

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

### Introduction

“Killing in war is not murder,” claimed Ben Bruce Blakeney, an American defense attorney for World War II Japanese war criminals.<sup>1</sup> The ambiguities of wartime international law and ethics remain a consistently relevant area of interest in historical discourse, yet only recently drawing scholarly attention. At the intersection of political, legal, and diplomatic history exists international relations. Studying how nations interact, and more notably, how Great Powers globally exert their ideals of sovereignty, provides a rich dive into the roots of current international conflict and affairs. Of these Great Powers, the United States has proven persistent in its desire to spread its democratic values on an international scale.

The International Military Tribunal for the Far East (IMTFE), also known as the Tokyo War Crimes Trials or Tribunal, provides a template to try and understand the implications of American exceptionalism, especially postwar, as well as the U.S.’s role in setting international legal precedent and ethical boundaries.<sup>2</sup> It helps raise the question of ethics in international affairs and restoring postwar relations. Preceding the IMTFE was the International Military Tribunal, or the Nuremberg Trials, which established the international war crimes of crimes against peace and crimes against humanity. Although both the Nuremberg and Tokyo Trials took place following the end of World War II, Japanese war criminals were still indicted with these charges, thus being accused of breaking essentially *ex post facto* laws.<sup>3</sup> Along with crimes against peace and humanity, war criminals at Tokyo were charged with aggressive warfare and conspiracy, a concept more familiar to common law judicial systems.

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<sup>1</sup> University of Virginia (UVA) School of Law, “Maj. Ben Bruce Blakeney Jr.,” *The Tokyo War Crimes*

<sup>2</sup> The IMTFE convened on April 29, 1946 and adjourned on November 12, 1948.

<sup>3</sup> The Indian justice, Radhabinod Pal, was the lone dissenting judge to exonerate all of whom were indicted. In his dissent, he highlighted these points as part of the reasoning behind his decision.

The IMTFE took place in Allied occupied Japan post-World War II. An abundance of scholarship exists on the Tribunal, with critics debating its fairness toward the defendants and role in setting proper international law precedent. However, what is lacking in scholarship is a discussion of Americans on the defense team, defending people their home country still viewed as the “enemy.”<sup>4</sup> The Tribunal itself, at the time and since then, has elicited great debate over its creation, execution, and outcome. It focused on Class A war criminals, those who did not directly commit the killings or brutalities but instead were regarded as the minds behind their implementation. Some scholars draw attention to the hypocrisy of the indictments against the Japanese and the unfairness of the trial structure. Others have defended the Trials, claiming the proceedings to be just and the rulings to have been in line with international legal precedent. Regardless, the defense team in Tokyo had a difficult undertaking in proving the innocence of those indicted. The team included both Japanese and American lawyers.

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, as the trial procedures were based on Anglo-Saxon judicial practices.<sup>5</sup> How did these Americans defend the same people accused of masterminding atrocities during the War and responsible for the deaths of Allied soldiers and civilians? It is essential to understand the mindset of the American defense team through the primary source material available. An effective way to understand what prompted Americans to maintain the

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<sup>4</sup> The 1998 dissertation by Galen Johnson titled “Defending the Japanese Warlords: American Attorneys at the Tokyo War Crimes Trial, 1946-1948” does concentrate on the American defense lawyers specifically, but more so centering on their legal experience, rather than their personal one. He argues that the American defense counsel performed in a revisionary way. A 1971 Master’s thesis by George Ware, Jr. titled “The Tokyo War Crimes Trial, 1948-1948: The Case for the Defense” also focuses on the American defense team’s experience but does little to explore the internal struggles of the team and their personal journey as defenders of the Japanese war criminals.

<sup>5</sup> 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 (Ardsley, 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.”

innocent status of their Japanese clients is to delve into what they left behind, what they wrote, how they argued their defense, and consequently, their true feelings and opinions on Japan and the war criminals as the Tribunal unfolded. In this paper, I will be exploring various primary sources to better comprehend the initial and ultimate motivations of the American defense lawyers. These include oral histories, essays, legal documents, and personal letters, which all outline the lawyers' transition from Americans striving to uphold the Anglo-American judicial way to sincere defenders of former Japanese war leaders. Specifically, personal letters housed at Georgetown Law Library's Special Collections from American defense lawyer, John Brannon, to his brother, Bernard, affectionately called Sonny, during his time in Japan were vital to my research. Through these letters, I was able to follow the journey of an American defense lawyer, gaining access to his inner thoughts and changing mentality over the course of his time working for the defense.

Although the Americans and the Japanese were wartime enemies during World War II, a turn around in mindset occurred that permitted the defense team 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 POWs and civilian internees. The first question is why. Why did the U.S. feel the need to put American lawyers on the defense team at the Tokyo War Crimes Trials? And, the other question is how. How did Americans work for the defense following a total war during which their clients were seen as the rival? The desire to spread American democracy and values to Japan in the immediate 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 success of the American system to non-democratic nations through the implementation of the Anglo-American judicial system when defending the accused in the IMTFE. Approaching

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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 thus as individuals worthy of justice.



*Courtesy of Georgetown Law Library Special Collections*

**Defense lawyers for the IMTFE, circa 1948**

Background

On December 7, 1941, the Japanese bombed Pearl Harbor. On August 6 and 9, 1945, the United States dropped the atomic bomb on Hiroshima and Nagasaki. On August 8, 1945, the Soviets began their invasion of Japanese occupied Manchuria after a vicious East Asia/ Pacific War, breaking its five-year non-aggression pact with Japan. And, then, on September 2, 1945, the Japanese formally surrendered. Soon after, the U.S. had already begun to occupy Japan led by the American General Douglas MacArthur as the Supreme Commander for the Allied Powers (SCAP), also known as General Headquarters (GHQ). The battle between the Axis and Allied powers during World War II caused an outpouring of nationalistic propaganda on both sides and a surge in nationalism. The Allied victory paved the way for the victor countries, like the United States, to promote their beliefs to the losing nations in order to show the superiority of democratic governments over totalitarian or fascist, militaristic governments and as a way to establish and ensure future peace in the aftermath of total war.

### The Allied Occupation of Japan

The U.S. wanted to democratize and demilitarize Japan as well as punish the war criminals. 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.<sup>6</sup> Therefore, the effort to implement a democratic system in Japan was primarily a U.S. desire. In addition to military officers and soldiers, the Department of the Army recruited American civilian personnel to work with SCAP. SCAP 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. There was, for example, a Government Section, which prepared a model draft constitution for postwar Japan that embodied the democratic values deemed necessary for the country to possess. The Legal Section concentrated on Japan's alleged war criminals.

### The Tokyo Tribunal

Following World War II, 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. These alleged criminals were those who actually performed war atrocities and brutalities.<sup>7</sup> 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, resulting in both

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<sup>6</sup> General Staff of Douglas MacArthur, ed., *Reports of General MacArthur: MacArthur in Japan: The Occupation: Military Phase: Volume I Supplement* (Facsimile Reprint, 1994), <http://www.history.army.mil/books/wwii/MacArthur%20Reports/MacArthur%20V1%20Sup/Index.htm#cont>.

<sup>7</sup> 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.

being executed.<sup>8</sup> However, his superiors in Washington authorized MacArthur to create an international tribunal so the Class A trial did not appear to be the United States alone seeking 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, with the trials in Tokyo to follow similar procedures as those in Germany. Initially, 28 Class A war criminals were selected for trial.<sup>9</sup> These Japanese leaders were accused of crimes such as conspiracy to start and wage war, aggressive war, crimes against peace, and crimes against humanity. When the Tribunal opened, the only judges were those from victor countries. Eleven Allied representatives would decide the fate of those they classified as Class A war criminals responsible for warring against their nations.<sup>10</sup> The nations represented on the court were: Australia, Canada, China, France, India, Netherlands, New Zealand, Philippines, United Kingdom, United States, and the Soviet Union, countries that endured vicious attacks from the Japanese military. Therefore, the defense feared that the judges would perhaps be biased in their rulings against the defendants.

### The Desire to Spread Democracy

The Tribunal was implemented in part to establish international precedent for war crimes based primarily on Anglo-American judicial values in line with the Occupation desire to further democratize Japan. John Dower argues in his 1999 book, *Embracing Defeat*, that, “To American reformers, much of the almost sensual excitement involved in promoting their democratic

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<sup>8</sup> 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.

<sup>9</sup> 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. And, Harry S. Truman Presidential Library, “John G. Brannon Papers”, *Stars and Stripes*, “SCAP Gave Emperor Hirohito Immunity Because of Chief of Staff Orders, Report,” January, 15, 1949. 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 in line with orders from the Chief of Staff.

<sup>10</sup> Initially, the Tribunal had nine representative judges from the Allied nations. Later, justices representing India and Philippines joined the court.

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.”<sup>11</sup> This sentiment permeated the Occupation and prompted 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 [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.”<sup>12</sup> Keenan maintained that the defendants had engaged in aggressive warfare because of their wish to destroy democracy, essentially aiming to disrupt peace and attack humanity. The U.S. effort to prosecute war criminals stemmed from its wish to promote democratic values on an international scale.

### Oral Histories

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 she thought were American aims with the Occupation effort. She replied, “Well, she [America] was trying to, I should say, turn Japan into a friend rather than an ex-enemy.”<sup>13</sup>

Donald Ritchie, film critic for the Pacific *Stars and Stripes* newspaper, said, “Yes, I remember

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<sup>11</sup> John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York, NY: W. W. Norton and Company, 1999), 80.

<sup>12</sup> University of Virginia (UVA) School of Law, “Prosecution Opening Statement,” *The Tokyo War Crimes Trials: Digital Collection*, <http://imtfe.law.virginia.edu/collections/morgan/3/4/prosecution-opening-statement> (2016).

<sup>13</sup> 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.

democracy was a great thing because that was on all Japanese tongues at that point.”<sup>14</sup> Others discussed their view of the Japanese during 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.”<sup>15</sup> 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.'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 help develop Japan's existing democratic tendencies to create a fully democratic nation and future ally.

### The Defense Team

With this belief in mind, the Americans recruited to the defense team felt justified in their role for they understood the Trials as aiding in the American mission of promoting democracy through employing American legal ideals. Elaine Fischel's 2009 memoir, *Defending the Enemy*, gives insight to the inner workings of American lawyers operating on the defense side and their struggle between loyalty to their clients and loyalty to their country.<sup>16</sup> 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

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<sup>14</sup> Donald Ritchie, Mayo Oral Histories, Tokyo, May 18, 1981, 9.

<sup>15</sup> Herbert Greer, Mayo Oral Histories, Norfolk, Virginia, September 12, 1979, 7-8.

<sup>16</sup> Elaine B. Fischel, an American, was the secretary for American defense lawyers William Logan and John Brannon. 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 law school and took the job. She initially wished to work for the prosecution team and was disappointed to be placed with the defense, but that feeling changed as she spent more time working on the defense cases and with the defendants as well as exploring Japan and socializing with the Japanese. In her memoir, she includes personal photographs and letters.



past two-and-a-half years, I helped defend ‘the enemy.’”<sup>17</sup> Fischel’s memoir offers some answers as she recounts her time as a secretary for the defense team, assisting with the cases for Kido Kōichi and members of the Japanese Navy under American defense lawyers William Logan and John Brannon.<sup>18</sup> In her introduction, she states, “Like so many other Americans [during the War], I judged Japanese people by the horrific hallmark event that took place at Pearl Harbor... to me, the Japanese were evil, subhuman people.”<sup>19</sup> However, she goes on to end her introduction, saying, “When I finally came home [from Japan], I had a completely different perspective of these people and their culture.”<sup>20</sup> What changed her mind? Perhaps, it was the same thing that prompted American lawyers to fight vehemently for the defense of the Japanese Class A war criminals.

By accepting their role as defending the “enemy,” the Americans believed they were upholding American democratic values by utilizing Anglo-American common law standards, which included concepts like “justice is blind” and “innocent until proven guilty.” Approaching the Tribunal in this way led the American lawyers to wholeheartedly defend people accused of 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, saying, “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

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<sup>17</sup> Elaine B. Fischel, *Defending the Enemy: Justice for the WWII War Criminals* (Minneapolis, MN: Bascom Hills Books, 2009), 292. Hereafter, Fischel, page.

<sup>18</sup> 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 Naval members 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.

<sup>19</sup> Fischel, xiii.

<sup>20</sup> *Ibid.*, xv.

aggression and dictatorship.<sup>21</sup> 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.”<sup>22</sup> Williams justified his defense status as a way to assist the American goal of spreading democracy.

The Tribunal was set up to follow an Anglo-American adversarial system, foreign to many of the Japanese.<sup>23</sup> In response, Americans were added to the defense team to work with the Japanese lawyers and ensure a fair trial.<sup>24</sup> However, the defense team contained no other Allied representatives beside Americans. American lawyers, thus, worked closely with the Japanese lawyers, becoming acquainted with various Japanese mentalities, nuances in language, and customs.<sup>25</sup> 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 law, especially Anglo-Saxon based law.<sup>26</sup> 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. However, he goes on to write, “They beg to learn and plead for explanations.”<sup>27</sup> Although some of the Japanese lawyers lacked familiarity with the English language and American and British legal methods, others were quite

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<sup>21</sup> 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.

<sup>22</sup> Williams, *The Tokyo War Crimes Trials*, 111.

<sup>23</sup> 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.”

<sup>24</sup> Fischel, 25. “To ensure a fair trial, guidance from the Allied nations was essential.”

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> Georgetown Law Library Special Collections, “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.

well versed on the judicial practices that would determine the fate of their former military leaders. 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.<sup>28</sup> In his article, titled "Conspiracy," he noted how Japanese defense lawyers did not correctly interpret the concept of "conspiracy," one of the charges, within the Anglo-American legal context.<sup>29</sup> Therefore, the Americans acted as an essential aid to guarantee the defendants received a concrete defense. The interaction of American and Japanese defense lawyers fostered a diffusion of knowledge and culture between the two. 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 the Defense Opening Statements, the team claimed that the prosecution had misunderstood the Japanese phrase *hakko ichiu*. The phrase, included in the preamble of the Tripartite Pact (1940), means 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 used the literal meaning as proof that Japan consciously intended to conquer the world in cooperation with Germany and Italy.<sup>30</sup> 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

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<sup>28</sup> Taekema, *Inside GHQ*, 244.

<sup>29</sup> 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).

<sup>30</sup> Kobori Keiichiro, *The Tokyo Trials: The Unheard Defense: English Edition* (Rockport, ME: New England History Press, 2003), 57.

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American attorneys a way to better understand the Japanese mentality and worldview, helping them to develop a sincere defense.

### No Longer the “Enemy”

American lawyers took their role very seriously and approached the Tribunal upholding the notion that justice is blind. Georgetown University Law Library houses an extensive collection of letters from John Brannon, which

illustrate his thoughts and beliefs on the Tribunal and

Japan. In one letter to Sonny, he wrote, “I want to

contribute to the establishment of future international law predicated on American concepts of

justice.”<sup>31</sup> Almost a year before, “I am an American first and a lawyer second.”<sup>32</sup> 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.’”<sup>33</sup> Carrington Williams recounted a conversation

with fellow defense attorney, Ned Warren, when first placed on the team, “I was so antagonistic

to the Japanese, and I also wanted to come home, like everybody else. And he [Warren] said,

‘Look, you're a lawyer, you're an American lawyer, and it's not a question of whether you like

the defendant that you're defending or not. It's a question of his being entitled to a good

defense.’”<sup>34</sup> 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



*Courtesy of Georgetown Law Library  
Special Collections*

**John G. Brannon**

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<sup>31</sup> Brannon, December 19, 1947.

<sup>32</sup> Brannon, February 26, 1947.

<sup>33</sup> George Furness Part 2, Mayo Oral Histories, Tokyo, May 18, 1981, 13.

<sup>34</sup> Carrington Williams, Mayo Oral Histories, Fairfax, Virginia, January 30, 1980, 31.

and impartially administered.”<sup>35</sup> <sup>36</sup> The lawyers understood it as their duty as *American* attorneys that they view the defendants solely as clients without influence from the War and home front attitudes. Again, they viewed the Tribunal as a way to represent the functionality of their judicial process, categorizing the defendants purely as clients seeking rightful justice.

### “Victor’s Justice” Trial

With this mentality, 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, becoming engrossed in their work and truly believing their clients to be innocent of their charges. In his 1971 book, *Victor’s Justice*, Richard Minear, heavily criticizes 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.”<sup>37</sup> Dower agrees, arguing that, “Class A trials were fundamentally an exercise in revenge.”<sup>38</sup> Minear further notes that, “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.”<sup>39</sup> This supports the notion that the Tribunal was a way for the U.S. in particular to prosecute war criminals as an extension of its wish to promote democratic values on an international scale. Scholars who critique the fairness of the Tribunal align with the defense argument that many of the charges against the war criminals were for breaking essentially ex post facto laws, and thus, the indictments were based on falsely established precedent.<sup>40</sup> Some scholars have contended against this consensus. In *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of*

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<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> Richard H. Minear, *Victor’s Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971), 6, 13.

<sup>38</sup> Dower, *Embracing Defeat*, 252.

<sup>39</sup> Richard H. Minear, *Victor’s Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971), 179.

<sup>40</sup> Kobori, *The Tokyo Trials*, 109-112.

*World War Two*, 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 made aggressive warfare a crime under international law. She goes on to argue that the Tribunal was modeled after the Nuremberg Trial, and the indictments in the IMTFE were considered international crimes in Nuremberg.<sup>41</sup> 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.<sup>42</sup> Although existing scholarship continues to debate the legitimacy of the charges against the Japanese war criminals, the defense team adamantly maintained that their clients were innocent and that the Tribunal was, from the start, working against the defendants.

Many of the defense lawyers quickly caught on to and argued the unfairness of the Tribunal, which accelerated their fervent 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.”<sup>43</sup> 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.”<sup>44</sup> A year later, Brannon tells his brother, “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

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<sup>41</sup> Totani, *The Tokyo War Crimes Trial*, 78-87.

<sup>42</sup> Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (Lexington, KY: The University Press of Kentucky, 2001), ix-xiv.

<sup>43</sup> Brannon, December 19, 1947.

<sup>44</sup> Brannon, November 14, 1947.

of our most cherished principles of justice.”<sup>45</sup> Brannon clearly articulates his growing discontent with the Trials. His letters show the shift in his perspective from someone wishing to promote American values to someone who questions them. Early in his time in Japan, Brannon grappled between allegiance to his country and maintaining impartiality as a lawyer.<sup>46</sup> A few months after arriving in Japan, Brannon expresses 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. or shall I go all out?” Brannon wondered.<sup>47</sup> Over the course of his two years in Japan, Brannon’s correspondence showcases a drastic change in mindset. In a later letter, toward the end of the Tribunal, Brannon offers 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 asks Sonny, “Is this American justice or just plain hypocrisy?” He began questioning the American way because of his ability to view his clients as just that, clients. They were no longer enemies, no longer criminals, they were innocent in the eyes of Brannon, and soon Brannon began reversing his attention to the United States as more of the wrongdoer. In the same letter, he went on to exclaim, “*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.’*”<sup>48</sup>

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<sup>45</sup> Brannon, September 16, 1948. The handwriting was unclear here, it may not have said, “displacing.”

<sup>46</sup> Brannon writes 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...”

<sup>47</sup> Brannon, December 14, 1946.

<sup>48</sup> Brannon, August 8, 1948.

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, when 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.<sup>49</sup> Minear calls this hypocrisy of the trial, "victor's justice," of which the American defense team became acutely aware. Only those nations that won the War were represented on the court. They exerted power over one of the defeated nations that massacred their citizens and destroyed their home fronts. However, many of the indictments charged against the war criminals were crimes of which the Allies too were guilty. Brannon, in an early letter to Sonny, shared that, "The colonel in charge of this [Legal] section hates me and all defense lawyers."<sup>50</sup> From the start, the defense had not only the task of defending the war criminals, but also working within a system inherently against them that contradicted the very values on which the Tribunal was supposedly based. Since the American defense lawyers approached the Trials with the goal of preserving American values, they were able to objectively research their client's defense and acknowledge the unfairness of the Tribunal itself.

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 the fact that the only nations represented in the judgment and prosecution were those that defeated

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<sup>49</sup> Defense arguments that mentioned the atomic bombings were not considered in the Trials.

<sup>50</sup> Brannon, December 14, 1946.



Japan, thus denying the Japanese an impartial trial.<sup>51</sup> He claimed in his oral history, “It was not a fair trial at all.”<sup>52</sup> Carrington Williams suggested that the judgment’s presumption was guilty from the start.<sup>53</sup> Owen Cunningham released an essay on the topic in 1948 titled, “The Major Evils of the Tokyo Trials,” in which he condemned the U.S. for the Trial’s creation and structure, saying, “The whole proceeding was contrary to American ideals and principles of justice.”<sup>54</sup> 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.”<sup>55</sup> Ben Bruce Blakeney, defense lawyer for Tōgō Shigenori, also strongly fought for the defense, vehemently maintaining that the trial was unfair, especially 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.<sup>56 57</sup> This part of the defense, called the “Russian Phase,” exposed, according to Blakeney, a clear example of the hypocrisy surrounding the Trials. Appealing the verdicts to MacArthur, he wrote, “The verdict was not fair; not based on the evidence.”<sup>58</sup> The defense also upheld that the defendants warned the U.S. of plans to attack Pearl

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<sup>51</sup> 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.”

<sup>52</sup> George Furness Part 1, Mayo Oral Histories, Tokyo, May 14, 1981, 14.

<sup>53</sup> Williams, *The Tokyo War Crimes Trials*, 121. “It was clear the presumption was of guilt, not innocence. The defense had an uphill fight.”

<sup>54</sup> Cunningham, “The Major Evils,” 2.

<sup>55</sup> Williams, *The Tokyo War Crimes Trials*, 108.

<sup>56</sup> 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.

<sup>57</sup> Yuki Tanaka and Richard Falk, “The Atomic Bombing, The Tokyo War Crimes Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements,” *The Asia-Pacific Journal* 7, 44, (2009), <http://apjif.org/-Yuki-Tanaka/3245/article.html>. “Thus he [Blakeney] implied that if the killing of combatants of the U.S. forces by Japanese forces during the Pearl Harbor attack was regarded as ‘murder,’ by the same token the U.S. President, Harry S. Truman, and the U.S. Army Chief of Staff, George C. Marshall, i.e., two of the American leaders ultimately responsible for the atomic bombing of Hiroshima, could be accused of ‘murder’ as well. In order to invalidate the new legal definition of ‘Crimes Against Peace,’ he directly challenged the dominant popular American idea at the time that the atomic bombing of Hiroshima and Nagasaki was a rightful act of revenge for the surprise attack on Pearl Harbor.”

<sup>58</sup> Fischel, xxvi.

Harbor but the message was not sent in time. Here were Americans overtly defending those accused of engineering Pearl Harbor. But, what truly stands out is the passion behind the American defense.<sup>59</sup> Many of these lawyers, who initially justified being on the defense team as a way to promote American values, were now turning the tables and criticizing their country for not providing an adequate trial for their clients.<sup>60</sup>

### Seeing the “Enemy” as a Friend

The American lawyers no longer viewed their clients as the adversary. When they assumed the legal defense role, they exercised Anglo-American judicial principles to understand the defendants through an untainted lens. This opened the door for them to fight for justice for those they now saw as innocent human beings, and, even in some instances, friends. In many cases, the lawyers traveled from hatred to genuine friendship. The available primary source accounts exhibit that being in Japan and working for the defense switched their mindset from the wartime loathing of the Japanese to curiosity, respect, and an authentic liking. Fischel’s various letters home showcase the juxtaposition between her changing outlook compared to those belonging to her friends and family, specifically, her mother and sister. She constantly felt the need to downplay her growing affection toward the defendants and the Japanese culture, referring to the Japanese as “Japs” in her letters, especially those to her mother.<sup>61</sup> For instance: “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...

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<sup>59</sup> The University of Maryland Libraries house 22 volumes edited by John R. Pritchard, et al. of the complete transcript of the Trial proceedings. The transcripts showcase the amount of passion and dedication these lawyers put into the legal defense of the Japanese defendants.

<sup>60</sup> 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.

<sup>61</sup> Ibid., 131.

but I'm not a Jap lover."<sup>62</sup> She felt torn between her shifting view toward the people she used to see as evil and appeasing her family's concerns back home. While in Japan, she even developed a friendship with Prince Takamatsu, one of the Emperor's brothers. Furthermore, she occasionally stayed with Kido's family during the Tribunal and continually refers to General Tōjō Hideki, who was regarded as the number one war criminal, as "nice."<sup>63</sup> She recalls that, "It desperately mattered to me that they [the naval defendants] not be hanged" and, "Each of the American defense attorneys became so attached to his particular clients; the thought of seeing them hanged was unbearable."<sup>64</sup> After some time on the defense team, she recounts, "I found them [the Japanese defendants] to be almost deferential and, to my surprise, likeable, even defensible..."<sup>65</sup> To add, in her memoir's introduction, she writes, "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."<sup>66</sup>

Fischel was not the only American on the defense team to develop affections toward the Japanese defendants. She and Brannon were the lone non-Japanese at the memorial service of Admiral Nagano, one of Brannon's clients.<sup>67</sup> She said of Brannon, "[He] was caught in the middle of loyalty to his homeland and loyalty to his client's defense."<sup>68</sup> During his time in Japan, Brannon developed a curiosity and subsequent love for the country, its people, and its culture. He wrote 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

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<sup>62</sup> Fischel, 136. Initially, 28 men were indicted. However, only 25 were charged. Two died during the Tribunal and one was declared insane and removed from trial.

<sup>63</sup> *Ibid.*, 121.

<sup>64</sup> *Ibid.*, 240, 162.

<sup>65</sup> *Ibid.*, 62.

<sup>66</sup> *Ibid.*, 20.

<sup>67</sup> *Ibid.*, 167.

<sup>68</sup> *Ibid.*, 165.

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States.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> Furness became so enchanted by Japan that he decided to remain after the Trials, opening up a law practice and marrying a Japanese woman.<sup>72</sup> Carrington Williams, in a 2003 essay, also shared that he sends a Christmas card to his defendant's widow each year.<sup>73</sup> And, 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.<sup>74</sup> 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."<sup>75</sup> The Americans began to see their clients as individuals, with families and personalities, feelings, and even valid justifications for their actions during the War.

### Conclusion

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. Yet, they did not forget. 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. Americans on the defense team employed their way of approaching law in

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<sup>69</sup> Brannon, November 27, 1946.

<sup>70</sup> Brannon, December 14, 1946, January 13, 1947.

<sup>71</sup> George Furness Part 2, Mayo Oral Histories, Tokyo, May 18, 1981, 2.

<sup>72</sup> George Furness Part 2, Mayo Oral Histories, Tokyo, May 18, 1981, 15.

<sup>73</sup> Williams, *The Tokyo War Crimes Trials*, 14.

<sup>74</sup> 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.

<sup>75</sup> *Ibid.*, 38.

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 and ultimately innocent until proven otherwise. In their research, moreover, 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. The American defense team gained a sense of loyalty toward the Japanese defendants, diverging from the sentiments 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.



*Courtesy of Georgetown Law Library  
Special Collections*

**John G. Brannon with Nagano’s family**

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