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LEX AMERICANA: CONSTITUTIONAL DUE PROCESS AND THE NUREMBERG DEFENDANTS*

JONATHAN A. BUSH**

I. INTRODUCTION

Malinski v. New York[1] is an obscure case about coercive interrogation and multiple confessions from the era before the due process revolution of the 1960s. The prosecution conceded that the lead appellant had been stripped and held naked for most of a day, put in fear, and subjected to multiple interrogations. Malinski confessed and later confessed again in writing, and the question before the Supreme Court was whether the second confession, given a few days after the nude detention, could be used in evidence. The Court reversed Malinski's conviction, though not his co-defendant's, reasoning that even if the coercive setting did not rise to the level of abuse found in *Chambers v. Florida*,[2] it made the first confession involuntary and tainted the second.[3] With facts typical of the Court's coercion cases a generation before *Miranda v. Arizona*,[4] and with a tame majority opinion by Justice William O. Douglas, *Malinski* would appear to be an unremarkable case. On one level, *Malinski's* only unusual feature is Justice Frank Murphy's pointed criticism of the New York prosecutor for his casual anti-Semitism: words from a time capsule.[5]

If *Malinski* is remembered at all for its law, it is for the odd concurrence by Justice Felix Frankfurter emphasizing the error of "[a] construction which gives due process no independent function but makes of it a summary of the

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** Fellow, Center for Scholars and Writers, New York Public Library. The author wishes to thank Peter Gay and Dorothy and Lewis Cullman for creating the wonderful scholarly oasis that is the Center for Scholars and Writers, and Lisa Lang for everything else.

1. 324 U.S. 401, 403-04 (1945).
2. 309 U.S. 227 (1940).
3. *Malinski*, 324 U.S. at 410.
4. 384 U.S. 436 (1966).
5. *Malinski*, 324 U.S. at 433-34 (Murphy, J., dissenting in part).

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specific provisions of the Bill of Rights . . . ."[6] Like a star whose elliptical orbit is affected by a nearby black hole, Frankfurter's argument revolved not around anything in Douglas' bland opinion, but in opposition to a memorandum circulated by Justice Hugo Black. Black may have been preparing to use *Malinski* as the vehicle for his famous argument that the Fourteenth Amendment, and especially its due process clause, incorporated all constitutional rights found in the Bill of Rights and made them applicable to state criminal justice. Having considered his novel incorporation argument almost since arriving on the Court, Black must have felt that the time or occasion was not right for the full-dress version of the incorporation argument, and he did not write in *Malinski*, nor two years later when the possibility presented itself again in *Louisiana ex rel. Francis v Resweber*.[7] But Frankfurter chose to include his reply to Black's memorandum in the *Malinski* concurrence, thus sharing with the world one side in what otherwise remained largely an internal debate.

Late in the 1946 term, Justice Black went public with incorporation in his famous dissent in *Adamson v. California*.[8] At the time, it seemed to convince almost no one, certainly not a sufficient number of his *Adamson* brethren, and in general not even his closest allies.[9] Soon after, the leading Supreme Court historian of the day savaged the historical basis of Black's position.[10] For fifteen years Black had only isolated victories to show for his incorporation argument,[11] and as late as 1959 Frankfurter sought occasion to drive a stake

6. *Id.* at 415 (Frankfurter, J., concurring). *See also* HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 156-57 (1960) (discussing Justice Frankfurter's *Malinski* concurrence).

7. 329 U.S. 459 (1947). *See* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING 138 (1984) (noting that Justice Black explored the incorporation approach as early as 1939). *See also id.* at 157-58 (discussing Justice Black's *Malinski* memorandum); *id.* at 159-62 (discussing Justice Black's unpublished *Francis* concurrence); Betts v. Brady, 316 U.S. 455, 474-75 (1942) (Black, J., dissenting) (Black advancing incorporation argument). *But see* THOMAS, *supra* note 6, at 156 (suggesting Frankfurter was replying in *Malinski* to innuendos in Douglas's opinion, rather than to Black's memorandum).

8. 332 U.S. 46, 68 (1947) (Black, J., dissenting).

9. J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 441 (1968) (quoting Murphy writing his law clerk: "It is hard for me to agree with all that Hugo writes. He may be right, but I doubt it."); SILVERSTEIN, *supra* note 7, at 167-69 (discussing Murphy's skepticism).

10. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

11. Wolf v. Colorado, 338 U.S. 25 (1949) (incorporating the Fourth Amendment and making it applicable to the states, but without the federal exclusionary rule).

through it.[12] Then, in the early 1960s, and especially after Frankfurter's retirement in 1962, the Court began consistently to hold that the Constitution incorporated each constitutional protection in the Bill of Rights to apply against the states, and to the same extent that it applied against the federal government.[13] By the end of the Warren Court, almost every clause in the Bill of Rights pertaining to the criminal process was deemed incorporated. Black's victory was complete.

Like most victories, it came with a dark lining. For one thing, Justice Black had been forced to wait so long—until the second half or the third phase[14] of the Warren Court, almost the end of his judicial career. For another, many of the incorporation cases were close majorities.[15] As a result, not only were they controversial, but they were also vulnerable to later retrenchment or reversal. One leading case was immediately bypassed and soon limited to its own facts,[16] and in the run-up to the best known case of all, *Miranda*, skillful judicial maneuvering was required in order to fend off an alternative proposal being prepared under the auspices of the American Law Institute by sympathizers of Frankfurter.[17] In some instances, Black saw the Court bypass incorporation to reach a liberal result that Black felt could not be justified by incorporation theory.[18] Elsewhere, Black's incorporation victories came burdened with concurrences by Harlan, still resisting the reasoning if not the result.[19] And right down to the end, even justices and scholars sympathetic to the due process revolution denied Black the crown of his victory by insisting

12. Bartkus v. Illinois, 359 U.S. 121, 124-29 (1959); SILVERSTEIN, *supra* note 7, at 170-71 n.107 (discussing Frankfurter's continuing desire to bury the total incorporation theory once and for all).

13. The literature on the Warren Court's rulings in the area of criminal law and procedure is voluminous. The classic work is FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW (1970) (originally published as THE SELF-INFLICTED WOUND). *See also* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 6-36 (1993). Fresh insights are found in the newest study, LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 379-444 (2000).

14. The periodization belongs to Russell H. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 SANTA CLARA L. REV. 773 (1980).

15. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

16. Bypassed by *Miranda*, the *Escobedo* holding was soon minimized into insignificance. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (Stewart, J., plurality opinion) (explaining that "the Court has limited the holding of *Escobedo* to its own facts . . ."); YALE KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS IN LAW AND POLICY 87-88, 162-63 (1980).

17. *See* description in POWE, *supra* note 13, at 392-94.

18. Estes v. Texas, 381 U.S. 532, 559-60 (1965) (Warren, C.J., concurring, with Douglas, J. and Goldberg, J.) (stating that regardless of whether incorporation rationale fits the case, due process requires and will be employed to justify reversal of conviction tainted by television publicity).

19. Pointer v. Texas, 380 U.S. 400, 408 (1965) (Harlan, J., concurring).

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that total incorporation was still wrong and that all the Court was doing was selectively incorporating each protection.[20]

But these were quibbles. Incorporation became the dominant rationale in criminal procedure, eclipsing the fundamental fairness or independent or free-standing due process theory that Frankfurter was advancing in *Malinski*. So thoroughly entrenched had Black's reasoning become that even when the Burger or Rehnquist Courts frequently ruled against constitutional claims in criminal procedure, they did so not by reversing Black-inspired incorporations, but by finding loopholes, exceptions, high thresholds, low waiver standards, or harmless error. For the moment, whatever its faults as demonstrated by history, and however incongruous it seems when harnessed to recent narrow constitutional rulings, the rhetorical logic of Black's incorporation theory that the Bill of Rights should apply to state as well as federal settings is simply too powerful to undo.

While the incorporation theory has flourished, its predecessor and rival, the independent due process theory, has been unable to shake its present low esteem among judges and academic observers. In part, this is because of its resemblance to substantive due process in other, non-criminal contexts—the *Lochner* problem.[21] It is also due to memories of the way fundamental fairness theory was often used in the 1950s to limit judicial scrutiny of even pretty unappetizing state criminal practices—the *Irvine* problem.[22] Not least, independent due process has languished because of its particular association with Frankfurter himself, whose difficult personality soured relations with broadly admired colleagues and who is widely, and not entirely fairly, blamed for equivocating on race and civil liberties issues—the Frankfurter problem. Whatever the reason, free-standing due process in criminal procedure is a theory whose time is widely felt to have come and gone, with few to mourn it.[23] Perhaps Professor Israel's essay[24] in this issue of the *Saint Louis University Law Journal* will be a first step in the revitalization of the doctrine.

In the following short essay, I will attempt a modest rehabilitation of the incorporation doctrine, and to do so I will rely on a seemingly remote example.

20. *In re* Gault, 387 U.S. 1, 12-14, 19-21, 27-28, 39 (1967) (relying on independent due process); *see also id.* at 21 (citing Frankfurter's concurring opinion in *Malinski*). For tweaking of Black by his allies, see LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 253-54 (1990). Black's benign public response to his allies' selective incorporation doctrine is quoted in GRAHAM, *supra* note 13, at 55-56.

21. Lochner v. New York, 198 U.S. 45 (1905).

22. Irvine v. California, 347 U.S. 128 (1954).

23. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 2.7(a) (3d ed. 2000) (noting "the Court's description of free-standing due process as having only 'limited operation,' with fundamental fairness infractions defined 'very narrowly,' . . ." though disagreeing with the accuracy of the Court's characterization).

24. Jerold H. Israel, *Free-Standing Due Process in Criminal Procedure: The Supreme Court's Development of Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001).

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At the same time as *Malinski*, in the late winter of 1945, another group of American lawyers was contemplating how to define a criminal process that would also embody basic norms of due process. In other words, the lawyers were attempting to define and implement the same notions that Frankfurter spoke of in *Malinski*. The setting was again Washington, where plans were being drafted for the war crimes trials that would soon be negotiated in London and begun in Nuremberg. The drafters were devising a wholly new legal institution, and in doing so they were not bound by the considerations of federalism and precedent. But if they were freed from those constraints, they were subject to another, for they knew that whatever trials were held would be subject to the closest legal and political scrutiny. In short, the drafters' task was to devise a court that was practical but manifestly fair, and they were writing on essentially a blank slate. The results of their drafting efforts, along with the later interpretative gloss of the judges, are the subject of this essay.

It is not the aim of this paper to examine systematically the procedural issues of the fourteen American-inspired Nuremberg-related trials. Nor is the aim to compare the procedure at the Nuremberg trials with contemporary American criminal procedure or with current international war crimes trials in The Hague and elsewhere. Finally, it is not the purpose to assert a causal connection between due process at Nuremberg and constitutional developments at home in the late 1940s. Indeed, with a few exceptions,[25] it is unlikely that there are causal connections, especially in the area of procedural fairness.

The aim here is simpler. After a brief survey of the Nuremberg and related tribunals in Part II, I will present in Part III a discussion of a few significant procedural features of the war crimes trials. The aim is to draw from the Nuremberg procedure a few generalizations about the contours of free-standing due process in the same period at home, and to suggest that to contemporaries, even to allies of Frankfurter, notably United States chief prosecutor Robert H. Jackson, free-standing due process was capable of bearing considerably more weight than it carried in the emerging Supreme Court jurisprudence.

25. Justice Jackson frequently commented on the deep impact Nuremberg made on him. *See, e.g.*, Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG xxxvii (1954) (describing Nuremberg as "the most important, enduring, and constructive work of my life"). Certainly the trial experience had a deep impact on Justice Jackson himself, especially in his First Amendment jurisprudence. *See* Terminiello v. Chicago, 337 U.S. 1, 22-25 (1949) (Jackson, J., dissenting); Kunz v. New York, 340 U.S. 290, 314 (1951) (Jackson, J., dissenting); JEFFREY D. HOCKETT, NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON 267-81 (1996) (discussing the impact of the Nuremberg experience on principally Jackson's First Amendment jurisprudence, but explaining that the influence, if any, on other judges or on criminal procedure doctrines is harder to identify).

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II. THE NUREMBERG BACKGROUND

The trials under consideration here were but fourteen of the thousands of trials held after the Second World War for Nazis, Japanese war criminals, and local collaborators in both the European and Asian theaters. The stakes in these various post-war trials were often enormous and the wrongs under review staggering in scope and horror. But the legal framework was almost always straightforward. Trials were conducted either by victorious belligerents relying on their national military codes, embodying their version of the laws of land or naval warfare, or by liberated nations employing treason or other criminal statutes or emergency decrees. Neither military nor liberated-nation trials required a new legal framework, and both were amply supported by historical precedent and international law. For its part, the United States held its share of military trials under the authority of the Judge Advocate General, many on the site of liberated Nazi concentration camp Dachau and others on only slightly less notorious Japanese and German facilities. Overall, proceedings were held in dozens of countries, starting immediately after liberation, with passions still high, and continuing years after, with elderly participants and unhurried process.[26] We will never have accurate numbers of how many trials were held in all. We only know that they were based on old law of some sort, and so did not require new formulations of due process.

But for a handful of the highest-level perpetrators, Hitler and Mussolini and Goering and Tojo, the legal situation was different. For one thing, every victim nation had been harmed by the perpetrators' deeds and, it was assumed, each nation wanted to be a part of post-war judicial reckoning. For another thing, the familiar tools of national and military law may not have been adequate to reach these leaders. If they were not uniformed personnel (subject to the military law of the victorious belligerents), and were not nationals of liberated nations or had not personally committed acts in those nations (subject to the law, say, of Norway or Poland), and if in the case of the German leaders, they had complied with or even formulated, rather than broken, German law (that is, if they were senior German officials rather than low-level killers), it was difficult to see how familiar tribunals could reach them. So, as planning for post-war settlement gained momentum during the war, the Allies began by 1942-43 to contemplate special provisions for "the case of the major criminals

26. Professor Howard Levie collected many of the more important cases in HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES (1993). A recent collection of studies examining the context of trials in a handful of liberated nations is THE POLITICS OF RETRIBUTION IN EUROPE: WORLD WAR II AND ITS AFTERMATH (István Deák, Jan T. Gross, & Tony Judt eds., 2000). The most complete survey of trials in the Far Eastern theater is PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951 (1979).

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whose offense have no particular location and who will be punished by a joint decision of the Governments of the Allies."[27]

The result of this broad distinction was a series of trials of major criminals by newly constituted international tribunals: a four-power trial at Nuremberg (1945-46) at which twenty-two individuals and six organizations were tried; twelve subsequent American trials at Nuremberg (1946-49) trying some 185 Germans grouped according to type of offense (SS, law, medicine, heavy industry, foreign ministry, banking and military high command); a series of French trials at Rastatt in French-occupied Saarland (1946-48) trying low and mid-level military personnel and a single industrial concern for use of French slave labor; and the eleven-power trial at Tokyo (1946-48) trying twenty-five senior military and political figures immediately below the emperor.[28] All four programs have been the subject of considerable academic study, and it is not the purpose here to add to that literature. For present purposes, all that matters is the international character of each of these proceedings. In legal contemplation, the three European programs were the result of international negotiation and were governed by international instruments. The first Nuremberg, Rastatt and Tokyo trials had an international cast of judges, and all four programs had the participation of an international staff of investigators, researchers and lawyers, both prosecution and to an extent defense. When various appeals and petitions were taken from the American Nuremberg tribunals to federal courts in Washington, those courts were right to recognize the international character of the proceedings and reject American review.[29]

That said, on another level these trial programs bear the deep impress of American participation and American legal norms. We know a great deal about the genesis of these trials. The eventual picture of Allied post-war cooperation grew inauspiciously out of initial British hostility in 1941 to the demands of the wartime governments-in-exile for post-war trials, through the ineffectual wartime activities in London of the official United Nations War Crimes Commission, down to continuing British ministerial reluctance as late

27. The last paragraph of the so-called *Moscow Declaration, Conference of Foreign Ministers*, Nov. 1, 1943, is cited in such official war crimes series as REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 11-12 (1949) ("Red Series"). An annotated version is given in THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-1945, at 13-14, 221 (Bradley F. Smith ed., 1982).

28. A survey of all four programs is found in LEVIE, *supra* note 26, at 45-98, 115-16, 141-55. For additional information on the two lesser known programs, see TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949) [hereinafter TAYLOR, FINAL REPORT]; YVELINE PENDARIES, LES PROCÈS DE RASTATT (1946-1954) (1995).

29. Flick v. Johnson, 174 F.2d 983, 986 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 879 (1949), *reh'g denied*, 338 U.S. 940 (1950). Other summary dismissals are cited in *K. Brandt v. United States*, 333 U.S. 836 (1948) and *Milch v. United States*, 332 U.S. 789 (1947).

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as the spring of 1945.[30] We know that neither British nor American military lawyers offered practical legal help in the difficult problem of handling top-level civilian perpetrators. As for the contributions of the other two major powers, it is simplistic but not inaccurate to say that the French seem to have been content just to be included among the Big Four victorious powers with the opportunity to punish offenders against French victims, and the Soviets were agreeable to any plan that would lead to the punishment of Nazis. The road to Nuremberg led essentially through Washington.

Historians have been able to reconstruct an almost day-by-day record of the work of these Washington planners.[31] The various contributions of Henry Stimson, Samuel Rosenman, Francis Biddle, Herbert Wechsler, Ammi Cutter and John McCloy are known, and the important innovations of second-tier officials like Murray Bernays and William Chanler have been retrieved from obscurity. We know who devised each of the characteristic American features of the Nuremberg trials—not only common law procedure, but conspiracy, organizational guilt, aggressive war and crimes against humanity, and what arguments they used to convince skeptics. We also know that in almost every draft and explanatory memorandum, they included discussion of the elements of fairness and due process as necessary elements for American participation in a tribunal.[32]

In the summer of 1945, after V-E Day and the immediate stabilization of Germany, war crimes planning moved to London, where representatives of the four major victors gathered from late June to early August to negotiate the ground rules and legal charter for what would be the first Nuremberg trial. Even more is known about these negotiations, for in addition to the manuscript notes of various delegates, we have the published contemporaneous notes collected by the personal secretary to Justice Robert H. Jackson, President Truman's plenipotentiary for war crimes issues and chief American delegate at the conference.[33] The notes show that the major sticking points at the London negotiations had to do with the substantive definition of crimes, venue, presidency of the judicial panel, and selection of particular defendants.[34] Trial

30. *See, e.g.*, TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 26-33, 40, 45-46 (1992) [hereinafter TAYLOR, THE ANATOMY]; UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR (1948); ARIEH J. KOCHAVI, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT (1998).

31. TAYLOR, THE ANATOMY, *supra* note 30, at 33-42; BRADLEY F. SMITH, THE ROAD TO NUREMBERG (1981); Sidney S. Alderman, *Negotiating on War Crimes Prosecutions, 1945*, *in* NEGOTIATING WITH THE RUSSIANS 49, 54-56, 79 (Raymond Dennett & Joseph E. Johnson eds., 1951) (emphasizing the distinctive features of the so-called American plan).

32. *See* TAYLOR, THE ANATOMY, *supra* note 30, at 45-46.

33. *See* REPORT OF ROBERT H. JACKSON, *supra* note 27.

34. Legal issues at the London negotiations included: different definitions of the crime of aggressive war, *see* REPORT OF ROBERT H. JACKSON, *supra* note 27, at 293-309, 312-17, 327,

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procedure was particularly important to Jackson, and he repeatedly made clear that both American legal standards and public opinion demanded fair trials.[35] But specific procedural points were handled with dispatch. Occasionally uncertainty arose concerning how to harmonize Anglo-American trial procedure with the civil law procedure more familiar to the French and Soviets, as well as the Germans. These issues were readily resolved, typically along common law lines, and the results embodied in the so-called "London Agreement" that created the first Nuremberg tribunal, the International Military Tribunal (IMT).[36]

The three trial programs that followed the IMT have predictably been the subject of less scholarly energy, and in examining their origins we lack the full record of published memoranda and minutes corresponding to the London material. But even the organic acts establishing the Tokyo trial (a proclamation to the various Far East Allies from the American Supreme Commander of the theater, General Douglas MacArthur),[37] and the two occupation-zone programs at Nuremberg and Rastatt (both authorized by Control Council Law No. 10 between the four occupying powers in Germany)[38] show that the framers of these tribunals recognized the need to

329-37, 359, 363, 373-75, 380-95; the structure on the indictment, *id.* at 79-80, 153-54, 271; the appointment of the judges, *id.* at 214-15; the presidency of the bench, *id.* at 73, 233; whether a defendant might testify and be cross-examined, *id.* at 257, 262-64; the autonomy of each nation's prosecution team, *id.* at 152, 254, 288, 321-22; in absentia defendants, *id.* at 246; the location of the trials and the administrative headquarters of the court, *id.* at 143, 149, 157, 277-78, 279-81, 340-41, 365; the blending of civil and common law procedure, *id.* at 78, 115-16; the treatment of witnesses, *id.* at 282, 403-04; and the rendition of suspects, *id.* at 145-48, 158-59.

35. For example, see Justice Jackson's remarks the need for or worrying about fairness and perceived fairness at the planned trials, REPORT OF ROBERT H. JACKSON, *supra* note 27, at 84, 102, 150, 158, 266, 284, 336, 389, 408; *see* TAYLOR, THE ANATOMY, *supra* note 30, at 49, 53, 59; Alderman, *supra* note 31, at 60-79. For comments to the same effect prior to the London Conference, see THE AMERICAN ROAD TO NUREMBERG, *supra* note 27, at 158-59, 167-71, 190, 196, 206-07.

36. *Charter of the International Military Tribunal Annexed to the London Agreement*, Aug. 8, 1945 [hereinafter *London Agreement*], *reprinted in* REPORT OF ROBERT H. JACKSON, *supra* note 27, at 420-29 (charter and protocol only); 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 10-18 [hereinafter TRIALS OF WAR CRIMINALS] ("Green Series"). For text with commentary, see LEVIE, *supra* note 26, at 54-69 (commentary), 549-58 (text of charter and protocol only). The rules of court, adopted 29 October 1945, are published in various war crimes official reports, such as 15 TRIALS OF WAR CRIMINALS 18-22.

37. *Charter of the International Military Tribunal for the Far East*, Jan. 19, 1946 [hereinafter *Tokyo Charter*], *reprinted in* 15 TRIALS OF WAR CRIMINALS, *supra* note 36, at 1218-23, 1224-27. Both charter as amended and court rules are also reprinted in LEVIE, *supra* note 26, at 141-55 (commentary), 571-77 (text).

38. *Control Council Law No. 10* (Dec. 20, 1945), *officially reprinted in* TAYLOR, FINAL REPORT, *supra* note 28, at 6-10 (commentary), 250-53 (text); 15 TRIALS OF WAR CRIMINALS, *supra* note 36, at 23-28. The American implementing legislation, *Ordinance No. 7*, dated Oct.

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define the courts, their jurisdiction and fair procedures for the defendants. While the French tribunal at Rastatt inevitably adopted French trial procedure, the other two international programs, at Tokyo and the second round of trials at Nuremberg, were planned along familiarly American lines.

As for the four trial programs that were ultimately held pursuant to these three international agreements, they followed in the direction contemplated by the drafters, with a careful focus on procedural fairness. To be clear, I am not arguing that all, most, or any war crimes judicial rulings came out "right" or were conformable with American constitutional law of that day or this. The point here is only that the American war crimes planners, prosecutors and judges who participated in and for the most part led these programs (aside from Rastatt) consistently tried, by their lights, to anchor their activities closely to what they understood to be the requirements of an American fair trial. The judges in particular, almost all of them, kept their trials focused on familiar issues of fairness and rights at least as much as on larger issues of political history and persecution. In the following discussion, I shall use a small portion of the published pre-trial and trial evidence to make a few generalizations about what American lawyers thought they ought to do and were obliged to do in conducting fair trials abroad, and to ask why it matters.

III. AMERICAN DUE PROCESS AT THE TRIALS

A key planning memorandum from January 1945, issued in the name of the Secretaries of State and War and the Attorney General, stated that American policy should be that international war crimes trials were to have streamlined, simplified procedure that avoided legal niceties.[39] As the creation of victors in war, any tribunal was itself an act of grace, one that might embody as many or few rights as the victors chose to give it. On a more practical basis, the fear was that a court freighted with the due process paraphernalia of domestic courts would be ineffectual. Worse, as British planners worried, a proper legal court might result in widespread exonerations and a propaganda debacle, much as had occurred with war crimes trials after World War I.[40] All this seemed obvious, and so the need for a summary court with streamlined,

18, 1946, is reprinted in TAYLOR, FINAL REPORT, *supra* note 28, at 286-91, and 15 TRIALS OF WAR CRIMINALS, *supra* note 36, at 28-35. Both charter as amended and court rules are reprinted in LEVIE, *supra* note 26, at 558-70.

39. *Memorandum for the President: Trial and Punishment of Nazi War Criminals*, January 22, 1945, *in* REPORT OF ROBERT H. JACKSON, *supra* note 27, at 3-9; THE AMERICAN ROAD TO NUREMBERG, *supra* note 27, at 117-22 (text), 55-56, 238-39 (commentary). The continuing emphasis on speedy, efficient procedure is found in both minutes and subsequent drafts. *See, e.g.*, THE AMERICAN ROAD TO NUREMBERG, *supra* note 27, at 77, 115, 121, 127-28, 145, 148, 154, 155, 165, 178; REPORT OF ROBERT H. JACKSON, *supra* note 27, at 66, 113, 126, 212, 270, 339.

40. TAYLOR, THE ANATOMY, *supra* note 30, at 29.

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effective procedure was reiterated in negotiations and draft proposals in the summer 1945 London conference. Streamlined procedure was retained in softened form in the final version of the London Agreement, and then was carried over into both Control Council Law No. 10 and the Tokyo Charter.[41] Not that military trials needed explicit reservation or international agreement under American law to authorize the use of summary (sometimes very summary) procedure. The Supreme Court had recently reiterated that only minimal standards of due process need be followed in so-called military commissions convened even on American soil under the traditional laws of war to try certain types of enemy offenders (in the Saboteurs Case).[42] It was to stand by that ruling again soon after the war in declining to review the flawed trial of General Yamashita and dozens of lesser-known military-law trials conducted overseas.[43]

Yet, having made sure to include in each charter language responding to the concern that due process standards might cripple war crimes trials, the drafters of each of the three instruments (London Agreement, Tokyo Charter and Control Council Law No. 10 with its American Ordinance No. 7) assumed and accepted that courts would be staffed by independent judges, applying civilian legal standards and ensuring their institutional independence by adopting additional, detailed court rules. Together, the three court charters and the subordinate court rules, along with the bench rulings interpreting their charters and rules, embody a clear vision of familiar due process for criminal trials.

Under the three trial charters and subordinate rules, the architects of the war crimes trials required charging documents that gave defendants fair notice and identified the charges with sufficient particularity, even though this latter requirement took some compromise prior to the first trial between prosecutors from common law and civil law traditions. They set up courts with independent judges; they guaranteed defendants the right to counsel of their choice and the opportunity to hear, object to, and rebut evidence against them, and to present their own evidence; they permitted the defendants the right personally to testify, and the right not to testify; and they gave judges the

41. *London Agreement*, *supra* note 36, Art.18-19; *Ordinance No. 7*, *supra* note 38, Art. VI-VII; *Tokyo Charter*, *supra* note 37, Art. 12.

42. United States *ex rel.* Quirin v. Cox, 317 U.S. 1 (1942).

43. *In re* Yamashita, 327 U.S. 1 (1946). *See also* Hirota v. MacArthur, 338 U.S. 197 (1948) (Douglas, J., concurring), 335 U.S. 876 (1948) (Jackson, J., mem.), *reh'g denied*, 335 U.S. 906 (1949); Homma v. Peterson, 327 U.S. 759 (1946) (other denials to cases from Far Eastern theater, both international tribunal and military commission cases). *See supra* note 29 (comparable holdings for cases from European theater).

power to compel evidence, both against and for the defendants.[44] Even at the most general level, the picture of due process looks both reasonably fair and familiar.

In fact, the new tribunals' charters gave defendants many rights that went beyond anything allowed in the American system, federal or state. For example, defendants in the second round of Nuremberg trials were given the right to be present with counsel both at depositions taken of witnesses unavailable for trial and, remarkably, also at interrogations of prospective prosecution witnesses who were being detained by the Allies (as possible defendants in later trials or as protected informants).[45] There indeed may be tactical advantages for a prosecutor to be able to confront a defendant with possible evidence against him and provoke a reaction implicating either the defendant or the witness, but the advantage is hardly so great that prosecutors want to allow all defendants presence in witness interrogations as of right. More likely, a defendant's presence will allow him to discover the evidence against which he has to prepare. For that reason, no American jurisdiction permits anything of the sort as of right.

Another Nuremberg procedure that went beyond anything allowed at home was the defendants' right to address the court if they wished, freely, not under oath, and not subject to cross-examination, at the close of proceedings, in addition to the right to give sworn testimony and to have counsel make a closing argument.[46] These unsworn statements were not wholly unknown to the common law, but almost so. Only Georgia of the then forty-eight American states and a handful of other common law jurisdictions permitted unsworn statements in 1945, and in the years to come, where the right had not lapsed into desuetude, it was abolished save only in a few Australian states.[47] Significantly, where unsworn statements were allowed at common law, the right was historically in lieu of the defendant's right to testify under oath. At Nuremberg, the cobbling together of common law procedure with some elements of civil law (which did allow unsworn statements) meant that defendants had three separate opportunities to speak to the court: as witness, through counsel's closing argument, and through the unsworn personal closing

44. *See London Agreement*, *supra* note 36, Art. 16; *Ordinance No. 7*, *supra note* 38, Art. IV; *Tokyo Charter*, *supra* note 37, Art. 9. *But see* PICCIGALLO, *supra* note 26, at 14 (stressing British as well as American contribution to Tokyo indictment).

45. 15 TRIALS OF WAR CRIMINALS, *supra* note 36, at 63-64, 66-67. *See* TAYLOR, FINAL REPORT, *supra* note 28, at 56 (observing that in late 1947 and early 1948 many defense witnesses preferred waiting in the Nuremberg jail to leaving, for their prospects might be either extradition to face trial or denazification proceedings).

46. [NEW SOUTH WALES] LAW REFORM COMMISSION, UNSWORN STATEMENTS OF ACCUSED PERSONS: REPORT NO. 45, at 13, 22, 32 (1985); Alderman, *supra* note 31, at 49, 67 (citing Taylor v. Georgia, 315 U.S. 25, 28 (1942)).

47. *Id*.

statement. In two trials, a few defendants were even given a fourth opportunity when the bench ruled the defendants possessed such unusual expertise that they, in addition to their counsel, should be permitted to cross-examine certain of the prosecution's expert witnesses.[48]

Other rights not commonly given at home included a remarkably broad guarantee of appointed counsel of one's choice. At home, the Supreme Court had read due process as ensuring counsel to all defendants in capital cases,[49] which the Nuremberg cases also were. But counsel for indigents, then and now, meant court-appointed, usually overworked and underpaid, and in death penalty cases sometimes stunningly inept representation. At Nuremberg, defendants (all of whom were indigent, since even formerly wealthy industrialists held currency, legal title, shares and so forth from a defunct regime whose legal guarantees at least provisionally were worthless) were allowed to select counsel of their choice from anywhere in Germany. Comparisons with indigent or frozen-asset defendants today are inapt, since most lawyers in war-ravaged Germany were indigent too. The attraction of American compensation and canteen privileges, along with sympathy for the German lost cause, proved compelling, and few lawyers turned down inquiries from Nuremberg defendants. The accused chose their counsel well, drawing from the ranks of the leading practitioners and academic lawyers. In the Tokyo and subsequent Nuremberg trials a defendants chose two and even three lawyers each. Nor was there a political litmus test for defense counsel. In the European theater, most of the defense lawyers had been at least nominal Nazis, and some more active than that. The court secretariat tried not to advertise the availability of Nazi lawyers, but turned down no requests on that ground. The only limit placed by the Nuremberg tribunal was, for obvious reasons, on lawyers who covered up their past or were themselves possible candidates for war crimes trials or denazification proceedings.[50] Nuremberg defendants also

48. 15 TRIALS OF WAR CRIMINALS, *supra* note 36, at 342-52. *See also id.* at 710 (permitting counsel to call another defense lawyer as a witness).

49. Powell v. Alabama, 287 U.S. 45 (1932).

50. TAYLOR, FINAL REPORT, *supra* note 28, at 29-30, 47-49, 86, 87, 297-344 (providing numbers, description and treatment of defense lawyers; list of names and resumes); TAYLOR, THE ANATOMY, *supra* note 30, at 627. For isolated episodes where the Allies denied defendants their chosen counsel, see 15 TRIALS OF WAR CRIMINALS, *supra* note 36, at 329-36 (refusal to permit participation of Earl Carroll, Esq., on Krupp defense team); BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 157 (1977) (noting that early in the IMT, two groups of senior German generals, not charged individually at the IMT but likely members of the organizational defendant "General Staff and High Command" secretly petition the court to drop their talented court-appointed civilian lawyer and be represented instead by an Army general; motions denied); ROBERT E. CONOT, JUSTICE AT NUREMBERG 83 (1983) (Doenitz requests British or American admiral as defense counsel in event Otto Kranzbuehler unavailable; Rosenberg requests co-defendant Hans Frank as his defense counsel). For examples of the German bar's ambivalence toward or rejection of Nuremberg defendants, see *id*. at 81, 84, 86 n.*; EUGENE DAVIDSON, THE

were permitted to waive potential conflicts and select joint counsel; thus, able defense lawyers like Dix, Kranzbuehler and Seidl were in demand and handled multiple defendants in a single case.[51]

A final illustration of due process rights exceeding anything at home was defendants' access to documents. At home, criminal law was still described by the old analogies to a game or a fox-hunt in which each side was left to its own resources and enjoyed almost no right to discovery of the other side's evidence.[52] The framework for modern federal criminal discovery ("Jencks,"[53] *Brady*,[54] and modern versions of Rule 16[55]) was still years in the future, and even the early case of *Mooney v. Holohan* (1935) was viewed more as an endgame move in a long-running political *cause celebre* than as the starting point of modern criminal discovery.[56] At Nuremberg, defendants were permitted, upon motion, to examine documentary evidence in the hands of the occupation authorities; in effect, given access to the prosecution's principal source of evidence.

TRIAL OF THE GERMANS 35 (1966). For the very different arrangements for Japanese and American defense counsel at Tokyo, see PICCIGALLO, *supra* note 26, at 13-14; Solis Horwitz, *The Tokyo Trial*, 28 INT'L CONCILIATION 473, 491-93 (No. 465, Nov. 1950); THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM 93-94, 104, 119-21 (Chiro Hosoya, Nisuki Andō, Yasuaki Ōnuma, Richard H. Minear eds., 1986).

51. For example, in the *Medical* case, Alfred Seidl defended three defendants and Hanns Marx and Fritz Sauter each defended two more of the twenty-three defendants. In six other trials (the *Justice, Farben, Einsatz, Krupp, List* and *High Command* cases), at least one principal defense counsel had two and sometimes three clients. *See* TAYLOR, FINAL REPORT, *supra* note 28, at 297-344.

52. The version of Rule 16 in effect at the time permitted discovery upon motion, if the court was satisfied the request was reasonable and the requested item material. In practice, however, this was construed very narrowly, and normally the only items shown to defendant were impounded documents taken from him. *See* LESTER B. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 329-33 (1947).

53. 18 U.S.C. § 3500 (2000). This is the so-called "Jencks Act"; it largely reversed *Jencks v. United States*, 353 U.S. 657 (1957).

54. Brady v. Maryland, 373 U.S. 83 (1963).

55. FED. R. CRIM. P. 16.

56. Mooney v. Holohan, 294 U.S. 103 (1935). Both Felix Frankfurter (as President Wilson's representative charged with preparing a presidential report on San Francisco bombing and Tom Mooney's trial) and Telford Taylor (as a young lawyer working on one of Mooney's final Supreme Court petitions in the mid-1930s), were familiar with Mooney and the problem of willful government use of perjured testimony. FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 130-35 (1960) (Frankfurter's participation); Telford Taylor, The Reminiscences of Telford Taylor 237-38 (1956), (unpublished manuscript, on file with the Columbia University Oral History Research Office) (Taylor's participation). *See, e.g.*, GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 200-01 (1977) (illustrating view of *Mooney* as about federal supervision of state practice more than criminal discovery as such). The Taylor oral history is cited with permission of the Estate of Telford Taylor, whom the author gratefully acknowledges.

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To a defense lawyer, this sounds too good to be true, and it was. For one, there is the familiar difficulty in this area of the law with requiring the defense to move for evidence when it does not know what relevant documents the other side has located and when a blanket request will not be honored. For another, the Nuremberg prosecution was obliged to comment on defense production requests, and the leading student of the matter has concluded that the opportunity to comment and object significantly, but not surprisingly, impeded defense discovery.[57]

The reason for this rule went beyond the usual desire of prosecutors to keep an advantage at trial, and lay instead in the unique context of Nuremberg. Never before, or since, had a modern bureaucratic state been completely defeated such that its official documents, where not destroyed, were captured. But captured did not mean catalogued. The volume of material was simply staggering, and historians and archivists were combing, cataloguing and inventorying the mountains of captured documents for years afterward. Teams of researchers (some formally part of the prosecution staff, others attached to other branches of the occupation authority or the War Department) were required just to make sufficient progress in time for trial in identifying the items culled for use as evidence. Often it was only happenstance that trolling and sampling methods yielded crucial evidence. And beyond the captured documents, the pretrial process itself also generated tens of thousands of additional items, especially witness depositions. As a result, simplification and streamlining were necessarily the practice. Prosecution staffers summarized the documents, summaries that were later admitted into evidence along with the underlying document or read to the court when the evidence was introduced. As the staffers worked through the material to produce the summaries, they generated in-house lists, cross-indices and other finding aids from which defense counsel were able to browse and request discovery of documents.

Then, midway through the trial program, the court modified its rules and eliminated the prosecution's privilege to comment on and block defense document requests.[58] From this point onward at least, defendants seemed to have little trouble obtaining evidence. Indeed, defense counsel went on (court-paid) document hunts to Frankfurt, Berlin and elsewhere, and government repositories (branch offices of the Nuremberg document center, as well as other government agencies) sent material to the Nuremberg defendants from

57. JOHN MENDELSOHN, TRIAL BY DOCUMENT: THE USE OF SEIZED DOCUMENTS IN THE NUREMBERG PROCEEDINGS 109-11 (1988) (noting impediments to defense discovery during second round of Nuremberg trials) [hereinafter MENDELSOHN, TRIAL BY DOCUMENT]; TAYLOR, THE ANATOMY, *supra* note 30, at 627 (acknowledging defense lack of access to prosecution's documentary hoard during IMT, and explaining that many of the defense lawyers were long-time and recent Nazis whose reliability with the documents was hardly to be assumed).

58. MENDELSOHN, TRIAL BY DOCUMENT, *supra* note 57, at 111.

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Berlin, Washington and Frankfurt. Of course not everything was available, but the defendants seem to have located ample evidence, and the court panels were not afraid to threaten the prosecution with discovery sanctions for failure to comply. Defendants were able to pull together enough material that in most cases, presentation of the defense case took longer than the prosecution case, with more documents, witnesses and court days.[59] It was a far cry from the American plan to have speedy, summary, martial-law-style proceedings without the full panoply of due process.

Not all due process rights were extended to or even contemplated for the war crimes trials. In most cases, the reason was obvious from the context of a newly pacified occupation zone, in which hundreds of thousands of culpable Germans were not yet distinguishable from their millions of hungry, sullen countrymen. Bail was irrelevant since the charges were capital and the risk of flight presumably high. American limits on search and seizure, to the extent that there were meaningful limits at home to state policing at the time, were irrelevant to occupied Germany, where the Allies needed to swoop in and seize weapons and fugitives, and where there were no neutral magistrates available to screen warrants and probable cause affidavits. There was no right to counsel during interrogation or when one was the focus of investigation, both steps difficult to square with a hungry, rag-tag defense bar and an occupation government that needed to know many things in a hurry. Jury trials would have been laughable, allowing a single "twelfth angry Nazi" juror to acquit even the worst perpetrator. The right to severance, to a trial uncontaminated by a co-defendant, was also largely irrelevant, given that the prosecution contemplated not an ongoing international or American trial program, but one or at most a handful of trials in which all the defendants were well-known, high-ranking figures and in which similarly situated defendants would be tried together.

Perhaps most controversial was the unavailability of any right to appeal. From the first, Justice Jackson had been adamant that there should be no appellate tribunal to which defendants might appeal[60] and that this was consistent with American due process, under which, then and long after, there was also no right to appeal.[61] All three Allied delegations agreed: In the

59. *See* TAYLOR, FINAL REPORT, *supra* note 28, at 88; MENDELSOHN, TRIAL BY DOCUMENT, *supra* note 57, at 114-17; 15 TRIALS OF WAR CRIMINALS, *supra* note 36, at 393-447 (offering examples of defense counsel being flown to archive repositories in other cities, large quantities of documents being brought to Nuremberg, and court panels threatening sanctions against the prosecution, such as threatening to draw adverse inferences about evidence subject to discovery but not produced). *See also id.* at 909 (stating that defense counsel for General Rendulic joined a site-visit to the scene of the alleged crime in Finnmark, northern Norway).

60. REPORT OF ROBERT H. JACKSON, *supra* note 27, at 161.

61. Griffin v. Illinois, 351 U.S. 12, 20-22 (1956) (Frankfurter, J., concurring) (rejecting "the easy assumption that it [the right to appeal from a criminal conviction] is fundamental to the

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context of trials of a tiny number of notorious men who had dominated the world stage for a dozen years, the need for appellate review of the quantum of evidence seemed unnecessary. But convicted men were nevertheless given the right to seek clemency and pardons, based on review of the evidence against them, legal issues and their personal circumstances. This proved to be far more valuable than appellate review. The clearest example was in the second round of Nuremberg trials. In total, some 142 were convicted, with twenty-six sentenced to death, only half of whom were actually executed. All others, whether sentenced to death, life imprisonment or a long term of years, were soon released. The convictions and sentences (except for those in the Ministries Case, which was still continuing) were given a supposed final review by the American Military Governor, General Lucius Clay, before his departure in the spring of 1949.[62] Then, in the years that followed, a series of civilian supremos, American High Commissioners John J. McCloy, Walter Donnelly and James Conant, re-reviewed every conviction. As early as 1952, most convicted men were free, by August 1955, only seven prisoners remained, and in 1958, the last prisoner was released.[63] Needless to say, the American clemency programs, and their counterpart in the British Zone, were widely seen as political: motivated by West German pressure and Cold War exigency.[64] A Nuremberg critic might still insist that the defendants' good fortune was not the same as having enjoyed a legal right to appellate review. Perhaps so, but one would be hard-pressed to show that any defendant would have done better before an appellate tribunal than he did by relying on the mercies of subsequent High Commissioners and their clemency boards.

Let me conclude this quick *tour d'horizon* by mentioning three instances of due process in the war crimes programs: one indispensable, the second shocking, and the third essentially eviscerating the entire program. The first was the burden of proof at Nuremberg. Probably the cornerstone of all other due process rights is the presumption of innocence until proven guilty beyond a reasonable doubt. Nowhere in Nuremberg planning documents was there

protection of life and liberty and therefore a necessary ingredient of due process of law," stressing "the fact that a State may deny the right of appeal altogether" and explaining the Court's holding as requiring only that if a state creates appellate avenues, it must do so consistent with the due process and equal protection clauses).

62. TAYLOR, FINAL REPORT, *supra* note 28, at 96.

63. *See* THOMAS ALAN SCHWARTZ, AMERICA'S GERMANY: JOHN J. MCCLOY AND THE FEDERAL REPUBLIC OF GERMANY 159-75 (1991); PETER H. MAGUIRE, LAW AND WAR: AN AMERICAN STORY 205-82 (2001); FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955, at 54-153 (1989). One of the arguments advanced in support of pardons and clemency was that Nuremberg was not a civil/common law hybrid, as Taylor had insisted, but essentially an American court, to which American standards of comparable, individualized, and merciful sentencing should apply. SCHWARTZ, *supra* note 63, at 354 n.2 (quoting McCloy as describing the trials as "justice American style").

64. *See, e.g.*, Telford Taylor, *The Nazis Go Free*, THE NATION, Feb. 24, 1951, at 170-72.

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any reference to burdens of proof, and there was no self-evident reason why a rigorous burden of proof should be adopted—after all, it was not only the Soviet delegates that kept asking whether the entire world did not know enough already of the guilt of men like Hermann Goering. Yet in the end, in both the first Nuremberg and later trials, defendants against whom damning evidence was introduced were acquitted of some or even all charges. Some defendants were acquitted despite adverse findings of fact because the court felt there was legal impediment: Schacht because of lack of specific intent that he made possible Hitler's illegal rearmament for actual use in war; Doenitz because of alleged ambiguity in the law of submarine warfare as understood by the British Navy and the American Pacific Fleet; General Rendulic because of his alleged perception of military exigency as he laid waste to northern Norway in the winter of 1944-45; Generals Foertsch and Geitner because on a flow-chart they were senior staff rather than line commanders when they knowingly disseminated direct orders for Balkan atrocities.[65] In each case, the acquittals were in the teeth of strong evidence and of Allied pressure to convict. But other defendants were acquitted solely and explicitly on burden of proof grounds, with the court sometimes conceding the likelihood that a defendant was guilty as charged. Thus, medical officials Ruff, Romberg, and Weltz, and I.G. Farben defendants Lautenschlager, Mann, and Hoerlein were fully acquitted of medical atrocities, and Milch acquitted of the medical charges (but not of slave labor) solely because of the prosecution's alleged failure to meet its Anglo-American burden of proof, even though the court charters did not require that level of proof.[66]

The second example of due process was the opening bombshell at the IMT involving the indefinite postponement of one defendant's case, even though there was no textual requirement to do so. It had always been the Allied plan to charge a representative defendant from German armaments and heavy industry for illegally arming Hitler and enthusiastically participating in the

65. United States v. Goering (1946), *published in* NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 134-37 (Schacht acquittal); *id.* at 138-40 (Doenitz decision); *id.* at 156 (Speer acquittal of aggressive war) (1947) ("Red Series"); United States v. List, 11 TRIALS OF WAR CRIMINALS, *supra* note 36, at 757, 1281-88 (Foertsch and Geitner); *id.* at 1295-97 (Rendulic) (1948) ("Hostage Case"); TAYLOR, THE ANATOMY, *supra* note 30, at 592-94 (evaluating Doenitz decision).

66. United States v. Goering, *in* OPINION AND JUDGMENT, *supra* note 65, at 137 (Schacht acquittal based on possibility of reasonable doubt); TAYLOR, THE ANATOMY, *supra* note 30, at 592 (Schacht); United States v. Brandt, 2 TRIALS OF WAR CRIMINALS, *supra* note 36, at 272-77 (1947) (Ruff, Romberg and Weltz); United States v. Milch, 2 TRIALS OF WAR CRIMINALS, *supra* note 36, at 773-79 (1947); United States v. Krauch, 8 TRIALS OF WAR CRIMINALS, *supra* note 36, at 1168-72, 1195 (1948) (the "Farben Case") (acquittal of the three Farben officials of medical atrocities and other charges); Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 27 INT'L CONCILIATION 241 (No. 450, Apr. 1949), *reprinted in* TAYLOR, FINAL REPORT, *supra* note 28, at 165-66, 212.

"aryanization" of German Jewish property in the 1930s and spoliation and massive use of slave labor across Europe in the 1940s.[67] Eventually the Allies decided to charge, at least in this first trial, Gustav Krupp, chief of the notorious Krupp firm until he stepped aside in favor of his son in 1941. On the eve of trial, it was learned that the elderly Krupp was in poor health and mentally incompetent. There was no provision in the London Agreement or the IMT rules for handling of incompetent defendants, and there was strong Allied pressure to try Herr Krupp anyway; after all, he would be represented by counsel, and an evidentiary record could be established. The court would hear nothing of it. It severed Krupp's case and brusquely rejected various prosecution pleas to substitute Krupp's son, who had managed the company at the time when it sought out and relied on slave labor. Traditional common (and civil) law rules about incompetent defendants were found to apply, just as they did at home.[68] In doing so, the Tribunal gave hope to the other Nuremberg defendants that it really intended to be fair.[69]

The final example was one that, in a real sense, sacrificed the entire American plan for Nuremberg in favor of due process. Briefly, a key feature, to some planners the crucial feature, of the American plan was that the first proceedings should try not only a few individual defendants, but also culpable Nazi organizations such as the Gestapo, and through that address the problem of the hundreds of thousands of other culpable Germans. The plan was that those organizations would have counsel, the presumption of innocence, the right to introduce and challenge evidence, and all other rights of individual defendants. But once found guilty as entities, their members could subsequently be tried by use of familiar American legal tools like criminal conspiracy and membership in a criminal organization. It was expected that these later trials would be quick and summary affairs, in which the historical case was already made and where the only question was whether a defendant had been a knowing member or party to a criminal conspiracy.[70] But when it came time for the judges to deliberate this American feature of the trial, the American chief judge, former Attorney General Francis Biddle, and his legal

67. TAYLOR, THE ANATOMY, *supra* note 30, at 91-94, 151-59.

68. Standard doctrine of the day was summed up by Sheldon Glueck, also a key behind-the-scenes architect of the first Nuremberg trial. *See, e.g.*, SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW: A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE 47-86 (1925); LIVINGSTON HALL & SHELDON GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 318 (1951).

69. ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 140 (1983).

70. Control Council Law No. 10 allowed the possibility of charging defendants in subsequent international trials such as the American Nuremberg or the French Rastatt proceedings with membership in an organization declared criminal in the first Nuremberg trial. Art. II, § 1(d), *cited in* TAYLOR, FINAL REPORT, *supra* note 28, at 250, and *discussed in* TAYLOR, THE ANATOMY, *supra* note 30, at 36.

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aides, chiefly former Assistant Attorney General and Professor Herbert Wechsler, would have nothing of it. They rightly foresaw the dangers to due process of group guilt and convictions based on passive membership rather than acts.

The result was that count one (conspiracy), the heart of the American presentation and the part of the case chief prosecutor Jackson had reserved for himself, was more or less collapsed into insignificance at the first Nuremberg trial.[71] Conspiracy was interpreted narrowly, and additional elements of specific intent were read into both the conspiracy and aggressive war charges, leading to the acquittal of defendant Schacht and in the later trials to the acquittal of Alfried Krupp (the son) and the board and senior management of both his firm and I.G. Farben on charges of aggressive war-making.[72] Overall, only eight defendants were convicted of conspiracy in either the first or second Nuremberg trial program, though many more had been charged.[73]

As for the six organizational defendants, the groups whose members were supposed to be amenable to summary disposition afterward, some were acquitted, and for the others it was held that participation or membership had to be not only knowing and willing but active.[74] The prospect of later trials of members of criminal organizations, even the three organizations convicted at the IMT, thus came to nothing. Aside from uniformed senior officials in the three SS trials at Nuremberg, only a few defendants in the later Nuremberg trials were convicted for membership at high levels of the SS. In all but three of even these few cases, membership was an additional charge to grave crimes against humanity, and the additional sentences were trivial.[75] There were no

71. United States v. Goering, *in* OPINION AND JUDGMENT, *supra* note 67, at 56; SMITH, *supra* note 50, at 121-22, 134-37. For criticisms of conspiracy liability from the Tokyo Tribunal, see the views of Webb (President, concurring) and Bernard (J., dissenting), *cited in* PICCIGALLO, *supra* note 26, at 28-29; Horwitz, *supra* note 50, at 554.

72. United States v. Goering, *in* OPINION AND JUDGMENT, *supra* note 65, at 136 (1946) (Schacht judgment); United States v. Krauch, 8 TRIALS OF WAR CRIMINALS, *supra* note 36, at 1211-1306 (Hebert, J., concurring in part); United States v. Krupp, 9 TRIALS OF WAR CRIMINALS, *supra* note 36, at 396-98 (1948); Taylor, *Nuremberg Trials*, *in* FINAL REPORT, *supra* note 28, at 191-92 (consequences of Schacht acquittal).

73. Taylor, *Nuremberg Trials*, *in* FINAL REPORT, *supra* note 28, at 226-29.

74. TAYLOR, THE ANATOMY, *supra* note 30, at 555-58, 587; SMITH, *supra* note 50, at 116, 161-65.

75. United States v. Brandt, 2 TRIALS OF WAR CRIMINALS, *supra* note 36, at 248-63 (conviction of Poppendick and Sievers for SS membership; Sievers also convicted of capital crimes against humanity); United States v. Flick, 6 TRIALS OF WAR CRIMINALS, *supra* note 36, at 1223 (1948) (conviction of Steinbrinck on membership and other charges, petty sentence); United States v. Krauch, 8 TRIALS OF WAR CRIMINALS, *supra* note 36, at 1196-1204 (acquittal of three defendants Schneider, Buetefisch, and von der Heyde of SS membership); United States v. Alstoetter, 3 TRIALS OF WAR CRIMINALS, *supra* note 36, at 1171-79, 1201 (1947) (the "Justice Case") (membership conviction only of defendant Alstoetter; five years); Taylor, *Nuremberg Trials*, in TAYLOR, FINAL REPORT, *supra* note 28, at 165, 174-85, 187, 189 n.170, 196 n.187.

separate membership trials, summary or not, for the hundreds of thousands of active, knowing, willing members whom Jackson or his successor General Telford Taylor had mentioned as potential defendants. It was a triumph for due process. Indeed, it was a measure of due process we were unwilling to apply at home a few years later,[76] and it came at the cost of any significant criminal trial program for hundreds of thousands of Nazi participants.

Senior SS personnel in another SS case who were acquitted of other charges and convicted of high-level active membership were sentenced merely to time served. *See* United States v. Greifelt, 5 TRIALS OF WAR CRIMINALS, *supra* note 36, at 157, 158, 164, 165, 166-67 (1948) (five defendants in the SS-race or "RuSHA Case"); United States v. von Weizsaecker, 14 TRIALS OF WAR CRIMES, *supra* note 36, at 865-66 (1949) (the "Ministries Case") (defendant Bohle sentenced to five years, but only one more to serve). In one other SS case, one defendant, Ruehl, was given a significant sentence for membership, while another, Graf, was sentenced only to time served. United States v. Ohlendorf, 4 TRIALS OF WAR CRIMINALS, *supra* note 36, at 581, 587, 589 (1948) (the "Einsatzgruppen Case"); Taylor, *Nuremberg Trials*, in TAYLOR, FINAL REPORT, *supra* note 28, at 179, 184 n.156. In other instances, the Tribunal read an element of scienter into membership liability, and accordingly acquitted of a membership charge defendants who were willing, voluntary senior members of the SS. *See, e.g.*, United States v. Pohl, 5 TRIALS OF WAR CRIMINALS, *supra* note 36, at 1018, 1061-62 (1947) (acquittal of Scheide and Klein); United States v. von Weizsaecker, 14 TRIALS OF WAR CRIMINALS, *supra* note 36, at 857 (acquittal of von Weizsaecker and Woermann despite their membership). Thus, only three defendants, Poppendick, Alstoetter and Ruehl, were punished according to Bernays' original plan of using membership to facilitate punishment of senior leaders of the worst groups against whom individual atrocities could not be shown, and only after exhaustive rather than summary proof. TAYLOR, THE ANATOMY, *supra* note 30, at 36.

76. *See* REPORT OF ROBERT H. JACKSON, *supra* note 27, at 112; TAYLOR, THE ANATOMY, *supra* note 30, at 54, 74 (giving far higher estimates for the number of culpable participants). A few years later, at the depths of the Red Scare, the United States was less hesitant at home to use theories of membership liability. Apparently various officials thought of bringing a test case under the "membership" clause of the Smith Act, which by the post-war years was read to proscribe the Communist Party and its related entities. Until this point, the act had been understood to criminalize only knowing membership. The new prosecution sought to establish a precedent for charging "mere members," for the defendant here was the first defendant charged only under the membership clause of the Smith Act and not with an additional conspiracy count. Selected for the honor was Junius Scales, whose case was tried in the presumably receptive confines of a Southern courtroom and whose conviction was quickly affirmed in an opinion by Nuremberg alternate judge, Fourth Circuit Judge John Parker. When Scales sought Supreme Court counsel, many of the best-known liberal lawyers turned him down. But eventually he made his way to Nuremberg judge Francis Biddle, by then retired from practice, who referred Scales to Nuremberg prosecutor Telford Taylor. For Taylor, the case became a seven-year crusade, to no avail. After retrials and further appeals, Scales was convicted, on proof that would have failed before the Nuremberg tribunal. *See* Scales v. United States, 367 U.S. 203 (1961); Telford Taylor, *Foreword* to JUNIUS SCALES AND RICHARD NICKSON, CAUSE AT HEART: A FORMER COMMUNIST REMEMBERS 290-94 (1987); TAYLOR, THE ANATOMY, *supra* note 30, at 558; Mark A. Sheft, *The End of the Smith Act Era: A Legal and Historical Analysis of* Scales v. United States, 36 AM. J. LEG. HIST. 164 (1992).

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IV. CONCLUSION

From the foregoing sketch, one might infer either that the international war crimes trials were perfectly fair or that the author believes they were. Neither of course is the case. Justice Jackson attempted to push the bounds of fair notice when he sought to substitute Krupp junior as a defendant for Krupp senior, and similar errors of law or judgment could be shown in almost every trial. Some of these excesses the tribunals saw and rebuffed, others they did not, and a few they initiated. Lines of defense were denied and proposed witnesses rejected. The selection of defendants was sometimes haphazard and, in the end, a few defendants who probably should have been acquitted were found guilty.[77] For them, it was no consolation that the courts had erred for others so far on the side of leniency.

German observers criticized the trials freely at the time, often writing in the German-language Swiss press. They denounced almost every aspect of the trials, from the unfamiliarity of the common law procedure to the novelty of the substantive charges and the tribunal itself, Soviet participation, the Soviet allegations about the Katyn Forest massacre, the participation as judges and chief prosecutors of men who had been London delegates establishing the court, and Allied refusal to use German courts or judges.[78] Japanese critics pointed to many of the same faults, and added their outrage at perceived American criminality for use of nuclear weapons.[79] More recently, criticism of Nuremberg was reawakened in the past decade by proponents of the ad hoc international criminal tribunals for former Yugoslavia and Rwanda and of the possible permanent international criminal court. These recent proponents seemed to have a distinct rhetorical strategy for handling the Nuremberg trials. On one hand, they held the fact of Nuremberg to be a good thing, proving that international trials are effective and can be conducted with basic fairness. On the other, in the early 1990s proponents enthusiastically catalogued the alleged deficiencies of Nuremberg, in those long years before there was a Hague tribunal and then when there were no defendants and no trials. The implication was almost of competition, that a new team would break the record of the old. Legal study groups were convened and reports issued criticizing such Nuremberg features as the death penalty, in absentia proceedings (against Martin Bormann), the lack of explicit attention to gender crimes, and the lack of neutral judges—as if there were neutral nations at the end of a world war

77. *See, e.g.*, TAYLOR, THE ANATOMY, *supra* note 30, at 153-59 (Jackson's overreaching with Krupp); *id.* at 562 (Streicher overconvicted); *id.* at 631 (haphazard process for selection of defendants).

78. A translated sample of this literature can be found in NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS (Wilbourn E. Benton & Georg Grimm eds., 1955).

79. Reactions of this sort can be sampled, albeit at a four-decade distance, in THE TOKYO WAR CRIMES TRIAL, *supra* note 50, *passim*.

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aside from Spain, Sweden and Switzerland, hardly models of arm's length neutrality.

Much of the criticism, then and now, is mistaken. A real-world criminal lawyer might dismiss it by saying that a court that acquits defendants because it feels the law compels that result, defendants against whom the evidence is strong and whose conviction both political leaders and the public strongly want, must know a bit about the rule of law. Either way, the effort to evaluate previous tribunals and give them passing or failing grades is formalistic and misplaced. The more interesting question is to ask of contemporaries according to their own stated standards why they made the choices they did. This essay has tried to suggest that the largely American architects of the Nuremberg and related international tribunals aimed at holding basically fair trials. Rather than grade their performance or hand out gold stars or demerits, I close by asking why these American lawyers held themselves to so much higher a legal standard when overseas in Germany than they did at home. At home, there was no suggestion that due process or basic fairness meant securing the best counsel from the private bar or outside experts for indigents or that defense counsel should observe prosecution witness interviews or have broad access to documents. Why such efforts abroad, at a time when federal courts at home took only infrequent steps to ensure the fairness of state investigatory and trial practices?

At first glance, the answer seems easy. The whole world was watching the war crimes trials, especially at the beginning, as the Allies knew. Publicity and self-consciousness are wonderful spurs to reform. Right around this time, many Americans began to realize that the world was also watching domestic police practices, particularly against African-Americans in the Deep South. But the heat from that spotlight never stayed too long, and was felt only after particular lynchings or show trials. Otherwise, Southern policing was part of the larger American dilemma about race, and it was a long time before change came.

For similar reasons, public attention can never be the whole answer for the conduct of the war crimes trials, for they too were never in the spotlight for that long. Trials could never compete with glitzier entertainment fare, and even the serious public was probably more interested in what had brought the world to ruin, what the Nazis did, rather than in what the Allies were saying about it after the war was over. Rebecca West surely overstated matters in her famous description of the extravagant boredom at Nuremberg in the spring of 1946,[80] but few trials can stay in the public eye for long, especially complex trials built on documents. Today's international criminal tribunal in The Hague learned this years ago when Court TV stopped its gavel-to-gavel

80. Rebecca West, *Greenhouse with Cyclamens I* (1946), *originally in* A TRAIN OF POWDER 11 (1955), *excerpted in* REBECCA WEST: A CELEBRATION 245 (1977).

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coverage after the first few months of the first trial. In its day, the IMT was among the longest criminal trials in either British or American legal history, and the Ministries Case (last of the second round of Nuremberg trials) and the Tokyo trial were each longer still. With proof in all three cases based on the introduction of tens of thousands of documents, none was likely to stay in the public eye after the first few weeks, and they did not.

So beyond the real need to meet the standards of the American public, the legal community, the victim peoples of Europe, and the wary Germans, there were likely other reasons that the participants of Nuremberg were willing to work with the discipline of a due process regime. For one thing, they could afford to do so. The Nuremberg programs had resources—fiscal, physical and political—while ordinary criminal processes at home were chronically underfunded. Funds were not unlimited, and every account of the British delegation at the IMT and Taylor's subsequent Nuremberg trials shows that funds were watched carefully and measured slowly. But there were sufficient funds for lawyers, mimeograph facilities and plane flights to interview witnesses, enough for the defense as well as the prosecution.

Additionally, trials of the worst of the vanquished enemy brought out the idealism in many Nuremberg participants. Even after the joy of VE-Day had faded, after the chill of the Cold War was in the air and the news from home was of unheroic things like inflation and strikes, in Germany the few who stayed on were doing important work, or so it still felt to many. Like other aspects of the American occupation, trials were felt to be part of an American trusteeship, to be discharged properly, and an historic opportunity, the conduct of which would be watched and judged. Crime control at home, by contrast, was not an historic opportunity but hard inevitability, offering little outlet for idealism.

Back at home, a Supreme Court frustrated by the intractability of both crime and police abuse could comfort itself with the knowledge that the federal structure seemed to preclude systematic federal oversight of state policing and trials. In fact, this respect for or distance from state practice was built into the notion of constitutional due process. Jurists applying due process tests that relied on the fundamental elements in the Anglo-American tradition saw that the need for productive interrogation—not coerced, but certainly interrogation not cluttered up or impeded by the presence of counsel—was part of the American tradition of policing as well.[81] In defining due process for the war crimes trials, Justice Jackson and his staff and successors were writing on a blank slate and could afford a due process that was more capacious, better funded, and less limited by federalism, lax precedent, and the ongoing needs of street policing.

81. Ashcraft v. Tennessee, 322 U.S. 143, 156-62 (1944) (Jackson, J., dissenting, with Roberts and Frankfurter, JJ.), *rev'g retrial*, 327 U.S. 274 (1946).

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Not least, there was also class bias in the allocation of due process. The German defendants were not lowly ethnic street hoodlums like Malinski or his co-defendant Rudish, but figures from the world stage. It is difficult to imagine "third-degree" or prolonged nude interrogation being applied to such olympian figures as Friedrich Flick and Alfried Krupp, the captains of German industry and recently among the wealthiest men in Europe; to Field Marshals von List or von Leeb, perceived legatees of the feared Prussian military tradition; or to proud, educated, articulate mandarins like Hjalmar Schacht or Ernst von Weizsaecker. Doubtless there were instances of abuse, especially in the first weeks after the defendants' capture.[82] But many Allied participants felt awe as well as contempt for the defendants.[83]

Last, the extension of full due process rights to the defendants may have appeared to the Nuremberg tribunals to offer a win-win situation, especially for those panels that increasingly adopted a sympathetic view of the imposing defendants from the higher reaches of German finance, industry, the military and the diplomatic corps. After all, against the most repulsive killers, like SS leader Kaltenbrunner and the Einsatzgruppen leaders, there was ample documentary evidence, and no amount of lawyering could help them. As for the elite defendants, their top-flight lawyers would show the court that their clients were not as guilty as it seemed, clarifying this bit of momentary misunderstanding, as it were, as with Schacht. Failing that, counsel would at least explain to the court some of the allegedly important context that mitigated their clients' guilt and showed them to have responded with as much humanity as one could expect under difficult circumstances, as with Flick, Albert Speer

82. Instances of petty abuse are cited in MENDELSOHN, TRIAL BY DOCUMENT, *supra* note 59, at 17; TAYLOR, FINAL REPORT, *supra* note 28, at 62. Graver allegations were made about the administration of Landsburg Prison, where the American occupation authorities housed both Nuremberg and other war crimes prisoners. From time to time there were investigations into the complaints, but no evidence was found to support them. TAYLOR, FINAL REPORT, *supra* note 28, at 97-98. Outside of German ultra-nationalist circles, few of these allegations were taken seriously. The exception was the international furor over claims that American military police and interrogators had brutalized the German soldiers arrested and later convicted for their role in the Malmedy Massacre, in which SS units had murdered American POWs captured in the Battle of the Bulge. The Senate investigated these allegations, led by freshman Sen. Joe McCarthy. Like his later efforts, the hearings proved little, but they gave time for conservative German and American opinion to mobilize. Eventually the convicted men were not hanged but given clemency, and the last was released in 1956. *See, e.g.*, *Malmedy Massacre Investigation, Investigation of Action of Army with Respect to Trial of Persons Responsible for the Massacre of American Soldiers, Battle of the Bulge, near Malmedy, Belgium, December 1944*, *Hearings before a Subcomm. of the Comm. on Armed Services*, 81st Cong. 1st Sess. (Apr.-June 1949, Sept. 1949) (pursuant to S. Res. 42, 2 parts); Nathan Glazer, *The Method of Senator McCarthy: Its Origins, Its Uses, and Its Prospects*, 15 COMMENTARY 244-56 (March 1953); MAGUIRE, *supra* note 63, at 260-71.

83. Some voices back home also called for an end of the trials of such distinguished Germans. *See* TAYLOR, FINAL REPORT, *supra* note 28, at 83-84.

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and others. Either way, the perception was that with defendants who were either so guilty or caught in a difficult spot, and with the truth seemingly there in objective documents, there was no cost to a generous understanding of due process rights.

Whatever the mix of motives and reasons, the incongruous result was that free-standing due process was understood more broadly and applied more generously in occupation Germany than at home in precisely those years between the Supreme Court's first steady interest in state police and trial practices and the sudden onrush twenty years later of the due process revolution. Due process is a phrase, a mere formula, and taken out of the constraints of the *Twining*[84]-*Palko*[85] and federalist tradition, it could be potent indeed. It is unlikely that Rudish, the Jewish co-defendant of Malinski whose conviction was sustained, appreciated the irony of our broad understanding of extraterritorial due process, any more than Admiral Dewey Adamson may have been interested to know that his case had prompted Justice Black's celebrated dissent.

84. Palko v. Connecticut, 302 U.S. 319 (1937), *cited in Malinski*, 324 U.S. at 414.

85. Twining v. New Jersey, 211 U.S. 78 (1908), *cited in Malinski*, 324 U.S. at 414.