomic bombings were not considered in the Trials.

⁴⁶ Minear, *Victor's Justice*, 77. "...the members of this tribunal being representatives of the nations which defeated Japan and which are the accusers in this action, a legal, fair, and impartial trials is denied to these accused by arraignment before this trial."

the victor nations.⁴⁷ Owen Cunningham condemned the U.S. for the Trial's creation and structure, saying, "The whole proceeding was contrary to American ideals and principles of justice."⁴⁸ Williams concurred, saying, "... it was then my opinion, shared by other American defense counsel, that despite our horror at Japanese atrocities, it was basically a political trial. It still is."⁴⁹ Ben Bruce Blakeney, defense lawyer for Tōgō Shigenori, also strongly maintained that the trial was unfair and hypocritical, especially in regards to the counts of aggressive war against the Soviet Union, which broke its five-year non-aggression pact with Japan, attacking during the final days of the war.⁵⁰ Appealing the verdicts to MacArthur, Blakeney wrote, "The verdict was not fair; not based on the evidence."⁵¹ The defense also upheld that the defendants warned the U.S. of plans to attack Pearl Harbor but the message was not sent in time. Many of these lawyers, who initially justified being on the defense team as a way to promote American values, were now criticizing their country for not providing an adequate trial for their clients.⁵²

The defense attorneys became convinced of the innocence of their clients, which is evident in their passionate presence in court. They began to critique various components of the judicial standards upon which the IMTFE was grounded. The Defense General Opening Statement A, presented by Japanese counsel Kiyose Ichiro on February 24, 1947, touched on the topic of conspiracy. It stated: "... it is not proper to apply a particular legal theory which had developed in a certain country... as if it were a general principle of law of universal application. The idea of conspiracy is unique in the Anglo-American legal system..."⁵³ The statement continued to explain that the idea of conspiracy, even in Anglo-American legal systems, is too abstract to determine criminality. The defense argued that by legal definition, for conspiracy as a crime to have occurred, there needed to be a certain date and place to constitute a plotting, yet the prosecution just gave the range from January 1928 to September 2, 1945. Kiyose's opening statement showcased the defense team's vehement belief that many of the charges, like the charge of conspiracy, had little merit. Another example is from Count 37, which accounts for crimes listed as "murder." The counsel "contend[ed] that the loss of lives due to the act of war does not constitute

⁴⁷ George Furness Part 1, Mayo Oral Histories, Tokyo, May 14, 1981, 14.

⁴⁸ Cunningham, "The Major Evils," 2.

⁴⁹ Williams, *The Tokyo War Crimes Trials*, 108.

⁵⁰ Tōgō Shigenori was a career diplomat and former ambassador to Germany and Moscow, as well as the former Minister of Foreign Affairs for Japan. In 1941, he became Foreign Minister under Prime Minister Tōjō. He was sentenced to 20 years in prison, but passed away in 1950, while in prison.

⁵¹ Fischel, xxvi.

⁵² *Ibid.*, 197. Fischel remembers Brannon saying, "We won this war on the battlefield; and we're not going to lose it in the courtroom," 197.

⁵³ Kobori, *The Unheard Defense*, 61.

murder. This, we believe, is an accepted theory of international law..."⁵⁴ Furthermore, the defense expanded on the counts regarding the mistreatment of POWs, stating that the alleged war criminals at IMTFE were unaware of the treatment, as this had not been their domain and had been beyond their scope of authority to change. They also touched on the notion that some of the indictments were based on *ex post facto* law. The defense counsel argued that Crimes Against Peace and Crimes Against Humanity were not established laws prior to when the accused supposedly committed them; therefore, these charges should be inadmissible.⁵⁵ The Trial proceedings span over 20,000 pages, showing that the defense team had numerous arguments to contend the various counts and charges. Understanding some of their main points helps to paint a clearer picture as to why the defense counsel came to accept the Japanese alleged war criminals as innocent of the charges against them.

The American lawyers no longer viewed their clients as the adversary, and in many cases, were able to develop genuine friendships with their Japanese clients. The available primary source accounts exhibit that being in Japan and working for the defense changed the lawyers' mindset from the wartime loathing of the Japanese to curiosity, respect, and an authentic liking. Elaine Fischel's various letters home showcase her changing outlook and increased sympathy for the Japanese. For instance, she wrote, "I came over here after seeing the U.S. cartoons expecting to see 26 monkeys sitting in court and being on trial, and yet there are 26 men up there each with individual personalities and faces..."⁵⁶ While in Japan, she even developed a friendship with Prince Takamatsu, one of the Emperor's brothers. She also occasionally stayed with Kido's family during the Tribunal and continually referred to General Tōjō Hideki, who was regarded as the number one war criminal, as "nice."⁵⁷ She recalled that, "It desperately mattered to me that they [the naval defendants] not be hanged," and wrote, "Each of the American defense attorneys became so attached to his particular clients; the thought of seeing them hanged was unbearable."⁵⁸ ⁵⁹ In her memoir's introduction, she also wrote, "I was proud and happy to be associated with the defense, despite the bitterness many of my countrymen felt about providing assistance to people who they considered barbaric murderers."⁶⁰

Fischel was not the only American on the defense team to develop affections toward the Japanese defendants. She and Brannon were the

⁵⁴ Ibid., 72.

⁵⁵ Ibid., 112.

⁵⁶ Fischel, 136. Initially, twenty-eight men were indicted. However, only twenty-five were charged. Two died during the Tribunal and one was declared insane and removed from trial.

⁵⁷ Ibid., 121.

⁵⁸ Ibid., 240.

⁵⁹ Ibid., 162.

⁶⁰ Ibid., 20.

lone non-Japanese at the memorial service of Admiral Nagano, one of Brannon's clients.⁶¹ She said of Brannon, "[He] was caught in the middle of loyalty to his homeland and loyalty to his client's defense."⁶² During his time in Japan, Brannon developed a curiosity and subsequent love for the country, its people, and its culture. He wrote to Sonny about his excitement after the Tokyo Bar Association contacted him to become a member. Brannon went on to describe his desire to practice law in both Japan and the United States.⁶³ In select letters, he also explained his growing relationship with Nagano's family, often dining at Nagano's sister's house and comforting Nagano's brother-in-law after Nagano's passing.^{64 65} In a similar respect, George Furness had close ties to his client's family, with Shigemitsu allowing Furness to stay at his house on the weekends, since Shigemitsu was away in Sugamo.⁶⁶ Furness became so enchanted by Japan that he decided to remain after the Trials, opening up a law practice and marrying a Japanese woman.⁶⁷ Carrington Williams, in a 2003 essay, also shared that he sent a Christmas card to his defendant's widow each year.⁶⁸ Beverly Coleman, the chief of the defense section until June 1946, had Admiral Nomura, the Japanese ambassador to the U.S. during the attack on Pearl Harbor, over for dinner during his time in occupied Japan.⁶⁹ When asked to explain how he could defend the same men who were labeled wartime enemies, Beverly Coleman responded that it was "like a boxer or team who shake hands after it is over."⁷⁰ The Americans began to see their clients as individuals, with families and personalities, feelings, and even valid justifications for their actions during the war.

Examining the Tribunal and the journey of these American lawyers opens the door to better understand the implications of American exceptionalism and the role of the U.S. in foreign relations, especially in the context of war. War creates a gray area in terms of right versus wrong, legal versus illegal. Furthermore, war introduces a broader issue in that nations begin to overlap and try to reach a consensus on overarching concepts. Yet, each nation has their own set of ethical codes, government structure, and legal outlines. During war and postwar periods, the legal and ethical ideals

⁶¹ *Ibid.*, 167.

⁶² *Ibid.*, 165.

⁶³ Brannon, November 27, 1946.

⁶⁴ Brannon, December 14, 1946.

⁶⁵ Brannon, January 13, 1947.

⁶⁶ George Furness Part 2, Mayo Oral Histories, Tokyo, May 18, 1981, 2.

⁶⁷ George Furness Part 2, Mayo Oral Histories, Tokyo, May 18, 1981, 15.

⁶⁸ Williams, *The Tokyo War Crimes Trials*, 14.

⁶⁹ Beverly Coleman, Mayo Oral Histories, Washington, D.C., March 25, 1980, 23. Coleman would leave the defense team early in the trial, along with a few other American lawyers, because he was unhappy with the way the defense was being organized.

⁷⁰ *Ibid.*, 38.

of each nation are often obscured in the inherent unethicalness of war, making the idea of prosecuting war criminals an extremely delicate and intricate process. The ambiguities of wartime international law and ethics as well as the U.S.'s role in international relations remain a consistently relevant area of interest in historical discourse. The story of the American defense team at IMTFE adds a new layer to the narrative.

From their passionate and vigorous work for the defense, it might seem that Americans on the defense team virtually forgot that their friends and family viewed the Japanese as vicious murderers, though this is untrue. Rather, they detached themselves from this propagandized mentality in order to provide their clients a fair trial in line with the values they felt distinguished the United States from other nations at the time. Americans on the defense team employed their way of approaching law in order to uphold the American ideals they deemed precious, just, and superior. In doing so, they were able to view the defendants no longer as the enemy but purely as clients entitled to a fair trial. In their research, many of the defense lawyers truly did discover their clients to be innocent and victims of an unfair "victor's justice" trial, consequently fighting devotedly for a "not guilty" verdict. Toward the end of the Tribunal, Brannon wrote to Sonny that, "*It is us – Americans – that are the teachers. It us that profess a better way of life, of government... It is not only asinine, but simply insane to justify what we do now by pointing to the Japanese and saying, 'you would have done much worse.'*"⁷¹ The American defense team gained a sense of loyalty toward the Japanese defendants, diverging from the sentiments of many of their countrymen. They did so through applying Anglo-American judicial principles to their legal approach, originally to promote American values aligned with the country's postwar wish to spread democracy, but in the end, leading them to see the Japanese war criminals as individuals who genuinely deserved justice.

⁷¹ Brannon, August 8, 1948.

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