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From defeat to democracy: postwar Germany and Japan with regard to Iraq

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I.R. Research Paper

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STATEMENT OF PURPOSE:

In this paper I will analyze and compare the process of enforced democratization that took place in Germany and Japan following the annihilation of their wartime regimes in the course of the Second World War. In these lessons from the past, American policy makers have a rough sketch of actions and aims that succeeded or failed throughout the course of two different military occupations. Germany and Japan present two distinct historical experiences in the creation of viable democracies from the ashes of defeat. America now faces a Second Gulf War in Iraq. The purpose of this study is to distill a flexible political framework of democratization from these case studies for potential use following the war’s conclusion. I will focus on three critical political developments that American policy makers implemented in the postwar world of the late forties and fifties: the political purges of Germany and Japan, war crime trials, and constitution writing. As the paper progresses, I will present the two distinct approaches to these three developments and their relative successes and failures. The lessons illustrated here may very well become general components in the blueprint of Iraq’s future. I will conclude each topical section by clearly and concisely describing that rough political blueprint with regard to Iraq.
RESEARCH METHODS:

For my research I will utilize contemporary documents of the period, analyze them and show the progression of American policy as it was relevant to achieving the above stated political developments. Secondary sources will also be utilized when necessary. A focused comparison of the effects these policies had upon the two postwar nations in question will illuminate those policies that were successful and those that were deficient. This analysis and comparison will serve to create a rough template for consideration in the postwar Iraqi order. The case studies will be broken down into topics first and then by nationality. I will consult sources on the extent of Ba'thist influence in Iraq in order to ground the template in reality.

OUTLINE:

I. Political Purges
   A. Denazification 1-13
   B. Demilitarization 14-23
   C. Deba’thification 23-26

II. War Crime Trials
   A. Nuremberg 27-38
   B. Tokyo 39-49
   C. Baghdad 50-53

III. Constitution Writing
   A. Germany 53-65
   B. Japan 66-77
   C. Iraq 78-84
Denazification and Political Purges in Postwar Germany

America initiated denazification in Germany when wartime passion was still high. The program of systematic political purges over-achieved its own objectives, creating problems for other important occupation objectives and did not help foster democracy in Germany. In 1948, following the conclusion of America’s denazification program, the U.S. Congress recommended a grant of full amnesty to the bottom rungs of Nazi Party members. Military authorities in Germany objected and denazification sputtered to an ambiguous and un-noteworthy conclusion. Denazification would have been far better served had policy makers determined in advance a narrow and exact definition of Nazi leaders and bureaucrats scheduled for political purging. This simple lesson is quite pertinent and timely when considering what not to do with the Iraqi Ba’th party and Saddam Hussein’s apparatus of repression in the near future.

Denazification policy in the American occupied sector of Germany derived from Joint Chiefs of Staff directive 1067, issued in April, 1945. In brief, JCS 1067 called for a removal and exclusion of “all members of the Nazi party who have been more than nominal participants in its activities, all active supporters of Nazism or militarism and all other persons hostile to Allied purposes...from public office and from positions of importance in quasi-public and private enterprises.” This entailed a review of anyone currently seeking political office or employment in civic, financial, educational, industrial, commercial, agricultural and media related fields. In total, virtually any gainful employment with the notable exception of manual labor. Clearly, JCS 1067 intended to denazify Germany in its entirety, not just German government. The directive also

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called for the preservation of any records of any Nazi affiliated organization, from the police services to economic organizations, for the purpose of identifying Nazi supporters.

The statement of policy in JCS 1067 made it quite clear that purging Nazis from political and public life was a prerequisite for German rehabilitation. Denazification was necessary to prevent the resurgence of a militaristic Germany that could threaten world peace. JCS 1067 spelled out that "the Nazi Party, its formations, affiliated associations and supervised organizations," "all police organizations, including security and political police," economic groupings and propaganda institutions would be quickly abolished. However, JCS 1067 did not explain how American military government intended to distinguish the "more than nominal" Nazis from the rest of the 'good' German population in cases where direct membership in abolished organizations could not be established. This omission and the intent to find and politically purge every Nazi in Germany led directly to a massive and unwieldy denazification program that should not be replicated in Iraq.

American armies, as they advanced through Germany and immediately after surrender, exercised a great deal of autonomy when interpreting JCS 1067. Accordingly, the early phase of denazification during the spring of 1945 was disorganized. This disorganization represents one of denazification's early flaws. Another problem that presented itself early on was the fact that restoring basic government services, "such emergency tasks as getting a supply of water available, procuring food for the hungry people, providing primitive means of transportation, and the like"

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4 "The net result was that in the summer of 1945 American military government was operating under at least four different denazification policies," in Zink, The United States in Germany, 157.
far outweighed denazification in priority. Although policy makers intended the U.S. Army to assume direct governance of occupied territory, military forces ensured the fulfillment of these services by using ‘good’ Germans. One of the first tasks undertaken by tactical military units after taking a city or village involved the removal of existing government officials and replacing them with other Germans. These good Germans “became hard to find, harder to evaluate, and to watch.” The reality of the situation that the Army faced was that most individuals qualified to run the German government, particularly civic, educational and other low level functionaries, had been forced at some point to associate with the Nazis. Those that did not were either dead or few in number. “Military Government Officers in the field felt time and again that the job was impossible.”

Even the process of denazification itself became too much for the Army of occupation in Germany. In mid 1945, General Lucius Clay, then Deputy Military Governor under General Eisenhower, described the extent of denazification in the early postwar months. His communique to policy makers in Washington emphasized the lack of American personnel qualified to review the Germans, and the steps taken to correct this deficiency: “program of arrest and removal has suffered from past lack of trained personnel but is being speeded by shift from combat to

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5 Ibid, 158.
6 This policy was later reversed in a speech by Secretary of State Byrnes in September of 1946. See Chapter on Constitution Writing in Germany.
8 Ibid, 258.
occupational phase, by steps under way to train reliable German personnel to assist in screening program. . ..9

The Patton Incident in September 1945, brought the disorganization of denazification among different American armies to the foreground of policy maker’s attention. General Patton of the Third Army in Bavaria attempted to force his own independent form of denazification in his area of responsibility. He compared the Nazi party to America’s own political system and reinstated some officials he deemed necessary to run the government. The incident resulted in Patton’s removal and replacement, a not-so-subtle signal to other Army commanders that further maverick programs would not be tolerated.10 The whole affair forced Clay to defend denazification efforts in Bavaria, now criticized by American press for being too soft and allowing the German employees of American military government to ‘renazify.’ In a letter to Washington, Clay listed the total number of Nazis removed from office at 45,000. He named prominent officials in various departments ranging from the Ministers of Education and Agriculture all the way up to Bavaria’s Prime Minister himself, Dr. Fritz Schaeffer, who had been removed since their appointment under denazification purges.11 Clay stated that Schaeffer, “felt our program for removing Nazis went too far and would destroy the essential administrative machinery and unduly increase the confusion and difficulties of the people.” Clay removed Schaeffer under pressure from Congress and media to end a soft German policy. However, among Germans, this criticism of denazification increased continually for the duration of the American occupation of Germany.12

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12 Ibid, 94.
The Allied Control Council, a grouping of wartime allies now occupying Germany composed of America, Britain, France and the Soviet Union, attempted to clear any ambiguity regarding denazification in early October, 1945. The Control Council Law no. 2 listed specific Nazi organizations that were politically liquidated. This removed some of the autonomy in determining which Germans were ‘good’ or not, but not entirely. The law only dealt with the abolition of Nazi organizations, not the culpability of their members - especially at the mid and lower levels of membership. Military government never adequately addressed this problem. In early January, 1946, the Control Council further defined the phrase ‘more than nominal participates’ in Nazism in its Directive 24. Unfortunately, that definition still encompassed a category far too broad to be manageable. The complete submission of local military authorities to central military government was avoided, despite the Patton Incident; the Control Council allowed some discretion in determining removal and exclusion of Nazis in less important aspects of society. Again, the Control Council did not come to the simple solution of limiting denazification to the upper echelons of German government and sensitive private enterprises.

Instead of correcting the untenable scope of denazification, America military government issued a comprehensive personnel questionnaire, called the Fragebogen, to all persons in public office or positions of importance. The purpose of this questionnaire was simple: to determine the political level of nazism in each individual who wanted to gain or retain a governmental position or a job in the multitude of private sector positions covered in JCS 1067. The paperwork generated by this was massive. Throughout 1945 and 1946, American occupation officials found

this burden on their shoulders and “the fact that almost every civil servant and industrial manager was in the criminal category added further confusion.”\textsuperscript{15} The system was, in fact, virtually overwhelmed.

At this time, as American military government slowly authorized the re-emergence of political parties in Germany, Clay found denazification policies criticized within and without Germany from the right for being too indiscriminate and from of the left, particularly communists, for being too lenient. In December, 1945, Clay again referred to the problems of denazification in another communique to policy makers in Washington, “[o]ur facilities are now crowded and with winter conditions will become quite bad.” Clay stated later in his memoirs that “by the end of 1945 there were in our zone alone more than 100,000 Nazis, classified as dangerous under our definitions, in internment camps under guard.”\textsuperscript{16} These Germans were not only excluded from office, but they had also been jailed. Military government found that the facilities and resources necessary to keep these individuals under lock and key strained their logistical capability. In order to screen and release some of these individuals, an appellate tribunal system was “set up to hear cases appealed from the local denazification tribunals.”\textsuperscript{17}

Of the 1,103,000 \textit{fragebogens} reviewed by January, 1946, roughly 25% had been found “more than nominal” Nazis in public and private positions. These 260,000 individuals were not employable in any other fashion than menial labor. The numbers of Germans excluded from many aspects of society and/or in jail disturbed many officials, Clay included. Despite the number


\textsuperscript{16} Lucius Clay, \textit{Decision in Germany} (Garden City: Doubleday & Co., 1950), 69.

\textsuperscript{17} Zink, \textit{The United States in Germany}, 162
processed as of January 1946, many more remained un-vetted. Officials already found the completed *fragebogens* a filing nightmare. American officials realized two things: it was not politically feasible to drop denazification, as the Patton Incident illustrated, while at the same time "experience in the field clearly indicated that it was utterly impossible to handle the job of 'vetting' more than thirteen million Germans in the American Zone."  

In order to relieve the American military government of denazification's growing shackles, policy makers decided to transfer further denazification over to German jurisdiction under American auspices. This occurred on June 1, 1946, when the American *Ländern Ministers* President passed the 'Law for the Liberation from National Socialism and Militarism.' When justifying his decision, Clay simply stated that a: "[f]actual analysis of the administrative problem was sufficient to convince me that there was no other solution to this problem." Although final authority would remain in the hands of the military government, the minutia of the process had been returned to German hands, formerly cleared by the *Fragebogen*.

The Law of Liberation brought denazification into German hands and under a unified set of principles. It effectively removed the burden of denazification from the American occupation and placed it on the Germans themselves. This German law divided suspected Nazis into four categories: major offenders, offenders (either activists, militarists or profiteers), lesser offenders or probationers and finally, followers; distinctions borrowed from American denazification. This Law reflected the most clear definition of Nazism, and elucidated a range of punishments that

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18 Ibid, 160.  
19 Ibid, 161.  
20 Clay, *Decision in Germany*, 70.  
included death for the most serious Nazis, imprisonment for some offenders, as well as surveillance and minor fines with probationary periods. Each side of the political spectrum in Germany criticized the Law of Liberation being both too harsh and too lenient. Nevertheless, "more than [sic] five hundred. . .local tribunals or boards had to be organized to handle the more than three million people chargeable under the law." The American occupation retained influence on denazification, and in the autumn of 1946, Military Government passed Law no.8, an economic corollary to the purges. Law no. 8 made the employment of Germans who had not passed the Fragebogen illegal for both the employer and employee. As mentioned earlier, those who did not clear the Fragebogen process were not eligible for any employment except manual labor. Due to the severity of American denazification, many Germans and occupation officials argued that "economic activity in the American zone had been severely handicapped as a result of its rigid application." Nevertheless, denazification was indeed taking place despite the considerable difficulties in personnel and magnitude of scope. General Clay, conscious of other factors affecting the political situation in Germany, began to consider further denazification a liability. Continuing criticism was effecting American prestige and straining limited resources with little tangible benefit in return. Clay's solution was to focus on the upper echelons of Nazi power. Clay reported that, "it appears most desirable to reduce the numbers chargeable under the law, emphasizing that this reduction is to permit German administration to concentrate on the punishment of active Nazis." At this time he helped pass an

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23 Ibid, 269.

24 Friedrich, American Experiences in Military Government, 262.

amnesty program for youth who were fourteen or younger at the time Nazis came to power, as well as for Nazis of the lowest income bracket, earning less than RM 3,600 in 1943.26 The effect of this amnesty released minor Nazis back into society with no penalties as the economy and their potential contribution to it became as important as the purge.

Following the Law of Liberation and the two amnesties, denazification does not figure prominently in Clay’s papers until August of 1947. American authorities held discussions with German officials to allow “both followers and lesser offenders [the privilege of employment] in positions other than ordinary labor” although political restrictions remained in place. The main idea was to “cut the load of major offenders and offenders from 700,000 to perhaps as low as 300,000... [and] enable the program as a whole to be brought to an end sometime around 1 April 1948 as originally contemplated.”27 Occupation officials wanted to release this mass of people back into society as reformed individuals capable of contributing to the German economy, instead of remaining a burden on it. This represented nothing less than the beginnings of a policy reversal; at this point even the two highest categories of Nazi criminality began to get off easy.28 Although economic imperatives and a desire to conclude the program took hold, even as late as the November 1947, London Conference, Clay included the following subparagraph in the military government’s proposal for the London Declaration: “the activities of personnel of former German armed forces and para-military organizations, as well as potentially dangerous Germans, shall continue to be controlled under existing quadripartite legislation.”29

28 "Perhaps the worst aspect of the entire denazification program...was that it permitted some of the most notorious Nazis to escape.” in Zink, The United States in Germany, 164.
29 Ibid, 487.
The German controlled tribunals screened and judged roughly 930,000 individuals. The final results in 1948 found 1,549 major offenders, 21,000 offenders, 104,000 lesser offenders and 475,000 followers. The tribunals sentenced 9,000 to serve time in prison, 22,000 to be excluded from office, 25,000 to lose property rights and more than 500,000 to pay fines. Most occupation officials at the time believed these statistics revealed a lenient approach given the low numbers of major offenders and offenders, the two highest categories of criminality. These results succeeded in reducing the numbers excluded from political society. Harold Zink, the former chief historian of the U.S. High Commissioner for Germany found that "when one contemplates the enormous amount of energy expended by American military government, the serious interference occasioned in other major programs [such as basic government service], the loss of prestige and respect which the United States suffered among Germans in its own and other zones, and various other factors, the achievement seems small indeed."^30

The first policy steps toward ending American involvement in denazification came in July, 1947. Joint Chiefs of Staff directive 1779 superseded JCS 1067; simply put, it fixed "United States policy for the next two years; unlike its predecessor, it dealt with denazification in a single sentence."^31 In terms of general military government, JCS 1779 increased German authority in denazification and reduced the responsibility of military government. JCS 1779 laid the foundations for Germany’s economic recovery and both Germans and Americans considered it a more liberal document than its predecessor, JCS 1067.^32 JCS 1779 paved the way to the

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^30 Zink, *The United States in Germany*, 164.


^32 Zink, *The United States in Germany*, 96-97.
conclusion of denazification in 1948, by declaring the program a success and moving on to the more important task of creating a viable, “stable and productive Germany.”

German involvement in denazification and the purging her own people now moved to the foreground of U.S. policy. Denazification employed 22,000 Germans at its peak, with 545 tribunals operating in the American sector responsible for up to 50,000 cases per month. Due to the need for efficiency, Germans held their tribunals ex parte. Liberals criticized this policy for being unfair. The practice stemmed from the shortage of personnel, the desire to quickly denazify Germany, and the huge numbers of Germans associated with Nazism.

In addition to previously mentioned difficulties within the American zone of occupation regarding the meaning and definition of ambiguous denazification terminology, a lack of consensus among allies along the same lines led to vast differences in denazification across the whole of Germany. For instance, what exactly was the boundary one crossed to pass over from ‘nominal Nazi’ to a criminal Nazi? American and British purged in similar fashions, advocating their visions of democracy, and the French and Russian authorities purged their zones to further the domestic policies of Paris and Moscow.

Problems within the policy making apparatus included “confusion in distinguishing among objectives, policies, and operational programs, and aberrations in timing relationships among them.” This created a situation where policy was developed in advance of any grand scheme being articulated, leaving considerable room for interpretation by the American military

35 Zink, The United States in Germany, 165-166.
governors, as exemplified throughout General Clay’s tenure.\textsuperscript{36} Initially this caused significant problems. Different sectors within the American zone had resulted in conflicting denazification programs. Once Washington unified policy following the Patton Incident, control remained in General Eisenhower’s and then General Clay’s hands. These men used their leeway to modify denazification to match the cultural and political situation in Germany in ways policy makers in Washington could not have. An example of this was Clay’s speeding and limiting of the purges mentioned above.

Because Allied declarations and German legislation divided Nazi criminality into four categories of offense, those extremely active Nazis chose not answer the \textit{Fragebogen} until late in the denazification process, when the prospects for clemency had increased. These men gambled on America losing interest after their G.I.s began returning home; they won. Statistics support this criticism. They show that although the numbers of \textit{Fragebogen} increased steadily through June 1949, the percentage of ‘major’ offender convictions declines from a high of .67 percent in July of 1946 to .17 percent one year later, where the percentage hovered for two years. This trend developed despite an increase in overall denazification program, during which military government expected to find more Nazis who attempted to hide from American military authorities. Other categories remained fairly constant in terms of percentages. In the end, “the stability of the statistics over a three-year period suggests that the boards were exerting their efforts in the direction of uniformity of findings rather than an absolute standard of justice and

\textsuperscript{36}Elmer Plischke, “Denazification in Germany,” 222.
helps to explain the almost universal criticism throughout Germany that denazification concentrated its fire on minor Nazis while allowing bigger quarry to escape.\textsuperscript{37}

The dispute about whether denazification was too harsh or too lenient continues to this day. Scholars disagree on whether the extent and scope of denazification exceeded or fell below its necessary extent. However, "those who review the program with hindsight tend to conclude that, if anything, the removal and exclusion program was too massive and might have preferably and more rapidly been dealt with from the top down."\textsuperscript{38} In Japan, we see this to be the case. General Clay himself came to much the same conclusion when he wrote that denazification policy "might have been more effective to have selected a rather small number of leading Nazis for trial without attempting mass trials."\textsuperscript{39} By initiating the program with inconsistency among American sectors, and then unifying them under a fairly draconian policy, American policy makers condemned denazification to a harsh historical judgement. Clay's final analysis is correct and in postwar Iraq it will serve as prescient advice.

\textsuperscript{37} Montgomery, Forced to be Free, 24.

\textsuperscript{38} Elmer Plischke, "Denazification in Germany," 223.

\textsuperscript{39} Clay, Decision in Germany, 261.
Demilitarization and Political Purges in Postwar Japan

The demilitarization of Japan, a political purge of wartime leaders and individuals associated with militarism, was a chaotic and seemingly haphazard event that caused great resentment among the Japanese people. At its peak in 1948, demilitarization ousted and/or found unsuited for public office over 200,000 individuals. In the short term, Japan’s demilitarization program was a success. Despite Japanese resentment, the purges achieved their purpose and excluded Japan’s wartime leaders from political participation during a critical transition to democracy. In the final analysis and longer term, only slightly more than 8,000 of those purged at the program’s peak in 1948 remained un-pardoned and excluded from public office as the Cold War erupted. As Japan emerged as a critical ally in America’s battle against communism, Japanese authorities, with American approval, released the purgees back into politics. This did not prove fatal to Japan’s new democracy because democratic institutions had taken root by this time. Japan’s experience in demilitarization shows that a similar ‘deba’thification’ of Iraq may only require a purge of the Iraqi regime’s upper echelon of power, rather than the extensive purge witnessed in Germany. The American occupation of Iraq should purge significant portions of Iraqi society affiliated with Saddam Hussein’s rule, but in the long run the U.S. should only require those individuals at its upper levels to remain outside of politics.

United States policy toward demilitarization in Japan stemmed from two key documents. The first was the Potsdam Declaration, in which paragraph 6 states: “There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest.” 1 The second was a statement of Presidential Policy relayed

to General MacArthur very shortly before his arrive at the forefront of the Sixth Army’s occupation of Japan. This statement of policy read in part:

“High officials of the Japanese Imperial General Headquarters and General Staff, other high military and naval officials of the Japanese Government, leaders of ultranationalist and militarist organizations and other important exponents of militarism and aggression will be taken into custody and held for further disposition. . . removed and excluded from office and from any other position of public or substantial private authority. . . [and] supervisory and teaching positions. . . Ultranationalistic or militaristic social, political, professional and commercial societies and institutions will be dissolved and prohibited. . .[and] will not be permitted to hide behind the cloak of religion.”

Policy set forth by both the allied nations at Potsdam and individually by the Commander-in-Chief clearly called for a purge of Japanese officials. However, as soon as the army of occupation set foot on mainland Japan a question arose: how to accomplish this task and govern Japan at the same time? Policy makers in Washington asked this question as well, for embedded within the initial post-surrender policy statement is the ambiguous phrase, “the Supreme Commander will exercise his authority through Japanese governmental machinery and agencies, including the Emperor, to the extent that this satisfactorily furthers United States objectives.”

Thus we see that demilitarization in Japan contained within its own parameters contradictory guidelines. On one hand, Washington directed military government to purge Japanese governmental institutions and society, while on the other hand, Washington tasked military government to proceed through existing agencies of those very same Japanese

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institutions! Immediately then, military government in Japan differs from the experience in Germany. In Japan military government was indirect, whereas in Germany it was more direct. An explanation for this is simple: in Germany Nazism was a single pathogen that infected the collective mind of German government and came to consume it; in Japan, militarism was a cancer that spread throughout the government. American military government considered the German government dead following the Nazis defeat, whereas the Japanese government was still salvageable, although it required extensive surgery. Nazis also made much better villains to purge. As one former occupation official himself stated later in life, referring to Washington’s Initial Post Surrender Policy Statement and its use of the sterile word ‘exponent,’ “anyone could hate a Nazi, but who could get excited about an ‘exponent?’”

Shortly after MacArthur’s arrival in Japan on 30 August, 1945, thirty-two members of secret societies dedicated to Japan’s imperial conquests publicly committed ritual suicide to atone for failing to win the war. Although this made U.S. policy in demilitarization slightly less difficult, many wartime leaders and their henchmen remained.

The first attempt at political purges began on October 4th, when the Supreme Command for the Allied Powers (SCAP) issued the ‘Civil Liberties Directive,’ which “ordered the immediate release of political prisoners and the removal from office of the Home Minister and top police officials; it also directed abolition of the Tokkō Keisatsu, a special police unit involved in thought control. . . and [the abolition of] numerous restrictions on the freedoms of speech, assembly, and

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religion." As a further political aftershock, the Higashikuni government, Japan’s immediate postwar Cabinet, collapsed. The Japanese organized a new government under Baron Shidehara Kijurō. Shidehara organized this cabinet on the basis that its members were untainted by war guilt rather than in possession of any political credentials. Despite the demise of the Tokkō Keisatsu, many militaristic organizations remained.

Within the next few weeks, nearly forty new political organizations sprang to life under the allied policy of free speech. Many of these were radical conservative organizations dedicated to the preservation of the empire, now in tatters. Take, for instance, the Tenguto or League of the Longnosed Goblins. Despite the ridiculous name it was a fairly sinister organization named for a mythical character reputed to teach samurai swordsmanship and dedicated to preserving the Emperor System through ‘strong-arm men.’ Older and more established organizations persisted as well, such as the Great Japan Military Virtue Association and the Black Dragon Society.

Joint Chiefs of Staff Directive 1380/15 gave General MacArthur specific instructions on how to begin demilitarization in Japan. Issued in early November of 1945, JCS 1380/15, among other occupational objectives, called for the dissolution of military and paramilitary organizations in Japan. Largely a recitation of previously stated objectives, this directive attempted to give U.S. forces clear instructions on military demobilization as well as demilitarization.

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6 Dale Hellegers, We, the Japanese People, v. 2 (Stanford: Stanford University Press, 2001), 444.

7 Hellegers, We, the Japanese People, v. 2, 461-462.

8 Meirion and Susie Harries, Sheathing the Sword: The Demilitarisation of Japan, 43-44.

Political demilitarization of Japan began in earnest only in early January, 1946, following a directive from SCAP to Shidehara's Cabinet. Policy called for purging the following categories of Japanese at the national level: those associated with "(a) War crimes, (b) Career and special service military personnel; and special police officials; officials of War Ministries, (c) Influential members of ultranationalistic, terroristic or secret patriotic societies, (d) Persons Influential in Imperial Rule Assistance Association, Imperial Rule Assistance Political Society, etc., (e) Officers of financial and business concerns involved in Japanese Expansion, (f) Governors of occupied territory, (g) Other militarists and ultranationalists." SCAP simultaneously issued further guidance to the Japanese government on exactly what these categories meant and who was to be affected. As in Germany, a questionnaire was created for individuals to complete on application for, or retention of public office.

Most American and Japanese officials expected the Shidehara Cabinet to collapse following these directives, as had its predecessor government under Higashikuni. The Cabinet did not collapse, although several of its members experienced the purge firsthand, primarily under category (g). The Cabinet attempted to reduce the scope and speed of the purge by requesting the establishment of Japanese tribunals to determine an individual's culpability. This request was denied and SCAP maintained the purge as an administrative affair, not a judicial procedure. In

10 General Headquarters (GHQ), Supreme Command for the Allied Powers (SCAP), "Removal of Ultranationalists" (SCAPIN 548), Ibid, 479-481.

11 GHQ, SCAP, "Removal and Exclusion of Undesirable Personnel from Public Office" (SCAPIN 550), Ibid, 482-485.

total, only 1,067 individuals were removed or barred from office (807 and 260, respectively) in the course of the next twelve months.\textsuperscript{13}

General MacArthur, under guidance from Colonel Kades (Government Section Chief), expanded demilitarization policy in Japan during December and January of 1946/7. The low numbers detailed above led the American military government to suspect that a great many Japanese militarists remained unaccounted for. A mere one thousand individuals could hardly be blamed for Japan's imperial conquests. With this in mind, SCAP extended the purge from the national level to local municipalities, and included the family members of purged individuals to prohibit their assumption of office as placeholders.\textsuperscript{14} Japanese government implemented this extension through Imperial Ordinances 1 - 4 of 1947. Furthermore, a Cabinet and Home Affairs Ministry Ordinance expounded on the criteria for Japanese screening would be based on; it listed nearly fifty pages of organizations, associations and positions which, if linked to the applicant, dictated his removal or prohibition from office.\textsuperscript{15} Nearly seven hundred thousand Japanese were screened throughout the countryside. By March, 1948, an additional 3,960 individuals were removed or barred from office at the local level (1,867 and 2,093 respectively).\textsuperscript{16}

SCAP next began a purge of economic and business leaders. This economic phase followed the pattern established with the political purges, in increasing intensity and scope.


\textsuperscript{14} "There appears to be no justification for the exemption of local executive officials enumerated in General Whitney's memorandum from screening to determine undesirable persons within the purview of the purge" & "The article simply bars one member of a family from succeeding to the power from which another member of the family has been removed," Douglas MacArthur, Letters to Japanese Foreign Minister Shigeru Yoshida, 1 Nov., 1946 & 26 Dec., 1946, Ibid., v. 2, 498 & 500.

\textsuperscript{15} Cabinet and Home Affairs Ministry Ordinance No. 1 of 1947, 4 Jan., 1947, ibid., 508-548.

\textsuperscript{16} Ibid, v. 1, 41.
Roughly 2,000 individuals were removed or barred from their positions as a result. The economic purge was the shortest; establishing a viable Japanese economy quickly exceeded the need to prohibit war profiteers from continuing their business.\textsuperscript{17}

Thus far, only roughly 7,000 leaders of Japanese society had been ‘purged’ under demilitarization policy. Excluded from these figures were those individuals screened and purged not in active pursuit of or retention of public office. This category, known as ‘provisional designation,’ “accounted for an overwhelming majority of those removed from the scene - some 193,000.”\textsuperscript{18} Officials considered these Japanese individuals preemptively purged.

The final grand total of purged Japanese under demilitarization policy was 201,815. Of all categories purged, the military received the harshest treatment with a total of 115,416 individuals removed and barred. Under the category ‘Additional Militarists and Ultranationalists,’ 49,291 Japanese were purged, although this category conceals the fact that roughly forty thousand of those individuals were members of ‘Ex-Servicemen’s Associations.’ Imperial Rule associations and societies suffered the next highest with 33,572 individuals purged.\textsuperscript{19} SCAP also established an intelligence agency to surviel the purged individuals to insure that their activities did not influence Japanese politics.\textsuperscript{20} Demilitarization policy reached its peak at this time in the spring of 1948.


\textsuperscript{18} Sheathin Harries, Sheathing the Sword, 48.


\textsuperscript{20} Baerwald, “Purge in Occupied Japan,” 195.
SCAP authorized an Appeals Board as early as January, 1946 with the caveat that the individuals appealing their status as purgees remained purged until exonerated. Because of this 'hitch, and the limited scope of demilitarization in 1946, an official Appeals Board was not established until January of 1947, when the policy expanded to local and municipal level.\textsuperscript{21} The initial mandate of this Board was very weak until occupation policy called for a reversal of demilitarization policy later on, at which time it was completely superfluous.\textsuperscript{22} Demilitarization policy officially ended on the 10\textsuperscript{th} of May, 1948 with Cabinet Order No. 62; very shortly it would be reversed altogether.\textsuperscript{23} Burgeoning Cold War politics, particularly America's formation of global alliances to contain communism and rising tensions on the Korean peninsula caused this reversal of policy and "the economy was turned back over to big capitalists and state bureaucrats. Politicians and other wartime leaders who had been prohibited from holding public office were gradually 'depurged,' while on the other side of the coin the radical left was subjected to 'Red purges."\textsuperscript{24} As this reversal of policy concluded in 1952, "only 8,710 persons were still purgees."\textsuperscript{25}

A number of lessons present themselves when considering the reality of demilitarization in Japan. Foremost is the fact that only 4% of purged individuals remained excluded from public office for more than the six years of U.S. occupation. This fact subverts the claim that permanent

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\textsuperscript{21}Government Section, \textit{Political Reorientation of Japan}, v. 1, 41-42.
\textsuperscript{22}Baerwald, "Purge in Occupied Japan," 193.
\end{flushright}
exclusion was a requirement for democracy, as stated in the Potsdam Declaration. However, during these six years another critical development occurred: the first free elections under a democratic constitution, and these individuals were not able to participate in (or work against) it. Also questionable is the concept of achieving democracy through autocratic decrees: the administrative rather than judicial nature of demilitarization stands out in this regard. As one OSS assessment stated, "ultimate and genuine democratization in Japan rests much less on the somewhat haphazard exclusion of undesirable individuals than it does on the will and ability of the Japanese to utili[z]e an existing institutional framework for the protection and expansion of democratic principles, principles with which the purge is in direct conflict." 26 However, demilitarization in Japan was not punitive, as it was in Germany where the Allies jailed over 100,000 individuals and fined one million others. In either case, the destruction of an individual's career on the basis of organizational association is a very harsh preventative measure, especially when it took so long to establish an Appeals Board. 27 Some Japanese who truly deserved to be politically purged managed to escape and even attain employment from the U.S. Army by resigning immediately following surrender. The Home Ministry's infamous Thought Police are one glaring example of this evasion. 28 In conclusion, although demilitarization in Japan was flawed, it was a success. As a model for Iraq it has more relevance for deba'thification than did denazification in Germany.

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26 OSS Report, in Harries, Sheathing the Sword, 50.

27 Government Section, Political Reorientation of Japan, 45.

28 Harries, Sheathing the Sword, 51.
Conclusions: Deba’thification and Political Purges in Postwar Iraq

Deba’thification, or the political purges that must follow a United States victory in the Second Gulf War, should follow the Japanese model of demilitarization rather than Germany’s denazification program. Purges modeled after both case studies would remove significant portions of Saddam’s regime, a necessary step to democracy in Iraq. However, Japan is a more appealing model because it was both more controlled and limited, while helping to accomplish the same objective of democracy. As we have seen, the denazification purges of Germany quickly became consumed with bureaucratic inertia and became a hindrance to the American occupation. Even Japan’s demilitarization presented nuisances that led American policy makers to allow an eventual de-purging throughout society. This is not to say that deba’thification should become a clone of demilitarization policy in Japan. In some areas German denazification policy must be consulted. In other cases, American policy should reflect Iraq’s unique cultural and political landscape. When considering the magnitude of this challenge, American policy makers should remember that “[i]n the space of a decade, imperial Japan gave way to a more egalitarian, modern society. . . . It was the victors’ justice that drove the new monumental undertaking and powered the twin goals of demilitarization and democratization.”¹ The lessons taken from Germany and Japan are the following:

Rather than spelling out the purges in ambiguous terms, American policy requires clear and concise statements that define specific organizations to be purged. In Germany, debates centered on the definition of who was more than a ‘nominal’ Nazi. In Japan, the phrase ‘exponents’ of militarism and ultranationalism continued the tradition of ambiguity. These

ambiguities may have been allowed in order to afford military authorities a wider net to purge society with. However, the downside of confusing and frustrating the populations outweighs this benefit. In any case, both purges reverted to focusing on specific upper echelons of Nazi and Militaristic power in Germany and Japan respectively. When occupying Iraq, American policy makers should go straight to the heart and define exactly who and what organizations are not acceptable. The emphasis of political purges in Iraq must be placed on Saddam’s inner circle. His extended network of control must be abolished, as Nazi organizations were. Controls on the members of these extended networks should not be so great as to encumber military government with excessive numbers of Iraqis as the German denazification experience illustrated.

Long Term Purgees: Certain segments of Saddam’s power circle must be excluded from holding public office permanently. These individuals belong to the inner circle and upper echelon of Saddam’s power structure and number perhaps two or three thousand. They include top membership in the Ba’th Party, and Saddam’s many police, security, intelligence and political organizations (Mukhabarat, Amn, Estikhbarat, the Mobile Police Strike Force and the Ba’th Party’s Revolutionary Command Council) as well as the leadership of the Special Republican Guard. Iraqis at this level of involvement with Saddam’s regime benefitted from his rule and must be removed to ensure that Iraq’s democracy is not hijacked as soon as American and allied troops return home.

Middle Term Purgees: Lower levels of Ba’th power and less elite military and paramilitary organizations also need to be removed from power, although generally for only a

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period of 3 to 4 years. The Ba’th Party itself numbers some 1.5 million members of which 25,000
are considered ‘full members’. These members must be removed from office for some years, until
democracy has taken root in Iraq. The membership of the entire Special Republican Guard
contains roughly the same number of individuals as the full membership of the Ba’th party. These
troops, along with their leadership must be purged as well.

Short Term Purgees: Rank and file of Iraq’s Republican Guard units should be removed
from politics for a period of 1 to 2 years. Because these individuals represent the lower rungs of
Ba’th power, their exclusion from politics will be for the shortest period. These individuals will be
able to reenter politics after the initial freedoms have taken root.

Rather than slowly escalating the purge process, American officials should announce
immediately which groups fall into the long, medium and short term purge categories along the
lines listed above. The impact of deba’thification will be greater this way; as opposed to both
Germany and Japan, where changes in scope and intensity during implementation caused
resentment among the native populations. This also has the appeal of offering a very ordered and
systematic approach to removing elements of Saddam’s terror regime.

As a corollary to individual purges, some departments of the Iraqi government will
require a closer vetting than others. Security, educational, media and police ministries will
require far more attention to detail than, say, the railways ministry.4 By keeping an eye on
important areas of government, American military government will learn both how the Iraqis are
working and a closer understanding of the political situation. In some agencies the purge may
need to be extended, while in others it may be reduced. By allowing nonpolitical ministries,

4"Iraq required a very profound deBa’thification at the administrative, educational, institutional and judicial levels" says Ali Allawi in
business and organizations to continue, as much as possible, uninterrupted services the disruption in Iraqi society will be lessened. The critical political sectors require extensive and careful review in order to return Iraq to the Iraqis and eliminate future oppression at the hands of Saddam’s minions.

_Some Iraqis tainted by Saddam’s regime will be required to continue their jobs in order to keep the nation running._ If governing Germany through direct military government proved problematic, as shown to be the case earlier, Iraqi military government will have an even greater need to employ Iraqis during the occupation. A functioning economy and government services will likely prove more important than purging certain individuals.⁵ Keeping in mind which organization the potential purgee is associated with will be important in the process. Non political fields that are essential - transportation, sanitation, water purification, and similar fields - will likely require some Ba’th tainted individuals to continue operations following occupation. As witnessed in the occupation of Germany, finding ‘good’ Iraqis to man simple services will become an immense task. At the time of this writing, evidence is already pointing in this direction as allied forces occupy southern Iraqi cities, Umm Qasr is a prominent example of the need for Iraqis.⁶

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⁶“'It's an awesome task,' said Major Allen Poulson [UK], who is in charge of vetting the thousands of applicants eager to return to their old jobs and, in some cases, hoping to get entirely new ones. 'I have to employ a port the size of Gibraltar in two or three weeks.'” in Thanasis Chambantis, “Allies' Job Fair Gives a Hint of Slow Revival.” _The Boston Globe_, 31 March 2003, A27.
Nuremberg and German War Crimes

The Nuremberg War Crimes Trials was an integral aspect of finalizing Nazi Germany’s defeat. Only a widely publicized legal proceeding that presented evidence of the Nazi’s crimes would confirm in the minds of Germans what the triumphant Allies already suspected: that National Socialism constituted a morally bankrupt ideology that had no place in the affairs of man. Once achieved, this objective helped ensure that the road to democracy in Germany never again faced a dictator like Adolf Hitler or his minions again. The International Military Tribunal indicted both key perpetrators of war crime and the Nazi governmental organs that these perpetrators represented. The Allies convicted a greater percentage of individuals than the governmental organs. American representatives believed and argued that the crux of the trial rested on proving the Nazi’s intent and conspiracy to launch aggressive war. However, any war crime trial based on this format in Iraq will face significant difficulties, despite the success of Nuremberg. The transference of the Nuremberg formula to the Far East and the Tokyo Trials did not succeed. This cross-cultural incompatibility presents itself again, even more prominently, in Iraq.

American military tribunals at Dachau tried a far greater number of Germans than the Nuremberg trials in less publicized proceedings. These proceedings, however, did not present any particularly radical developments in international war crime law. The conviction ratio was much higher than Nuremberg’s, and more death sentences were delivered. The Dachau trials made no mark on fostering democracy in Germany; military authorities intended them to punish perpetrators of specific war crimes against American POWs rather than Nuremberg’s wider goal.
of discrediting the very concept of Nazism. This paper will emphasis the groundbreaking Nuremberg trials.

During the course of the war, Allied governments denounced the reported excesses of the Nazi regime but did not make any firm commitment on how or when the intended to transform their words into action until the Moscow Declaration of 1943. Due to the accumulation of evidence streaming back from the advancing allied armies, such a statement became necessary. Signed by Roosevelt, Churchill and (ironically) Stalin, the declaration proclaimed that “those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein”. The Declaration concluded that major war criminals, “whose offenses have no particular geographical localisation...will be punished by the joint decision of the Governments of the Allies”. The Allies never specifically defined who the major war criminals were, how they would be tried and when this trial was scheduled to take place.

Following the London Talks during the months of September and August, 1945, the Allies finally agreed upon a framework for the major war criminals. The newly created International Military Tribunal (henceforth referred to as the Tribunal) possessed a simple purpose, one that echoed the Moscow Declaration. It called for the “trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their

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capacity as member of organizations or groups or in both capacities. Article 6 of the Tribunal’s Charter spelled out the crimes charged against the Nazis. There were three acts of criminality: (a) crimes against peace, the conspiracy, preparation and act of waging aggressive war; (b) war crimes, atrocities against civilians and prisoners of war as well as devastation not justified by military necessity; and finally, (c) crimes against humanity, atrocities of political, racial or religious grounds whether or not legal in the country where perpetrated. The Allies also released the official indictment against twenty-four surviving Nazi leaders and six “Groups or Organizations” (organs of government relating to security, police, intelligence, political and military leadership). The list included names and organizations easily agreed upon such as Hermann Goering, Ernst Kaltenbrunner and die Schutzstaffeln (SS) to those that the Allies did not always agree upon, such as Gustav Krupp von Bohlen und Halbach and die Reichsregierung (Reich Cabinet).

The process of indicting organizations was unprecedented in international law. This portion of the trial rested upon the Anglo-Saxon legal tradition of conspiracy to commit crime. In this tradition, organizational guilt was derived from a group of individuals or an organization coming together with express intent to commit and knowledge of the crime charged to the defendants. One difficulty faced by American representatives was convincing French and Russian

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5 The complete list of individuals included: Hermann Goering, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Rupp von Bohlen und Halbach, Karl Doenitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurath and Hans Fritzsche. Indicted Organizations were the Reich Cabinet, Leadership Corps of the Nazi Party, the SS/SD, the Gestapo, the SA, the General Staff and High Command of the German Armed Forces. From “International Military Tribunal: Indictment Number I”, ibid, 14 & 15.
delegations to agree to this concept. Due to the preponderance of major war criminals already in U.S. custody, the American indictments of Nazi organizations and the conspiracy charge passed into the Charter.

The American delegation at the London Talks pushed for indicting organizations because of the sheer scale and magnitude of Nazi crime. The Departments of State, War and the Navy eventually agreed that if war crime indictments were only charged against individuals, the greater crime would go unpunished do to the expectation that some war criminals would inevitably escape punishment. By indicting and then (they hoped) convicting the Nazi organs of government, the Allies wanted to deprive national socialism of any moral legitimacy. Organizational guilt removed the possibility of some Germans claiming that national socialism was a morally permissible ideology corrupted by imperfect men and women. Additionally, by convicting the very notion of national socialism through its organizations, the Allies hoped to avoid a situation similar to the inter-war years of the 20's and 30's, in which Germans claimed “that an admission of war guilt was exacted from them under duress”.

The twenty-four indicted defendants faced four counts at Nuremberg. They were as follows: count one, “The Common Plan or Conspiracy”; count two, “Crimes Against Peace”; count three, “War Crimes”; and count four, “Crimes Against Humanity”. Article 6(a) of the Tribunal’s Charter served as the basis for counts one and two, while Article 6(b) & 6(c) served as the foundation for counts three and four respectively.

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6. "The attempt to try these crimes on the basis of the separate prosecutions of large numbers of individuals will only make good the Nazi assumption that their crimes would go unpunished if they committed them on a sufficiently grandiose scale". Draft Memorandum for the President from the Secretaries of State, War and Navy, 11 Nov 1944, from Smith, The American Road to Nuremberg: The Documentary Record, 1944-1945, 42.

7. Draft Memorandum for the President from the Secretaries of State, War and Navy, from The American Road to Nuremberg, 43.

Count one, known as the conspiracy count, was perhaps the most important of the charges; if a substantial portion of the defendants were found guilty, it would provide a legal basis for war guilt. Count one also cited pre-war crimes against humanity as well as those committed during the course of the war as part of the conspiracy to wage aggressive war, and thus transformed any question of action within Germany's sovereign territory representing a crime outside the Tribunal's purview into a moot point.\(^9\) Theoretically, the Tribunal already accomplished this last point in Article 6(c) of the Tribunal's Charter, but questions remained about the legality of convicting individuals for breaking laws that did not exist when the crime they defended against was committed. For instance, in pre-war Germany the persecution of Jewish practitioners was legal and encouraged. By framing those infamous Nuremberg Laws as part of the Nazi conspiracy to prepare the German people for an illegal and aggressive war (the acquisition of Austria, the invasion of Poland and the world war that ensued), those crimes against humanity became chargeable under international law, ipso facto removed from the issue of sovereignty. The conspiracy count also provided a framework for the allegations made against the six Nazi groups and organizations under the indictment. Without this count, much of the potency of Nuremberg would have been lost.

Counts two, three and four constituted the most straightforward aspects of the trial. The conviction on these counts required only an adequate presentation of facts, and tying the defendants to the crimes through their own documentary trail. That the crimes took place was not in dispute, in most cases, only the level of participation by the defendants. France and the

\(^9\)"The common plan or conspiracy contemplated and came to embrace as typical and systematic means, and the defendants determined upon and committed, Crimes against Humanity, both within Germany and within occupied territories...in execution of the plan for preparing and prosecuting aggressive or illegal wars". Ibid, 15. Emphasis added.
Soviet Union drafted the specific and revolting war crimes and crimes against humanity charges under counts three and four. These counts consumed the most amount of paperwork and time because of the extensive evidence available.  

The America prosecution team, led by Supreme Court Justice Robert Jackson, opened the trial with the goal of presenting the overarching plan and conspiracy of Nazism in Germany. This goal was nothing less than count one in its entirety. The Prosecution encountered difficulties in translations; the defense, for instance, did not receive translations of all evidence presented against it. In some cases the prosecution presented only ‘staff evidence analysis,’ or English summaries of German documents. Despite these problems, the prosecution presented a historical picture of how the Nazis rose to power, including incriminating statements by many of the individuals in writing or speech. Hitler’s book Mein Kampf showed intent to wage aggressive war, the Nazi seizure of power illustrated the first actions taken to achieve this intent. Concentration camps were constructed, according to Goering’s book Reconstruction of a Nation, with the express purpose of securing and maintaining that power. Later, speeches by Nazi officials further drove the prosecution’s charge home. The prosecution also vividly described Nazi Germany’s naked aggression against its European neighbor states.

The trial moved on to present evidence against the indicted organizations. Cases against the individual defendants followed the organizations. The defense then took center stage and presented its own case on behalf of the defendants. For the purpose of clarity, this paper will focus on the cases against a limited number of individual defendants and organizations: Hans

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11 Ibid, 213-420.
Frank, Herman Goering and Hans Fritzsche as well as the organizations: Die Schutzstaffeln (SS), the Die Geheime Staatspolizei (Gestapo) and the German General Staff and High Command (General Staff). As mentioned, the organizations were tried first.

Allied prosecution charged the SS and the Gestapo fully and under all four counts of the indictment. The General Staff faced charges under counts one and two regarding aggressive war, but only with the execution (not conspiracy and planning) of counts three and four regarding war crimes and crimes against humanity.¹²

When presenting evidence against the SS, the prosecution possessed an abundance of material. Rather than dispute the evidence, “the defense endeavored to show that the SS was a fragmented, diverse organization and that members of one part of the SS often did not know of the actions of the other parts.”¹³ The defense called a variety of witnesses to the stand with this intent in mind. The SS, its subsidiary and affiliated organizations (Waffen SS, SD and the infamous Einsatzgruppen, charged with the execution of some of Germany’s most heinous acts of genocide during the Holocaust) did present a complicated network but the Tribunal did not conclude that the SS as an organization was innocent. Accordingly, “the Judgement of the Tribunal declared that the SS was a criminal organization within the meaning of the [IMT] Charter.”¹⁴

The Gestapo faced a similar abundance of evidence. Additionally, the Einsatzgruppen featured prominently (due to the interwoven nature of police and security organizations, and allied

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¹² International Military Tribunal, Indictment Number I, Appendix B’, Nazi Conspiracy and Aggression, 70-72.

¹³ Sprecher, Inside the Nurember Trial, 1173.

¹⁴ Ibid, 1194.
misunderstandings regarding the actual division of control, this paramilitary commando group appeared in both cases) regarding its activities in occupied Russia. Gestapo activities included the suppression of democracy and the extermination of minorities inside of Germany. Defense witness Dr. Karl Best attempted to show that the Gestapo was an amalgamation of police and security officials rather than a voluntary organization as charged under Count One (conspiracy), and that furthermore, it included a large group of individuals such as typists, janitors and minor functionaries who were compelled to join. Again, specific war crimes were not contested, although often the defense attempted to foist them off as the work of related organizations such as the Einsatzkommandos of the Einsatzgruppen. Essentially, the defense attempted to take advantage of Nazi Germany's complex and loosely affiliated organizational structure with the intent of painting a picture in which only individual guilt could be proven. As in the SS case, the Tribunal did not waver and declared the Gestapo a criminal organization.

The case against the General Staff represented the most difficult case for the prosecution to drive home. The prosecution faced little difficulty when endeavoring to prove that planning for aggressive war took place. However, the General Staff represented the smallest of all indicted organizations (about 130 members), and was defined more easily as a group than an organization, even in the indictment. Prosecutors used evidence of anti-partisan warfare in Russia and Poland and the summary executions of Allied Commandos and Paratroopers as evidence of war crime

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16 Ibid, 1195-1203.

17 "Functioning in such capacities and in association as a group at the highest level in the German Armed Forces Organization..." in "International Military Tribunal, Indictment Number I, Appendix B", Nazi Conspiracy and Aggression, 73. Emphasis added.
guilt. Defense of the General Staff centered around the assertion that it was not an organized
group, that it did not plan for aggressive war, nor was it responsible for crimes committed by
paramilitary units such as the Einsatzgruppen and finally, had opposed Hitler’s summary
execution orders. These arguments proved telling when the Tribunal gave judgement. Because
of the small-size of the General Staff, and its dubious classification as an organization under the
indictment, the Tribunal “stated that no declaration of criminality should be made with respect to
the General Staff.” The Tribunal believed a more appropriate course of action was the trial of
individual perpetrators of specific war crimes.

Herman Goering faced all four charges under all four counts of the IMT indictment, while
Hans Frank and Hans Fritzsche faced charges under counts one, three and four. Goering’s and
Frank’s charges reflected direct responsibility for and participation in all applicable charges, while
Fritzsche’s charges only accused direct responsibility and participation in count one and
encouragement of counts three and four.

Goering’s case presented the most documentation of any individual tried at Nuremberg.
Most individuals had already been implicated during the previous cases presented against Nazi
organizations of which many were members. Prosecutors used Goering’s own prewar writings as
a virtual admission of guilt. The prosecution also showed his status as Hitler’s heir apparent and
as a leading architect of Jewish persecution and genocide. When Goering’s defense began, many

18 Sprecher, Inside the Nuremberg Trial, 459-568.
19 Ibid, 1214-1230.
20 Ibid, 1379.
21 “International Military Tribunal, Indictment Number I, Appendix A”, Nazi Conspiracy and Aggression, 57, 60 & 68.
22 Sprecher, Inside the Nuremberg Trial, 494-496.
officials expected and feared that he would make use of his trial as a platform to re-establish Nazi ideology and turn the occasion into a propaganda platform. Although he seemed quite pleased with his own defense, "neither Goering nor his witnesses had shaken either [the] authenticity or [the] impact" of the documents proving his guilt. Following his conviction on all counts and shortly before his scheduled execution, Goering committed suicide.

The IMT indicted Hans Frank, a leading member of the Nazi party since its conception, on Count One for his role in the Nazi conspiracy, as well as Counts Three and Four due to his role as military governor of Poland and the atrocities committed under his direction. Frank’s own relative cooperation during the trial represents one of the more unusual cases at Nuremberg. He gave up an extensive personal diary to the prosecution which proved useful in many of the other cases. Numerous statements by Frank added additional weight to the evidence against him found in the diary. Frank continued on his unique defense and stated publicly that, "I am possessed of a deep sense of guilt." Frank’s strategy involved making statements of remorse, as this one illustrates, without actually declaring personal responsibility (true guilt). Frank’s counsel, meanwhile, attempted to pin most of the Polish atrocities on easily culpable individuals and organizations like the dead Himmler and his SS. Frank, possessed either of true remorse or insanity, eventually admitted responsibility in the extermination of German and Polish Jewry,


24. Ibid, 609.

25. "We have to understand that the purpose of this whole war is to expand the living space for our people in a natural manner." Frank Speech at Galicia, 1942, in Sprecher, *Inside the Nuremberg Trial*, 509.

26. Ibid, 897.
adding his famous remark, “a thousand years will pass and still this guilt of Germany will not have been erased.” The Tribunal found Frank guilty; he was later executed by hanging.

Hans Fritzsche, an official in the Reich’s Propaganda Ministry, found himself facing charges on participation in the general Nazi conspiracy, as well as war crimes and crimes against humanity because of his propaganda incitement. Fritzsche signed a confession while in Soviet custody earlier in Moscow, a confession he revoked at the trial. Prosecutors succeeded in establishing that Fritzsche did indeed represent a link in the Nazi’s propaganda chain, but they were not able to link him to any conspiratorial meetings. His defense focused on this inability, showing that he did not attend meetings other conspirators were at, and that he merely implemented instructions from policy makers (leading primarily to Josef Goebbels). The Tribunal found that he was not guilty of conspiracy and that it was “not prepared to hold that they [strong statements of propagandist nature] were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged.” Fritzsche represents one of the three Nazis found not guilty.

In total, the Nuremberg War Crime Trials succeeded in permanently erasing Nazism. War crime trials in Iraq must emulate this goal and forever abolish any political legitimacy that Saddam Hussein and his Ba’th party possess. The extensive documentary history of the Nazis’ crimes is both detailed and damning. In Iraq, the evidence must be equally detailed and damning. As an ideology, Nazism saw its autopsy and funeral at Nuremberg. In order to ensure a sound defeat

27 Ibid, 899.
28 Ibid, 533-547.
29 Ibid, 1088-1105.
30 Ibid, 1409.
of Ba‘th power and Saddam Hussein’s legacy in Iraq, a similar judicial autopsy and funeral must take place. This is not to say that there are no criticisms of how the trials were conducted.

Translation difficulties immediately come to mind. Some critics found that the trials gave advantages to the prosecution. For instance, the Tribunal allowed submission of evidence during and even following the defense’s case, a typically unheard of practice. The reasoning behind this explained that due to the difficulty of collecting evidence in the war-torn nation, the prosecution needed some allowance for new evidence. It also had the effect of keeping the defense off guard and unprepared. Some critics denounced the concept of organizational guilt, which allowed future trials of individuals based solely on their association with Nazi organizations declared guilty. Following Nuremberg, judges decided that “conviction of a defendant, prosecuted for membership in an organization declared criminal, required proof that the defendant had joined voluntarily and that the defendant knew that the organization engaged in crime as defined in Article 6 of the [IMT] Charter.”31 This decision eased much of the criticism over organizational guilt. Additionally, General Lucius Clay’s denazification program assumed responsibility for minor functionaries of Nazi organizations and from there eventually these Nazis came under the jurisdiction of Germans themselves.32

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Tokyo and Japanese War Crime Trials

American and Allied prosecution of war criminals in postwar Japan did not help promote Japanese Democracy. The trials, including but not limited to the Tokyo based International Military Tribunal of the Far East (IMTFE), accomplished only victor’s justice and retribution for wartime atrocities. In some cases, as described below, the trials afforded the guilty a platform to present an apologist’s view of Imperial Japan’s conquests. Modeled on the Nuremberg Trials in Germany, the Tokyo Trials did not transfer well. At its worst, the trials gave the defendants a podium from which they proclaimed the innocence of Japan’s prewar and wartime policies while casting a shadow of suspicion on European and American intentions during the same period of time. This is relevant because at any trial of war crime in Iraq, America will face a similar situation.

Allied powers had limited knowledge of atrocities committed by the Japanese military throughout the course of World War II. Reports of escaped prisoners and the Red Cross were primary sources for the American government. The full extent of Japan’s military prison abuses remained unknown until the war ended. American government withheld information, on occasion, to keep focus on defeating Germany first.1 However, the Potsdam Declaration maintained that “stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.”2 Despite this statement, many war criminals went unpunished. The United States established “a centre for collating alleged war crimes” in Chungking, China during the course of the war that resulted in “extensive lists of defendants. . .

with accompanying evidence, mostly in the form of sworn testimony.” Some estimates expected as many as fifty thousand individual indictments following surrender. Nevertheless, only 5,700 Japanese ever faced official war crime tribunals. Various national governments conducted the majority of these trials, scattered over the vast lands under the former Japanese Empire. Although full disclosure of these trials may never be known, “according to the most authoritative Japanese tabulation... 984 initially were condemned to death; 475 received life sentences; 2,944 were given more limited prison terms; 1,018 were acquitted; and 279 were for one reason or another not sentenced or never brought to trial.”

America’s first war crime trial in the aftermath of World War II, both eastern and western theaters, took place in the Philippines. The trial established more legal precedents than any other war crime trial of the period, and is one of the least well known. On February 23, 1946, General Tomoyuki Yamashita was hung following a conviction of war crimes committed under his command in the time between October 9th, 1944 and September 2nd, 1945 in the Philippine Islands. His indictment under an American military tribunal read that Yamashita as commander, “unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependancies.” Although news coverage was sensational at the time, these charges and their implications are largely forgotten.

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3 Harries, Sheathing the Sword, p. 99.

4 “At the same time, the Soviet Union conducted secret war-crimes proceedings against Japanese who had been captured in Manchuria, northern Korea, and Karafuto (southern Sakhalin).... the Soviets may have executed as many as three thousand Japanese as war criminals, following summary proceedings.” in John Dower, Embracing Defeat: Japan in the Wake of World War II (New York: W.W. Norton & Company, 1999) p. 449.

5 Dower, Embracing Defeat, p. 447.

today. Yamashita’s indictment never charged him with direct war crimes, yet he was sentenced to hang! The atrocities committed by Japanese forces were never disputed, not even by Yamashita’s own defense counsel, “the defense sought only to extricate their client from legal responsibility for those misdeeds.”7 Yamashita’s trial centered on his failure to fulfill his commission as commander rather than his actual misdeeds. His conviction was appealed to the United States Supreme Court and upheld. Shortly following Yamashita’s trial, military tribunals tried and convicted Lt. General Masaharu Homma on a similar basis for his failure to enforce discipline among Japanese troops during the now infamous Bataan Death March in which many war crimes were committed against prisoners of war. Further trials were carried out and Americans executed a total of 51 Japanese. The Manila trials carried the highest percentage of death sentences (roughly 40% of convictions) of any Allied war crime trial following World War II.8

The bulk of American war crime trials took place in Yokohama, where military tribunals of the U.S. Eighth Army directly tried 474 trials. Eventually, “over 1,000 suspects were tried at Yokohama; 200 were acquitted, while 124 sentenced to hang and 62 to life imprisonment.”9 The reason for the discrepancy in numbers of trials versus numbers convicted is that military tribunals conducted some ‘mass trials’ due to overlapping evidence between cases. The Yokohama Trials utilized the precedents established in the Yamashita and Homma trials. These trials were not nearly as deadly as their predecessors, however; only 14% of the accused and convicted received death penalties - of those less than 50% were ever executed.10

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7Piccigallo, The Japanese on Trial, p. 52.
9Harries, Sheathing the Sword, p. 101.
Only one trial made a lasting impression on Japanese society and judicial tradition: the International Military Tribunal of the Far East (IMTFE), commonly known as the Tokyo Trial. American officials drove the formulation of the IMTFE, and brought with them many ideas originated in the European based International Military Tribunal (IMT). The Charter for the IMTFE borrowed the revolutionary concepts of conspiracy to wage aggressive war and crimes against peace directly from the Charter of the original IMT. The Judicial concept of ‘conspiracy’, already described unique under Anglo-Saxon tradition, made for an even stranger idea in the Far East. Americans sought the justification for crimes against peace in the 1919 Covenant of the League of Nations and the 1928 Kellog-Briand Pact, but as solid judicial precedents in international law, these ideas were weak. As in Germany, this conspiracy clause allowed the prosecution to cast a wider net to catch war criminals. This gave rise to a popular conception of ex post facto trials and victor’s justice to a greater extent than in Germany. Some judges feared a precedent of judicial legislation, but in the end the conspiracy charge held in the IMTFE as it had in the original IMT. As opposed to the Nuremberg Trial, American officials made no attempt to put Japanese organizations on trial, as they did with Nazi and military organizations in Germany. Successive parliamentary governments ruled Japan during the war and the years leading up to it, as opposed to the sole power exercised by the Nazi Party in Germany. Military control was independent of civilian agencies in Japan, where in Germany the two were intertwined. These two facts drove the abandonment of a quest for organizational guilt.

11 The legal categories of the crimes against the peace and humanity have been criticized as ex post facto legislation on the part of the London Conference, in that these crimes did not exist in international law prior to 1945. Similarly, conspiracy, which was the linchpin of the charge of the crime against the peace, was a legal concept found exclusively in Anglo-Saxon jurisprudence prior to the Charters.” in Antonio Cassese, The Tokyo Trial and Beyond: Reflections of a Peacemaker (Cambridge: Polity Press, 1993) p. 5.


13 Antonio Cassese, The Tokyo Trial and Beyond, p. 3. See Nuremberg paper, above, for details.
However, as representatives of Japanese militarism, U.S. officials took care in “choosing men who during the course of their career had held more than one high position in the military and/or government”. The point was to indirectly convict the organizations by proving that their leadership committed war crimes. This goal was not achieved; only 3 out of the 28 defendants were recognized by the average Japanese citizen in a postwar Newsweek poll utilizing photographs. The most infamous defendant was Hideki Tōjō, a former Army General and Prime Minister from before Pearl Harbor to Saipan’s fall.

Emphasizing the focus that the IMTFE placed on Japan’s military was the omission of specific mention of civilians in chapter 5(c) of its charter. The chapter pertaining to ‘Crimes against Humanity’, in the IMT (Nuremberg), the charter reads as follows: “murder, extermination, enslavement, deportation, or other inhuman acts committed against any civilian population”; whereas in the IMTFE (Tokyo) Charter, the phrase “committed against any civilian population” was deleted. This omission had the effect of broadening crimes against humanity to emphasize military personnel and this was the purpose of the Tokyo Trial.

Another difference between the two landmark trials lay in the fact that at Tokyo, America did not press for representation of economic interests. The Japanese zaibatsu, large family owned corporations later broken up and then restored by MacArthur’s decrees, presented a unique analogy to the Krupp family in Germany. Due to time constraints evidence could not be compiled quickly enough; the prosecution barely managed to accumulate evidence against the more important and prominent military defendants.

14 Harries, Sheathing the Sword, p. 126.

15 Chassese, The Tokyo Trial and Beyond, p. 3.
Of the fifty-five charges against the Japanese defendants, Count 1 was far and away the most important. Count 1 detailed the seventeen year conspiracy to wage war and dominate Asia; Count 5 adds collusion with the Nazis for world domination, judges agreed later that this corollary was implausible. No death sentence resulted without a conviction on Count 1. The reason for so many charges is that Counts 6 - 36 deal with individual nations or groups of nations that were violated as a part of this conspiracy when Japan attacked. Nation-specific charges gave the prosecution greater leeway and avoided the possibility of losing a conviction on the basis of an overly ambitious conspiracy charge. Counts 37 - 52 dealt with murder and the conspiracy to commit it, based on the reasoning, for instance, that military personnel and civilians killed at Pearl Harbor were murdered because they died with no advance declaration of war. Counts 53 - 55 combined war crimes and crimes against humanity. A total of 217 charges against the 28 defendants resulted in 132 convictions; seven conspirators suffered the death penalty. 16

The trial itself presented an excellent opportunity for the prosecution to detail the rise of each defendant in the context of the conspiracy charge. The prosecution also explained how each defendant utilized his individual powers to "indoctrinate and manipulate the Japanese people into acquiescing in the militarists' grand design." 17

Of the defendants, two of the most prominent and important were Tōjō Hideki and Hirota Kōki (the only civilian executed). Tōjō was the head of the War Ministry, Home Ministry and government at the same time throughout 1941-1944. Hirota accepted a posting as Prime Minister immediately following the military's coup d'etat in 1936 and was the Foreign Minister prior to it.


17 Chassese, p. 137.
Together they represented key pillars in the prosecution’s attempt to incriminate militarism and the civilian government of Japan. Ultimately, both came to represent substantial failures for the prosecution. The conviction and death of both achieved little in terms of Japan’s democratic transition. Tōjō became a popular hero from the ashes of defeat and Hirota a tragic victim.

Tōjō’s trial presented the worst atrocities committed by the Japanese military, and his conviction was assured. The disaster lay in his own defense and the cross-examination that followed. The defendants were required to submit an affidavit presenting their case prior to its actual argument before the tribunal. Tōjō was no different. He also requested that his affidavit be published for the Japanese people, and SCAP foolishly agreed. In short, “he achieved two ends. He created for himself the persona of an honest, loyal patriot, sincere in his duty and his love of the Emperor; and, with closely-reasoned but simple arguments, he justified Japan’s pre-war policy”.

One of Tōjō’s tactics was to cite the economic blockade imposed on Japan prior to Pearl Harbor as evidence of economic warfare that provoked Japan needlessly, or in his words, “waging an economic war against Japan while at the same time keeping herself out of actual war... to reap the fruits of victory over Japan without resorting to an act of war”. Tōjō also interjected the shadow of colonialism in his own and Japan’s defense; he claimed that Japan liberated the former slave nations under European and American sway. Furthermore, he defended his Emperor to the last, presenting him as a man completely reliant upon his military and Cabinet for leadership. In a final coup, Tōjō defeated his own captors in a verbal duel during his cross-

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19 Ibid, p. 159.
examination. During this stage he managed to turn questions from the Chief Prosecutor Joseph Keenan around to work against the United States, even when the questions had little or no direct relevance to militarism in Japan.\(^{20}\) Thus Tōjō, the most infamous of defendants at the Tokyo Trials, turned his own prosecution into a grandstand. This did not advance American and Allied goals to present Japan's actions during and before the war as criminal.

Hirota Kōki dealt another severe propaganda defeat to the prosecution. In contrast to Tōjō's grandstanding, Hirota maintained a majestic silence. One observer noted that there was "something moving and mysterious about Hirota's adamantine poise and reticence during the trial and afterwards. He reminds me of a dignified Roman senator, or perhaps an ascetic Mandarin of Imperial China."\(^{21}\) Hardly the words to describe a disgraced war criminal. The Japanese public was both shocked and surprised at what occurred next. His conviction and death sentence was the closest of all the defendants: only 6 of 11 judges voted for his execution.\(^{22}\) Justice Röling of Holland wrote a dissenting opinion, and found Hirota not guilty at all; this time SCAP had the foresight to repress all dissenting opinions, however, and Röling's views were not publicized until 29 years later.\(^{23}\) Because of the dissent surrounding Hirota's conviction, the American and Allied goal to show the criminal nature of Japan's civilian government before and during the war was overshadowed by the unexpected lack of near unanimity.

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\(^{20}\) One amusing example: Keenan: "Of course, is it obvious, is it not, that the Vichy Government was under the control of the Hitler Government; you know that don't you?" Tōjō: "I was well aware of the fact that the Vichy Government was operating under German occupation, but I consider the Vichy Government as the legitimate government of France. It is just as the present Japanese Government, operating under the American government, is the legitimate government of Japan." Ibid, p. 163.

\(^{21}\) Ibid, p. 141.

\(^{22}\) Dower, Embracing Defeat, p. 459.

\(^{23}\) Cassese, The Tokyo Trial and Beyond, p. 6.
The defense, when buried with evidence of Japan’s wartime atrocities, could not refute many charges directly. Instead they publicized America’s own congressional investigation into Pearl Harbor. By doing so, the defense showed that prior to the attack, the United States, Holland and Great Britain engaged in secret talks with the purpose of organizing and releasing guerrilla fighters to engage in “subversive activities, sabotage and corruption in Japan and in Japanese-occupied territories.”24 Additionally, the defense cast significant doubt on the previously mentioned fallibility of conspiracy and crimes against the peace as ex post facto laws.25 As Justice Webb himself stated as President of the Trial, “International law, unlike the national laws of many countries, [read Anglo-Saxon nations] does not expressly include a crime of naked conspiracy.”26 The Court itself did not allow the defense to fully develop its case that Japan’s prewar policies were, in fact, not a conspiracy but rather a reaction to international developments that threatened Japan’s national security. The Court allowed this only in personal statements. This curtailment may have reduced the defendants ability to utilize the Trial as a propaganda tool before their execution, but it also provided ammunition to those who complained that the Trial was a show-trial.27

An outstanding deficiency of the IMTFE remained in its failure to indict the Emperor himself. As the final embodiment of sovereignty under the Meiji Constitution, many expected that Hirohito himself would stand trial accused of conspiracy. The key to Hirohito’s immunity lay in

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24 Harries, p. 152.
25 Minear, Victor’s Justice, p. 61-73.
26 Dower, Embracing Defeat, p. 463.
his utility to the occupation forces. General MacArthur himself stated that to try and convict the Emperor would result in widespread chaos, guerrilla warfare and the spread of communism. Occupational authorities feared that the process of constitutional reform would have been derailed and an inestimable cost exacted from the pace of reform. The Potsdam Declaration proclaimed that the Japanese people would determine their own government. Consensus among policy makers was that the Japanese people would demand some from of democratic and constitutional monarchy. How could American officials achieve both the Emperor's trial and his retention as monarch in a constitutional democracy as figurehead (an expected outcome)? In the end his absence from the trial represented measures to ensure a smooth occupation by the American government.

As an attempt to establish an international precedent for all time, the Tokyo Trial was a dismal failure. In regards to democratizing Japan, its effect was not noteworthy. U.S. interests would have been better served by delegating authority to a U.S. military tribunal along the lines of the Eighth Army's Yokohama trial, which was low-key, did not draw any particular attention, allowed no grandstanding by defendants and accomplished the objective of punishing war crime. The Yamashita and Homma trials established the precedent of trying a commander for the crimes of his troops. Although these trials were later criticized for their lack of judicial precedent and extreme severity, similar trials in Iraq will guarantee the permanent removal of Saddam Hussein and a small circle of his key leadership. Additionally, as in Japan, no opposition to American

29 Harries, Sheathing the Sword, p. 128-129.
actions will amount to anything more than a lack of approbation in some historical footnotes. The Yamashita format for war crime trials should only be used in the immediate closing days of the war. Because attention on the occupation will increase as time goes by, American policy makers will have very little time to enact this type of war crime trial before it becomes politically unfeasible. It is much more advisable to emulate a Nuremberg style tribunal, and ensure that the defendants cannot use their own trials as one last soapbox to secure their atrocious legacies.
Conclusions: Baghdad and Iraqi War Crime

War crime trials will prove to be an essential part of Iraq’s future. By trying and convicting Saddam Hussein’s gang of thugs for the crimes which they are responsible for, America will bring closure to his reign of terror. It is not enough to merely convict and execute war criminals. American war crime trials in Iraq must emulate the moral destruction of Nazism that occurred in Germany and wipe out any legitimacy of Saddam Hussein’s apparatus of political control may possess residually following the war. Unfortunately, relying on the Nuremberg or Tokyo war crime trials as an exact framework will not work. Despite this lack of direct compatibility, some general lessons can be derived from both historical experiences.

Clearly, it will be necessary to place Saddam and his closest lieutenants on trial for crimes they have committed against the Iraqi people and his neighbor states, such as Iran and Kuwait, as well as for war crimes committed against allied troops as they occur in the present war.1 What is not clear is how this is best accomplished. If Saddam is still alive, which government will try and convict Saddam? America’s? Iran’s? The provisional government of Iraq itself? Of course, this question may be answered in the coming weeks; Saddam’s survival at this point is far from assured. Other officials will likely flee the country. Nevertheless, some of his inner circle will remain following the war. A convocation of an International Military Tribunal for the Middle East (IMTME), driven by American, British, Kuwaiti and Iranian judges provides the answer, and does not preclude representation from any other involved countries.

The IMTME should reflect the variety of Counts that both the IMT and IMTFE possessed. Charges that cover both Iraq’s aggressive wars against Iran and Kuwait, Saddam’s regime’s internal crimes against humanity as well as war crimes represent candidates for inclusion in any indictment. Certainly, his overt support for suicide bombers inside and outside of Iraq represent a clear starting point for specific and easily proven charges. Only by convicting Saddam and his lieutenants in all their capacities as perpetrators of criminal atrocities can America and her allies permanently vanquish the Ba’th legacy.

This will not be an easy task. Even more than in the trial of General Tōjō, American prosecutors must be ready for Saddam and his inner circle to utilize their own trials as a means to secure their own twisted legacies and justify their actions in the minds of the Middle East at large. In any trial regarding Iraq’s war of aggression against Iran, we must expect that the defendants will publicly and vocally bring to light America’s involvement in the conflict. During the Iraqi initiated Iran-Iraq war, the American government provided battlefield intelligence to Iraq that helped prevent Saddam’s defeat by revolutionary Iran. In much the same way that Tōjō framed Japan’s wars of conquest as wars to free oppressed Asian nations from the yolk of western imperialism, Saddam and his inner circle will attempt to show Iraq’s actions as either American sponsored wars against Iran, or defiance of the American Empire on behalf of the Muslim and Arab nations of the world; indeed this is part of Ba’th ideology’s very essence! Similar arguments of American involvement will present themselves when detailing Saddam’s war crimes

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involving chemical attacks on the Iranians. At any ‘Baghdad Trial,’ the evidence against Saddam and his ministers and generals must be both massive and irrefutable to counter what could become a judicial fiasco. The Baghdad Trial should also severely limit the ability of Saddam Hussein and his immediate circle to make public statements in order to preclude this from occurring on the world stage.

Organizational guilt should not be pursued in Iraq because the necessary conventions exist for prosecution of crimes against humanity under various international conventions. Political purges, detailed above, will remove the necessary individuals from Iraqi political society following the war. The amount of time and effort needed to convict organizations would outweigh any tangible benefit from doing so. Saddam’s regime can be defeated morally by convicting its top leadership of crimes committed under their rule. These individual trials will serve to destroy any residual legitimacy in Ba’th organizations.

A conspiracy charge to wage crimes against the peace could certainly be argued against the Ba’th Party; but this charge is neither necessary nor advisable. This charge, if attempted would vastly increase the period of time under investigation. Charging individuals with specific acts of crimes against the peace would be more than enough to prove war guilt in the cases of the Iran/Iraq war and the First Gulf War. With America’s specific emphasis on weapons of mass destruction (WMD) in the current administration’s case for the current Gulf War, any attempt to prove a war guilt charge regarding current hostilities will depend on the discovery of WMD inside of Iraq. If no WMD are discovered, then the administration will find that many observers around

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the world will view any war guilt charges, even regarding earlier wars, as examples of American hypocrisy.

_In any trials, the prosecution should not be given any extra powers that will give the appearance of favoritism toward the prosecution._ In both the Nuremberg and Tokyo trials, criticism was leveled that the prosecution carried with it the undeniable advantage of ‘Victor’s Justice.’ American authorities should ensure that translation facilities and personnel are available to keep both evidence and charges available to everyone involved. A specific date for the trials needs to be chosen, beyond which new evidence will not be allowed. In Germany, the allowance of a second chance for the prosecution to submit evidence was considered unfair.

_Should a lack of evidence present itself to American authorities when constructing a case to prosecute Saddam Hussein or any of his top officials and military leaders, they should refer to the Yamashita and Homma trials in Japan to convict him for war crimes committed under his command._ The application of this trial format should remain a judicial weapon of last resort. The expansion of the Yamashita precedent to political leadership for the crimes would present significant difficulty, and the trial would lose potency as a result. Many would charge that the trial constituted a complete sham and America would face an international public relations fiasco. In the postwar months that Yamashita and Homma were tried, other events overshadowed their prosecution and execution. This will not be the case in postwar Iraq, and an immediate and swift military tribunal would need to execute Saddam and his lieutenants before their captivity becomes a drawn-out affair. Although contemporaries and historians would likely condemn the action, Saddam’s reign of terror will have ended once and for all - and no world powers would be in any position to stop the execution.
Constitution Writing in Postwar Germany

America pressed for German self-government within its own zone of occupation, creating the early Ländern following German surrender, and led the way toward the development of a national self-government for what became Western Germany. The entire process entailed two separate steps: firstly, the drafting of state constitutions within the American zone and lastly, the drafting of the West German constitution.\(^1\) Allied and American policy makers at the London Conference established a rough framework to work within. When intervention became a necessity to correct what Allied military governors found objectionable in the first German draft constitution, nearly all German parties involved criticized the unwanted intrusion.\(^2\) By providing only a rough constitutional framework, the Allies ensured that the German final product would not meet their specific and unstated requirements for express federalism. Eventually the western allied governments abandoned their objections to reach a conclusion. A better reasoned policy would have spelled out exact requirements of federalism in addition to the rough framework; leaving as much room for German direction as possible within these requirements. Despite these flaws, the military governors of Germany managed the German constitution drafting process much more adroitly than that which had occurred earlier in Japan. Although disputes took place, military government did not draft a constitution that was forced on the Germans. As a model for what American military government will shortly face following the conclusion of the Second Gulf War, postwar Germany offers more positive lessons than negative warnings.


\(^2\)"German opinion had united in condemning the military governors for intervening in matters thought proper for German decision." in Golay, The Founding of the Federal German Republic, 101.
In the early postwar months following the formal surrender of German military forces, Secretary of War Henry Stimson moved quickly to establish a policy that would remove Germany as a burden on his department. The War Department held no desire to directly govern Germany any longer than absolutely necessary. Under Stimson’s direction, “among other things, the Army did everything it could to complete its assignment in Germany as quickly as possible, essentially trying to make military government a ‘going concern’ from which the Army could then withdraw gracefully.”

To achieve this end, Military Governor Dwight Eisenhower and his deputy Lucius Clay quickly formulated a policy to shift governmental responsibilities back to the Germans themselves with all possible haste. Following the Potsdam agreements, Clay worked to schedule local elections at the earliest opportunity, stating that these elections “will give the Germans an opportunity to learn democratic procedures on the lower levels before undertaking elections for larger units. At the same time, the election of such local officials will tend to relieve military government of many duties at that level.” This led to the creation of the Council of Ministers President within the American zone of occupation in October of 1945. Clay transferred a good deal of the occupation’s minutia to this council, including food, agriculture, industry, transportation and prices, “so that it soon took on the character of a central government of the American zone.”

Local elections took place across the American zone in January of 1946 as the

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5 Lucius Clay, letter to John McCloy, “Conditions in Germany,” ibid, 67.

6 Gimbel, “Governing the American Zone of Germany”, 94.
War Department "abandoned its formal efforts to shift military government to the State Department and shifted toward a more indirect approach." 7 American military government directed the Germans to elect constituent assemblies in the Council of Minister Presidents to draft Ländere, or State, constitutions creating ministries capable of assuming greater responsibility.

In January, 1946, successful local elections that took place throughout the American zone of occupation in smaller towns and villages. Shortly thereafter, in June, American military government under General Clay pressed for the creation of Constitutional Assemblies. This process gave the Germans a firsthand experience with democracy and at a level where the pressure and tension of a national convention was absent. These Assemblies quickly drafted constitutions and "after being reviewed by military government, the constitutions were submitted to the voters in the respective states in late 1946 and early 1947 and approved by respectable majorities." 8 In some instances military government did not immediately approve specific portions of these new constitutions. In Hesse, for instance, General Clay and his staff disagreed with a provision that allowed the state government to usurp control of certain industries in some cases. Although Clay eventually decided to leave the provision unaltered, he suspended it for the time being. 9 Military government subjected the powers of the Länder legislatures created by these constitutions to its own discretion.

Secretary of State James Byrnes publicly spelled out US foreign policy objectives toward occupied Germany in a speech in September of 1946. He stated that reparations had to be paid by

7 Ibid, 96.
9 Zink, The United States in Germany, 181.
the German nation, that a resurrection of a strong Reich was prohibited, and that it was not the intention of the occupation to create from interzonal boundaries "self-contained economic or political units." Brynes also called on the "early establishment of a provisional German government" and stated that "the American people want to return the government of Germany to the German people." This policy statement illustrated the American intention to move quickly toward a national German constitution. At this point, even policy makers believed direct governance of Germany was no longer advisable or possible.

Russian intransigence on virtually every point in early four-power Allied talks in London during 1947 led America, Britain and France to pursue a separate, western German constitution. After Soviet representatives walked out of the Allied Control Council immediately prior to the Berlin Blockade, President Truman stated that the Army would continue to implement "American policy to develop German self-government and administrative responsibility."

General Clay followed this promise to its fullest extent and pushed for a German Constitution as an integral part of US policy. Before the opening of the London Conference of 1948, where Britain, France, the United States and the Benelux countries debated policy on Germany and the Ruhr region in particular, Clay stated in a cable to Washington that "a constitutional assembly should be elected...to begin drafting the German constitution." Clay emphasized the need for a central government, federal in nature, that would still be able to administer the nation effectively. This requirement provoked an inter-Allied dispute over the nature of German government. For security reasons, the French delegation pushed for a

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11 Gimbel, 100-102.
confederation of quasi-independent states that would be dominated easily. The French stance conflicted with Clay’s belief in a revitalized Germany. Clay stated that “a loose confederation of states cannot possibly cope with the conditions which will exist in Germany for several years to come.” Clay also pressed for allowing the Germans considerable room within any proposed guidelines to write a constitution that would be German in nature, not a foreign imposition.12

As the London Conference progressed, French opposition to the timing and nature of the establishment of a West German government proved to be a considerable obstacle. Progress stalled to the point that Clay advised a British/US bizonal agreement independent of the French zone.13 This implicit threat, coupled with the incentive of the Marshall Plan, proved enough to force the French into accepting the London Communique, issued in early June of 1948. The recommendations stated that the military governors should meet with their respective Ministers President and authorize a Constituent Assembly. Guidelines were concise: “the constitution should be such as to enable the Germans to play their part in bringing to an end the present division of Germany not by the reconstitution of a centralized Reich but by means of a federal form of government which adequately protects the rights of the respective states, and which at the same time provides for adequate central authority and which guarantees the rights and freedoms of the individual.”14

Military governors among all the wartime allies believed the abolition of the German Länder of Prussia was critical in the development of German federalism.15 The Allied Control

15 Zink, The United States in Germany, 329-330.
Council Law no. 46 had officially ended Prussia’s territorial existence for the sake of democracy over a year earlier, in February of 1947, by dividing Prussia among the occupying powers.¹⁶ Prussia’s long history of demographic and geographic dominance in Germany’s political order among the Länder and even in relation to the central government was deemed unacceptable. This development, although not directly related to constitution writing in Germany, was directly related to the express constitutional requirement of federalism as stated in the London Communique, and later in the London Documents. Military authorities did not want to take the chance of allowing a dominant regional entity usurp control from a federalized central government. With regard to Iraq, the opposite is true. The Sunni dominance of Iraqi government in recent history is not the result of demographic or geographic dominance, as was the case with Prussia. In Iraq, regional autonomy is key to creating a viable Iraqi government acceptable to the various ethnic and religious groups residing there. Breaking up regional entities, such as the Kurdish state, or the Shia south, will destabilize federalism and allow further dominance from the central government by weakening its component entities.

In July, 1948, occupation authorities released the London Documents, a more formal set of declarations and guidelines on a Western German government, following the London Communique’s earlier guidelines. The Documents went into further detail on the composition of the constituent assembly (one delegate per 750,000 people at the last census). They also restated the relationship between military governors and the future civilian leadership for Germany; the Documents directed the governors to allow German autonomy in legislative, executive and

¹⁶“Control Council Law No. 46: Abolition of the State of Prussia,” in von Oppen, Documents on Germany Under Occupation, 210-211.
judicial fields with severe limitations on foreign relations, and the power to enforce the observance of any approved constitutions.\textsuperscript{17}

The German Ministers President received these documents, and raised some semantic objections. They did not want the finalized product to be called a Constitution, nor did they want the drafting assembly named a Constituent Assembly, as these names implied recognition of a divided Germany, something that no political party wanted to associate itself with. The German Ministers President preferred \textit{Grundgesetz}, or Basic Law, as a title for this provisional constitution. Rather than a Constituent Assembly, the Germans preferred a Parliamentary Council.\textsuperscript{18}

Initially, the western allies viewed this as an attempt by the Germans to regain governance while avoiding constitutional responsibility. After negotiations, the Germans clarified that \textit{Grundgesetz} could easily be translated to ‘Basic Constitutional Law,’ and the allies compromised. The term Basic Law raised no objections among the Western powers, and once resolved the term Parliamentary Council posed no problems. The Western governments also issued a set of specific guidelines in November, 1948 on what the military governors would look for when determining whether or not to approve Basic Law. Allied powers gave considerable leeway in terms of governmental structure; no mention was made of a separation of executive and legislative powers. However, required elements in any constitution were a bicameral legislature, an independent judiciary, guarantees of the States’ and individual’s rights, and expressly enumerated federal

\textsuperscript{17}“The London Documents (1-3),” ibid, 315-318.

\textsuperscript{18}“Reply of the Ministers President to the Proposals Made by the Military Governors,” Ibid, 322-330.
powers. The military governors expected that this document provided enough guidance for the Parliamentary Council.

With these guidelines the Germans crafted a provisional constitution themselves, with very little further guidance or interference. The Germans crafted a document with the Weimar constitution as a model. The Germans presented their first draft of Basic Law to the military governors in January, 1949. Following a review in February, the military governors returned the draft constitution in early March with proposed revisions. Unfortunately, "the American and French representatives objected to what they regarded as undue concentration of authority in the central government and a vague division of power between the central government and the states." In short, the military governors rejected the first draft.

General Clay's political advisors agreed that the German draft gave excessive powers to the central government, "particularly in the fields of public health, public welfare, labor, and the press, which had been specifically excluded from federal control in the London Agreement," and further added that Parliamentary Council granted the central government excessive powers in revenue-raising and tax-collection. The draft stated legislative jurisdiction in ambiguous and confusing ways that would benefit the executive branch. The Parliamentary Council, after objecting vehemently, returned to redraft the constitution and submitted it again on March 10th. The redraft again failed to satisfy the American and French objections to the centralization of

19 "Aide-Memoire Concerning the Basic Law Presented by the Military Governors to the President of the Parliamentary Council at Bonn," Ibid, 343-345.

20 "Even a casual reading of the Bonn Basic Law will reveal a striking similarity to many parts of the Weimar Constitution," in Harold Zink, *The United States in Germany*, 187.

21 Ibid, 187.

22 Clary, *Decision in Germany*, 421.
finance and legislature. "In fact," stated General Clay in his memoirs, "in the financial field the amended Basic Law authorized the federal government to transfer revenue from the more prosperous to the less prosperous states, a power which would almost certainly have destroyed the financial independence of the individual states." Again, the military governors rejected the German's redrafted constitution; in their opinion it had gotten worse!

At this point, German public opinion began to sour in relation to the military government. The Allgemeine Zeitung stated that "it is impossible for a constitution, which from the start bears in the eyes of the people the stigma that it exists in virtue of the will of the victors, to win the nation's loyalty." Further proposals followed the second rejection on March 17th. The military governors found that rather than a real redraft, the Parliamentary Council had only reshuffled the way powers were listed. The gridlock formed because neither side, German or Allied, wanted to upset hard won compromises. The Western allies did not want to upset the London Agreements, and the Germans did not want to throw off the fragile balance of political parties that had crafted the draft constitution.

Tense negotiations within the parties represented in the Parliamentary Council and between the Council and the military governors ensued. Some parties, such as the Christian Democrats, announced a willingness to accommodate the military governors as the lesser of two evils, whereas others continued to hold fast.

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23 Ibid, 424.
26 Ibid, 103.
Concurrently, a meeting of the Western allies in Washington led to the release of a statement addressed to the Parliamentary Council stressing the expectation of a "mutually cooperating attitude" in preserving the London Agreement’s guidelines. The statement represented a veiled threat that if the Parliamentary Council continued to lag behind the military governors’ expectations, further intrusion should be expected. In addition to addressing the Parliamentary Council, the Washington Conference secretly delivered concessions regarding the centralization of finance and executive power that the military governors were allowed to make. Policy makers in Washington instructed the military governors to present the concessions to the Germans at an appropriate time. 27 The new policy "was to proceed with setting up of a German government, making the best bargain possible." 28 Cold War politics drove this consideration. If the first attempt at West German government failed, the Soviet Union would have been the primary beneficiary. However, the Germans negotiating amongst themselves had no inkling of this new policy; they thought only that if they did not compromise amongst themselves and the western allies quickly, they would regret it.

A process of political fragmentation began among the German parties involved in the constitution drafting, threatening to tear apart the Council. 29 At this point, on April 23rd, the military governors revealed the secret concessions to the Parliamentary Council. The effect of this galvanized the parties and they "conceded an administration of major taxes by the Länder to the Allies and a reduction of the powers of the Bundesrat to the Social Democrats, but retained

27 Ibid, 103.
28 Zink, The United States in Germany, 188.
29 "The breakdown of agreement between the German parties seemed complete." in Golay, The Founding of the Federal Republic of Germany, 106.
for the federation power to legislate in the concurrent fields 'to maintain economic and legal unity,' as well as a provision for financial equalization between the Länder." The French and British military governors agreed to approve the draft, and General Clay held out for only a short time; he agreed following minor alterations in phraseology that he deemed more acceptable. Following the approval of the military governors, Basic Law was adopted by a full vote of Parliamentary Council on May 8th, 1949.

In conclusion, America and her allies initially presented too few specifications on the nature of federalism they desired to see in the German constitution. Statements made at the London Conference in 1948 gave the impression of wide latitude in determining the nature of German federalism, while the allies really held a very precise definition of that federalism based principally on the American government's image because of General Clay's leading role in the negotiations. By then forcing the issue, the military governors found themselves faced with a politically untenable situation. If the Parliamentary Council collapsed, a huge political defeat would have occurred at a critical time during the Cold War. When the home governments realized this danger, they reversed course to prevent a fiasco. No long term damage was caused by this, but it would have made more sense to have avoided the situation altogether by providing more specific instructions to the German Parliamentary Council. When guiding constitutional development in Iraq, military government can utilize this experience and by providing the proper specific advice, avoid constitutional troubles later on. In Germany's case study, as we will see in Japan's, the constitution drafting process pulls on historical memory in ways that are difficult to counter. The Germans' desire to create a stronger executive central government came from the

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30 Ibid, 106.
recent past, and the model for Basic Law was largely the Weimar constitution. In Iraq, where constitutional history has largely been suspended by internal coups since the latent provisional constitution of 1964, this historical pull will not be present.
Constitution Writing in Postwar Japan

Occupation authorities of the United States chose to intervene in the creation of Japan's post-war constitution when it became apparent that the government of Japan was both unwilling and unable to draft a document of the required scope and power to ignite democracy in the shattered empire. A lack of explicit guidance to the Japanese government and its own intrinsic conservative nature created a situation where the unwanted intrusion became required. Once the intervention began, it became a grueling cultural ordeal for those involved, particularly the Japanese. Great care was taken to hide the American hand behind the final draft presented to the Japanese Diet. To avoid intervening directly in Iraq’s constitution, American officials have much to learn from this case study. Clear requirements on the content of any constitution must be elucidated at the beginning to avoid intervention later on.

Initial Allied policy toward post-war Japan, stated in the Potsdam Declaration, called for the removal of obstacles to democracy and the establishment of civil liberties. As American forces occupied Japan, General MacArthur received instructions that expanded this policy to include active encouragement of democratic trends. Washington transmitted the ‘United States Initial Post-Surrender Policy for Japan’ to his headquarters in September of 1945. Finally, a Joint Chiefs of Staff Directive (1380/15) spelled out instructions to the General in a secret document not publicized by SCAP until 1948. Neither the Initial Post-Surrender Policy or JCS 1380/15 mentioned constitution writing. Policy makers did not specify what, if anything, they wished to see MacArthur do with regard to a new constitution. Allied policy did call for the removal of laws and organizations contrary to democracy and civil liberties.¹

Initially, American and Allied officials hoped that by maintaining a subtle occupation in terms of constitutional reform, the Japanese people would create their own democratic constitution. The occupation required existing Japanese government agencies to continue running the day-to-day affairs of the nation. A lack of American personnel with the linguistic ability to interact with the Japanese population caused this situation. 2

When General MacArthur and the American occupation forces of the Sixth Army arrived in Japan, they had very sparse guidance in terms of exactly how and where the occupation was to proceed. In fact, U.S. post-surrender policy was only radioed to MacArthur during his stopover in Okinawa en route to Atsugi Airfield in mainland Japan. 3 Following tentative early steps, MacArthur quickly assumed the mantle of authority formerly held by the Emperor himself. He possessed the ego, drive, and maneuvering room from a lack of explicit Allied policy to expand the influence of his General Headquarters (GHQ) under the Supreme Command for the Allied Powers (SCAP) in Japan. SCAP exercised its power on the general population of Japan indirectly. MacArthur did not have the ability to directly control the civil infrastructure of entire nation, but he did have the ability to influence those officials at the apex of the Japanese government. BLACKLIST, the plan to occupy Japan, foresaw MacArthur’s ability to influence at the top; it called on SCAP to find and utilize “reliable Japanese officials and, insofar as practicable, Japanese administrative machinery.” 4 When the encouragement of democratic trends became a priority, SCAP continued this policy of using Japanese officials over into the field of

3 Hellegers, *We, the Japanese People*, v. 2, 438.
reform and constitution writing. SCAP initiated both reform and constitution writing where its influence was the greatest, at the apex of Japanese government.

Throughout the occupation, Imperial Ordinances translated into Japanese law directives from SCAP regarding the abolition of Imperial Japan’s machinery of political repression. MacArthur and his superiors in Washington took special care to avoid offending the cultural sensibilities of the Japanese people. Preservation of the Emperor became one expression of this policy, and it was achieved by working through him, ironically, in the form of these Imperial decrees.⁵ Allied objectives focused on “remaking the political, social, cultural, and economic fabric of a defeated nation,” while “dismantling [an] authoritarian structure root and branch, even while disclaiming any intention to ‘impose’ an alien system of government on the defeated foe.”⁶ Very shortly, this policy of dismantling authoritarianism revealed the need to create something to take its place. The political maneuvers that allowed the Japanese to believe change was not externally imposed reached a new level of complication. Again, SCAP began by exercising its influence at the apex of Japan’s government.

Under the brief tenure of Prince Higashikuni Naruhiko’s Cabinet immediately following surrender and occupation, the Japanese government took action to forestall any foreign attempts at constitutional reform. Prince Konoe Fumimaro, a minister without portfolio, advocated a constitutional review immediately, realizing that “constitutional reform would indeed be a natural consequence of Japan’s acceptance of the Allied ultimatum.”⁷ Konoe also believed that reform

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⁷Hellegers, We, the Japanese People, 441.
was best implemented from within, and that he was the man to do it. After speaking with General MacArthur and receiving an ambiguous commission to do so, Konoe began a constitutional review process that outlasted the Higashikuni Cabinet\(^8\), but he failed nonetheless. Konoe’s project was the victim of changing policies in Washington, where policy makers became weary of his backroom politics. Additionally, the new Cabinet under Baron Shidehara Kijurō began its own constitutional reform project under the aegis of Matsumoto Jōji, another minister without portfolio. Although Konoe’s draft, completed shortly before his suicide (spurred by rumors of his impeding arrest regarding war crime allegations), never influenced any further constitutional drafts, it is a testament to how quickly the internal process of constitutional reform began in Japan.\(^9\)

The Shidehara Cabinet’s constitutional review process was likewise doomed from the start. It was conducted in near secrecy, even from most Cabinet members. Additionally, Matsumoto Jōji was a conservative reactionary concerned with preserving the Imperial system. Matsumoto believed that the 1889 Meiji Constitution required only minor adjustments to satisfy Allied requirements for democracy and civil liberty. His influence was increased by GHQ and SCAP policy to maintain a hands-off stance “because it preserved the fiction that the Japanese government was acting voluntarily.”\(^10\) He pressed his personality onto the team of professors, lawyers and politicians assembled to help him. The Committee produced two constitutional drafts. One, drafted almost entirely by Matsumoto himself, rewrote the Meiji Constitution with

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\(^8\) The Higashikuni Cabinet collapsed in early October, 1946, following a SCAP Directive on Civil Liberties and the Purging of militaristic elements within Japan. See paper on Demilitarization of Japan above.

\(^9\) Hellegers, 438-460.

\(^10\) Ibid, 468.
some minor changes in terms -- deleting references to 'Imperial' Japan, for instance. Other
members of his committee created a second draft, slightly more reformist, yet in American eyes
not nearly enough so. Matsumoto never presented the second draft to the Shidehara Cabinet for
discussion. He wanted to maintain control over what he began to view as his own private
constitution writing convention. Later on, this second and lesser debated draft emerged as the
turning point of Japan's constitutional history in an entirely unexpected fashion.

Meanwhile, numerous political parties were drafting their own draft constitutions.
“[S]ome, like that of the Socialist Party, were quite liberal, and others, like those of the
Progressive and the Liberals, were quite limited. There was no contact between the Japanese
government and SCAP on this matter.” MacArthur's exclusive reliance on official channels
within the Japanese government became a liability in this case. By neglecting to consult other
political parties and their drafts, SCAP effectively closed its eyes to potential alternatives. These
alternatives might have offered backdoor routes to constitutional reform that avoided overt
American intrusion into the constitution writing process.

Further guidance from Washington regarding constitutional reform in Japan arrived in
January, 1946. The State-War-Navy Coordinating Committee Directive 228 (SWNCC 228)
spelled out the direction and destination of constitutional reform required, as well as MacArthur's
authority to encourage it. On one hand, “the Japanese should be encouraged to abolish the
Emperor Institution or to reform it along more democratic lines,” while at the same time the

11 "The Matsumoto Committee toyed with the mechanics of the Meiji Constitution but did not scrap the machinery, even where it had proven unreliable in the past.” Ibid, 475.


13 See Koseki Shōichi's, The Birth of Japan's Postwar Constitution (Boulder: Westview Press, 1997), 26-50, for in depth discussion of
these independent drafts.
Supreme Commander should order the reforms “only as a last result.”\textsuperscript{14} SWNCC 228 also stated that the final Japanese governmental structure must reflect the “freely expressed will of the Japanese people.”\textsuperscript{15} In other words, reforms initiated in closed committees, unknown even to many Cabinet members themselves, already had one strike against them.

As the Matsumoto Committee completed its drafts in early February, 1946, Nishiyama Ryōzō, a wandering reporter searching for a scoop, found the second and more reformist of the two lying on a table in the Committee’s office. Shortly after ‘borrowing’ and copying the draft, the proposed constitution appeared on the front page of \textit{Mainichi Shibun}, a widely read paper, and from there made its way to the Government Section (GS) of SCAP via the Kyōdō and Jiji news services. General Courtney Whitney, the influential head of GS, relayed the draft to MacArthur and stated that it left “substantially unchanged the status of the Emperor with all rights of sovereignty vested in him.”\textsuperscript{16} Although American policy allowed the retention of the Emperor in some form, he was to become a figurehead. These Matsumoto Committee proposals, revealed to American officials unexpectedly and publicly, were unacceptable.

Following some confusion on the extent of SCAP’s powers to direct the actual drafting of constitutions,\textsuperscript{17} MacArthur, on 3 February, 1946, directed General Whitney and the GS staff to create a model constitution to direct Japanese efforts. The \textit{Shibun} scoop catalyzed SCAP’s resolve to intervene. MacArthur presented Whitney a short list of requirements that guided GS in

\begin{itemize}
\item \textsuperscript{14} Theodore McNelly, \textit{The Origins of Japan’s Democratic Constitution} (Lanham: University Press of America, 2000), 6 & 56.
\item \textsuperscript{15} Theodore McNelly, \textit{The Origins of Japan’s Democratic Constitution}, 57.
\item \textsuperscript{16} Ibid, 516.
\item \textsuperscript{17} The creation of the Far Eastern Commission (FEC) as a result of the Moscow agreement in 1945 ostensibly revoked some of MacArthur’s powers; the FEC was still organizing itself and not particularly influential at this time.
\end{itemize}
its unofficial constitutional convention: 1, “The Emperor is at the head of state... His duties and powers will be... responsible to the basic will of the people”; 2, “War as a sovereign right of the nation is abolished”; and finally, “The feudal system of Japan will cease... Pattern budget after British system.”

MacArthur also stated a preference for a unicameral legislature, because in Japan’s bicameral legislature of the time, the upper house was composed of Peers, part of the feudal system and this house was slated for dissolution. GS considered the unicameral legislature a bargaining chip with the Japanese, American officials had no objection to a bicameral body provided both houses were democratically elected. In seven days, GS completed its draft constitution in complete secrecy.

The GS draft reflected a parliamentary system of government in deference to Japan’s constitutional history. It focused on popular sovereignty and civil liberties, expanded suffrage to women and created a powerful unicameral Diet that could resist executive veto. The GS draft included provisions for local self-government, a radically new concept to the Japanese. Perhaps the most noteworthy portion of the constitution is the now famous Article 9, the renunciation of war. Following MacArthur’s approval with one minor modification on the inviolability of civil rights, the draft became Japan’s model constitution.

On 13 February, General Whitney presented the model constitution to stunned Japanese officials. Matsumoto, Foreign Minister Yoshida and the Prime Minister’s confidant Shirasu Jirō expected the discussion to focus on the merits of Matsumoto’s draft. Instead they found their efforts rejected and a complete counter-proposal written by foreigners in their hands. Whitney

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forcefully presented the model, implicitly stating that its acceptance was crucial to preserve the Emperor’s person, and explicitly threatening to present the model to the Japanese body politic should they refuse. As expected, the Cabinet agreed to consider the model, with some reservation regarding the unicameral nature of the proposed legislature.

Over the next week, Matsumoto fought a rearguard action on behalf of his draft, and submitted an explanatory note that he believed would alleviate American objections. These efforts failed; American officials adamantly refused his appeals. Matsumoto attempted to hide his failure; not until 19 February did the entire Cabinet even become aware of the American model! Their collective reaction was shock and revulsion – Shidehara wanted to reject it. Shidehara, at a meeting with MacArthur that same day, expressed concern about the renunciation of war, a provision the Cabinet found particularly distasteful. MacArthur remained steady and continued to deflect Japanese attempts to alter the revolutionary document to their liking. On the 22nd, Whitney met with Yoshida, Matsumoto and Shirasu again and let them know that although the essential nature of the model was unalterable, “modifications in form might be permitted to make the meaning clearer or to conform with Japanese procedure.” Whitney also conceded that a democratically elected bicameral legislature was acceptable. With no other options, Matsumoto agreed to redraft the American model into a Japanese constitution.

Matsumoto attempted to dominate the process of translating the American model into Japanese without informing anyone of his intent. When Matsumoto submitted the complete

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20 Hellegers, *We, the Japanese People*, 518-529. General Whitney is also reputed to have made reference to Japan’s ‘Atomic Sunshine’ to further cow the Cabinet as it considered the American proposal.


redraft to SCAP on 4 March, a marathon re-translation back into English began; it lasted thirty hours. American officials were dismayed as the re-translation progressed, finding in Matsumoto's work subtle - though substantive - changes. For instance, "after a lengthy polemic with Kades [an American military official key in the drafting process] and the American translators over whether the Cabinet gave its 'advice and consent' (hōitsu to kyōsai) or merely 'counsel' (hōitsu) to the Emperor, Matsumoto burst forth in his own 'broken English' to ask the Americans if they had come to Japan to remake his country's language as well as its constitution." 23

These cultural collisions continued until Matsumoto left in anger, leaving further translation to his key aides, Satō Tatsu and Shirasu Jirō. Still, translation disputes continued over seemingly simple concepts such as the definition of 'people.' In the former Meiji Constitution people were referred to as shinmin, or subjects. The Foreign Ministry used jinmin in portions it redrafted, the word commonly used in translations of the U.S. Constitution; Matsumoto's draft utilized the archaic term kokumin, roughly translated as 'country people,' a term deemed less in opposition to the Emperor, as well as being more nationalistic. Variations in the use of the word 'people' would later deny some basic rights to thousands of nationals in Japan. The concept of 'sovereignty' itself also constituted a point of contention when Shidehara's delegation attempted to substitute the word shikō, an ambiguous word not in common use in government, for the commonly understood shuken. This minor difference meant the American draft read, "sovereign will of the People," whereas the Shidehara draft read "supreme will of the People." Matsumoto wanted to avoid transferring sovereignty to the people. 24 The Americans conceded kokumin, but

23 Hellegers, We, the Japanese People, 539.
in the end *shuken* was used rather than the obfuscatory *shikō*.25 One negative result of the *kokumin* concession was that it allowed the Japanese officials to succeed in a feat of "linguistic subterfuge... denying equal civil rights to the hundreds of thousand of resident ex-colonial subjects, including Taiwanese and especially Koreans."26 Although this mistake was rectified by the Japanese themselves in the 1950s, it represents the dangers of cross-cultural translation.

Matsumoto presented the draft to the Shidehara Cabinet for approval, who then resubmitted it to SCAP for public approval prior to its publication in Japanese newspapers and debate in the Diet.27 By this slight of hand SCAP hoped to avoid the image of forcing the constitution on Japan. Suspicions abounded, due to the radical difference between this new draft and the Matsumoto draft scooped by the *Mainichi Shibun* in the previous month.28

As the Japanese Diet debated the draft constitution, American officials allowed much greater modifications than they had in secret. The bicameral concession was only one such modification. The House of Representatives’ proposals that SCAP approved included increasing the amount of free schooling, immediately abolishing the Peerage system rather than phasing it out, increasing local governmental autonomy, increasing the Emperor’s ceremonial roles in governmental appointment, and increasing the majority necessary to amend the constitution to two thirds or more of each house.29 Because debate within the House of Representatives was an open forum, SCAP considered it a representation of the Japanese people’s will. This Japanized
version of MacArthur’s draft constitution passed overwhelmingly in both houses of the Japanese legislature, including the House of Peers that was abolished by its own vote. The Far Eastern Commission, an international body of war time Allies established to oversee occupied Japan by the Moscow declaration in 1945, had no choice but to approve this new Japanese constitution because it represented the freely expressed will of the Japanese people in accordance with the Potsdam Declaration. Thus, SCAP’s connivance to make the new constitution appear as Japanese as possible served two purposes. It avoided both the stain of cultural contamination and unwanted Allied intrusion into America’s Japan. The Emperor’s final decree as sovereign enacted the new constitution roughly one year later on the 3rd of May, 1947.

Although the Japanese Constitution grew into a success, American intervention in its genesis was a procedural failure that SCAP attempted to conceal. The Japanese had not, as American policy makers stated in the Potsdam Declaration, determined their own government. This intervention might have been avoided had SCAP provided much more clear constitutional requirements earlier in the occupation. By entrusting constitution writing to elements within Japanese society that still believed in the Emperor System of government - as exemplified by Matsumoto - SCAP virtually ensured that the draft produced would attempt to maintain the status quo of the Meiji Constitution. If the Americans had established a true constitutional convention involving Japan’s political parties, a more liberal Japanese draft would have resulted. MacArthur could still have presented his three requirements that guided SCAP’s Government Section in their drafting process. In either case, however, the linguistic obstacles that faced the occupation officials would have been considerable. American officials should avoid this experience of

constitutional intervention in Iraq. The image of a foreign-imposed constitution in Iraq smacks of neocolonialism, and will not likely be accepted by the Iraqi people with that stain. If intervention is required for whatever reason, the American hand must be hidden as thoroughly. In any case, the German experience provides a much more apt model to emulate with an equal amount of success.
Conclusions: Constitution Writing in Postwar Iraq

America will dominate post war Iraq in concert with closely allied nations. American influence in determining Iraq’s constitutional development will also be great. Care must be exercised to wield this influence responsibly. In a recent speech, President Bush declared that “The United States has no intention of determining the precise form of Iraq’s new government, that choice belongs to the Iraqi people. Yet we will ensure that one brutal dictator is not replaced by another.” These words are echo statements in regard to both Germany and Japan prior to constitution writing. Yet in Japan, American military government came very close to determining the precise form of Japanese government. In Iraq, that situation can be avoided by applying the lessons learned during the experience of American military government in postwar Germany and Japan. The following initial steps will greatly ease the creation of the constitution writing process based on those lessons.

American officials must initiate constitution writing in Iraq at the regional or state level. As a country composed of an amalgamation of ethnicity, culture and religion\(^3\), as well as many exiled opposition groups waiting to return\(^4\), this step will allow individual groupings of Iraqis to assert their autonomy in the most stable and calm manner possible. U.S. State Department sponsored studies among Iraqi exiles indicates that some type of federal government is a requirement; therefore some local and regional autonomy is necessary.\(^5\) As witnessed in

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Germany, this process of initiating politics at a low level gave occupation officials a sense of political development and provided a stepping stone to a national constitution convention. In Japan, where military government drove for a national constitution quickly and at the national level, occupation officials failed to determine these political trends and hence did not foresee the entrenched resistance to a fresh constitution freed of the Meiji’s failings. State or regional constitution writing provides the Iraqis a democratic opening where competition between regions is not yet present. This will reduce the possibility of a grid-locked constituent assembly at the national level that is concerned first and foremost with which regions are dominant. The example of regional German cooperation stemming from the early establishment of Ländern is a case in point. The regional governments established as a result of these constitutions will also provide a platform from which Iraqis can draft their national constitution.

*Any Iraqi constituent assembly should be composed of representatives from the majority of Iraq’s autonomous groups elected from state legislatures established following regional constitution writing; Iraqi exiles should be allowed to participate, but not dominate this constituent assembly.* Disaster resulted in Japan, where military government attempted to focus its constitution writing at the upper echelons of Japanese government, through the officials of the Imperial Regime. Because of the Japanese government’s attachment to the old regime, an acceptable democratic constitution did not result. The Japanese officials attempted to maintain the status quo of the Imperial system. Germany’s constituent assembly, the Parliamentary Council, represented various political parties from different regions, and formed the basis for a cohesive national West German government. These individuals had no attachment to Nazi disgrace. The parties and regions worked together to form a democratic and German
constitution. Military government in Iraq must seek to emulate the German occupation, and encourage the participation of independent political parties in Iraqi constitution writing.

The question of Iraq’s many exiles poses a much more pressing question today than the postwar world that followed the demise of Imperial Japan and Nazi Germany. The Iraqi middle and upper middle class embarked on an exodus of unprecedented proportions in modern history during Saddam’s brutal regime and is “estimated to compromise as much as 15% of the populace”.⁶ A recent convocation of the exile groups covering the full spectrum of Iraq’s ethnic and religious kaleidoscope met in November of 2002, and proposed that a postwar Iraqi government be composed of an executive committee and a constituent assembly, the later of which would contain 50% Iraqi exiles.⁷ Exiles need to be integrated back into Iraqi society, but they should not be allowed to dominate it. A more reasonable figure for representation is 20-30% at most. Future elections may very well increase these numbers, but the initial postwar years must be led by Iraqis who have lived recent years in Iraq.

Because Iraq’s broken constitutional history is almost a half century past, it is unlikely that any Iraqi constituent assembly will attempt to resurrect a constitution from the past.

Germany and Japan present opposing cases regarding the acceptability of utilizing constitutional frameworks from the past. In Japan, MacArthur and his advisors believed that any association with the Meiji Constitution was unacceptable. The Weimar Constitution of Germany, however, did provide a rough framework for Basic Law. The reason for this dichotomy is simple. In Japan, the Meiji Constitution gave militarists a basis for Imperial War, and constituted the basis

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⁷Strobel and Landy, “Group of Exiles...” accessed online via Lexis Nexis.
for Japanese wartime government. Despite a military coup, Japan nominally functioned under the Meiji Constitution throughout its wartime period beginning in the 1930's. In Germany, the Nazis systematically destroyed the Weimar Constitution before consuming the government entirely. Therefore the Weimar Constitution did not carry the stigma of a Nazi wartime document. It did carry the stigma of a failed constitution. Basic Law was a new constitution only based on the Weimar Constitution; the Matsumoto Committee in Japan merely reworded the old Meiji Constitution. The last Iraqi constitution was written as a provisional document in May, 1964 and focused on Arab unity rather than any particular internal freedoms and rights; indeed, the provisional constitution attempted to achieve just the opposite. The President at the time, 'Adb al-Salam 'Arif desired to transform of Iraq into “a country of Egypt’s solidarity and homogeneity” for his own purposes of political control. Because these goals are so outdated, it is highly unlikely that an attempt to return to the 1964 provisional constitution will occur.

Ensuring that the Iraqi constitution is vital enough to withstand future abuse without American military government actually writing the constitution, requires that the following recommendations are implemented:

_The constituent assembly will require specific guidance from American military government on the substantive requirements of any final constitution._ In both Germany and Japan, we witnessed a significant failure of authorities to accomplish this. Specific guidance will help avoid a situation where American intervention is needed to create a viable and acceptable constitution. American officials must avoid a situation were direct constitution writing is attempted, as in Japan. With modern communication and media, it is highly dubious whether

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American officials would be able to hide their intervention in Iraq, as they did in Japan of the 1940s. American officials in Germany attempted a public intervention because of disagreements over the German interpretation of federalism. The German people resented this intrusion. In Japan’s case study, we saw that military government concealed its own dominant hand in the constitution writing process, knowing full well that the Japanese needed to believe that their constitution was not a foreign imposition. American officials should carefully craft their requirements beforehand to negate the need to meddle later on.

*If American officials want specific relationships between the States and the central government, in any fields, these relationships need to be defined quickly and clearly as federal in nature.* For instance, finance and tax powers will constitute an early point of contention. This issue will directly affect where Iraq’s substantial oil revenues are distributed. Because money equals power, the ability of either state governments or the central government to completely dominate the other cannot be tolerated. If states are to have powers in concert with a central government under a federal system, a balance is necessary. American officials need to establish clear and fair guidelines to prevent abuse by either state or central governments. Germany, a nation without a sole commodity of such value and importance, presented a case study of how financial and taxation issues led to an attempt by military government to impose its will. In Iraq this potentiality is increased, and America military government needs to avoid this bone of contention through clear guidelines.

*Critical to Iraq’s federal nature is the definition of internal state boundaries that encourage a degree of autonomy rather than diminish it.* Iraqi exile groups propose divisions
primarily along geographic lines and roughly along ethnic lines. This solution is only acceptable if the vast majority of ethnic enclaves are not broken apart. For instance, a Kurdish state in the north and a Shia state in the south must not be broken into pieces. For any real autonomy from the central government to grow, these political, ethnic and religious groups cannot be divided. As opposed to Germany, where the state of Prussia was abolished to combat the perceived militaristic nature of German Society, Iraqi states must be left geographically intact and autonomous.

*Fears of a divisive Shia and Kurdish state need to be realized for what they are: fears, not realities.* American policy makers will further stabilize the nation rather than weaken it by allowing these groups the autonomy and freedom denied them by a long history of repression. Any calls for a return to the ‘benevolent’ dictatorships of the Nuri and Qasim era should be rejected. Constitutions created during these eras were not written with freedom as a goal, and neither were the actions of their writers. These very ‘benevolent’ dictatorships are the very substance that prohibited a democratic history in Iraq. Clearly a break with the past is necessary; “the ‘ownership’ of a new Iraq would have to be shared; its vocation would have to be a new social and political contract between state and society and among the principal communities of the land.”

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9 Strobel and Landy, “Group of Exiles...” accessed online via Lexis Nexis.

10 “Some of their [Qasim’s] civilian allies believed that this would open the way for a radical assault on the systems of privilege and exclusion which characterized Iraq’s deeply inequalitarian society, allowing political life to be refounded on a more liberal and democratic basis. However...” [The seductions of office worked on them as powerfully as they had on Nuri al-Sa’id and the sherifin officers who had found themselves, a generation previously, in positions of command in the new state of Iraq.” in Charles Tripp, *A History of Iraq* (Cambridge: Cambridge University Press, 2003), 148.

Military government must determine requirements regarding the balance of power between Iraqi legislative, judicial and executive branches early on. Intervention later on is a messy affair. In Japan, it required a nearly complete assumption of constitution writing responsibilities by military government. Military government in Germany attempted to alter the balance, but eventually determined the struggle became too costly and gave the Germans what they wanted. This guidance is a key to avoiding unwanted intrusion in the constitution writing process. Japan lacked it more than Germany did, and both would have benefitted from better instruction and assistance. In Iraq, where fear of American and western cultural intrusion is an even greater factor, America must undertake to present its criteria for an acceptable balance of power very early in the constitution writing process. This will allow Iraqis to debate how best to achieve the criteria without the shadow of America’s hand forcing them on any particular path to that destination.

When reviewing any constitution submitted by the Iraqi constituent assemblies, great care must be taken when translating. Allowing simple misunderstandings can deny entire segments of the population their full rights as citizens. This was the case with former colonial subjects living in Japan proper, a tragic example not corrected until some years later. Should Iraqi constituent assemblies attempt to engage in ‘linguistic subterfuge’ for whatever reason, American military government must be ready to translate quickly and clearly. For this reason a well qualified translation staff is a crucial requirement.
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