

Washington and Lee University

From Gangbuster to
War Crimes Prosecutor:
Joseph Berry Keenan
and the International Military
Tribunal for the Far East, 1946-48

Senior Honors Thesis

Department of History

By

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GLOSSARY

ACJ	Allied Council for Japan
BW	Biological Warfare
CIS	Counter Intelligence Section (SCAP)
DONZ	<u>Documents on New Zealand External Relations.</u> Vol.2, <u>The Surrender and Occupation of Japan</u>
FEC	Far Eastern Commission
GHQ	General Headquarters (SCAP)
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East
IPS	International Prosecution Section
JAG	Judge Advocate General
JBK	Joseph Berry Keenan
JCS	Joint Chiefs of Staff
Keenan Papers	Joseph Berry Keenan Papers, Harvard Law School Library, Cambridge, Massachusetts
MMA	MacArthur Memorial Archives, Norfolk, Virginia
NYT	<u>New York Times</u>
POLAD	Political Adviser to SCAP
RG	Record Group
SCAP	Supreme Commander for the Allied Powers
SWNCC	State-War-Navy Coordinating Committee
UNWCC	United Nations War Crimes Committee

To Kiyomi and Boba

INTRODUCTION

The Allied Occupation of Japan, under the Supreme Commander, General Douglas MacArthur, was rather special. One participant, John K. Emmerson, who was assigned to the Office of Political Adviser to SCAP, has recalled:

Living through the first few months of the MacArthur revolution was a once-in-a-lifetime experience. We were indeed transforming a country. Looking back now, we occupationaires were a confident and patronizing lot. Obligated to democratize Japan, we knew only too little of the country we were trying to remold.¹

Of the many efforts to reform Japan, the International Military Tribunal for the Far East has been praised as "one of the best examples of international cooperation displayed during the occupation of Japan."² The New York Times asserted that the IMTFE was "fully as important to the future history of the Orient as were the Nuremberg trials to the future history of Germany, perhaps more so."³ Yet, unlike its sister trial, the IMTFE has been the subject of only a few secondary works in English, and the complete

¹John K. Emmerson, The Japanese Thread: A Life in the U.S. Foreign Service (New York: 1978), 249, 267.

²Roger Buckley, Occupation Diplomacy: Britain, the United States and Japan 1945-1952, International Study Series (Cambridge, England: 1982), 108.

³Hanson W. Baldwin, "Tokyo War Guilt Trials," New York Times, 4 December 1946, 36.

transcripts have only recently become widely available.⁴ The author of a recent study of the trial, Arnold C. Brackman, has noted: "In truth, the IMTFE has simply been swallowed up by the biggest black hole in the history of the twentieth century."⁵ A former British prosecutor at the IMT, Brigadier G.I.A.D. Draper, generally concurred with Brackman's assessment in a letter to the Publications Committee at the London School of Economics, which was responsible for editing the IMTFE transcripts. He described the IMTFE as "one of the great international events of this century, and unique in international history; in the history of international law and in the history of war criminality" Explaining that the Western world has focused almost exclusively on Nuremberg, he decried the "sad gap in interest and in scholarship which ought to be remedied."⁶

This is an attempt to fill part of the "black hole" in the historical record through a study of the man who served as Chief of Counsel. Also a victim of historical oversight, he was perhaps the crucial figure at the IMTFE. His name was Joseph Berry Keenan.

⁴R. John Pritchard and Sonia Magbanua Zaide, eds., The Tokyo War Crimes Trial, with an introduction by Donald Cameron Watt (New York: 1981). This is the first time the complete transcripts have been made available in published form.

⁵Arnold C. Brackman, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials (New York: 1987), 22. The author covered the IMTFE as a correspondent for United Press.

⁶R. John Pritchard, An Overview of the Importance of the Tokyo War Trial, Publication of the Nissan Occasional Paper Series, ed. Roger Goodman, no. 5 (Oxford: 1987), 1.

CHAPTER 1

"GANGBUSTER" AND "JOE, THE KEY"

Superlatives have frequently been used to describe the IMTFE, which was in session from 1946 to 1948. Popularly known as the Tokyo War Crimes Trial, the international media termed it "one of the three great trials in the recorded history of man ... placed after the trial of Jesus and with the Nuremberg trial."¹ At the center was Joseph Berry Keenan, the American Chief Prosecutor, who had won nationwide fame in the 1930s as a "gangbuster" and as a key member of the Justice Department in President Franklin D. Roosevelt's Administration.

Born 11 January 1888, in Pawtucket, Rhode Island to Bernard A. and Sarah (Berry) Keenan,² he received his B.A. and M.A. degrees

¹Elton M. Hyder, Jr., "The Tokyo Trial," Texas Bar Journal 10 (1947): 136.

²"Keenan, Joseph Berry," in Who Was Who in America (Chicago: 1960), 465.

from Brown University in 1910.³ In 1913, he received his LL.B. from Harvard Law School, was admitted to the Ohio Bar, and then, in 1914, began practicing in Cleveland.⁴

Twice Keenan served in the military. In 1916 he was on the Mexican Border with Troop A, 107th Ohio Cavalry (also referred to as the Cleveland "Black Horse" cavalry troop). During World War I, he served in France with the same cavalry unit, which had been absorbed into the American Expeditionary Force as a field artillery unit. Overseas, he was commissioned a first lieutenant and later assigned to the Judge Advocate General's office. He received citations for his war service from both Major General John J. Pershing and the French government.⁵

In 1919 Keenan joined the Cleveland law firm of Day, Day, and Wilkin. That same year Governor James M. Fox named him special assistant to Ohio's Attorney General, to help investigate Cleveland-area crime. It was the start of his successful

³The 1909-10 Brown University catalogue listed Keenan as a senior and a graduate student in two majors--History and Political and Social Science. Brown does not have a copy of a thesis by Keenan. Martha L. Mitchell, Brown University Archivist, to author, 2 March 1989.

⁴"Keenan, Joseph Berry," 465; Biography--"Joseph B. Keenan," MS Box 2, Folder 4, Joseph Berry Keenan Papers, Harvard Law School Library, Cambridge, Massachusetts (hereafter, cited as Keenan Papers).

⁵"Keenan, Joseph Berry," 465; Biography--"Joseph B. Keenan," MS Box 2, Folder 4, Keenan Papers; Anna Rothe, ed., Current Biography: Who's News and Why-1946 (New York: 1947), s.v. "Keenan, Joseph Berry;" Mac R. Johnson, "Long Career Aids Keenan in Tokyo Trials," New York Herald Tribune, 17 March 1946, [page number unknown].

prosecution of Cleveland's gangsters.⁶

Although Keenan attempted unsuccessfully to win a delegate position at the 1920 Republican National Convention, he first became politically involved in 1932 as an "ardent supporter of Roosevelt."⁷ Since the local Democratic machine was uninterested in FDR's candidacy, Keenan's role in promoting Roosevelt for President was substantial.⁸ Meanwhile, in 1930 he had established the law firm of Keenan and Butler in Cleveland.

In 1933 Keenan moved to Washington, D.C., to become U.S. Attorney General Homer Cummings' Special Assistant in charge of racketeering cases. He intended to duplicate his prosecution successes of 1919 on a nationwide scale.⁹ Responsible for prosecuting a variety of famous gangsters, Keenan was a "formidable trial lawyer, scourge of America's mobsters" in the 1930s.¹⁰ Only four months after his appointment, he helped secure the conviction of "Machine Gun" Kelly, a notorious gangster, in connection with the Charles F. Urschel kidnapping case.¹¹

⁶"Keenan," 465; Rothe, 1946; and "Joseph B. Keenan, Prosecutor, Dies," New York Times, 9 December 1954, 33.

⁷"Keenan," 465; Rothe, 1946; Johnson, "Long Career"; and "Mr. J.B. Keenan," Times (London), 10 December 1954, 8.

⁸Johnson, "Long Career."

⁹"Keenan Is Praised by the President," New York Times, 17 February 1939, 5.

¹⁰Meirion Harries and Susie Harries, Sheathing the Sword: The Demilitarization of Japan (New York: 1987), xxx.

¹¹"Joseph B. Keenan, Prosecutor, Dies," 33.

In October 1933, Keenan was promoted to Assistant Attorney General, Criminal Division. He attacked crime on a broad front through trial prosecution work, speeches to professionals, articles directed toward the general public, and lobbying for legislation to empower the federal government to take a more active role in the fight against crime. He traveled across the country to observe and participate in trials of kidnapers, racketeers, and other such criminals. For example, he gave the prosecution's final argument at the Urschel trial, where he said that "the time has come to decide whether we are to have a government of law and order or abdicate in favor of machine gun gangsters."¹²

When Keenan returned to Washington, he was expected to develop model legislation for Congress, increasing the federal government's powers to act against crime.¹³ Indeed, the following March, he appeared before a Senate Judiciary Subcommittee with six proposed changes to the criminal code. These included a federal anti-racketeering law and a clearer definition of racketeering, a proposal to make bank robbery a federal crime, amendments to the Lindbergh kidnapping law, a law addressing the problem of stolen goods crossing state lines, and an act concerning innocence of the defendant.¹⁴

¹²"Urschel Plotters Scored by Keenan," New York Times, 29 September 1933, 4.

¹³New York Times, 1 October 1933, 34.

¹⁴"Racketeer Curbs Asked by Keenan," New York Times, 2 March 1934, 28.

In his speeches and articles, Keenan emphasized several major Administration goals with respect to fighting crime. An important component of FDR's plan was to have the federal government play a greater role "as a coordinating and cooperative law enforcement agency in all communities."¹⁵ At the Attorney General's Crime Conference, Keenan contended that greater federal involvement in fighting crime was permitted by the Constitution, and called for local authorities to handle local crimes, while the Justice Department would deal with interstate crimes.¹⁶ Keenan addressed the issue of lawlessness, citing his promotion of federal legislation to restrict access to firearms by requiring registration.¹⁷ Finally, Keenan worked especially hard to increase "the scope of the Federal Bureau of Investigation."¹⁸ Keenan's position required him to work closely with the FBI and its director, J. Edgar Hoover.¹⁹

Certainly, Keenan had a strong belief in, feeling for, and pride in American-style justice. In one speech, he reminded the

¹⁵"Keenan Pledges Blows at Crime," New York Times, 4 August 1933, 3.

¹⁶"Cummings to Push Federal Crime War Even If States Act," New York Times 13 December 1934, 1, 11.

¹⁷"New Weapons for the War on Kidnappers," New York Times, 20 May 1934, sec. 8, p. 1; "Clubwomen Insist on Anti-Pistol Bill," New York Times, 25 May 1934, 8. He called Americans "the most lawless people in the world." "Keenan Insists Public Must Aid Crime War," New York Times, 29 July 1934, 22.

¹⁸"Mr. J.B. Keenan," 8.

¹⁹Brackman, 54.

American general public about the importance of true justice, arguing that "the basic principles of criminal justice" were that "no man should be condemned without being given a day in court and without being proven guilty beyond a reasonable doubt."²⁰ While he disapproved of lynching mobs taking justice into their own hands, he endorsed capital punishment.²¹ Keenan would adhere to these same principles during the IMTFF.

His promotion, in early 1936, to the position of Assistant to the Attorney General ultimately propelled him into the President's inner circle. On 6 January 1936, FDR announced hundreds of appointments, but the nomination of Keenan to this extremely high post in the Justice Department led the list in the New York Times the following day.²² For three years, he was responsible for recommending nominees to serve as Federal judges, U.S. Attorneys, Marshals, and Justice Department employees, and for overseeing the department's legislative proposals, as well as the FBI and the Bureau of Prisons.²³ Obviously, he had to work frequently with the U.S. Congress, especially the U.S. Senate, which confirms such nominations.

²⁰"Anti-Crime War Gains Emphasized," Washington Star, 26 July 1938, sec. A, p. 16.

²¹"New Weapons," 1.

²²"Keenan Nominated for Higher Office," New York Times, 7 January 1936, 15.

²³Biography-"Joseph B. Keenan," MS Box 2, Folder 4, Keenan Papers; John C. Henry, "Portfolios of President's Cabinet Are Held by Oddly Assorted Group," Washington Star, 27 November 1938, sec. C, p. 5.

Although FDR is said to have called Keenan "Joe, the Key," he was also referred to as "Roosevelt's representative" among legislators. The New York Herald Tribune's lengthy profile of him suggested that "Keenan probably knew more members of the Senate better than any one in history, . . ." ²⁴ Newsweek credited Keenan's "knack for winning friends" as the reason he became the "key lobbyist" for the Justice Department. ²⁵ Indeed, Keenan had already become friends with legislators through his lobbying for new crime legislation. Senator Arthur H. Vandenberg, for example, praised Keenan, while debating an FBI bill with Senator Burton K. Wheeler in 1935. Vandenberg explained that, despite the difference in party affiliations, he considered Keenan to be "one of the most trustworthy and able officials of the Department of Justice in its history. His services have been without parallel. Any bill Keenan sponsors for the Department of Justice has my approval." ²⁶

Keenan's contacts with the Senate and Roosevelt expanded even further when he served as the primary lobbyist for the Supreme Court Reorganization Bill, FDR's famous "court-packing plan." Although "a new man" to the inner circle, Keenan was included as one of the "principal officers of the new general staff," which met daily at the White House to plan the campaign. Selected for his contacts with Senators and as the requisite Justice Department

²⁴Johnson, "Long Career."

²⁵"Judgeship Plums: Joseph B. Keenan Gets Job of Piecemeal Court Reformer," Newsweek, 20 June 1938, 10.

²⁶Johnson, "Long Career."

representative, Keenan worked with Thomas G. Corcoran in lobbying the Senate.

In their comprehensive review of this legislative battle, two contemporaries described Keenan as "a short, red-faced man, with a flavor of the race track and the political clubhouse about him,..." He not only "reassured the legislators by his mere appearance,"²⁷ but got along particularly well with Senate Majority Leader Joseph T. Robinson, who was the principal backer of the proposal in the Senate.²⁸ Keenan devoted himself to this task, "buttonhol[ing] Senators by the score,"²⁹ and keeping in regular contact with Robinson.³⁰ Before the General Federation of Women's Clubs council meeting in Tulsa, Oklahoma on 29 April 1937, Keenan defended the reorganization plan, explaining that the legislation "is unquestionably not unconstitutional" and that past Congresses had changed the Court's number of justices.³¹

The Administration's plans were disturbed by Robinson's sudden death. Even aboard Robinson's funeral train, however, Keenan, Postmaster General James A. Farley, and Under Secretary of Interior Charles West discussed (as "emissaries of the White House") a

²⁷Joseph Alsop and Turner Catledge, The 168 Days (Garden City, New York: 1938), 81, 85-6, 83.

²⁸Ibid., 113, 225.

²⁹"Judgeship Plums," 10.

³⁰Alsop and Catledge, 225.

³¹"Court Is Debated for Women's Clubs," New York Times, 30 April 1937, 2.

compromise version with the thirty-eight Senators and twenty-three Representatives traveling together to Oklahoma.³² Despite this effort, the bill failed.

Keenan persisted, as he lobbied for specific sections of the bill to be enacted separately. When the Omnibus Judgeship Bill was eventually passed, it was Keenan who had to recommend candidates to fill the fifteen new District and five new Appellate Court judgeships from among five hundred applicants. He also had to lobby Congress for their confirmations.³³

Loyal to the President and his Administration, Keenan made "unswerving efforts in the Supreme Court fight and the Purge," which tried to rid the Democratic Party of those legislators who did not support the Administration.³⁴ Through this work, Keenan moved to the very center of decision-making within the Administration. In May 1938 Senator Wheeler identified Keenan as one of the White House cabal or inner circle, whom he charged with

³²"New Compromise Offered on Court by Roosevelt Men," New York Times, 18 July 1937, sec. 1, p. 1 and 24.

³³"Judgeship Plums," 10.

³⁴"National Affairs: The Cabinet--Eighth Inning," Time, 27 February 1939, 14; Joseph Alsop and Robert Kintner, Men Around the President (New York: 1939), 185.

"running the government."³⁵ Other newspaper articles confirmed that Keenan had increasingly become an asset to FDR as he assumed many duties previously assigned to Farley, who had once dispensed presidential patronage.³⁶

When Attorney General Cummings announced his resignation in November 1938, there was considerable speculation that FDR might appoint Keenan to fill the Cabinet post. Other subjects of speculation included Robert H. Jackson and Michigan Governor Frank Murphy. While Keenan's qualifications were many, including a "vigorous character and flawless New Deal record,"³⁷ this "principal administration pleader" on Capitol Hill, one of Roosevelt's "most faithful and useful sub-Cabinet henchmen," did not receive the nomination.³⁸

In March 1939, Keenan resigned to return to private practice,

³⁵"Wheeler Charges Six Men Run U.S.," [newspaper unknown], 1, 7, Robert T. Murphy's Personal Collection. Others in the alleged cabal were attorneys Corcoran and Ben Cohen, Secretary of the Interior Harold L. Ickes, the Works Relief Administrator, Harry L. Hopkins, and James Roosevelt. Some articles contain variations of this list, but Keenan was included consistently.

³⁶Joseph Alsop and Robert Kintner, "The Capital Parade--Farley Watched by White House Advisers as Potential Administration Rebel," Washington Star, 18 March 1938; Joseph Alsop and Robert Kintner, "The Capital Parade--Dinner Parley on Fate of Wage-Hour Bill Discloses Personnel of Roosevelt's 'General Staff,'" Washington Star, 26 May 1938.

³⁷Keenan supported New Deal legislation, such as that dealing with social security, labor relations, security and commodity exchanges, and utilities. Lemuel F. Parton, "Who's News Today--Keenan Prominent as Attorney General Possibility," [newspaper unknown], Murphy's Personal Collection; Henry, sec. C, p. 5.

³⁸Henry, sec. C, p. 5; "National Affairs: The Cabinet--Eighth Inning," 14.

where he remained until 1945 when he was appointed Chief Prosecutor for the IMTFE.³⁹ He was offered a \$12,500 federal judgeship, but he refused, since the salary was insufficient to cover his children's college expenses.⁴⁰ When his resignation was announced by the White House, it was widely reported in the newspapers. Roosevelt even released the friendly exchange of resignation letters between the two men. Moreover, Keenan expressed a hope that he could continue to assist the Administration.⁴¹

While it is unclear exactly what role he subsequently played in the Administration, Keenan maintained a private interest in national politics. Indeed, he successfully denied an accusation that he had bribed someone to oppose Senator Gerald P. Nye (North Dakota, Republican) in the 1944 election. Senator William Langer, a Republican from North Dakota, solicited Keenan's advice regarding the chances of a potential rival defeating Nye. While Keenan admitted that he opposed Nye's isolationist perspective and 1944 re-election bid, he emphatically declared that he had never offered

³⁹"National Affairs: The Cabinet--Eighth Inning," 14. This article postulated one possible reason for Keenan's resignation. Perhaps Keenan realized that if President Roosevelt adhered to the two-term Presidential tradition, the New Deal would end in 1940, and many government lawyers would have to find positions in the private sector. In that case, "able Lawyer Keenan will have a long headstart on them."

⁴⁰Ibid.

⁴¹"Keenan and Taylor Quit as Cabinet Aides," Washington Post, 17 February 1939, 1.

money to any potential candidate.⁴²

Meanwhile, Keenan resumed practicing law privately, in Washington, D.C. and Cleveland, Ohio.⁴³ After FDR's death and the end of World War II, he became "an 'outsider' in White House power."⁴⁴ When he finally returned to public service, he did so as prosecutor of the major Japanese war criminals.

⁴²"Nye Story of Rival Denied by Keenan," New York Times, 27 September 1944, 18.

⁴³"Keenan," 465; Johnson, "Long Career."

⁴⁴Robert Donihi, Washington, D.C., to author, 13 April 1989.

CHAPTER 2

KEENAN'S APPOINTMENT AS CHIEF PROSECUTOR

Ever since the Allies issued the Potsdam Declaration and the Japanese accepted its terms by signing the Instrument of Surrender on 2 September 1945, there had been plans for prosecuting major Japanese war criminals. In late September 1945, Assistant Secretary of War John J. McCloy asked General MacArthur if he needed counsel to serve under him in a capacity similar to that of Supreme Court Associate Justice Robert H. Jackson, who was U.S. Chief of Counsel with the IMT at Nuremberg.¹

MacArthur must have agreed to this proposal, because, in October, McCloy visited him and discussed Keenan's potential appointment. At that time, it was agreed that Keenan should have "full charge in the theater for the trial of 1A category criminals before international tribunal and is to be appointed by SCAP."² Furthermore, MacArthur was to make the appointment upon

¹Message from Assistant Secretary of War to General Douglas MacArthur, WX70135, 27 September 1945, RG-9, Blue Binder: War Crimes, MacArthur Memorial Archives, Norfolk, Virginia (hereafter, cited as MMA).

²McCloy to Cutter, CA53804, 25 October 1945, RG-9, Blue Binder: War Crimes, MMA. MacArthur "hadn't met Keenan, hadn't specifically asked for Keenan or ... any particular prosecutor and probably didn't know anything about Keenan." Johnson, "Long Career."

the President's approval.³

It is not clear why Keenan was chosen as the Far Eastern counterpart to the more famous Jackson. There were rumors that it was a "purely political act," designed to assist Keenan in running for an Ohio Senate seat against Republican Robert Taft.⁴ Some contended that President Truman did not like Keenan and wanted to get him "out of the White House,"⁵ or to "remove an embarrassment from Washington,"⁶ although these accounts are not consistent with the fact that Keenan had resigned in 1939 from the Administration and returned to private legal practice.⁷

On the other hand, there is evidence that Truman and Keenan were friends. According to U.S. Assistant Prosecutor Robert Donihi, Truman appointed Keenan because of his "talent for getting things done."⁸ Soon after Truman suddenly became President, there was speculation that Keenan, "a close friend," might be named Attorney General. A contemporary report described the two men as

³Ibid.

⁴Pritchard, An Overview, 29; C. Hosoya et al., eds., The Tokyo War Crimes Trial (Japan: 1986), 16. Donihi confirmed that Keenan had been "expected to become the Demo[crat] who would someday unseat Taft of Ohio." Donihi to author, 13 April 1989.

⁵Brackman, 54.

⁶Harries and Harries, 105-6.

⁷However, Donihi thinks Keenan continued to function as part of FDR's inner circle even after he resigned. He characterizes Keenan as "probably FDR's most powerful aide" during World War II. Donihi to author, 13 April 1989.

⁸Philip R. Piccigallo, The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951 (Austin, Texas: 1979), 10.

having "worked together in various official capacities" in recent years.⁹ Keenan's law partner, Robert T. Murphy, has confirmed that when Truman was still a U.S. Senator from Missouri, Keenan was "a good friend." Truman, according to Murphy, was "a great admirer of Keenan."¹⁰ The New York Herald Tribune reported that Truman "knows him well While Senator, Truman matched wits and cards with Keenan at stud poker."¹¹

Ultimately, several government officials, including the President, approved Keenan's appointment. Attorney General Tom C. Clark initially suggested Keenan. In a letter to Truman asking for the President's approval of the appointment, Clark explained that "it is my suggestion and recommendation and that of the Secretary of War that Joseph B. Keenan of Ohio be appointed . . . , and this recommendation is concurred in by the Secretary of State and General MacArthur."¹² Clark added, "I am sure you know Mr. Keenan," and indicated that it would be a SCAP appointment. Truman showed his approval by signing "OK H.S.T." and sending it back the following day to Clark.¹³ Both Murphy and Donihi have noted that

⁹Robert K. Walsh, "Joseph Keenan, Native of State, Close to Truman," Providence Evening Bulletin, 18 April 1945.

¹⁰Robert T. Murphy, Chevy Chase, Maryland, phone interview by author, 17 March 1989.

¹¹Johnson, "Long Career."

¹²Tom C. Clark, Attorney General, to President Harry S. Truman, The White House, 29 October 1945, Papers of Harry S. Truman, Official File, Harry S. Truman Library, Independence, Missouri.

¹³Ibid.

it was Keenan who had greatly facilitated Clark's advancement in the Justice Department in the 1930s. Moreover, Murphy has characterized Clark as a "very ardent admirer of Keenan."¹⁴ Perhaps it was "pay-back time" in Washington.

Notification was sent to MacArthur, explaining that Keenan was to be on MacArthur's staff and "to have full charge in [MacArthur's] theater of the trial of persons charged with such war crimes as consist of planning, preparing, initiating, or waging a war of aggression or in violation of international treaties and agreements or of participating in a common plan or conspiracy for any of the foregoing purposes."¹⁵ Keenan's responsibilities as Chief Prosecutor were discussed and clarified in an exchange of messages between Secretary of War Robert Patterson and MacArthur in mid-November 1945. While Keenan was to be responsible for trying class "A" war criminals,¹⁶ either before an international or U.S. tribunal, Colonel Alva C. Carpenter, in charge of a War Crimes Section since 10 April 1945, would continue to work on "B" and "C"

¹⁴Murphy interview, 17 March 1989; Donihi to author, 13 April 1989. Donihi also wrote, "My personal guess is that Tom Clark was repaying a favor by making the recommendation" to Truman.

¹⁵Secretary of War Patterson to MacArthur (Personal), W 80455, 2 November 1945, RG-9, Blue Binder: War Crimes, MMA.

¹⁶Class "A" war criminals were those "high Japanese political leaders who were charged with responsibility for the policy decisions leading to Japan's 'crimes against peace.'" Of the twenty-five Class "A" defendants convicted by the IMTFE, seven were hanged, sixteen received life imprisonment, and two received shorter prison sentences. Kazuo Kawai, Japan's American Interlude (Chicago: 1960), 22.

class trials.¹⁷ Carpenter also oversaw trials held in the Philippines, such as that of General Tomoyuki Yamashita, and acted as SCAP's general legal adviser.¹⁸ MacArthur acknowledged the important role Keenan would play, describing the Chief of Counsel position as "one of great dignity and prestige." Keenan would be "an independent agency serving directly under [MacArthur's] immediate command to carry out the directives outlined by the President and ... [Keenan] will be given the maximum latitude and support." Although MacArthur admitted his ignorance of the details concerning Justice Jackson's work at Nuremberg, he expected that Keenan's role would, in general, be similar.¹⁹

Patterson followed up by explaining that the class "A" war criminals had "high political significance" and that the U.S. Government desired "to maintain a certain uniformity of approach

¹⁷Class "B" refers to about twenty military officers of high rank who were "charged with command responsibility for troops who had committed atrocities." Soon after the Japanese surrender, Generals Tomoyuki Yamashita and Masaharu Homma were tried, convicted, and executed in the Philippines by ad hoc military courts. Others in this category were tried before special military courts established by SCAP in Tokyo and acquitted. Class "C" criminals comprised "the lesser officers and men charged with mistreatment of prisoners of war or with relatively minor atrocities." These trials were conducted under the authority of the U.S. Eighth Army at Yokohama or under the authority of the other Allied military powers. This class numbered about 4200 people, of whom about 700 were sentenced to death, 3100 imprisoned, and 400 acquitted. Kawai, 22.

¹⁸Patterson to MacArthur (Personal), W 83844, 18 November 1945, RG-9, Blue Binder: War Crimes, MMA; MacArthur to Patterson, CA-54916, 17 November 1945, RG-9, Blue Binder: War Crimes, MMA.

¹⁹MacArthur to Patterson, CA-54916, 17 November 1945, RG-9, Blue Binder: War Crimes, MMA.

in the trial of this class of War Criminals throughout the world...." Thus, MacArthur was instructed that Keenan's staff was to have precedence over other agencies, in cases where there were conflicts; for example, with respect to "determination of the defendants [,] designation of witnesses, evidence and other facilities...."²⁰

Finally, Patterson notified MacArthur that, based on Jackson's experiences with the IMT, Keenan was attempting "to arrange for maintaining support of his work from Washington." Therefore, Truman issued an executive order "authorizing any executive department, independent establishment, or other Federal agency to furnish to Mr. Keenan personnel and other assistance."²¹

Before leaving the United States for Tokyo on 2 December 1945,²² Keenan met with Truman and Clark to discuss his responsibilities as Chief of Counsel.²³ Five days later, MacArthur had "a comprehensive and thoroughly satisfactory conference with Judge Keenan" about trials for class "A" suspects. Commenting that he and Keenan were "entirely agreed that it is essential that these

²⁰Patterson to MacArthur (Personal), W 83844, 18 November 1945, RG-9, Blue Binder: War Crimes, MMA.

²¹Patterson to MacArthur (Personal), W 82759, 14 November 1945, RG-9, Blue Binder: War Crimes, MMA. This was Executive Order 9660, entitled "Conferring Certain Authority Upon the Chief of Counsel in Preparation and Prosecution of Charges of War Crimes Against the Major Leaders of Japan and their Principal Agents and Accessories," 29 November 1945.

²²"JBK's Diary Notes," MS Box 1, Folder 6, Keenan Papers.

²³"Trials in Japan Speeded," New York Times, 16 November 1945, 5.

trials proceed without delay," MacArthur pressed for a deadline for receiving the Allies' replies to the American invitation to participate in an international military tribunal. Otherwise, the U.S. would proceed to unilaterally prosecute the war criminals.²⁴

On 8 December, the International Prosecution Section, with Keenan as chief of section, was established as part of SCAP's General Headquarters.²⁵ Its purposes were to investigate and prosecute major war criminal suspects who had been arrested by SCAP's Legal Section since the early period of the Occupation.²⁶ As part of General Headquarters, the IPS "was supported fully by SCAP." Thus, the prosecutors for the IMTFE received assistance from GHQ "for full administrative help--translators, stenographers, clerks, and other essential personnel."²⁷

There is some dispute over the scope of Keenan's authority as Chief of Counsel. Several American attorneys charged that Keenan allowed MacArthur too much authority over the IPS.²⁸ Keenan may not have had much choice, however, if he wanted the IPS to be able to function in Occupied Japan. Someone who worked in the Legal

²⁴MacArthur to Joint Chiefs of Staff, CA55816, 9 December 1945, RG-9, Blue Binder: War Crimes, MMA.

²⁵Harries and Harries, 106.

²⁶Piccigallo, 10.

²⁷William Joy Sebald and Russell Brines, With MacArthur in Japan: A Personal History of the Occupation (New York: 1965), 156-7.

²⁸Pritchard, An Overview, 7.

Section explained that Keenan could not operate effectively if he were independent of SCAP. This participant suggested, in a confidential memo, that Keenan did possess extensive authority, predicting that Keenan would receive "enthusiastic support in all he desires to do," but only if he did not insist on exercising "the powers he actually has when he comes out here."²⁹ Likewise, Donihi asserts that Keenan had "presidential orders--equivalent to the 'Supreme Commander for the Allied Powers.'"³⁰

Keenan recognized the limits of his power, and explained as much in a memo delineating the Associate Prosecutors' responsibilities. He reminded the attorneys that SCAP had established the IPS, and it was "part of his Headquarters." Furthermore, Keenan explained that "all actions of this section are subject to the approval of the Supreme Commander."³¹

²⁹Confidential Memo [author and addressee unknown], 29 October 1945, MS Box 1, Folder 6, Keenan Papers.

³⁰Donihi to author, 13 April 1989.

³¹Memo from Joseph Berry Keenan to Associate Prosecutors, "Subject: Responsibility of Associate Prosecutors," 13 February 1946, Robin Kay, ed., Documents on New Zealand External Relations, vol. 2, The Surrender and Occupation of Japan (Wellington, New Zealand: 1982), 1522-3 (hereafter, cited as DONZ).

CHAPTER 3

BACKGROUND ON THE IMTFE

When Keenan arrived in Tokyo in early December 1945, the future IMTFE was being nicknamed "Japan's Nuremberg,"¹ which indicated the war crimes trials in the Far East had already been overshadowed by those in Germany. Certainly, the example of the IMT at Nuremberg was a compelling reason for establishing an international tribunal to try major Japanese war criminals. The War Department rejected MacArthur's plea for a U.S.-only trial of Tojo and his Cabinet for the surprise attack on Pearl Harbor, and cited "the desire of the President" and plans for an international trial similar to the one for the German Nazis.² On 22 September 1945, the U.S. Joint Chiefs of Staff sent a directive to SCAP which contained "detailed instructions regarding the prosecution of Japanese war criminal suspects and establishment of...a tribunal."³

Despite this rebuff, in October 1945, MacArthur again communicated to the Joint Chiefs his desire to proceed with a U.S.-staffed commission to try ex-Prime Minister Tojo's Cabinet ministers. He called for indicting them on the charge of "illegally authoriz[ing] the assumption by elements of the Japanese

¹Brackman, 53.

²"Now Told: Secret History of World War II," U.S. News and World Report, 25 January 1971, 40-1.

³Piccigallo, 10.

armed forces of belligerent rights before making a declaration of war and direct[ing] their use against the United States, thus causing the murder of nationals of a country with which their nation was still at peace."⁴ The Joint Chiefs responded that the U.S. Government desired an international tribunal to try Tojo's Cabinet and other class "A" war criminals. Allied nations had already been asked "to nominate [a] panel of their nationals for appointment by [MacArthur]...as members of such International Tribunal." If other signatories to the Instrument of Surrender did not indicate interest in participating, the Joint Chiefs expected that the U.S. would act alone.⁵ Still dissatisfied, MacArthur soon cabled his concern that such a delay would create "one of the greatest psychological mistakes."⁶ Upon his return to Washington after having consulted with MacArthur in Tokyo, McCloy reiterated that the State Department and Truman were determined to have an international trial, if the other Allies were in agreement.

There was some delay in organizing the trial, which involved the nine Allies, India, and the Philippines. Officially

⁴Message from MacArthur to JCS, CA 54138, 31 October 1945, RG-9, Blue Binder: War Crimes, MMA. MacArthur claimed in his Reminiscences that another reason for his advocacy of a class "A" trial restricted to the charge of attacking Pearl Harbor was the repugnance he felt for "the principle of holding criminally responsible the political leaders of the vanquished in war." Douglas MacArthur, Reminiscences (New York: 1964), 318.

⁵JCS to MacArthur, WX 82533, 11 November 1945, RG-9, Blue Binder: War Crimes, MMA.

⁶Message from MacArthur to JCS, CA 54646, 12 November 1945, RG-9, Blue Binder: War Crimes, MMA.

established on 19 January 1946, the IMTFE sprang from several important documents and declarations. These included the Cairo Declaration (1 December 1943), the Potsdam Declaration (26 July 1945), the Japanese Instrument of Surrender (2 September 1945), the Presidential Policy Statement on Japan (6 September 1945), the Moscow Conference (26 December 1945), and, ultimately, the two versions of the Tribunal's Charter.

Generally, the Potsdam Declaration's Paragraph 10, which declared that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners," is highlighted as crucial to the foundation of the IMTFE. It is argued that the Japanese accepted this provision when they signed the Instrument of Surrender.⁷ Keenan contended in his book Crimes Against International Law, however, that the Tribunal's actual jurisdiction had not been dependent on the Potsdam Declaration, but essentially had "rested on a body of international criminal law which existed before the acts of the defendants."⁸

The original IMTFE Charter called for participation by the nine countries which had signed the surrender instrument. India

⁷John Alan Appleman, Military Tribunals and International Crimes (Indianapolis, Indiana: The Bobbs-Merrill Company, Inc., 1954; reprint, Westport, Connecticut: Greenwood Press, Publishers, 1971) 238; Edwin M. Martin, The Allied Occupation of Japan, with a Foreword by W.L. Holland (New York: American Institute of Pacific Relations, 1948; reprint, Westport, Connecticut: Greenwood Press, Publishers, 1971), xi, 20; Memo from JBK to Associate Prosecutors, 13 February 1946, DONZ, 1523.

⁸Joseph Berry Keenan and Brendan Francis Brown, Crimes Against International Law (Washington, D.C.: 1950), 18.

and the Philippines were added later, and these changes were incorporated in the Amended Charter, issued 26 April 1946.⁹ The charter was drafted by American members of the IPS, especially Keenan. Later, the recommendations of other countries' prosecutors and the Far Eastern Commission's decision (3 April 1946), entitled "Apprehension, Trial and Punishment of War Criminals in the Far East," also led to an amended Charter. This basically American product was based on the Joint Chiefs' directive (22 September 1945) and the IMT's Charter.¹⁰ However, officially, it was really "a Far Eastern Commission document [at least] it was agreed to by the Far Eastern Commission."¹¹

Conducted at the former Japanese War Ministry building, the IMTFE opened on 3 May 1946. In his autobiography, Christmas Humphreys, a member of the British prosecution team, called it "profoundly impressive,"¹² and Mark Gayn, a reporter in Japan from 1945 to 1948, wrote in his diary that "as a historic performance,

⁹Pritchard, An Overview, 13.

¹⁰Piccigallo, 10-1; Richard H. Minear, Victors' Justice: The Tokyo War Crimes Trial (Princeton, New Jersey: 1971), 20-1; John Curtis Perry, Beneath the Eagle's Wings: Americans in Occupied Japan (New York: 1980), 100.

¹¹Explanation by Dr. R. John Pritchard in the "Question and Answer Period," in C. Hosoya et al., 56-7.

¹²Christmas Humphreys, Both Sides of the Circle: The Autobiography of Christmas Humphreys (London: 1978), 125. He does mention a few inconveniences participants experienced in the early stages of the trial. Due to the television lights required for filming the trial proceedings, some people had to wear dark glasses. Also, the heat was oppressive, until air conditioning was properly installed.

the trial was beautifully staged."¹³ The Ministry's auditorium had been remodelled by SCAP to become a courtroom with "dark, walnut-toned paneling, imposing daises, [and] convenient perches for the press and motion picture cameramen."¹⁴ The eleven judges sat at "a long, high bench near the center" of the courtroom with the appropriate national flags behind them.¹⁵ Hundreds of spectators could be accommodated with seats for 300 Allied personnel and 200 Japanese, and there was a large press box, too.¹⁶ Brackman estimated that one thousand people were present during the average court day, which began at 9:30 A.M., including "judges, accused, lawyers, legal staffs, MPs, stenographers, translators, cameramen, spectators, [and] Japanese and foreign press." He also estimated that spectators at the IMTFE over the course of the trial numbered more than 200,000, including approximately 150,000 Japanese.¹⁷ The President of the Tribunal, Sir William Flood Webb, announced to the courtroom on 3 May 1946 that there "has been no more important criminal trial in all history."¹⁸

¹³Mark Gayn, Japan Diary (Tokyo: Charles E. Tuttle Company, 1981), 200.

¹⁴"War Crimes: Road Show," Time, 20 May 1946, 24.

¹⁵"To Judgment," Newsweek, 13 May 1946, 50.

¹⁶Gayn, 201.

¹⁷Brackman, 18.

¹⁸Pritchard and Zaide, eds., The Tokyo War Crimes Trial, transcripts--21.

The IMTFE is also historically noteworthy for its sheer size. The IMT at Nuremberg lasted approximately one year (18 October 1945-16 October 1946), whereas the IMTFE lasted over two and one-half years.¹⁹ Moreover, the IMTFE, "the most comprehensive military tribunal in history,"²⁰ was significantly larger in scope. The trial included 417 court days. There were 1,194 witnesses, divided between 419 people who appeared in court and presented oral evidence, and 775 people through affidavit. There were thousands of exhibits, and the daily transcript covered 48,412 pages, or about nine million words. Moreover, since there were two official languages of the court, English and Japanese, all documentary and oral evidence, as well as the daily proceedings, had to be translated into the other language, which contributed to the extraordinary length of the trial. It is estimated that the IMTFE cost \$10 million, which was funded by the United States.²¹

¹⁹Gordon Ireland, "Ex Post Facto from Rome to Tokyo," Temple Law Quarterly 21 (July 1947): 43. The indictment named twenty-four individuals and seven groups as defendants. During "216 days of trial time [the IMT held] 403 open sessions, in which it heard 33 witnesses for the prosecution, 19 of the defendants, and 61 witnesses and 143 depositions on behalf of the individual defendants." The tribunal handed down its decision on 30 September 1946, announced the sentences on 1 October 1946, and those defendants sentenced to die were hanged on 15 and 16 October 1946.

²⁰McKenzie, 16.

²¹"Japan: Wages of Infamy," Newsweek, 22 November 1948, 36; "Japanese War Guilt," Times (London), 13 November 1948, 5; and Pritchard, An Overview, 21.

CHAPTER 4

CHIEF OF COUNSEL

Two months after his arrival in Japan, Keenan wrote to his friend, Horace ("Hap") Flanigan, about the magnitude and daunting nature of his position:¹

This is some job. I guess if I had known what it was going to be in the beginning I would have given long hesitation before embarking. But it is beyond that point now and the sole object in mind is to see it through to a successful conclusion.²

Keenan's position as Chief of Counsel certainly involved more than simply acting as a prosecutor in court and as IPS Administrator. He was instrumental in organizing the machinery and establishing the Tribunal. As mentioned earlier, Keenan had a principal role in drafting the IMTFE Charter, which MacArthur then promulgated. The two men also cooperated in developing the guidelines for Allied nations to use in selecting their nominees for judges and prosecutors. When the State Department, which was responsible for notifying the Allies about the IMTFE, requested details from SCAP, Keenan drafted a reply, outlining the membership and appropriate rank of judges, the Charter and court rules--

¹Unlike the IMT's cooperative system of prosecution, in which each nation had its own chief of counsel, the IMTFE relied on a system of joint prosecution under an American chief of counsel.

²JBK to Horace Flanigan, 18 February 1946, MS Box 1, Folder 5, Keenan Papers.

including a proposal to rely on Nuremberg precedents when appropriate--and the membership of the prosecution staff. MacArthur and Keenan also asked that the Allies designate their judicial nominees and appoint prosecutors no later than 5 January 1946, so as to avoid excessive delay.³ Later, Washington asked Keenan to coordinate the travel arrangements, including air priority, for those Allied representatives.⁴

The Chief Prosecutor also played an active role in recruiting American defense attorneys to assist the Japanese defense counsel. On 21 and 28 February, he requested twenty-five attorneys, civilian or military. Later, he wished to know how many had already been chosen and were coming, and emphasized that they were needed soon or else the IMTFE would be delayed. SCAP noted that the appropriate job descriptions, including one Chief American Defense Counsel, had already been sent to the Overseas Branch, Civilian Personnel Division, Office of the Secretary of War.⁵

³JBK to MacArthur, "Suggested Reply to WX 89365," 22 December 1945, RG-9, Blue Binder: War Crimes, MMA; Message from MacArthur to JCS, CA 56271, 22 December 1945, RG-9, Blue Binder: War Crimes, MMA; and Message from JCS to MacArthur, W 93831, 21 January 1946, RG-9, Blue Binder: War Crimes, MMA.

⁴War to JBK, WCL 38407, 18 January 1946, RG-9, Blue Binder: War Crimes, MMA.

⁵Message from MacArthur to WARCOS, [identification unclear], 1 April 1946, RG-9, Blue Binder: War Crimes, MMA. The Chief American Defense Counsel's duties were as follows: "Supervise all American defense counsel members. Assign duties to the various defense attorneys. Advises Japanese counsel in the court procedure and judicial and non-judicial matters unfamiliar to the Japanese. Acts as a liaison between the Japanese and American counsel, the Tribunal, and other Allied Representatives. Attends pre-trial conferences. Initiates procedures to follow in regard to the administrative duties of the defense, i.e. permission to visit

The evidence suggests that the Chief of Counsel evinced a particularly keen interest in the selection of the American judge. MacArthur and Keenan recommended the nomination of the American Bar Association president, Willis Smith.⁶ Shortly thereafter, Keenan was greatly disturbed to learn that Washington was instead considering nominating Chief Justice John P. Higgins of the Superior Court of Massachusetts. He warned both Clark and the Judge Advocate General's office that this would be a grave mistake, since such a locally-known and "intermediate grade" justice would not rank with the other Allies' nominees. He noted that among the Allied appointments were "the Chief Justice of one nation and other approximate ranking jurists." Moreover, such an appointment would undermine their plan to designate the U.S. representative as President of the Tribunal, "with the substantial powers conferred upon him by the Charter." Keenan urged that the nomination be reconsidered, and recommended Smith; Dean Roscoe Pound, a former ABA president; or someone with experience on the U.S. Circuit Court of Appeals or a higher court.⁷ Noting the "vexing problems of far-reaching importance that must be submitted and adjudicated for the first time in this unique proceedings," and expecting various

Japanese prisoners."

⁶Message from MacArthur to JCS, CA 57022, 18 January 1946, RG-9, Blue Binder: War Crimes, MMA.

⁷Message from JBK to Judge Advocate General, 21 January 1946, RG-9, Blue Binder: War Crimes, WC [70], MMA; Message from JBK to Clark, 21 January 1946, RG-9, Blue Binder: War Crimes, WC [69], MMA.

"legal complications" to develop, Keenan reiterated his advice that someone with more appropriate experience should be the U.S. nominee.⁸ However, Clark responded that Higgins would probably have to be the nominee. He believed that no more federal judges could be assigned to such international tribunals, since there was considerable "unfavorable comment about additional Federal judges being taken from their work and being placed on these assignments."⁹ Clark contended that it was a poor time to remove another eligible judge from the bench.¹⁰

Despite the inconvenience to the federal judicial system, it would have been worthwhile for the U.S. to nominate a more qualified applicant. Indeed, one and one-half years later, Keenan complained to his wife about 1) this selection process and 2) the second American member, Judge Myron C. Cramer, who had replaced Higgins. He believed that if the U.S. had selected a good, or "perhaps a good average," U.S. Circuit Court judge, whom MacArthur could have appointed as Tribunal President without embarrassment, "we could have had this trial successful and over long ago."¹¹

⁸Message from JBK to Clark, 21 January 1946, RG-9, Blue Binder: War Crimes, WC [69], MMA.

⁹Clark to JBK, 24 January 1946, MS Box 1, Folder 6, Keenan Papers. Clark explained that "there have been several bills prohibiting it."

¹⁰Ibid.

¹¹JBK to Charlotte Keenan, 4 November 1947, MS Box 1, Folder 7, Keenan Papers.

As Chief of Counsel and the head of the IPS, Keenan functioned as part of the GHQ-SCAP bureaucracy and within the military environment of Occupied Japan.¹² He complained that "Army red tape is beyond belief," and cited the example of messages which "go into so many channels where they become lodged in a pocket."¹³ While Keenan did not enjoy the red tape associated with the Army, he benefitted from it. For example, although the Chief of Counsel was a civilian, he was treated as if he were a lieutenant general.¹⁴ Along with many of his section's male staff members, Keenan lived in Hattori House, a Western-style house which had been built by a great Japanese merchant jeweler.¹⁵

Unable to hire a good Public Relations Officer before he left the U.S., Keenan assumed responsibility for publicity of the trial, as well.¹⁶ This could be a crucial issue, according to a prosecutor in another Far Eastern war crimes trial, Lt. Colonel (JAGD) John H. Hendren, Jr. Based on his perception that "the public does not give a damn any more about war crimes," Hendren advised Keenan to

¹²Much later, Keenan dealt with the GHQ Manpower Board, outlining the personnel situation in the IPS and arguing against the cuts recommended by the Board. JBK to GHQ Manpower Board, "Personnel Survey of International Prosecution Section," 14 August 1947, MS Box 1, Folder 8, Keenan Papers.

¹³JBK to Flanigan, 16 January 1946, MS Box 1, Folder 6, Keenan Papers.

¹⁴Johnson, "Long Career."

¹⁵Keenan also had a Japanese butler, maid, and valet. JBK to Flanigan, 16 January 1946, MS Box 1, Folder 6, Keenan Papers.

¹⁶JBK to John H. Hendren, Jr., 25 April 1946, MS Box 1, Folder 2, Keenan Papers.

"try to keep the public interest up in your cases."¹⁷

Keenan dealt with such important visitors as the U.S. House of Representatives' Naval Affairs Committee. One committee member, George J. Bates, later remarked that his visit with Keenan was "one of the most interesting and pleasurable incidents" on his trip to Japan.¹⁸ In addition, Keenan regularly reported to an Assistant Policy Coordinator at the Department of State, Harry J. Krould, who noted in response that publicity was one of the problems faced by the IMTFE. Krould observed in January 1946 that the press still was not recognizing the distinctions between military trials and those of class "A" war criminals.¹⁹ Among his many other duties, Keenan responded to a New York Times reporter's request for key documents utilized by the IMTFE, promising to assign one of his attorneys to supply such materials on a regular basis. He also shared with the reporter some background information about the prosecution's development of its case.²⁰

It is very interesting to note the number of letters Keenan received from friends and acquaintances, who importuned him for assistance in solving various problems. This was probably a result

¹⁷Hendren to JBK, 16 April 1946, MS Box 1, Folder 2, Keenan Papers.

¹⁸George J. Bates to JBK, 16 February 1946, MS Box 1, Folder 5, Keenan Papers.

¹⁹Harry J. Krould to JBK, 7 January 1946, MS Box 1, Folder 6, Keenan Papers.

²⁰JBK to Hanson W. Baldwin, 20 November 1946, MS Box 1, Folder 1, Keenan Papers.

of Keenan's highly visible position. The topics of the letters ranged from law cases and business deals involving Japan to the difficulties of a young serviceman wanting a wife and child brought over to live with him in Japan.²¹

²¹Anthony A. Buford to JBK, 5 August 1946, MS Box 1, Folder 2, Keenan Papers.

CHAPTER 5
CHIEF OF THE IPS

Keenan's primary responsibility was, of course, to oversee the operations of the IPS. While he possessed final responsibility, he wanted policy to be determined among the prosecution attorneys.¹ The size of Keenan's staff fluctuated considerably, dramatically increasing with the arrival of the Associate Prosecutors and their staffs, and then decreasing as members who had finished their phases of the case departed. There were about thirty-eight people, including sixteen lawyers, in the original group of Americans who traveled to Tokyo in December 1945.² It has been estimated that at the height of the IMTFE, Keenan was in charge of 50 lawyers, of whom one-half were Americans, plus a staff of 104 Allied and 184 Japanese, who worked as translators and clerical help.³ In mid-February, Keenan's own estimate was that the prosecution included 200 people, of whom about 75 were translators, interpreters, and clerical staff.⁴ After the conclusion of the prosecution's case, the Times (London) reported that the prosecution staff comprised 35 lawyers and "205

¹Solis Horwitz, "The Tokyo Trial," International Conciliation 465 (November 1950): 490.

²New York Times, 8 December 1945, 6; Brackman, 55; and Donihi to author, 13 April 1989.

³Brackman, 56.

⁴JBK to Flanigan, 18 February 1946, MS Box 1, Folder 5, Keenan Papers.

expert advisers and clerks."⁵ While most Associate Prosecutors' staffs consisted of two to four lawyers and clerical staff, the Soviet delegation was exceptionally large, with forty-seven members.⁶

There was one woman among all the IMTFE prosecutors; Mrs. Grace K. Llewellyn worked on the Manchurian phase of the prosecution's case.⁷ Some of the American participants were "outstanding prosecutors,"⁸ including John Darsey, who had served as the Attorney General's representative at the IMT and John W. Fihelly, Chief of the Criminal Division, Justice Department.⁹

In a February 1946 memo to the Associate Prosecutors, Keenan outlined their rights and responsibilities. These included representing their nations' opinions on the phases of the prosecution, helping choose defendants, developing charges against them and questioning them, and taking "active participation in [the] trial."¹⁰

⁵Times (London), 10 March 1947, 5.

⁶Humphreys, Autobiography, 124; Pritchard, Overview, 28.

⁷"Manchurian Phase of Case Resumed at Tribunal Session," Nippon Times, 31 July 1946, 1. According to the editors of the IMTFE transcripts, there may have been one more woman participant, a Mrs. Lambert.

⁸New York Times, 8 December 1945, 6.

⁹Harries and Harries, 106.

¹⁰Memo from JBK to Associate Prosecutors, 13 February 1946, DONZ, 1522-3. Keenan added some details about the provisions. They had the "right to preliminary examination of any witness or suspect, subject to approval by the Supreme Commander." With respect to the actual trial, Keenan offered the Associate Prosecutors the opportunities to help him to develop a procedure

Naturally, with the large size of the IPS staff and the magnitude of the prosecution's case, mechanisms to promote coordination had to be established. There were investigative, language, document, and administrative divisions within the IPS. In addition, the Chief of Trial was in charge of the preparation and the presentation of the case. Every workday, all staff members received updated reports from the Research and Analysis Section, which worked closely with the Chief of Trial. Its duties included summarizing the record, supervising studies that would be used in more than one place, and developing general arguments and summations.¹¹

From December 1945 until September 1946, Ernest E. Danly functioned as head of the Documents Division, which was responsible for obtaining, identifying, "cataloging and processing and making ... available" thousands of documents, many of which required translating from the original Japanese.¹²

The Language Division, which is reputed to have employed over two hundred translators and "checkers," was of fundamental

for examining witnesses, and to add pertinent evidence to the case, if they first cleared it with the prosecutor in charge of that particular phase. Also, they could give an introduction, closing speech, and could have an assistant substitute.

¹¹Horwitz, 493, 491. Likewise, the defense was broken down into such divisions. Especially after it had finished presenting its case, the prosecution offered the use of some of its resources, including those relating to language, documents, and reproduction, to the defense. Horwitz, 493.

¹²JBK to Ernest E. Danly, 17 September 1946, MS Box 1, Folder 2, Keenan Papers.

assistance to the prosecution. It took one working day to correctly translate one page--translation followed by three checks.¹³ Some Japanese translators were biased and had to be fired, after a second translation of certain documents revealed that some previously dismissed as of little use were actually important.¹⁴

Initially, the prosecution confronted the problem of a lack of documentary evidence, because the Japanese military had never kept such extensive records as in the U.S. and Germany, or because it had been deliberately destroyed.¹⁵ Having been warned by the Potsdam Declaration of the impending war crimes trials, some Japanese took advantage of the two-week interval separating the surrender and the beginning of the Occupation to burn potentially incriminating documentary evidence. Moreover, Gayn has explained in his diary that "unlike Germany and Italy, Japan has had few politicians or generals ready to tell all to save their skins or make some money."¹⁶

Thus, Keenan checked elsewhere, including Time magazine. He requested and received copies of all 1941 issues of the magazine, which he used as secondary sources to corroborate other information

¹³Pritchard, Overview, 46-7; Walt Sheldon, The Honorable Conquerors: The Occupation of Japan 1945-1952 (New York: 1965), 175.

¹⁴Walter I. McKenzie, "The Japanese War Crimes Trials," Michigan State Bar Journal 26 (May 1947): 16 and 18-9.

¹⁵Johnson, "Japanese Fear Keenan."

¹⁶Gayn, 271.

he had gathered.¹⁷ Due to this paucity of evidence, Keenan sent someone from the IPS to visit the IMT at Nuremberg to search for any relevant documents.¹⁸ Despite the special handicaps they encountered, the prosecution eventually did collect much documentary evidence. After his arrival in Tokyo, New Zealand Associate Prosecutor R.H. Quilliam commented that the IPS had an extensive library and its Documents Division had an "excellent filing system," making it relatively easy to check on a person or other subject.¹⁹

Indeed, during the course of presenting its case, the prosecution collected an enormous number of documents, best described by a documents division officer: "At first I listed all incoming documents. Then they came so fast that I listed only incoming bags. Then crates of bags. Now I just list the rooms they're in."²⁰ The U.S. Army had taken control of the official Japanese documents remaining after the Japanese had destroyed many of them. Contrary to a defense attorney's charge, 95% of these

¹⁷JBK to Henry R. Luce, Editor, Time Magazine, 29 January 1946, MS Box 1, Folder 5, Keenan Papers.

¹⁸"Keenan Says Japs Covered Evidence," 16 December 1945, [newspaper unknown]. This may not have proved as rich a source as Keenan had hoped. Jackson wrote to Keenan that "there is not much we can do for your case compared to what we have for our own here." Jackson to JBK, 29 April 1946, MS Box 1, Folder 2, Keenan Papers.

¹⁹Quilliam to Foss Shanahan, 12 February 1946, DONZ, 1526.

²⁰"War Crimes--The Prosecution Rests," Time, 3 February 1947, 25.

were available to the IMTFE participants on both sides.²¹

In the early days of the trial, the chief of the Investigative Division was Harold Nathan, formerly an assistant to J. Edgar Hoover.²² The IPS staff included other FBI agents famous in the 1930s, including John Crowley, Roy Morgan, and Lt. Colonel Ben Sackett.²³ The Investigative Division continued to work during the course of the trial, as evidenced by a confidential memo Keenan received from the division's chief, Edward P. Monaghan, in August 1947.²⁴

The Executive Committee was another important unit of the IPS. Apparently, Keenan asked U.K. Associate Prosecutor Arthur Strettell Comyns-Carr, K.C., to do much preparatory work, including establishing the Executive Committee.²⁵ Comprising all the

²¹Brackman, 149. The IPS could not gain access to the other 5% of this documentary evidence then or later. Perhaps its topics included politically-sensitive subjects such as the "Japanese drive to acquire nuclear weapons, the Soviet Union's spy ring in Japan," biological warfare, and the Emperor's role.

²²Keenan established this division on 9 December 1945 by first appointing Lt. Colonel Ben Sackett, who also had FBI experience, as chief. Sackett immediately set out to determine what progress SCAP had made. He quickly discovered that, aside from the arrests of suspected war criminals, SCAP had not initiated any action. Brackman, 56.

²³Johnson, "Long Career."

²⁴The memo reported his near-certainty that the Emperor kept a diary, and suggested that SCAP be asked to obtain it, especially those sections covering the years in the indictment, for Keenan. Edward P. Monaghan to JBK, "Emperor's Diary," 12 August 1947, MS Box 1, Folder 8, Keenan Papers.

²⁵Buckley, Occupation Diplomacy, 116; Humphreys, Autobiography, 123.

Associate Prosecutors and senior American counsel, the Committee was responsible for determining the Indictment, the defendants, and evidence, as well as policy and international law.²⁶ The Committee on Evidence, a smaller body, was responsible for actually implementing the Executive Committee's decisions.²⁷

Overseeing these extensive IPS operations and fulfilling his duties as Chief of Counsel kept Keenan busy, but he did find a little time for relaxation, when he especially liked to read. In Tokyo, he read and reread Douglas Southall Freeman's works on Robert E. Lee and his lieutenants.²⁸ He also borrowed the Philippines Associate Prosecutor's copy of William A. White's Autobiography, which he greatly enjoyed. In a letter to White, Keenan praised the book's "quaint humor," which had helped him to relax and given him his "first real laugh ... in many months here."²⁹

Keenan wrote to Clifford Dowdey, author of Experiment in

²⁶Horwitz, 490-1; Humphreys, Via Tokyo, 78.

²⁷Horwitz, 490-1.

²⁸Robert T. Murphy to Douglas S. Freeman, 4 April 1946, MS Box 1, Folder 3, Keenan Papers; JBK to Freeman, 21 May 1946, MS Box 1, Folder 3, Keenan Papers. Abraham Lincoln was another real hero of Keenan's. Murphy interview, 17 March 1989.

²⁹JBK to William H. [actually, A.] White, 2 October 1946, MS Box 1, Folder 1, Keenan Papers. One must wonder whether Keenan was in an alcoholic daze when he wrote this letter to someone who had been dead for two years. Or did Keenan simply not realize that White's book had been published posthumously? This book, published in 1946, won the Pulitzer Prize. White, who was nationally known as the "Sage of Emporia" and as a representative of middle class Midwest America, died in January 1944. Encyclopedia Americana, 1986 ed., s.v. "White, William A."

Rebellion, and expressed his appreciation for a comment about "honorable citizens," which often assisted him in the IMTFE courtroom. He explained that it caused him "to react with a smile of amusement rather than to experience a feeling of anger."³⁰ In his reading, Keenan came across another source of inspiration in U.S. Circuit Court of Appeals Judge Learned Hand's essay entitled, "The Spirit of Moderation." Keenan wrote that the prosecutors were striving to practice its principles in the courtroom and in working with each other.³¹

³⁰The comment Keenan refers to was: "The world is full of honorable citizens who had rather put someone in his place than save friendship or serve a common cause. We rightly apotheosize those few of our heroes who rose above the pettiness of strutting little egos." JBK to Clifford Dowdey, 4 November 1947, MS Box 1, Folder 7, Keenan Papers.

³¹This passage was published in The Practical Cogitator. Excerpts from the pertinent passage: "What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, ... which feels a unity between all citizens ... which recognizes their common fate and their common aspirations....Men must take that temper and that faith with them into the field, ... into the council room, into their homes...." JBK to Learned Hand, 23 October 1946, MS Box 1, Folder 1, Keenan Papers.

CHAPTER 6

KEENAN AND THE PROSECUTORS

There seems to have been a consensus among the IMTFE participants that Keenan was not the most qualified person to act as Chief of Counsel, or as Chief of the IPS, and that the numerous responsibilities required capabilities greater than his.¹ Dutch Justice Roling, for example, described Keenan as "mediocre," in contrast to Jackson, the American Chief of Counsel at the IMT in Nuremberg.²

Assistant Attorney General Darsey, who was the "number 2 man" among the original group of American prosecutors, admitted his own surprise that Keenan had received the appointment. According to Darsey, Keenan was "an arrogant, brutal egotistical genius lacking essential administrative ability to command," who "had little patience with people."³ Donihi blames Keenan's "meanness" at the IMTFE on his drinking,⁴ and many other observers severely criticized Keenan for his heavy drinking.

¹Critics include the following: Prosecutor Frederick Mignone-- "[Keenan] did not measure up to the job"--Brackman, 55; Defense Counsel Beverley Coleman--"Keenan was a good lawyer, but he was not the man to handle a trial like this"--Brackman, 55; New Zealand Tribunal member E.H. Northcroft--Keenan showed "every sign of being an exceedingly incompetent lawyer"--Northcroft to McIntosh, 2 July 1946, DONZ, 1612.

²C. Hosoya et al., 16.

³Donihi to author, 13 April 1989.

⁴Ibid.

Moreover, Keenan managed to have good relations only with his friends and cronies. On his longest leave of absence, which was about six months during the first half of 1947, Keenan gave Frank S. Tavenner, Jr., a crony, the responsibility, rather than Comyns-Carr or Australian Associate Prosecutor Alan Mansfield, probably because he wanted to maintain control of the IPS, even from afar.⁵

Although unpopular, he "managed to boil the multi-national IPS together." Having been a "genius at law and politics in the Justice Department,"⁶ Keenan brought some excellent qualities to his position. "A good listener, negotiator, and organizer," Keenan "delegated authority easily and freely." "He liked to see his colleagues promoted in their jobs," and "excelled in a gruff form of diplomacy and in putting together a team of diverse personalities," important qualities for someone who had to deal with lawyers representing twelve countries.⁷ Moreover, he was "sincere about his mission," and "no fool."⁸

Under the unusual situation which prevailed in Japan, it is

⁵Ibid.

⁶Ibid.

⁷Brackman, 55. A friend once commented in a letter to Keenan that he could not agree with another's assessment of Keenan as being gruff, based on his own early acquaintance. He wrote that, when he was teaching at Georgetown, he called Keenan to ask about a position for a former student: "You [Keenan] answered a telephone personally--without a screener--which was not de rigeur, and helped the person. I could not corroborate your gruffness. Having read the recent repartee between Madame [Chiang] and yourself, you do not appear to have changed." Lewis C. Cassidy to JBK, [23] April 1946, MS Box 1, Folder 3, Keenan Papers.

⁸Harries and Harries, 106; Brackman, 56.

not surprising that frictions developed among the prosecutors, or that some participants sought solace in alcohol. In devastated Japan, they were functioning in a most difficult situation. Few knew recent Japanese history, and many of the attorneys, naturally, did not know each other. Moreover, they faced the added pressure of a rather intense international spotlight.

Quilliam provided some insights into how unity among the Associate Prosecutors was fractured. He explained that the Filipino and Chinese prosecutors usually supported Keenan, the French and the Dutch were unlikely to oppose him, and the Soviet prosecutor tended to be independent-minded.⁹

There appears to have been a battle for control of the prosecution between the British Commonwealth prosecutors and Keenan.¹⁰ While Quilliam stated that those prosecutors representing Australia, Canada, New Zealand, and the U.K. did not want to be perceived as a "British cabal or bloc,"¹¹ Keenan complained in his correspondence that, in fact, they did act together to thwart his efforts.¹² In August 1946, he wrote that problems among Associate Prosecutors seemed to have been resolved and that the British had come to recognize that "they are not going to have the run of this

⁹R.H. Quilliam to McIntosh, 26 July 1946, DONZ, 1633; Quilliam to Shanahan, 2 July 1947, DONZ, 1683.

¹⁰Northcroft to McIntosh, 2 July 1946, DONZ, 1612.

¹¹Quilliam to McIntosh, 26 July 1946, DONZ, 1633.

¹²It is interesting to note that the Commonwealth prosecutors lived together in the Canadian Legation. Humphreys, Via Tokyo, 30.

trial,"¹³ which he believed was their desire.

Yet, problems obviously continued, since the British Commonwealth's representatives, dissatisfied with the progress of the IMTFE, tried to "change the procedure and to have a scheme for the prosecution."¹⁴ Quilliam's correspondence is filled with criticisms of Keenan's work.¹⁵ In January 1947, he was upset that "Associate Prosecutors are rarely consulted and have very little influence on the conduct of the case,"¹⁶ and in September, he was worrying that Keenan would not assign him more defendants' cases, because the "British prosecutors have become too prominent."¹⁷

The U.K. prosecution team was headed by Associate Prosecutor Comyns-Carr, supported by Humphreys, R. Spencer Davies, and Maurice

¹³JBK to Joseph Bossong, 13 August 1946, MS Box 1, Folder 2, Keenan Papers.

¹⁴Quilliam to McIntosh, 7 June 1946, DONZ, 1600.

¹⁵In reading Quilliam's criticisms, it is important to recognize his perspective--how critical he was of everything. Perhaps he was disposed toward criticism, because he was dissatisfied with remaining in Tokyo so long, or frustrated at not having more influence on decision-making. Writing to the Deputy Secretary of External Affairs, Foss Shanahan, Quilliam mentioned his self-interest in determining plans for handling the rest of the trial. He stated point-blank that he did not want to remain in Tokyo "any longer than is absolutely necessary." Quilliam to Shanahan, 2 July 1947, DONZ, 1683. Quilliam seemed unusually bitter that the defendant to whom he had been assigned (Nagano) died during the trial, rendering his work meaningless. "I am inclined," he wrote, "to regard his demise as somewhat inconsiderate to me personally." Quilliam to Shanahan, 15 January 1947, DONZ, 1655.

¹⁶Quilliam to Shanahan, 24 January 1947, DONZ, 1658.

¹⁷Quilliam to Shanahan, 30 September 1947, DONZ, 1694.

Reed, who was from the British Attorney General's Office.¹⁸ Humphreys effusively praised Comyns-Carr, whom he said often had to function as chief counsel due to Keenan's inadequacies.¹⁹ Humphreys named two other Commonwealth prosecutors, Mansfield of Australia and Brigadier Henry Grattan Nolan of Canada, as having been especially good.²⁰

Perhaps the British were unhappy about American domination of the trial,²¹ because they had objectives they desired to accomplish, too. The U.K. Prosecutors, whom one scholar characterized as having played an important role in the IMTFE, were concerned about British prestige, revenge, and ensuring that the trial was a real international undertaking.²² On their journey to Tokyo, the U.K. team had stopped in Washington, D.C. and shared their views with the Assistant Secretary of War. Their suggestions included developing a pool of defense counsel, allowing non-Japanese to act as defense attorneys, restricting the number of defendants to avoid too lengthy a trial, omitting organizations from the indictment,

¹⁸"British Prosecutors En Route to Tokyo," New York Times, 29 January 1946, 9; Humphreys, Via Tokyo, 9.

¹⁹Humphreys, Autobiography, 123.

²⁰Humphreys, Via Tokyo, 81. The Australian Prosecutor brought along an assistant, Alistair Rose Macdonald. They arrived in Tokyo on 5 February 1946. The Canadian Prosecutor arrived in Tokyo on 8 February 1946. Quilliam to Shanahan, 26 March 1946, DONZ, 1543.

²¹Quilliam to McIntosh, 25 June 1946, DONZ, 1602.

²²Buckley, Occupation Diplomacy, 115.

and "fixing responsibility on leaders for atrocities."²³

While some British Commonwealth prosecutors expressed great dissatisfaction with Keenan's leadership, other Associate Prosecutors praised him. Keenan sent a congratulatory letter to the French Associate Prosecutor regarding the French Division's presentation of its phase of the case.²⁴ In response, Robert Oneto praised Keenan's leadership, citing the assistance the French received from the various IPS divisions, "which execute their duties so efficiently under your able direction." He also commended Keenan for his efforts to induce cooperation among the prosecutors: "I have been impressed by the understanding which you have always shown towards the representatives of the various nations ... and by your untiring efforts in obtaining the full cooperation of each nation for the success of the prosecution as a whole." Oneto thanked Keenan for his assistance in arranging an investigative trip to Indo-China, "with a minimum of delay," to collect evidence and for his "vital intervention" in favor of the use of French at the IMTFE.

Writing after his departure from Tokyo to assume a seat on the Madras High Court, the former Indian Associate Prosecutor seconded Oneto's praise of Keenan's work. Govinda Menon reminisced

²³SERVJAG to JBK, WAR94686, 27 January 1946, RG-9, Blue Binder: War Crimes, MMA.

²⁴Keenan not only thanked those who served with him; he also shared his feelings of appreciation with witnesses, such as Henry Pu-Yi, last Emperor of China, and Emperor of Manchuria under the Japanese. Keenan to Henry Pu-Yi, 27 August 1946, MS Box 1, Folder 2, Keenan Papers.

about his experiences "under [Keenan's] outstanding and able leadership," and emphasized Keenan's "wise counsel and genuine kindness" as "matters which always recur in my mind."²⁵

While Keenan's leadership abilities received both positive and negative appraisals among the prosecutors, his heavy drinking inspired many unflattering comments from his fellow prosecutors and others associated with the IMTFE. Rumors of excessive drinking and "uproarious behavior" at the Tokyo Press Club circulated through Tokyo and beyond. Although Brackman, who lived at the Tokyo Press Club while he covered the trial, reported that he "never once saw Keenan at the bar,"²⁶ the British, in their diplomatic correspondence, referred to the stories in Tokyo that Keenan "was unable to distinguish black from white unless blended in the same bottle."²⁷

Such allegations have been substantiated by W. Macmahon Ball, British Commonwealth representative to the Allied Council for Japan, who included in his diary eyewitness accounts of a drunken Keenan. His 6 June 1946 entry is typical, describing a British party he attended at which Keenan, intoxicated and uninvited, appeared. According to Ball, Keenan "was exceedingly drunk,

²⁵P. Govinda Menon to JBK, 21 October 1947, MS Box 1, Folder 1, Keenan Papers.

²⁶Brackman, 55.

²⁷Letter from Sir George Sansom to British Foreign Office, 16 September 1946. Buckley, Occupation Diplomacy, 244 (n.39).

dressed in sports clothes and only in the mood for flinging his arms around the necks of those present, and boasting, in quite a disgusting way, about his intimacy with President Truman and other great men."²⁸

Quilliam learned from one of the senior American prosecutors, Carlisle W. Higgins, that Keenan had been an alcoholic "for some years," but maintained abstinence for one year before his appointment as Chief of Counsel. Shortly after his arrival in Japan, he started drinking again, "to excess habitually."²⁹ Keenan was probably the most prominent, but he was by no means the only victim of alcohol in Occupied Japan. Some people associated with the IMTFE and SCAP found themselves more likely to resort to alcohol in Japan than at home. Even Ball admitted that the pressures and difficulties associated with serving on the Allied Council for Japan pushed him to drink. He revealed to a friend afterward: "My sanity was slowly going, and I honestly believe that all the Johnny Walker Black Label could have turned me into an alcoholic if I'd stayed another six months."³⁰ Humphreys commented that the British Commonwealth prosecutors sometimes drank too much.³¹

²⁸Alan Rix, ed., Intermittent Diplomat: The Japan and Batavia Diaries of W. Macmahon Ball (Carlton, Victoria, Australia: 1988), 67.

²⁹Quilliam to McIntosh, 25 June 1946, DONZ, 1603.

³⁰Rix, xiv.

³¹Humphreys, Via Tokyo, 34.

Keenan's personal behavior was obviously of great interest, since it threatened the discharge of his duties as Chief of Counsel. Drawing on Comyns-Carr's papers, some scholars have labeled the chief prosecutor a "confirmed alcoholic" who "became an increasing liability."³² At a 20 June 1946 meeting of Associate Prosecutors requested by the British Commonwealth prosecutors, while Keenan was visiting the U.S. in June and July 1946, Quilliam complained that Keenan had demonstrated poor leadership, and that it was common knowledge that Keenan's "condition of health precluded his carrying out his duties properly."³³ Thus prodded, the senior American prosecutors, Eugene D. Williams, Frank S. Tavenner, Jr., and Carlisle Higgins, determined that the case was more important than loyalty to Keenan. They agreed that their boss should not return to Tokyo, unless he promised to completely stop drinking.³⁴ Williams, Comyns-Carr, and Mansfield voiced their concerns to MacArthur, who was thoroughly familiar with the situation.³⁵ An admirer of Keenan, MacArthur had "no political control to remove him as Chief of Counsel."³⁶ So, the movement to

³²Harries and Harries, xxx. Donihi, who lived with Keenan at the Hattori House in Tokyo, recalls that Keenan "did drink too much though I never saw him drink or drunk but often saw him after [he had been] drinking--his blood pressure was the enemy--alcohol sent it to the ceiling." Donihi to author, 13 April 1989.

³³Quilliam to McIntosh, 25 June 1946, DONZ, 1602.

³⁴Quilliam to McIntosh, 25 June 1946, DONZ, 1603.

³⁵Quilliam to McIntosh, 15 July 1946, DONZ, 1623-4,; 7 November 1946 diary entry, Rix, ed., 132-3.

³⁶Donihi to author, 13 April 1989.

have Keenan sacked fizzled out.

Meanwhile, Keenan, who was then at Saratoga Springs "for treatment,"³⁷ had asked SCAP to extend his leave of absence by thirty days. Acting Chief of Counsel Higgins, who had received the impression that Keenan would not get the extension, did not know if Keenan would be forced to resign or withdraw.³⁸

Although his difficulties had been an open secret in diplomatic and IMTFE circles, as well as among the war criminal defendants and suspects at Sugamo Prison,³⁹ Keenan had to do neither. He returned to Tokyo and resumed his position as Chief of Counsel "as if nothing had happened."⁴⁰

Alcohol again threatened his position as Chief of Counsel in February 1947. After a conference with Secretary of War Patterson and Assistant Secretary Petersen, SCAP's Political Adviser, George

³⁷Roger Dingman, reviewer of Documents on New Zealand External Relations, vol. 2, The Surrender and Occupation of Japan for The Journal of Asian Studies (vol. 43, August 1984, 763-5), explicitly stated that Keenan was "an alcoholic who had to be shipped to a Saratoga Springs, New York, clinic to dry out." However, there does not appear to have been any such specialized clinic or nursing home in Saratoga Springs during the period 1946-48. Perhaps Keenan went to the Spa State Reservation for the mineral waters. It should be noted that "some visitors came to the Spa under the guise of taking the waters when, in fact, they were being treated for alcoholism or other chronic diseases." Dr. Martha Stonequist, City Historian, City of Saratoga Springs, New York, to author, 6 March 1989. According to Donihi, Keenan had "more than one 'drying out' period in the USA." Donihi to author, 13 April 1989.

³⁸Quilliam to McIntosh, 9 July 1946, DONZ, 1618.

³⁹15 July 1946 diary entry. Yoshio Kodama, Sugamo Diary (Japan: Radiopress, 1960), 141.

⁴⁰Quilliam to McIntosh, 8 August 1946, DONZ, 1634.

Atcheson, Jr., sent MacArthur an "Eyes Alone" letter regarding Keenan. From this conversation, Atcheson deduced that Keenan was still experiencing problems and had "periodically taken to the hospital," and that the two men wanted a resolution. Atcheson felt unqualified to suggest any American prosecutor as Keenan's replacement, and mentioned to MacArthur that it might even be possible for Keenan to return to work. Patterson instructed Petersen, however, to notify Keenan that he must decide to return or his appointment would be terminated, and to enlist the help of the Attorney General in starting to search for a replacement.⁴¹

As we know, Keenan was not replaced. He admitted later that he had health problems during the trial.⁴² On top of excessive drinking, Keenan had "a very bad heart condition," according to an American Army doctor.⁴³ Finally, on one trip home to the U.S., he had to have prostate surgery.⁴⁴

⁴¹George Atcheson, Jr., to MacArthur, 14 February 1947, RG-5, Box 107, SCAP, Occupation Staff Sections: Diplomatic Section Folder #1 Atcheson Correspondence, MMA.

⁴²JBK to MacArthur, 14 June 1949, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

⁴³26 July 1946 diary entry, Rix, 84.

⁴⁴Murphy interview, 17 March 1989.

CHAPTER 7

KEENAN, MACARTHUR, AND WEBB

For Keenan, long discussions with Douglas MacArthur were a healthier source of enjoyment and relaxation than alcohol. Although MacArthur had not known Keenan prior to his appointment as Chief of Counsel, the General was immediately impressed and promised to support Keenan "100 percent" in his efforts to prosecute the war criminals.¹ The admiration was mutual, since Keenan "admired MacArthur greatly [and] relied on SCAP to sustain his leadership."² The two men spent considerable time together,³ and from Keenan's reports of their conversations, it is clear that they felt comfortable together.⁴ Sometimes they discussed current events; on other occasions Keenan shared with MacArthur books and speeches of interest and meaning to him. For their very first Christmas in Occupied Japan, Keenan sent MacArthur a book by Arthur Humphreys, which the latter genuinely

¹Johnson, "Long Career"; Mac R. Johnson, "Japanese Fear Keenan More Than Anyone," New York Herald Tribune, 24 March 1946.

²Donihi to author, 13 April 1989.

³JBK is listed as one of the "Men Who Had the Most Contact With MacArthur, 1945-1951," having met with the General thirty-one times according to MacArthur's Office Diary (3 September 1945-9 April 1951). D. Clayton James, The Years of MacArthur, vol. 3, Triumph and Disaster, 1945-1964 (Boston: 1985), 693.

⁴On the basis of his conversations with Keenan, Murphy characterized Keenan's relations with General MacArthur in Tokyo as "excellent, very friendly." Keenan found MacArthur to be the "most influential and charismatic [man/person] next to FDR." Murphy interview, 17 March 1989.

appreciated.⁵

Keenan regularly praised the General's efforts on behalf of the Occupation of Japan. The Chief Prosecutor sent congratulatory letters on such occasions as MacArthur's speech to the Allied Council, the publication of the new Japanese constitution,⁶ and the General's speech recounting the accomplishments of the Occupation's first year. Keenan passed on to MacArthur the "high approval of the United States Senate of the direction and progress made during the occupation," which he heard from Secretary of the Senate, Leslie Biffle.⁷

Since his great interest in American national politics did not diminish during his service in Tokyo,⁸ Keenan once called SCAP

⁵JBK to MacArthur, [25] December 1945, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA; MacArthur to JBK, 26 December 1945, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

⁶JBK to MacArthur, 11 March 1946, RG-5, Box 2, SCAP Correspondence: Official Correspondence January-March 1946, MMA.

⁷JBK to MacArthur, 3 September 1946, MS Box 1, Folder 2, Keenan Papers.

⁸Although MacArthur had a reputation for being a "political" general, in the summer of 1946, he told Keenan that he was not interested in running for President. MacArthur said he was grateful to Truman for appointing him as SCAP, over the opposition of the Joint Chiefs, who had favored Admiral Nimitz. In a letter to Biffle, Keenan explained MacArthur's desire to share the praise of the Occupation's progress with President Truman. The General did not think "Washington" realized how much credit was due to Truman. Keenan suggested that Biffle follow up on these matters with an appropriate person. The Chief of Counsel wrote that he fully believed MacArthur, and "I do feel that since the President was responsible for his appointment and in view of some considerable popularity the General has--as I felt I sensed back in the States--it would be nothing but just and proper that the public might realize that this occupation here is the result of a Truman move."

to inform MacArthur about the schedule of upcoming primaries for the 1948 elections, even though they were still at least six months away.⁹ While waiting for the Tribunal to prepare the IMTFE judgment, Keenan kept MacArthur abreast of stateside campaign issues in 1948, including expected party gains and losses of Senate seats. In addition, Keenan mentioned the interest he found in the U.S. in foreign policy questions, including the Occupation of Japan, and noted Americans' concerns that war might break out in Europe.¹⁰

After the Tribunal announced the Judgment and the verdicts against the individual defendants, Keenan returned home. In a letter to MacArthur, he discussed the oral arguments delivered before the U.S. Supreme Court as part of an appeal by several condemned Japanese defendants. Since it was the U.S. Solicitor General's responsibility, Keenan did not participate, but he was happy to see the Court recognize that the IMTFE was not subject to its jurisdiction.¹¹

After he returned to the U.S., the Chief Prosecutor continued his correspondence with MacArthur. He shared with the General his

JBK to Biffle, 31 July 1946, MS Box 1, Folder 2, Keenan Papers.

⁹Memo to MacArthur, 11 October 1947, RG-5, Box 63, Memos to the C-in-C, July-December 1947, MMA.

¹⁰JBK to MacArthur, 18 October 1948, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

¹¹JBK to MacArthur, 30 December 1948, [RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL], MMA.

concerns about the threat communism posed to the U.S.¹² Finally, Keenan stressed his high opinion and admiration of MacArthur with public audiences. In a 1950 radio broadcast interview, the former IMTFE Chief of Counsel praised MacArthur, asserting that "he has done an awfully good job and will have completed the major part of it [the occupation] in a year or two."¹³

In contrast to the very amicable relations between Keenan and the General, hard feelings existed between the Chief Prosecutor and the President of the Tribunal. A famous Life magazine article on the IMTFE asserted there was a continuing "courtroom feud" between Webb and Keenan.¹⁴ According to Life, Webb's "antipathy" towards Keenan centered on the question of whether to try the Emperor. On this issue the two represented their countries' respective viewpoints: Webb "tried to steer the questioning in directions that would implicate Hirohito," whereas Keenan "tried to skirt the delicate question--a difficult job since the U.S. indicted Hirohito's confidante--Marquis Koichi Kido, Lord Keeper of the

¹²JBK wrote to MacArthur on several occasions (in 1949 and 1951) to congratulate him on his speeches. He sent a telegram containing Christmas greetings in 1949, which he signed "devoted friend." Various correspondence between JBK and MacArthur, 1949 and 1951, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

¹³"Joseph Keenan Meets the Press," American Mercury, April 1950, 460. This was a guest appearance on "Meet the Press," with a group of five panelists from the Bell Syndicate, Time/Life, Baltimore Sun, Newsweek, and an American Mercury editor.

¹⁴"A 'Dead Man' Speaks," Life, 26 January 1948, 87.

Privy Seal."¹⁵ In his memoirs, General Kenryo Sato, has explained that the defendants also sensed this antagonism between Webb and Keenan, which he ascribed to "an emotional problem between the two men."¹⁶ Murphy gathered the impression that Webb did not like Keenan, but that Keenan did not reciprocate the animosity.¹⁷

In a letter to MacArthur, Webb refuted Life magazine's assertions point by point. With regard to his relationship with Keenan, Webb stated that he had "never had any feud with the Chief of Counsel or with any other Counsel....I have always been polite to the Chief of Counsel and all other Counsel, and they have been polite to me, with one exception." Webb admitted that he had told Keenan "the Prosecution's evidence implicated the Emperor," but he had also added that "the question whether the Emperor was guilty or not was irrelevant as he was not on trial." Furthermore, he denied Life's statement that Australia and the U.S. disagreed on

¹⁵Ibid., 88. Harries and Harries (p.xxix-xxx) concur, explaining that Webb had an "open dislike" for Keenan, because Keenan prevented Webb from attaining his goal of having Emperor Hirohito put on trial.

¹⁶Kenryo Sato, Prospect and Retrospect of the Greater East Asia Wars [or Greater East Asia War Memoirs] (Tokyo: 1966); cited in Brackman, 344.

¹⁷Murphy interview, 17 March 1989.

how to handle the Emperor.¹⁸

Still, Webb sometimes reprimanded Keenan for his courtroom oratory, complaining that it was too rhetorical for the Tribunal and more suitable for a jury. One such instance was Keenan's rebuttal of the defense's challenge to the court's jurisdiction. Here he questioned whether the Allies, which, because of Japanese aggression, had suffered "the loss of a vast amount of their resources and deplorable and incalculable quantities of blood due to the crimes of murder, brigandage, and plunder," were "now totally impotent to bring to trial and punish those responsible for this worldwide calamity...?"¹⁹

Like Keenan, Webb was the subject of considerable criticism by Quilliam and others.²⁰ Roling noted Webb's "dictatorial behavior" in his relations with the judges, prosecutors, and the defense, and his "quarrelsome [nature] at times."²¹ The former

¹⁸Webb explained that he had been asked by the Australian Government for his advice on this matter. He cabled the Minister of External Affairs, Dr. Evatt, in late 1945 that "although there was a prima facie case against the Emperor, his position should be determined at the highest level.... Later I told Dr. Evatt that if the Emperor were indicted I would not take part in his trial." William F. Webb to MacArthur, 11 February 1948, RG-5, Box 60 SCAP Correspondence Subseries 4: Office of the Military Secretary, MMA.

¹⁹Brackman, 97.

²⁰Quilliam to Shanahan, 13 June 1947, DONZ, 1676. One scholar suggests that prosecution members sometimes helped Webb when on occasion he "demonstrated his poor grasp of substantive law." Pritchard, *An Overview*, 20. Webb served as the Chief Justice of Queensland's Supreme Court (1940-46), and then was elevated to be a justice on Australia's High Court (1946-58). Sebald, 156.

²¹C. Hosoya et al., 17.

suspected that Webb's courtroom behavior reflected how "completely unsure of his own position" he felt.²² Not only did the president worry that history might not acknowledge the importance of the IMTFE,²³ but the defense team also questioned his authority to serve as an IMTFE judge. They argued that Webb's service as Chairman of the War Crimes Investigating Commission of Australia, and his experience writing the report on Japanese atrocities and war crimes, would prejudice his judgment.²⁴ The Tribunal ruled against the defense, however, and declined to accept any challenges against the judges.²⁵ Webb's standing suffered particularly from the impression, among many American and Japanese defense counsel, that rules governing the submission of evidence to the Tribunal were more generous for the prosecution than the defense.²⁶ This was not an effort to prejudice the defense's case, but to increase efficiency. After the prosecution had finished presenting its case in early 1947, the Tribunal implemented several changes in the rules, including a new "best evidence" requirement, to speed up the

²²Ibid.

²³Appleman, 239.

²⁴This 465-page report was based on interviews with about five hundred military men and civilians, including many former POWs, and was submitted to the UN War Crimes Commission in London. Pritchard, An Overview, 17; Takeda, 65.

²⁵The majority had decided in Chambers that each judge had to determine for himself whether he was qualified, and they did not have the power "to set aside an appointment by General MacArthur as Head of SCAP." Pritchard, An Overview, 17-8.

²⁶Sheldon, 176; Times (London), 6 March 1947, 4.

trial.²⁷

Much criticism has been heaped on Webb for his "notorious" absence from the IMTFE to participate in the Sessions Court in Australia.²⁸ Certainly, if a judge were absent, it could affect the Tribunal's rulings on the acceptance of evidence.²⁹ From 10 November 1947 until 12 December 1947, Myron C. Cramer acted as president.³⁰

Webb, who strove to protect the independence and fairness of the trial, was greatly perturbed to hear from Keenan that MacArthur might take it upon himself to interpret the meaning of the Charter. The president wrote to MacArthur immediately, and explained that the judges strongly protested this viewpoint and requested

²⁷Harries and Harries, 143.

²⁸Pritchard, An Overview, 16. While President Webb's absence may have had a greater impact on the functioning of the court, the proceedings probably suffered from absences of all the judges. One American defense counsel, Owen Cunningham, figured out each judge's total number of absences (in days): Bernard (France)--32, Cramer (USA)--28 + 2 months late, Jaranilla (Philippines)--38, Lord Patrick (UK)--43, Mai (China)--49, McDougall (Canada)--14, Northcroft (New Zealand)--49, Pal (India)--109, Roling (Netherlands)--14, Webb (Australia)--53, and Zaryanov (USSR)--37. Total of "466 judge-days...lost." Harries and Harries, 149.

²⁹Unlike the IMT's, the IMTFE Charter had no provision for alternate judges, perhaps because of the complications that would have been involved in supporting eleven additional officials in devastated, occupied Japan. Harries and Harries, 148.

³⁰Pritchard, An Overview, 17 (note #37). Cramer's own appointment had been controversial, because there was no provision for replacing a judge who resigned. According to Quilliam (who heard it from Carr, Williams, and Mansfield's meeting with MacArthur), even though MacArthur was unsure what to do, and the U.S. Attorney General advised against it, it was President Webb who insistently called for the appointment of a new U.S. judge to replace Higgins.

clarification. If this were truly the case, Webb said he would have to resign.³¹ Shortly thereafter, at a meeting with Keenan, Northcroft, and Webb, MacArthur guaranteed that the Tribunal would be independent and responsible for interpreting its own Charter.³² Having resolved this issue satisfactorily, MacArthur urged Webb to always "feel the utmost freedom in presenting advice and suggestions."³³

Cross-cultural differences in legal systems may have been partially responsible for some of the friction. Keenan found himself at odds with the British Commonwealth Tribunal members, as well as the Commonwealth prosecutors. He complained to his wife that the U.S. should never again allow itself to be in a situation where "we have one vote and the British Commonwealth five," because the British Commonwealth nations almost always voted together. From their dominant position, they could influence the direction of the trial. He commented that he was no longer irritated, but in fact amused, at how they tried to adhere to the British legal tradition in conducting the IMTFE: "They say one thing from the bench with reference to the Charter which was drawn in an exactly opposite fashion to that governing any national court, but they

³¹Webb to MacArthur, 5 March 1946, RG-5, Box 2, SCAP Correspondence: Official Correspondence January-March 1946, MMA.

³²Webb to MacArthur, 6 March 1946, RG-5, Box 2, SCAP Correspondence: Official Correspondence January-March 1946, MMA.

³³MacArthur to Webb, 8 March 1946, RG-5, Box 60, SCAP Correspondence Subseries 4: Office of the Military Secretary, MMA.

apply the British rules whenever possible."³⁴

³⁴JBK to Charlotte Keenan, 4 November 1947, MS Box 1, Folder 7, Keenan Papers.

CHAPTER 8

PROSECUTION STRATEGY:

CONSPIRACY THEORY AND INTERNATIONAL LAW

Keenan gave great weight to the overarching objectives of the trial--"to advance the cause of peace and right notions of international law."¹ He expressed his view that the American "system of justice and way of life will be put on trial with the accused Japanese."²

Contrary to the defense team and the IMTFE critics' strict interpretation of existing international law, the prosecution and its supporters accepted "the Nuremberg claim that the sources of international law were considerably wider."³ With the advent of the atomic bomb, Keenan and other prosecutors insisted that the Allies could not postpone action until the establishment of an international congress, which could then initiate an international code of law.⁴ Keenan was confident that the international military

¹Keenan and Brown, Crimes Against International Law, 155. Minear quotes Keenan as having said that the defendants were less important than these ultimate goals, just as "the lives of morally and legally innocent men may be sacrificed in the achievement of the common purpose, but the common good requires the taking of the beachhead." C. Hosoya et al., 161.

²JBK to Krould, 19 December 1945, MS Box 1, Folder 6, Keenan Papers.

³Buckley, Occupation Diplomacy, 119.

⁴Mignone, 490; "Joseph Keenan Meets the Press," 459. Roling wrote that "the natural law of the atomic age includes as a matter of course the criminal responsibility of the individual bent on aggressive war." B.V.A. Roling, "The Tokyo Trial in Retrospect," in Buddhism and Culture, ed. Susumu Yamaguchi, 247-66 (Kyoto,

tribunals, which attempted to develop new law, including crimes against peace and humanity, to cope with a new world situation, represented a better method of handling war criminals.⁵ He was willing to see the same punishment meted out to American leaders, if they ever were guilty of the same crimes with which the prosecution charged the Japanese.⁶

In Keenan's eyes, the purpose of the IMTFE was "to establish the fact that men in high places, who planned and initiated aggressive war, were criminals--common, ordinary criminals."⁷ The vast majority of American lawyers attending the American Bar Association convention in October 1946 apparently approved of the international military tribunals.⁸ Furthermore, forty years later, most "qualified commentators on the Nuremberg endeavor are increasingly in overwhelming agreement that it marked a significant and greatly needed landmark in international law."⁹

Japan: 1960), 265.

⁵C. Hosoya et al., 48-9; Roling, "The Tokyo Trial in Retrospect," 265.

⁶"U.S. Prosecutor Defends Tokyo Trials," New York Times, 29 October 1946, 8.

⁷"Joseph Keenan Meets the Press," 458.

⁸[James V. Bennett] to JBK, 4 November 1946, MS Box 1, Folder 1, Keenan Papers.

⁹Frederick Bernays Wiener, "Comment: The Years of MacArthur, Volume 3: MacArthur Unjustifiably Accused of Meting Out 'Victors' Justice' in War Crimes Cases," Military Law Review 113 (Summer 1986): 215.

While the criticism that, prior to his appointment, Keenan did not know anything about Japan or the Far East may be valid, after his arrival he did acquire an appreciation of the effects of the war. Keenan, his military aide, Luke Lea, and several assistants took a plane trip over naval bases and Hiroshima. He was deeply impressed by the devastation. Writing to U.S. Senator Kenneth McKellar, Keenan commented that pictures could not convey the scene: "You have to go close enough to sense and even smell some of the results of the fires and bombardment from the air. It surely conveys a terrible lesson."¹⁰ These experiences surely reinforced Keenan's determination to prosecute those responsible and to seek the outlawing of aggressive warfare.

Of course, the prosecution's strategy evolved as Keenan and his assistants became more familiar with the evidence and suspected class "A" war criminals. Just as MacArthur had proposed in the fall of 1945, Keenan first considered, and the prosecution originally intended to base their case on, the attack on Pearl Harbor and its associated circumstances.¹¹ They realized that the Japanese defendants would counter this by claiming they had acted in self-defense to prevent encirclement. Thus, the prosecution decided to expand its case to include the full extent of Japanese

¹⁰JBK to Kenneth McKellar, 26 December 1945, MS Box 1, Folder 6, Keenan Papers.

¹¹Very early in his research, Keenan considered prosecutions under the Territory of Hawaii's laws. Ingram M. Stainback, Governor of Hawaii, to JBK, 17 December 1945, MS Box 1, Folder 6, Keenan Papers; JBK to Stainback, 1 January 1946, MS Box 1, Folder 6, Keenan Papers.

military aggression in order to accurately explicate the situation.¹² Even the time frame of crimes was adjusted--from July 1937 back to the early 1930s, perhaps even earlier--as Keenan and his team determined that the Japanese war criminals had begun their aggressive conspiracy with the "Manchurian Incident."¹³

The prosecution understood the purpose of this conspiracy to have been "immediately to create a new order in East Asia and the South Pacific under the political leadership, domination and control of Japan and ultimately to create a new world order under the domination and control of Japan."¹⁴ Keenan rebutted the defense's claim that no conspiracy had existed, saying that if the individual defendants had disagreed on the means, they had all sought essentially the same goal.¹⁵ As part of the larger picture of conspiracy, the prosecution attempted to prove that the defendants were also guilty of Japanese atrocities "inflicted on POWs, on civilians, and on Asian forced labor."¹⁶ Thus, they were

¹²JBK to Baldwin, 20 November 1946, MS Box 1, Folder 1, Keenan Papers.

¹³New York Times, 15 December 1945, 2; JBK to Baldwin, 20 November 1946, MS Box 1, Folder 1, Keenan Papers. According to the New York Times, it may have been MacArthur who initiated the change to an earlier date, since he was the one who ordered files on the suspected war criminals relating to events from 1932, while Keenan was still discussing a cutoff date of 1937.

¹⁴JBK to Baldwin, 20 November 1946, MS Box 1, Folder 1, Keenan Papers.

¹⁵"Prosecution Case in Tokyo," Times (London), 12 February 1948, 3.

¹⁶Brackman, 21.

trying to make the leaders responsible for acts associated with the conspiracy.¹⁷ Keenan outlined the prosecution's argument in his three-hour, fifteen-minute opening statement to the Tribunal, which the New York Times hailed as "the `bluntest' condemnation ever made of the Japan war machine."¹⁸

Critics have frequently attacked the prosecution's essential premise on two counts. First, aggressive warfare and conspiracy were vague theories which had not been previously defined, and hence threatened the foundations of the IMTFE with the specter of ex post facto theory. IMTFE Justices Radhabinod Pal and Roling were among these doubters, as was U.S. Senator Robert A. Taft (Ohio-Republican), who expressed his opinion that both international military tribunals "violate that fundamental principle of American law that a man cannot be tried under an ex post facto statute."¹⁹ Other critics argued that the prosecution blundered by trying to construct a conspiracy based on the events that occurred in Japan up to the outbreak of war. One scholar criticized the prosecution for having "betrayed an underlying inability to grasp the dynamics of Japanese politics or a misplaced determination to force, after the fact, unrelated and fortuitous events into a preconceived

¹⁷Ibid., 56.

¹⁸"Joseph B. Keenan, Prosecutor, Dies," 33.

¹⁹"War Crimes: `Hidoi!'" Time, 22 November 1948, 32. In his dissenting opinion, Justice Pal condemned "`aggressors' [as] merely a label applied by conquerors to the conquered." "Japan: Wages of Infamy," 36; Walter W. Ruch, "Taft Condemns Hanging for Nazis as Unjust Verdict," New York Times, 6 October 1946, 45.

thesis."²⁰ In their opinions, Justices Pal and Henri Bernard also raised serious doubts about the prosecution's central thesis.²¹ In short, there was some misunderstanding among the judges and trial observers as to what exactly constituted a "conspiracy."

In expectation of such strong criticism, the prosecution had its juridical consultant prepare an extensive evaluation of conspiracy theories. Keenan's expert, Brendan F. Brown, along with two others, Benjamin F. Pollack and Norah C. Taranto, wrote an extensive memorandum entitled, The Criminal Conspiracy in the Japanese War Crimes Trials for the prosecution's use. The authors surveyed the "conspiracy" concept in the Anglo-American, French, pre-Nazi German, Russian, Chinese, and Japanese legal systems, as well as U.S. federal and state statutes. According to the authors, the prosecution's use of conspiracy in the IMTFE indictment was based on "a generic concept of conspiracy which was suitable and just, according to international law," because it drew from common elements of all these major legal systems.²² They argued that, contrary to those emphasizing the ex post facto doctrine, international society could act in a legal manner even without the

²⁰Piccigallo, 211-2.

²¹Justice Bernard wrote: "No direct proof was furnished concerning the formation among individuals known, on a known date, at a specified point, of a plot...." He did concede, however, that the prosecution had proved "the existence among certain influential classes of the Japanese nation of the desire to seat ... the domination of Japan upon other parts of East Asia." Hankey, 87-8.

²²Brendan F. Brown, Benjamin F. Pollack, and Norah C. Taranto, The Criminal Conspiracy in the Japanese War Crimes Trials, (1946), 1.

prior existence of a specific law, as long as the context was "an objective ethical order, recognized by the generality of mankind, just as racial and national society has done for ... thousands of years."²³

One prosecution team member explained his hope that the IMTFE Tribunal's Judgment would fully incorporate the indictment's conspiracy counts, thereby conclusively establishing it as a crime,²⁴ and rendering obsolete the critics' ex post facto concern. Such a resounding ruling, Keenan hoped, would also act as a deterrent to help prevent aggressive war.²⁵ In this respect, the IMTFE would confirm the transfer of principles governing criminal behavior on the domestic level to the international level, another goal of Keenan's.²⁶

In his pursuit of larger aims, Keenan did not lose sight of the necessity of conducting a fair and just trial of the twenty-eight accused. He realized their prosecution had to be sound and "should not fall into the category of hit and miss punishment of individuals who are suspected of being guilty."²⁷ Later, Keenan reiterated this, writing that their intention had not been

²³Ibid., 34.

²⁴McKenzie, 21.

²⁵"Trial of Japanese Tied to Peace Aims," New York Times, 4 June 1946, 17; Keenan, "Observations and Lessons," 124.

²⁶Keenan and Brown, Crimes Against International Law, 6; Keenan, "Observations and Lessons," 124.

²⁷JBK to Krould, 19 December 1945, MS Box 1, Folder 6, Keenan Papers.

vengeance, and it was their efforts to conduct a fair trial which produced "a somewhat discouraging, long, drawn out proceeding."²⁸

Thus, Keenan and his IPS approached their task with care. Keenan requested for IPS use in preparation of the prosecution's case a number of substantial, pertinent reference works addressing war crimes and international law issues.²⁹ Furthermore, the prosecution obtained the assistance of an expert on international law and Japanese treaty relations. Having co-authored a special memorandum on conspiracy for Keenan, Brown went to Tokyo in June 1946 to assist the prosecution, and served as "the eminent foremost adviser to the Chief Counsel."³⁰

In addition to such research, Keenan and the Tribunal strove to keep abreast of developments in other war crimes trials. Keenan and Carpenter were anxious to learn how the U.S. Supreme Court would handle an application for judicial review from Yamashita's defense. Keenan traveled to Shanghai in March to observe the early part of the trial, before a military commission, of four Japanese officers associated with "the execution of eight United States airmen of the famous Doolittle raid, shot down over China in

²⁸Keenan, "Observations and Lessons," 123, 122.

²⁹Swearingen to JBK, 19 September 1946, MS Box 1, Folder 2, Keenan Papers.

³⁰New York Times, 6 June 1946, 10; Ireland, "Ex Post Facto," 52. He was a Professor of International Jurisprudence at Catholic University. Later, he co-authored a book with Keenan, entitled Crimes Against International Law.

1942."³¹ After the conclusion of this trial, Keenan expected one of the prosecutors to visit him in Tokyo to review the record for evidence implicating class "A" war criminal suspects.³² Finally, the IMT's transcript arrived daily in Tokyo by plane. While the Judges were glad to have access to Nuremberg's precedents, the prosecution and defense also studied the IMT record carefully.³³

³¹Piccigallo, 71. He also went to Chungking to discuss China's involvement in the upcoming IMTFE with President Chiang Kai-shek. Piccigallo, 172.

³²Hendren to JBK, 16 April 1946, MS Box 1, Folder 2, Keenan Papers.

³³Brackman, 148.

CHAPTER 9

THE SELECTION AND INDICTMENT OF THE DEFENDANTS

Early in his tenure as SCAP, MacArthur had ordered the arrests of suspected war criminals. By 11 September 1945, the Counter Intelligence Section of SCAP had already arrested thirty-nine suspects, including Tojo's Cabinet, supplemented by names chosen from Who's Who in Japan.¹ Ex-Premier, War Minister, and General Hideki Tojo was clearly MacArthur's top priority among class "A" war criminals, according to CIS chief Brigadier General Elliott R. Thorpe.

SCAP was not the only agency involved in making recommendations and decisions regarding the handling of Japanese war criminals. Headquartered in London, the United Nations War Crimes Commission issued its own recommendations on 29 August 1945. As of 12 September 1945, the State-War-Navy Coordinating Committee developed its own war criminal policy, and by the end of November 1945, the Political Adviser to SCAP had recommended a list of forty-eight suspected war criminals.²

SCAP paid particular attention to the instructions outlined under the heading "Arrest and Internment of Japanese Personnel" in the overall document, "Basic Initial Post-Surrender Directive to Supreme Commander for the Allied Powers for the Occupation and

¹Emmerson, 254. Emmerson admitted that "the selection of suspects became more organized" later.

²Ibid., 254.

Control of Japan," which was sent on 8 November 1945. This document called upon SCAP to arrest "as rapidly as practicable and [hold] ... as suspected war criminals, pending further instructions concerning their disposition," the people of the categories described.³

When SCAP authorized the arrests of class "A" war criminals, it issued lists of their names to the press. An article in the New York Times, reviewing the 2 December list of fifty-nine people, expressed the difficulty outsiders had in understanding on what basis the suspected war criminals were chosen, especially as some had not been active in government service after 1937.⁴

Keenan had commented in December 1945 that many of the Japanese who had been jailed as suspected war criminals "probably do not belong there at all."⁵ The Chief of Counsel and his prosecution staff were responsible for selecting the class "A" defendants, from among about 250 potential defendants, to be tried at the IMTFE.⁶ The Allied nations were interested in proving the

³Martin, 122, 130. These included military commanders, commissioned officers of the Kempeitai and "all officers of the Army and Navy who have been important exponents of militant nationalism and aggression," major figures in the various "ultra-nationalistic, terroristic and secret patriotic societies," and anybody SCAP has reason to believe was a war criminal.

⁴New York Times, 7 December 1945, 3; New York Times, 15 December 1945, 2. Perhaps SCAP's instructions were never made public.

⁵JBK to Bossong, 28 December 1945, MS Box 1, Folder 6, Keenan Papers.

⁶Minear, 102.

wrongs they believed the Japanese had committed, and would consider failure by their prosecutors to achieve convictions as an unmitigated disaster.

Thus, the IPS, realizing it had to be especially careful in choosing the people to be indicted, selected defendants whom it thought could be found guilty by the Tribunal. This procedure did not contribute to an unfair trial, because "it is standard practice among prosecuting agencies in criminal cases to insist on being reasonably certain of a person's guilt before charging him."⁷ The prosecutors' belief that there would be more than one trial probably also affected their designation of defendants. According to press reports in October 1946, Keenan was discussing another trial "that would definitely include zaibatsu defendants."⁸

An American assistant counsel, Horwitz, said that choosing the defendants involved an "arduous process of weighing and balancing the guilt of one suspect against that of another."⁹ The prosecution used five sources of evidence to choose the defendants: interrogation results; documents; the study, "Conferences before the Emperor"; Marquis Kido's diary; and former Japanese Major General Ryukichi Tanaka's statements.¹⁰ In addition, Horwitz

⁷Harries and Harries, 125.

⁸Ibid.

⁹Minear, 103.

¹⁰Harries and Harries, 125. A controversial witness for both sides, Tanaka testified extensively throughout the trial. He had served in Manchuria at the time of the Mukden Incident, but Premier Tojo dismissed him from military service in 1942. Brackman, 140. Bergamini, whose book has been discredited, used Tanaka as a source

asserted that the defendants should be those who could be charged with crimes against peace and be representatives of the "various branches of the Japanese Government and of the various phases of the period covered by the indictment."¹¹ Humphreys explained that, at its weekly meeting, the Executive Committee considered dossiers on approximately fifty to sixty people and decided whether they were "in," "out," or "deferred for further consideration."¹² Keenan had advised the Associate Prosecutors that a majority of the Executive Committee would select the defendants, but if a tie occurred, the one who suggested including that particular defendant would have the right to break the tie, and that SCAP had the right to approve or disapprove of the list of defendants.¹³ Keenan, who had promised MacArthur that he would show him the list of defendants, continued to believe that the prosecution should submit the list to MacArthur, who could strike or add defendants, and possibly even the FEC or an individual nation. Keenan believed

for his portrayal of Keenan. According to Bergamini, a kind of friendship sprang up between this witness and the Chief Prosecutor. They spoke in French and drank together, and Tanaka supplied Keenan with female companions. David Bergamini, Japan's Imperial Conspiracy, with an introduction by Sir William Flood Webb (New York: 1971), 175-6, 180. Donihi does not believe these stories from Tanaka recounted by Bergamini, because Keenan was "a very moral Catholic on family matters." But, he thinks Tanaka, whom he characterizes as "not a 'good' man," did supply women to other people. Donihi to author, 13 April 1989.

¹¹Minear, 103.

¹²Humphreys, Via Tokyo, 79.

¹³Memo from JBK to Associate Prosecutors, 13 February 1946, DONZ, 1522.

that MacArthur would not change the defendants.¹⁴

The prosecutors agreed to limit the number of defendants, although Keenan admitted that there were more people who could have been prosecuted.¹⁵ The final twenty-eight designated war criminals were those whom the Executive Committee believed had been the leaders "who controlled Japan from the Mukden Incident in 1931 to the final surrender in 1945."¹⁶

Comyns-Carr drafted the fifty-five count Indictment (counts 1-36 charged crimes against peace; 37-52, murder; and 53-55, "conventional war crimes and crimes against humanity"),¹⁷ but most prosecutors contributed to it. Since it mixed eleven types of law and reflected Comyns-Carr's strong Anglo-Saxon bias,¹⁸ the Indictment did not fully adhere to established American practice. One American prosecutor concluded that it "was not a document of which an American lawyer would be proud; but when the entire Indictment was considered, it fairly apprised the accused of the offense with which they were charged."¹⁹

The Soviets, who arrived late, were dissatisfied, and asked

¹⁴Quilliam to Shanahan, 18 March 1946, DONZ, 1540.

¹⁵Minear, 37.

¹⁶Humphreys, Via Tokyo, 79. Two scholars have suggested that in April 1946, the "IPS did not yet have all the evidence available, and [in] some cases its assessment of guilt was flawed." Harries and Harries, 125.

¹⁷Times (London), 10 March 1947, 5.

¹⁸Piccigallo, 14.

¹⁹McKenzie, 19.

the prosecutors to change the Indictment's form in order to make it comprehensible to people around the world, rather than just judges. This proposal met with the agreement of Keenan and a majority of the prosecutors, including those from China, France, the Netherlands, and the Philippines, while the Commonwealth representatives were opposed.²⁰

The IMTFE Indictment used Nuremberg's as a model, but the IMTFE's went further "in directly charging the individual defendants with murder at international common law."²¹ The indictment revealed that the prosecution perceived international law as having six sources: "international conventions ... [and] custom; `general principles of law recognized by civilized nations'; judicial decision; `teaching of highly qualified publicists' and `justice, equity and good faith.'"²²

Sometimes Keenan referred to the Japanese wartime leaders, including the IMTFE defendants, as "gangsters." The nationally-known "gangbuster" of the 1930s readily defended his use of such a characterization, for he did not mean it "in any sensational or cheap manner."²³ He also drew strong parallels between the Japanese war leaders and other Fascist and Nazi leaders of World War II: "Whether it was Hitler, Mussolini, or Tojo, their techniques were

²⁰"Indictment of Tojo Ready by Wednesday," New York Times, 22 April 1946, 6.

²¹Humphreys, Via Tokyo, 79.

²²Buckley, Occupation Diplomacy, 245 (n.54).

²³Keenan, "Observations and Lessons," 119-20.

alike as peas in a pod."²⁴

The prosecution's case consisted of fourteen main categories or phases, including sections on the Japanese Constitution, which looked at the defendants' offices and their functions, and "preparing Japan for war, which includes such subjects as education, political organizations, assassinations and threats, and police coercion." Other phases dealt with Japanese aggression; Japanese-German-Italian collaboration; Japanese relations with the USSR, the U.S., and the British Commonwealth; preparation for war, which was the first of two parts dealing with Pearl Harbor; and "B" and "C" offenses.²⁵

When the prosecution drafted the Indictment, the defendants included only military and political leaders, but no zaibatsu representatives. Keenan and the IPS Executive Committee had not been able to find sufficient evidence that the conspiracy extended to such business leaders.²⁶

²⁴Ibid., 126-7.

²⁵JBK to Baldwin, 20 November 1946, MS Box 1, Folder 1, Keenan Papers.

²⁶Theodore Cohen, Remaking Japan: The American Occupation as New Deal, with a foreword by Herbert Passin (New York: 1987), 154, 157; Piccigallo, 16.

CHAPTER 10

THE QUESTION OF THE EMPEROR

The most notable person missing from the twenty-eight defendants was, of course, Hirohito. It is clear that the decision not to try him was a political decision, which dogged Keenan throughout the trial.

A few weeks after his arrival in Tokyo, Keenan expressed his opinion that the imperial institution was "highly dangerous" and would "have to be done away with before there will be any solid foundation for reasonable expectation of peace."¹ Yet, as Chief of Counsel, Keenan had to put aside his personal opinions and adhere to the Allies' high-level policy decisions. Having received "strict instructions that the Emperor was not to be implicated in any way,"² Keenan was responsible for navigating the prosecution's case around this sensitive topic.

The United States Government did not make a final decision about Hirohito prior to Keenan's arrival in Tokyo. A "Top Secret" SWNCC document dated 30 November 1945, which was sent to MacArthur, revealed that the U.S. Government had not yet ruled out the possibility of arresting and trying Hirohito as a major

¹JBK to McKellar, 26 December 1945, MS Box 1, Folder 6, Keenan Papers.

²Rothe, 1946; Harries and Harries, xxx (note 315).

war criminal.³ When, in January 1946, Australia called for the war crimes trials to include Hirohito among sixty-two Japanese leaders to be charged, the Joint Chiefs requested MacArthur's current findings on the Emperor.⁴ After stating that "no specific and intangible evidence has been uncovered...which might connect him in varying degree with the political decisions of the Japanese Empire during the last decade," MacArthur projected a horrifying picture of Japan, if Hirohito were to be indicted. He anticipated massive resistance, eternal hatred and resentment, a breakdown of government, and the outbreak of guerrilla warfare. Such a situation would require a new Occupation plan, involving as many as a million Occupation troops and several hundred thousand civil servants. He concluded that high-level policymakers would have to make the final determination about what to do with the Emperor.⁵

As MacArthur had expected, his message was quite effective in influencing the U.S. State and War Departments. The U.S., the U.K., and Australia were interested in demobilization and did not desire to become involved in a long guerrilla war with the

³Message from JCS to MacArthur, WX 85811, 30 November 1945, RG-9, Blue Binder: War Crimes, MMA.

⁴Message from JCS to MacArthur, WX 93871, 22 January 1946, RG-9, Blue Binder: War Crimes, MMA; Paul Manning, Hirohito: The War Years (New York: 1986), 211.

⁵Message from MacArthur to JCS, 24 January 1946, [RG-unknown], MMA. MacArthur's Military Secretary, Bonner F. Fellers, had written much the same message to MacArthur in an October 1945 memo. Memo from Bonner F. Fellers to MacArthur, 2 October 1945, RG-5, Box 2, SCAP Correspondence: Official Correspondence July-December 1945, MMA.

Japanese.⁶ The British Government assured Washington in February 1946 that "no action would be taken which might result in publicity on possibility of charging Emperor as war criminal."⁷ In April, the Joint Chiefs sent SCAP a Department of State "Directive on the Apprehension, Trial and Punishment of War Criminals in the Far East," based on the 3 April 1946 FEC policy decision. Paragraph 16 explicitly stated that SCAP was to "take no action against the Emperor as a War Criminal pending receipt of a special directive concerning his treatment."⁸

Keenan later reported that "the Allies [had] decided to exempt the Emperor from trial" for political reasons.⁹ Stalin "reluctantly agreed with the decision,"¹⁰ and the British believed very strongly that the Emperor should not be tried.¹¹ According to Comyns-Carr, the prosecutors, "acting on instructions from their governments," decided by a majority vote not to name the Emperor

⁶Nishi, 55; Manning, 221.

⁷Message from JCS to MacArthur, W96341, 8 February 1946, RG-9, Blue Binder: War Crimes, MMA.

⁸Message from JCS to MacArthur, W85467, 25 April 1946, RG-9, Blue Binder: War Crimes, MMA.

⁹See the interview published in Asahi Shimbun, 21 December 1948; cited in Kiyoko Takeda, The Dual-Image of the Japanese Emperor, with a foreword by Ian Nish (London: 1988), 141. This was probably decided during Keenan's visit to the U.S. in June and July, 1946.

¹⁰Ibid.

¹¹Buckley, Occupation Diplomacy, 117.

as a defendant.¹²

By the conclusion of the trial, Keenan had determined that "no satisfactory evidence existed to prosecute the Emperor as a war criminal," but he said he would have liked to have called the Emperor as a witness.¹³ Since they had a monarchy, the British opposed the idea.¹⁴ MacArthur also opposed it, since if the Emperor was a witness, "he was ready to take personal responsibility for all the actions committed by the Japanese government neglecting all evidence to the contrary."¹⁵

Several years after the IMTFE's proceedings, Keenan disclosed that the Emperor "strictly legally...could have been tried and convicted, because under the Constitution of Japan, he did have the power to make war and stop it."¹⁶ Thus, it was a difficult responsibility to attempt to "keep the emperor's name out of the testimony."¹⁷ Some Japanese appreciated Keenan's efforts on the Emperor's behalf. Yoshio Kodama, a class "A" war criminal suspect who was not tried, kept a diary of his life at Sugamo Prison in

¹²Ibid.

¹³Takeda, 141; Courtney Browne, Tojo: The Last Banzai (New York: 1967), 227.

¹⁴Times (London), 22 November 1948, 3; Takeda, 141.

¹⁵Takeda, 141. This may have particularly concerned MacArthur, because he was cognizant of rumors of Hirohito's abdication throughout this period. Manning, 216.

¹⁶"Joseph Keenan Meets the Press," 459.

¹⁷Russell Brines, MacArthur's Japan (Philadelphia: J.B. Lippincott Company, 1948), 95.

which he recorded that Keenan's return to the U.S. in June 1946 was regarded with mixed feelings by the prisoners. Some argued it would be disadvantageous, saying: "It was just because Mr. Keenan came to Japan that the question of the Emperor never became an issue."¹⁸ In his own memoirs, Sato recorded the IMTFE defendants' gratitude toward Keenan, on the occasion of one of his debates with Webb about the Emperor's role.¹⁹

Keenan did not indict Emperor Hirohito as a class "A" war criminal or call him as a trial witness, but he did hold a four-hour meeting with him after the trial's final adjournment. The interview, Keenan recalled, "only confirmed what we believed to be true from the evidence that came out at the trial," which was that the Emperor considered himself to be a constitutional monarch.²⁰

Keenan's final report to President Truman included a message from Hirohito about the Emperor's desire to encourage American-style government in Japan. Showing the effects of the Occupation, the Diet responded by censuring the Emperor, and he was "accused of private dealings with foreign powers without reference to the elected representatives of his country."²¹

Despite Keenan's efforts during the trial, questions about Hirohito's role in the war and calls for his prosecution again

¹⁸Kodama, 141.

¹⁹Brackman, 344.

²⁰"Joseph Keenan Meets the Press," 458.

²¹New York Times, 3 December 1948, 14; Harries and Harries, 82.

surfaced in 1950. The Soviet Government issued a series of notes, dated 1 February, 30 May, and 30 December, to the United States, the U.K., and China, asking for a new international trial. This request came in the wake of the Soviet Military Tribunal conducted at Khabarovsk in December 1949, in which evidence about Japanese biological warfare was revealed, and twelve Japanese officers were tried and sentenced for "taking an active part in the preparation and employment of bacteriological weapons,...." The Soviet Government wanted the new international tribunal to try five proposed defendants "as responsible for the general direction of bacteriological research and production."²² In a message to SCAP's Political Advisor, the State Department explained its belief that "under no circumstances should Soviet requests for trial of Emperor or Gen[eral]s be acceded to."²³ The Soviet campaign throughout 1950 for a new international military tribunal was rejected by both the State Department and MacArthur.²⁴

²²Max Beloff, Soviet Policy in the Far East, 1944-1951 (London: 1953), 144.

²³Message from DA to SCAP, Political Advisor, W 80549, 14 March 1950, RG-9, DA WX March 1950, MMA.

²⁴Takeda, 147.

CHAPTER 11
THE CROSS-EXAMINATION OF TOJO
AND THE BIOLOGICAL WARFARE QUESTION

Some of the harshest criticisms of Keenan have been reserved for the Chief of Counsel's handling of the cross-examination of the "star" defendant, Hideki Tojo. His exchanges with Tojo also provided Keenan with an opportunity to protect the Emperor from being implicated during one of the most heated and publicized episodes of the trial.

According to most reports, this crucial and controversial cross-examination should have been the responsibility of John Fihelly, chief of the Criminal Division of the U.S. Justice Department, and reputed to be "the best trial lawyer in the U.S. Government service."¹ Harold Evans, an associate of Northcroft, said Fihelly was "specially sent from the United States for the purpose of preparing the cross-examination--and, presumably, conducting it himself."²

Since it was such an important segment of the trial, Keenan wanted "to 'make an appearance' himself," and so he "rushed to the rostrum" to ask Tojo a few questions before he tried "to turn it over to Fihelly who had been preparing for the event since

¹Harries and Harries, 106.

²Harold Evans to McIntosh, 9 January 1948, DONZ, 1699.

December 1945."³ While the defense agreed that Keenan and Fihelly could split the cross-examination, a majority of the Tribunal voted to uphold its rule that only one counsel could conduct the cross-examination. Keenan decided to conduct it himself, and Fihelly left the courtroom and never returned.⁴

Donihi blames "antipathy between Keenan and Sir William Webb and interpretation of the rules" for problems regarding the cross-examination.⁵ Almost immediately, Keenan encountered difficulties, since Webb ruled his first question out of order.⁶ Keenan also antagonized Tojo's American defense counsel, George F. Blewett, by refusing to address Tojo as General because "of course, you know there is no longer any Japanese Army."⁷ Although not present in the courtroom, Evans believed that Tojo, not Keenan, seemed to control the direction of the cross-examination. Unprepared with respect to details, Keenan was often vague in his questioning,

³Ibid., 1699-1700; Donihi to author, 13 April 1989.

⁴Evans to McIntosh, 9 January 1948, DONZ, 1699-1700. Actually, one and one-half years earlier in a letter to McIntosh, Quilliam had enclosed a clipping from the newspaper Stars and Stripes dated 9 July 1946, which cited unnamed IPS sources as having said that Keenan would "personally ... handle examination of former Japanese Premier Hideki Tojo." Quilliam to McIntosh, 9 July 1946, DONZ, 1618-9.

⁵Donihi to author, 13 April 1989.

⁶Keenan tried to ask Tojo "whether his affidavit was a profession of innocence or whether it was intended as a continuation of imperialistic militaristic propaganda addressed to the people of Japan." Times (London), 1 January 1948, 3.

⁷Sheldon, 171.

forcing Tojo to repeatedly ask for clarification.⁸

Reporting to Shawcross, Comyns-Carr had to concede that Tojo had put on a "very fine performance."⁹ Similarly, Gascoigne told the British Foreign Office that, in a conversation with MacArthur, "SCAP admitted to being 'extremely concerned' at the debacle" of Keenan's cross-examination of Tojo.¹⁰ Evans was particularly frustrated at the unfortunate outcome, since he knew that the prosecution had collected much pertinent evidence from documents and witnesses, which could have been used tellingly against Tojo and his Cabinet. In fact, he believed the prosecution "could have made the fight at least an equal one if he [Keenan] had had the character and ability to use [the evidence] effectively."¹¹

There was reason to worry about the Japanese reaction to the cross-examination.¹² Time magazine quoted one Japanese: "I used to think Tojo should be hanged. Now I don't know. If we had won we would have tried the Americans."¹³ The general consensus was that Tojo had been "successful in freeing the Japanese people from any feeling of war guilt and restoring to them much of their lost

⁸Evans to McIntosh, 9 January 1948, DONZ, 1700-1.

⁹Buckley, Occupation Diplomacy, 121.

¹⁰Ibid., 247 (n.62).

¹¹Evans to McIntosh, 9 January 1948, DONZ, 1700-1.

¹²Ibid., 1701.

¹³"War Crimes: 'The Greatest Trial,'" Time, 5 January 1948, 24-5.

pride."¹⁴

The cross-examination was also a critical moment for Keenan, because Tojo could have provided information about the role of the Emperor with respect to the attack on Pearl Harbor. In most of his testimony, Tojo was very careful to absolve the Emperor of any blame or responsibility for the outbreak of war. According to his affidavit, the 1 December decision to start the war "belongs to the responsibility of the Cabinet and High Command, and absolutely not to His Majesty."¹⁵

One rather puzzling incident occurred during the cross-examination when Tojo remarked that "there is no Japanese subject who could go against the will of His Majesty, more particularly among high officials of the Japanese government or of Japan."¹⁶ The implication that the Emperor had played a decisive role disturbed Keenan. Having been instructed not to prosecute the Emperor, he knew that, if true, this could raise questions about

¹⁴"Tojo's Defence of Japan," Times (London), 1 January 1948, 3. Recognizing the need to counteract Tojo's affidavit and cross-examination testimony, the Occupation staff suggested that Keenan's "summation demanding the death penalty for defendants" be published in Japanese under the title, "The Demand of Civilization." By late May, fifty thousand copies of Keenan's statement had been sold, in contrast to only five thousand copies of Tojo's affidavit. "Tojo Outsold as Author by U.S. Prosecutor In Battle of Books From War Crimes Trial," New York Times, 25 May 1948, 16. It should be noted that Tojo's cost fifty-five yen in comparison to only ten yen for Keenan's!

¹⁵Takeda, 143.

¹⁶Ibid., 142.

the fairness of the IMTFE.¹⁷ There are several reports that Keenan, Tanaka, and perhaps even Keenan's Japanese secretary developed a secret plan to convince Tojo to amend his testimony to remove any doubt about the Emperor's role.¹⁸

Whether such a secret plan was actually hatched is unclear. Certainly, several days later in the cross-examination, when Keenan returned to Tojo's earlier remark about loyalty to the Emperor, Tojo explained that his comment had only been in reference to his personal "feeling towards the Emperor as a subject." The former Prime Minister reiterated that it was the Cabinet which had determined to go to war.¹⁹

High-level political considerations prevented Keenan from pursuing another controversial issue at the IMTFE. Both the editor of the published transcripts of the IMTFE and a Japanese scholar have asserted that allegations of Japanese experiments with biological (germ) and chemical warfare on Chinese civilians and American POWs were also deliberately excluded from the IMTFE.²⁰

¹⁷Minear, 114-5; Takeda, 142.

¹⁸Takeda, 142; Minear, 114 (relying on Keenan's secretary's account); and Manning, 215.

¹⁹Takeda, 142. In one of his final messages to the Buddhist priest Shinsho Hanayama, Tojo declared that he could "die in peace of mind because no trouble was brought upon the Emperor." Shinsho Hanayama, "Last Days of Tojo," Collier's, 6 May 1950, 59.

²⁰Kentaro Awaya, a Japanese scholar, pointed out a document he discovered in the IPS files that had not been submitted as evidence, but which provides verification that germ warfare had been used on "the Chinese mainland by Unit 1644, the counterpart of Unit 731 in the Central China Expeditionary Army." C. Hosoya et al., 85. Communist leaders in Japan accused Japanese medical corps members of having "inoculated American and Chinese prisoners with

Keenan's explanation was that the Chinese levied charges during the Tribunal, but were unable to substantiate them. Specifically, American and Chinese prosecution members had investigated the claim by visiting the alleged site in China and uncovered no evidence. Keenan reiterated this position rather tersely in 1950, saying that it was "investigated and proved to be unfound[ed]." ²¹

According to R. John Pritchard, the prosecution had been collecting evidence in the months leading up to the opening of the IMTFE and intended to incorporate it "into one of eight subdivisions of the prosecution's case relating to China." ²² Having found new evidence, Pritchard implicated Keenan, the U.S. War Crimes Branch, and MacArthur's Intelligence Section Chief as participants in a "very genuine conspiracy to pervert the course of the trial and to reduce its significance in terms of international law." ²³ Kentaro Awaya, a Japanese scholar, has hypothesized that the United States considered its self-interest to be more important than prosecution of such criminal activity,

the bubonic plague virus in experiments in Harbin and Mukden, Manchuria." "Virus Used on Captives," New York Times, 6 January 1946, 30.

²¹"Joseph Keenan Meets the Press," 457-8. Pritchard does not understand why China did not aggressively push this issue at the IMTFE. He notes that when Wellington Koo was looking for evidence for the IPS, he could not get any cooperation or information from the Chinese Foreign Ministry. Pritchard, An Overview, 44-5.

²²Pritchard, An Overview, 43.

²³Ibid.

and so was willing to grant immunity to Unit 731.²⁴

Consistent with Awaya's contention, the documentary evidence reveals American concerns that the Soviets not obtain too much scientific information.²⁵ A "Memorandum for Record" dated 6 May 1947 suggested that the Japanese had been involved in a variety of biological warfare experiments, such as "human experiments, field trials against Chinese, research on BW by crop destruction," and that the Japanese General Staff might have authorized the BW program. It also showed that the U.S. was interested in maintaining control over such research data. The author predicted that they could extract additional information if they told the appropriate Japanese that the "information will be kept in intelligence channels and not employed for 'war crimes' evidence."²⁶

When questioned about this matter by the War Department, Chief of Legal Section (SCAP) Carpenter reported that his section did not have enough evidence in its files to prosecute anyone associated with BW for war crimes, although several of the defendants at the IMTFE (Umezu, Minami, Koiso, and Tojo) might have been Ishii's

²⁴C. Hosoya et al., 86.

²⁵Message from JCS to MacArthur, W 94446, 21 March 1947, RG-9, Blue Binder: War Crimes, MMA. A request by the Soviet prosecutor, Golunsky, to question three Japanese, General Ishii and Colonels Kikuchi and Ota, who had been associated "with biological warfare research and experiments at Pingfan Laboratory near Harbin, Manchuria," initiated a series of correspondence on this subject. Message from MacArthur to [Chief of Staff of Army], C-69946, 7 February 1947, RG-9, Blue Binder: War Crimes, MMA.

²⁶Message from [MacArthur] to War Department, C-52423, 6 May 1947, RG-9, Blue Binder: War Crimes, MMA.

superiors. Furthermore, except for two of Ishii's subordinates who were in Soviet custody, no one associated with Ishii was facing charges by the Allies or the IMTFE.²⁷ Carpenter also explained that the IPS had decided in December 1946 not to include BW evidence in their case, because it was then insufficient to meet the Tribunal's requirement for accepting evidence about POWs and atrocities.²⁸ Finally, Carpenter predicted that the Soviet Associate Counsel would attempt to cross-examine defendants on this subject, so as to introduce BW evidence later in the trial.²⁹

Despite these IPS doubts in 1946-47 and Keenan's dismissal of the Soviet Government's call for a reevaluation of these "sidestepped" issues as "some type of propaganda,"³⁰ Pritchard has contended that there is now available sufficient proof to show a "direct connection" between the Japanese Army's BW program and at least twenty of the twenty-eight IMTFE defendants.³¹

²⁷Message from Carpenter to War Department, C 53169, 6 June 1947, RG-9, Blue Binder: War Crimes, MMA.

²⁸Ibid. The prosecution had to be able to assure the Judges that the defendants "could be associated with the acts charged."

²⁹Ibid.

³⁰"Joseph Keenan Meets the Press," 456.

³¹Pritchard, An Overview, 43-4.

CHAPTER 12

THE CONCLUSION OF THE TRIAL

As Chief of Counsel, Keenan played major roles in concluding the trial and determining the policy for terminating the cases against Japanese class "A" war criminal suspects. He had reason to be satisfied with the majority Judgment, since it upheld the prosecution's crucial arguments. Later, he advocated publication of the IMTFE's transcripts.

As the IMTFE proceedings entered their second year, the question arose of whether or not to conduct another international military tribunal. In a message to the Joint Chiefs, MacArthur asked what was to be done with the approximately fifty class "A" suspects still incarcerated in Sugamo Prison fourteen to nineteen months after their arrests. This was of grave concern, because such treatment was not consistent with true justice, and thus contradicted the goals of the Occupation. Noting its "cumbersome, slow, costly, and generally unsatisfactory organization," MacArthur questioned whether conducting another such international military tribunal was advisable.¹

MacArthur's comments foreshadowed the changing climate of public opinion in the Allied nations. By late 1948, the earlier Allied enthusiasm for war crimes trials had greatly diminished. Time magazine sensed that there was a general, increasing

¹Message from MacArthur to JCS, C-52563, 12 May 1947, RG-9, Blue Binder: War Crimes, MMA.

"uneasiness over war crimes cases that had dragged on for years," and suggested ending the trials with the IMTFE.²

MacArthur's recommendation was to try the remaining suspects before military commissions, as was done with "B" and "C" class criminals, under the auspices of the Legal Section of SCAP.³ Draper of the War Department responded that if some of the suspects were eligible for trial as class "B" or "C" criminals, MacArthur possessed authority to go ahead, but that his suggestion regarding class "A" criminals would require an FEC directive.⁴

Temporarily back in the United States in June 1947, Keenan requested Tavenner, Acting Chief of Counsel, to begin screening those suspects in order to determine what course of action to take.⁵ Keenan opposed another trial, because he did not consider the remaining suspects to be real class "A" war criminals. Not only would such a trial be anti-climactic and redundant, but there was also the danger that a different Tribunal, reviewing much of the same evidence and arguments, might produce a different Judgment. Thus, he recommended that the IMTFE be the only class

²"War Crimes--`Hidoi!'" 32.

³Message from MacArthur to War Department (SAOUS), C56091, 13 October 1947, RG-9, Blue Binder: War Crimes, MMA.

⁴Message from Draper to MacArthur, WAR 88868, 23 October 1947, RG-9, Blue Binder: War Crimes, MMA.

⁵Message from JBK to Frank S. Tavenner, Jr., W80433, 19 June 1947, RG-9, Blue Binder: War Crimes, MMA. Six months later Keenan sent one of the prosecutors to Washington, D.C., in an effort to resolve this issue. JBK to Clark, 3 December 1947, MS Box 1, Folder 7, Keenan Papers.

"A" trial.⁶

When MacArthur and he received no definitive answer from the War Department, Keenan wrote to Clark, asking him to present his (Keenan's) views directly to Truman in the hope that the President would authorize the "termination" of the class "A" cases and trials upon conclusion of the IMTFE.⁷ In his report, Keenan suggested that those who qualified could be tried as class "B" or "C" suspects; otherwise, they should be released from prison or house arrest. Further, he acknowledged the Allies' rights to put them on trial in national military courts.⁸

At last, in early February 1948, this issue was resolved.⁹ Nine months before the IMTFE finished, the Americans who had "peremptory rights of leadership ... in particular [by] exercising Keenan's power as sole chief prosecutor and the functions of the Legal Affairs Bureau of GHQ,"¹⁰ had decided there would be no more such international military tribunals for any Far Eastern war criminals. The British Foreign Office and New Zealand's government

⁶JBK to Clark, 3 December 1947, MS Box 1, Folder 7, Keenan Papers.

⁷Ibid.

⁸Message from MacArthur to Department of Army, C57937, 13 January 1948, RG-9, Blue Binder: War Crimes, MMA.

⁹Message from Draper to MacArthur, W 95123, 1 February 1948, RG-9, Blue Binder: War Crimes, MMA; Message from SCAP to Department of Army, C 58459, 6 February 1948, RG-9, Blue Binder: War Crimes, MMA.

¹⁰C. Hosoya et al., 83.

agreed with the U.S. decision.¹¹

In November 1948, the IMTFE resumed court sessions to announce the Tribunal's Judgment and verdicts. The reading of the Judgment consisted only of the majority Judgment. It did not include the separate and dissenting opinions written by five members of the Tribunal: Australian President Webb, French Justice Bernard, Indian Justice Pal (dissenting opinion), Netherlands Justice Roling, and Philippine Justice Delfin Jaranilla. According to Roling, the Indian justice had earlier changed the whole course of the Tribunal's handling of the Judgment. Before Pal, Jaranilla, and I.M. Zaryanov, the Soviet judge, had arrived, the other eight justices had met and agreed to issue only one judgment with no dissents, "reflecting the opinion of the majority and the secrecy of the deliberations in camera respected." After their arrival, Jaranilla and Zaryanov also approved of this plan. Pal refused to relinquish his opportunity to write a dissenting opinion, however, and the pact among the judges collapsed.¹² This is especially important, because Pal's dissenting opinion has provided much support and evidence for those who have criticized the IMTFE.

Perhaps Tokyo went even further than Nuremberg or most other trials. According to Justice Roling, the IMTFE was unique among

¹¹Buckley, 121; Blakeslee, 197. In 1950-51 the Soviet government sent diplomatic notes to protest SCAP's early release of various Japanese war criminals. Beloff, 144-5.

¹²B.V.A. Roling, introduction to The Tokyo Judgment: The International Military Tribunal for the Far East-29 April 1946-12 November 1948, ed. by B.V.A. Roling and C.F. Ruter, vol. 1 (Amsterdam: 1977), xvi.

the Asian trials for addressing "the charge of aggressive war," and even the European trials generally were "very reluctant to declare individuals guilty of the crime of aggressive war."¹³

The two trials shared some parallels in their Judgments. Both agreed that "the maxim *nullem crimen sine lege* was not a limitation of sovereignty, which would prevent trial of *ex post facto* crimes, but a principle of justice. It would not be unjust to punish an aggressor; it would be unjust, if he were allowed to go unpunished."¹⁴

The Tribunal's majority Judgment vindicated Keenan's prosecution case and ruled that the Charter was not an example of *ex post facto* law. Declaring that there was no greater crime than conspiring to wage aggressive war, the Judgment announced that the Tribunal had found "the existence of the criminal conspiracy to wage wars of aggression ... has been proved." The Court also upheld counts on conventional war crimes and crimes against humanity.¹⁵ Furthermore, Japan was found guilty of "repeated violations of treaty obligations and waging aggressive war." The Tribunal concluded that the army was primarily to blame,¹⁶ the navy

¹³Roling, "The Tokyo Trial in Retrospect," 260.

¹⁴Woetzel, 230-1.

¹⁵Brackman, 373-4, 377, 375.

¹⁶"Japan--Wages of Infamy," 36. Six of the seven defendants who received the death sentence had once been associated with the Kwantung Army, which the IMTFE credited with predominant responsibility for leading Japan into war and war crimes and atrocities.

played a much smaller role, and civilians had been unable to have much impact.¹⁷

Until the 1980s, the complete transcripts of the IMTFE were not available to the general public in published format, in spite of the importance of the trial. Yet, Keenan had urged their publication and offered his support for an abridged version.

More than a year after the conclusion of the IMTFE, the JAG Office suggested that the proceedings be published.¹⁸ SCAP discovered that it would be too expensive for the Occupation to subsidize publication in Japan of the complete transcripts. However, a two-volume set, including the Judgment, separate and dissenting opinions, and associated documents, was deemed feasible and recommended.¹⁹

Dissatisfied with SCAP's recommendation, Keenan urged that the publication include the Indictment, (his) opening statement, and both teams' summations, as well as the majority Judgment and separate and dissenting opinions. With keen insight, Keenan realized that readers might misunderstand the Judgment, if they read it outside the context of the rest of the trial. He noted that "the majority opinion makes very limited reference to specific

¹⁷"Japan--The Mills of Justice," Newsweek, 15 November 1948, 40.

¹⁸MacArthur to JBK, 6 May 1950, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

¹⁹Message from SCAP to [Department of Army], Z41068, 24 March 1950, RG-9, Blue Binder: War Crimes, MMA.

testimony, while the dissenting opinion of Judge Pal ... makes copious reference to the record and to specific testimony." Thus, he feared that Pal's dissent might be "extremely misleading and could well cause a conclusion to be reached by a reviewer that the majority decisions were not warranted and subject the entire prosecution to misconception." He believed, as a consequence, that it was crucial that the majority Judgment be supplemented by the prosecution's summation, which did point to "specific testimony and record reference."²⁰

After SCAP made its recommendations regarding this project, there was no response whatsoever from Washington.²¹ MacArthur concluded that the JAG Office was not really interested in the project. Still, if it was decided that the IMTFE record would be published, he promised that Keenan's views would be solicited.²²

²⁰JBK to MacArthur, 21 April 1950, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

²¹Draft letter by Colonel Carpenter for MacArthur to Keenan, 4 May 1950, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

²²MacArthur to JBK, 6 May 1950, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

CHAPTER 13

JAPANESE ATTITUDES TOWARD KEENAN AND THE IMTFE

Along with Douglas MacArthur, Joseph B. Keenan dominated Japanese perceptions of the Occupation. According to a New York Herald Tribune profile, he was second only to MacArthur among the Occupation officials "most respected by the Japanese." Even more so than MacArthur, he was feared by some Japanese.¹ This was probably because Keenan had the authority to send suspected war criminals to Sugamo Prison and an important role in choosing those who were to be tried. The Herald Tribune journalist cited, as evidence of this fear, an interview he had with a former Japanese diplomatic officer. When asked if there was anything else he could share, the ex-official responded: "Even if Mr. Keenan was to call me to his office and question me by the hour, I could not supply another bit of information."²

Ordinary Japanese also respected him, and they wrote to express their concerns and opinions about the IMTFE and the treatment of the major war criminals.³ One Japanese explained the suffering ordinary citizens had endured during the war, and asked for Keenan's assistance in seeing that the property of

¹Johnson, "Japanese Fear Keenan."

²Ibid.

³The author found several such letters with attached English translations in Keenan Papers.

convicted war criminals be shared with the poor.⁴ "A Lover of Peace" asked for a fair trial and that "freedom of spectators, freedom of the defendants to protest, and the court's procedure should be fairly reported by press and radio."⁵ A third missive was a "thank you" letter from 250 people in Niigata Prefecture, who explained that they felt responsible for the war and had been following the progress of the IMTFE. They desired to thank all the prosecutors for their efforts, and for helping with "the establishment of a peaceful Japan and promotion of eternal human welfare."⁶ These letters indicated that some Japanese paid close attention to the trial and understood its purposes.

So important did Emperor Hirohito consider the IMTFE that he ignored his birthday cards (his birthday was a national holiday) in order to read the prosecution's Indictment.⁷ Keenan's opening statement elicited considerable Japanese commentary. The New York Times declared that Japanese were most interested in his assertion that this would not be the only trial, and his statement's wide sweep, which "indicted the entire Japanese military system back as far as the beginning of the present century."⁸

Responding to Keenan's challenge, the editorializer of the

⁴[Letter], MS Box 1, Folder 3, Keenan Papers.

⁵[Letter], 1 May 1946, MS Box 1, Folder 3, Keenan Papers.

⁶Yagi, Kanicharo, and others, to JBK, 24 August 1947, MS Box 1, Folder 8, Keenan Papers.

⁷Times (London), 30 April 1946, 4.

⁸New York Times, 6 June 1946, 10; 5 June 1946, 12.

Nippon Times (forerunner of the Japan Times) favored the new theory that people, rather than the state, are responsible and should be the ones punished, because it is they who really "break treaties or wage an aggressive war." In addition, he submitted that the Japanese must "grasp the implications of the new theory."⁹

Keenan was happy with the Japanese articles on the trial, which he called "complete and accurate."¹⁰ Not only were there daily press reports, but there was also extensive radio coverage. The Japanese spectators' gallery "was completely occupied during the entire trial," according to Keenan.¹¹ Humphreys recalled that reports appeared daily in the Nippon Times and the Stars and Stripes.¹² Half the reporters' gallery was reserved for Japanese correspondents, perhaps twenty of whom regularly attended, in contrast to just a few regular foreign correspondents.¹³ One source

⁹"Press Comments--Friday--June 7--State and Individual Responsibility," Nippon Times, 9 June 1946, 4.

¹⁰JBK to Flanigan, 31 July 1946, MS Box 1, Folder 2, Keenan Papers.

¹¹Keenan, "Observations and Lessons," 124. In this speech delivered in 1949, Keenan's memory seems to have been faulty. Several other sources suggest that as the trial stretched on, Japanese spectator attendance declined until such special testimony as Tojo's defense spurred interest again. For example, one author remarked that after a few months, "attendance tickets that had been selling for high prices on the black market couldn't be given away." Sheldon, 178. Moreover, Life reported on the dramatic changes which occurred when Tojo was on the stand, and pointed out that "press galleries filled and the courtroom was jammed with spectators." "A 'Dead Man' Speaks," 87.

¹²Humphreys, Via Tokyo, 82.

¹³Ibid.; "Japan: The Long, Long Trial," 43.

has suggested that such extensive coverage of the IMTFE was sometimes "encouraged" by the Occupation.¹⁴ Furthermore, the Nippon Times actively urged the populace to pay attention by making available for sale a copy of the Indictment.¹⁵

Press reports and the prosecution's case itself were perhaps most effective in conveying to the Japanese public the true history of the previous two decades.¹⁶ Henceforth the Japanese could begin to understand the Allies' attitude toward their actions in World War II and the prosecution's contention that Japan had been under "a very large scale, long-continued national conspiracy for aggression, war and murder."¹⁷ The Japanese public reacted to the trial's revelations with "surprise and disgust at [the] atrocities, at the complications of the Manchurian operations, and at the people's ignorance of the war's progress."¹⁸

Despite all this, the consensus seems to be that the IMTFE did not have the major impact on the Japanese public desired by

¹⁴"Remember?" 895.

¹⁵"Full Text of Indictment with Japanese Translation" (advertisement), Nippon Times, 1 July 1946, 2. The price for a single copy was 30.00 yen, available through the newspaper office.

¹⁶Times (London), 10 March 1947, 5; "A Lesson in History," Nippon Times, 6 July 1946, 4. One author predicted the court records would also be of great importance to Japanese historians. "For the first time," personal memoirs and state papers, which covered the spectrum of prewar Japanese policy, would become available to them. "Observations on the Trial of War Criminals in Japan," External Affairs 1 (1949): 21.

¹⁷Lindesay Parrott, "Japanese Shocked by Trial's Opening," New York Times, 5 June 1946, 12.

¹⁸"Japan: The Long, Long Trial," 43.

the Allies, even with all the extensive Japanese-language news reports on the Tribunal. In other words, it did not produce any "change of heart" among Japanese; other Occupation programs proved to be of greater significance in building a "new democratic Japan."¹⁹

There are several possible explanations. First, for many Japanese who were suffering from the wartime devastation, survival was more important than events surrounding the IMTFE.²⁰ Others may have been greatly surprised by Keenan's opening statement to the Tribunal, which forced them to recognize that the Allies had not forgotten the war crimes and atrocities committed by the Japanese, although they had imposed a "soft" occupation.²¹ In addition, many Japanese perceived the class "A" war criminals included in the Indictment as guilty and assumed they would be convicted. The war leaders had been discredited in the people's eyes because they lost the war.²² The public was "disillusioned with [its] wartime leaders" and "glad ... to see them brought to justice."²³ At the end of the trial, common feelings included pity for those executed and relief that the trial was finished.²⁴ To ascertain general

¹⁹Kawai, 24.

²⁰Manning, 215.

²¹Parrott, "Japanese Shocked by Trial's Opening," 12.

²²"Tic Tac Tojo," 38; "Japan: Whose Criminals?" Newsweek, 10 March 1947, 42; Manning, 212.

²³Kawai, 23.

²⁴Ibid.; "War Crimes: Seven Old Men," Time, 3 January 1949, 19.

attitudes, a Japanese newspaper reporter polled people on the street as the trial concluded. He discovered that the Japanese perceived the major war criminals as fulfilling the need for "a symbolic sacrifice to the angry spirits of those whom Japan had wronged."²⁵ The Buddhist priest who ministered to the defendants, as well as a Western scholar, also sensed this attitude that the leaders were being tried as a substitute for the Japanese people, which freed the masses to project any guilt they might have felt onto the defendants.²⁶ These attitudes were in contrast to those common in Europe at the same time. Unlike the French methods of handling their Nazi collaborators, wrote a Japanese prime minister, "we Japanese had no particular desire to prosecute and judge those who were, or might have been, responsible for our miseries."²⁷

Seeking confirmation of the average person's disinterest in the IMTFE, a Newsweek correspondent showed pictures of the defendants to twenty-two randomly-chosen Japanese in June 1946. The highest score for correct identifications was four of twenty-eight defendants.²⁸ Japanese were also critical of some aspects of the IMTFE. Some believed neutral judges should have been

²⁵Manning, 216.

²⁶Shinsho Hanayama, The Way of Deliverance; Three Years with The Condemned Japanese War Criminals (New York: 1950), 25; Martin, 21-2.

²⁷Shigeru Yoshida, The Yoshida Memoirs: The Story of Japan in Crisis, translated by Kenichi Yoshida (Cambridge, Massachusetts: 1962), 160.

²⁸"Tic Tac Tojo," 38.

included as Tribunal members, others that the trial was unfair, and some that it was difficult to distinguish between "so-called war criminals and the innocent participants in the war."²⁹ The IMTFE did attain a farcical label among some Japanese, who "began to call the trials Ichigaya Shibai, or Ichigaya Stage Play, after the area where they were held."³⁰

Individual opinions of the IMTFE provide additional insight into Japanese attitudes. According to Tojo's Japanese defense counsel, Dr. Ichiro Kiyose, his client "would get a fairer trial before the international tribunal than if he were tried under Japanese law."³¹ Dr. Kiyose and his Japanese defense counsel colleagues perceived the ultimate goal of the IMTFE to be different from that envisioned by the Allies. They understood "the role of the tribunal was to act as a mediator between the parties, to arrive at the truth of the matters at issue, and to render a decision which could restore harmony."³² The defense also urged that the dissenting, as well as the majority, judgments be read in court. When they heard this would not be done, there were those who suspected that the Tribunal members were pushing the trial to its conclusion so that the judges could return home in time for

²⁹Times (London), 10 March 1947, 5.

³⁰Sheldon, 174.

³¹New York Times, 22 April 1946, 6.

³²Lawrence W. Wadsworth, "A Short History of the Tokyo War Crimes Trials with Special Reference to Some Aspects of Procedure," (Unpublished dissertation, The American University, 1955), 226.

Christmas.³³

Other rumors circulated among the Japanese, as everyone waited for the U.S. Supreme Court's response to several convicted defendants' appeal. Some thought the U.S. would intervene through its Supreme Court to save the convicted war criminals to "help in fighting Russia." This should not be so surprising, since a majority of Japanese were probably very confused by Western legal ideas.³⁴ Moreover, they could perceive without difficulty the beginnings of the Cold War.

Tojo, the central defendant, found this context of the IMTFE disturbing. He questioned how the trial could be more than "victors' justice," or how his conviction and death could protect humanity, when there was clear evidence of the outbreak of the Cold War.³⁵ From his prison yard, the former war leader could watch the training exercises of American fighter planes. He quoted IMT U.S. Chief of Counsel Jackson's comment that the the trial would lose its meaning if the U.S. and the U.S.S.R. were to fight, and observed that in less than two years their relationship had deteriorated to a point "as bad as it can be."³⁶

At the time of the trial and for years afterward, a class "A" war criminal suspect, Yoshio Kodama, perceived the IMTFE to be an

³³"Tokyo Trial Findings," Times (London), 13 November 1948, 4.

³⁴"War Crimes-For Posterity," Time, 20 December 1948, 26.

³⁵Kodama, 268.

³⁶Ibid., 267-8.

example of victors' justice. He did approve of the trial's goal, as he understood it, "to absolve the Emperor and the mass of people from responsibility for the war."³⁷

Sumie Mishima, who worked as a translator for the Defense section of the IMTFE, published her impressions of the Japanese attitude toward the trial.³⁸ She wrote that the Japanese were "impressed by the sincere attempts at justice ... as well as by the courtesy it [IMTFE] showed to the defendants and their families." In contrast to the results of the military commissions exercising judicial functions on various South Pacific military bases, the IMTFE's results were "comprehensible" to the Japanese.³⁹ Mishima sensed that "some Japanese felt extremely disappointed" that, at the time of the hangings, the convicted leaders' final words were printed. They had hoped that the condemned would have "express[ed] regret at having failed the Japanese people and caused such harm to humanity."⁴⁰

³⁷Ibid., 269, viii, 142.

³⁸Sumie Seo Mishima, The Broader Way: A Woman's Life in the New Japan (New York: The John Day Company, Inc., 1953; reprint, Westport, Connecticut: Greenwood Press, Publishers, 1971), 105, 107. Mishima explains that she sought to work at the IMTFE, because she had heard that it paid its Japanese employees better than other SCAP-GHQ offices. She worked there for two years and five months, beginning in summer 1946. (111).

³⁹Ibid., 130.

⁴⁰Ibid., 17-8.

CHAPTER 14
PRAISE FOR THE CHIEF OF COUNSEL
AND THE LAST YEARS

While diaries, letters, and internal messages may have been more frank and accurate in their appraisal of Keenan as Chief of Counsel and Chief of the IPS, one cannot totally discount the public praise heaped on him at the time. Recognizing the "prodigious" nature of Keenan's responsibilities,¹ MacArthur extolled his significant contributions to the accomplishment of the goals of the Allies. He characterized Keenan as having a wealth of experience, an abundance of dignity, and a high standard of justice. He stated that the Chief of Counsel, upon his departure, had "the full respect of both victor and vanquished."² Seven months later, MacArthur reiterated his endorsement of Keenan, and promised that if Keenan were to visit Japan again, he could be sure that his clearance would be "automatic" and that MacArthur would offer him "a hearty

¹At the beginning of his stay in Tokyo, Keenan and his prosecution members did not have "a clear idea of the size of the court or the number of nations that would participate in the prosecution, or the exact nature of the charges." Yet, undaunted, Keenan immediately went to work. Brackman, 56.

²MacArthur to JBK, 26 November 1948, [RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of the Military Secretary KE-KEL], MMA.

welcome."³

When Keenan returned to Washington after completing his duties in the IMTFF, he met with President Truman at the White House, and received a Presidential note "expressing deep appreciation for his services."⁴ Perhaps the best confirmation of the President's high esteem for Keenan's service, which "involved the pioneering of a new code of international criminal law," was the former's almost immediate nomination of the latter to another important international post. On 11 December 1948, the United Nations General Assembly had passed a resolution establishing the UN Palestine Conciliation Commission, which included representatives from France, Turkey, and the United States.⁵ On 28 December, Truman appointed Keenan as the U.S. member. Pleading that "conditions had arisen that made it impossible to serve, especially as the assignment required travel abroad," Keenan resigned on 14 January 1949.⁶ Hearing that Keenan had given up his new post, the British Foreign Office "expressed [its] regret."⁷

³MacArthur to JBK, 26 June 1949, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary, KE-KEL, MMA.

⁴"Hirohito Likes U.S. Plan," New York Times, 3 December 1948, 14.

⁵"Truman Chooses Keenan for Palestine Commission," New York Times, 29 December 1948, 12.

⁶"Quits UN Mediation Post," New York Times, 15 January 1949, 2.

⁷Charles E. Egan, "Britons Hit Bevin on Palestine Issue," New York Times, 16 January 1949, 2.

Less than a month after his resignation, Keenan was under consideration for a more tangible expression of his government's gratitude for his IMTFE service. The Department of the Army was considering nominating Keenan for the Medal of Merit, which Jackson had received for his IMT service, and requested MacArthur's opinion.⁸ MacArthur heartily approved this public recognition, citing Keenan's "exceptionally meritorious conduct in the performance of outstanding services" as Chief of Counsel from 2 December 1945 until 27 November 1948.⁹ Whether Keenan eventually received the Medal of Merit from President Truman is unclear.

Although Keenan returned to private practice in Washington, D.C. and Cleveland, he did accept at least one more assignment from his government, serving as counsel for a special Congressional investigation. In July 1949, U.S. Representative Carl Vinson (Georgia), House Armed Services Committee Chairman, appointed Keenan to assist with his investigation into possible improprieties associated with the B-36 bomber.¹⁰ The hearings, which were scheduled to begin on August 9, ended a few weeks later when it was discovered that the original accusations which had led to the

⁸Message from Draper to MacArthur, W83880, 9 February 1949, RG-9: Messages, Blue Binder Series, Decorations, MMA.

⁹Message from MacArthur to Department of Army, C-67788, 11 February 1949, RG-9, Messages, Blue Binder Series, Decorations, MMA.

¹⁰"Keenan Will Guide Inquiry into Bomber," New York Times, 8 July 1949, 10.

inquiry were false.¹¹

After the termination of his association with the IMTFE, Keenan became increasingly concerned about the threat communism posed to the democratic American way of life.¹² Writing MacArthur, he explained that American audiences truly appreciated his discussion of "Politburo gangsters," as a result of his knowledge of the methods of the Japanese acquired at the IMTFE.¹³ One of those audiences was the Kansas City Bar Association, to which he declared:

It is probably the most important thing in the world for us today to make clear to the people that Communism in America today is not a doctrine of economics and social changes. It is today a philosophy that preaches force and violence, disloyalty to our own government and to the basic wholesome principles upon which it is founded.¹⁴

In 1950 Keenan reflected that it was important that the Soviet Union had participated in both international military tribunals, because they had agreed with the other Allies that the Japanese wartime behavior had been criminal.¹⁵ When the Soviet Government

¹¹"31 Leaders Called in Bomber Inquiry," New York Times, 7 August 1949, 5; William R. Conklin, "Navy Aide Admits Writing B-36 Note That Led to Inquiry," New York Times, 25 August 1949, 1.

¹²Donihi asserted that Keenan, Clark, and J. Edgar Hoover were probably "the nucleus of anti-communist sentiment growing in the U.S. during the post-World War II years." Donihi to author, 13 April 1989.

¹³JBK to MacArthur, 5 July 1949, RG-5, Box 32, Series 1: Correspondence Subseries 4: Office of Military Secretary KE-KEL, MMA.

¹⁴Keenan, "Observations and Lessons," 126.

¹⁵"Joseph Keenan Meets the Press," 458.

issued its call for the trial of Hirohito and Japanese officers associated with BW experiments, Keenan commented that by then it made more sense to try Stalin rather than the Japanese Emperor.¹⁶

The "outstanding lesson" Keenan had gained from his IMTFE service was that "peoples never want war, and never cause war." Understandably, he laid all the blame for wars on the leaders.¹⁷ Sorting out the victims from the criminals to the very end, on 8 December 1954, the former gangbuster and war crimes prosecutor passed away at age 66 in Asheboro, North Carolina, of a "heart ailment."¹⁸

It would take thirty-five years before the pieces began to be fitted into the jigsaw puzzle of his remarkable but largely untold life. Now that the IMTFE transcripts which he urged be published, have appeared, the remembering has begun. And it would seem that U.S. Assistant Counsel Robert Donihi was too pessimistic when he regretted that "Keenan will go down in history badly and

¹⁶Ibid., 457.

¹⁷Keenan, "Observations and Lessons," 118.

¹⁸"Transition-Died," Newsweek, 20 December 1954, 59; "Joseph B. Keenan, Prosecutor, Dies," New York Times, 9 December 1954, 33. The list of honorary pallbearers for Keenan included many well-known government figures and friends. Among these were two Supreme Court Justices, Harold H. Burton and Tom C. Clark; two U.S. Senators, Olin D. Johnston (D-S.C.) and William Langer (R-N.D.); J. Edgar Hoover; and Leslie L. Biffle. [Washington Post, [11] December 1954, clipping in Attorney General Personal File-Correspondence with Joseph B. Keenan..., Homer Stille Cummings Papers (#9973, Box 120), University of Virginia Library, Charlottesville, Virginia.

undeservedly."¹⁹

¹⁹Donihi to author, 13 April 1989.

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