

THE NAZI'S PERSECUTION OF RELIGION AS A WAR CRIME: THE OSS'S RESPONSE WITHIN THE NUREMBERG TRIALS PROCESS

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[1] The track record of both intelligence agencies and the Christian Churches in the war crimes field has attracted controversy. For example, serious allegations have been made regarding help given to suspected Nazi war criminals in the immediate post-war years by both the US Counter Intelligence Corps in the Klaus Barbie case,¹ and Vatican officials as well as other senior Church officials who co-operated with Nazism² and the fascist Ustasha movement in Croatia.³ There exists, however, a less well-documented record of the Office of Strategic Services' (hereinafter 'OSS') support for the Nuremberg prosecutors, which contributed to the recognition that the Christian Churches were amongst the early victims of Nazi war criminality. This article is not an attempt to provide a detailed commentary on the OSS report published in the current edition of this journal. Instead, we will analyse some vital background, institutional and interpersonal dimensions of the OSS's contribution to this aspect of the Nuremberg war crimes trials, particularly the important role of Franz Neumann, which places the report in its wider institutional and political contexts.

The Donovan Collection at Nuremberg

[2] Once General Donovan agreed to act as Justice Jackson's deputy in May 1945, that is, as a senior aide to the head of the US Office of Chief of Counsel responsible for America's contribution to the Nuremberg trials, Jackson's office also acquired the services of OSS's experts on Nazi Germany from the Central European Section (hereinafter "CES") of the Research and Analysis (hereinafter "R&A") Branch. For purposes of exposition, this Branch's contribution can be divided into three broad, and far from clear-cut categories: the supply of broad strategic analysis, the provision of personnel to augment and supervise Jackson's own prosecution staff and other miscellaneous generalised support falling outside the first and second categories. Amongst the Nuremberg files of General Donovan⁴ head of OSS, i.e., America's first central intelligence agency, is a hand-written note attached to an OSS / R&A report on the persecution of the Churches, which states simply "hold for Neumann." But who was "Neumann?" Why should the leadership of the OSS allocate this particular individual responsibility for investigating and analysing Nazi religious persecution as one facet of this regime's overall "crimes against humanity", or, perhaps, crimes against the self-expressions of divinity?

[3] The focus of this article is largely on Neumann's contribution to the analysis of Nazi religious persecution. This is primarily because his overall analysis informs so much of the documentation produced by OSS and other Nuremberg prosecutors and research analysts.⁵ However, the work of other members of the OSS prosecution team, such as Drexel Sprecher, James Donovan, Whitney Harris, Bernard Meltzer, Thomas Lambert, and Robert Stevens, must not be forgotten.⁶

Church specific material within the Donovan collection

[4] Materials generally relevant to the Nazi's persecution of the Christian Churches can be found scattered across the Donovan/Cornell collection, and fall under different genres of OSS and Nuremberg documentation. These genres include draft trial briefs prepared by OSS and other trial lawyers, and internal memoranda between different OSS sub-sections and Branches providing services for Jackson. Other relevant material is located within OSS Research and Analysis Reports (hereinafter 'R&A reports') specifically commissioned by Jackson, other earlier R&A Reports addressing aspects of how the Nazi's governed occupied Europe, and in the many hundred Staff Evidence Analysis summaries of individual items of documentary evidence. One of the most important documents, however, is published in the present edition of this journal – namely a 91-page R&A report entitled "*Persecution of the Christian Churches*",⁷ and cited as "approved by the prosecution review board." This report's own summary

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accurately distils its main purpose: “This study describes, with illustrative factual evidence, Nazi purposes, policies and methods of persecution of the Christian Churches in Germany and occupied Europe.” This study is important not only as a justification for the strategy adopted in subsequent trial briefs, but also for its elucidation of “criminal organisational” elements of religious persecution within, for example, Goebels Ministry of Propaganda. Although the report highlights its own limitations as a document restricted to sources then available in Washington, it also identifies various witnesses from continental Europe, whose testimony should provide vitally necessary supplementary evidence of additional, and much-needed probative value. We shall see that one of Franz Neumann’s tasks was to remedy these admitted limitations.

[5] The main headings under which this report analyses such persecution are as follows:

1. The Nature of the Persecution.
2. The Problem of Establishing Criminal Responsibility.
3. The Basic National Socialist Attitude Towards Christian Churches.
4. Policies Adopted in the Persecution of Christian Churches.
5. Methods Used to Implement the Policy of Persecution.
6. Organisations Bearing Particular Responsibility ...
7. List of Chief Witnesses in the Cases.
8. Appendix: Wartime Documents Relating to the Wurttembergische Landeskirche.

[6] In characterising the nature of the persecution, the authors maintain the anti-positivist thesis that the very act of law-making can itself be considered a war crime, particularly when it subverts the very basis of the rule of law. Throughout the period of National Socialist rule, the Nazis employed a combination of ‘lawful’ and criminal devices to persecute the Churches in a cynically opportunistic manner designed to minimise damage to their other interests

[R]eligious liberties in Germany and in the occupied areas were seriously impaired. The various Christian Churches were systematically cut off from effective communication with the people. They were confined as far as possible to the performance of narrowly religious functions, and even within this sphere were subjected to as many hindrances as the Nazis dared to impose. Those results were accompanied partly by legal and partly by illegal and terroristic means.⁸

[7] The reports analysis of “the problem of establishing criminal responsibility” provides the strategic thinking that, as will be shown below, informed at least the majority of the references to religious persecution within the subsequent Nuremberg trial briefs. The central argument is that

To establish criminal responsibility in connection with the persecution it is sufficient to show that the measures taken against the Christian Churches were an integral part of the National Socialist scheme of world conquest. In many cases it is also possible to show that the measure in question were criminal from the standpoint of German or of international law, depending on the region in which any given act was committed.⁹

This applies the typical Frankfurt School methodology of “immanent critique”¹⁰ to argue that the Nazi regime can be convicted most effectively by demonstrating that it violates not only the laws of ‘foreign’ countries, such as those of its victors, but also the very ‘Germanic’ traditions this extreme nationalistic movement always purported to be militantly upholding. Indeed, from the start, the report argues that, unlike other civil liberty provisions, the key articles of the pre-Nazi Weimar constitution¹¹ “were never formally abrogated by the National Socialist regime, ... were left untouched and still remain theoretically in force.”¹² Furthermore: “respect for the principle of religious freedom”, continued to be reiterated in various official policy statements of the NS regime, and in various “enactments of the National Socialist state, particularly the Concordat of 20 July 1933.”¹³ It follows, therefore, that: “To demonstrate the illegality of specific acts of persecution, it is sufficient to show that they were in violation of these legal provisions.”¹⁴

[8] In other words, and in opposition to what was later to emerge as Jackson’s general strategy, this report argues that the persistence of legal norms “immanent” to the German tradition of criminal law meant that there was no need to resort to *ex post facto* laws introducing a retrospective form of criminalisation akin to the more problematic of the Nazi’s own innovations within the criminal justice system. This attempt to hoist the Nazi leadership by their own petard, which is a practical translation of Frankfurt School methodology of immanent critique, was one of the many areas of disagreement between the OSS / R&A Branch and Jackson.

[9] Within the Donovan/Cornell files, this R&A report is located next to another of the OSS's important contributions to the Nuremberg process: a detailed chart showing "Organisations Responsible for the Persecution of the Christian Church."¹⁵ This was one amongst several dozen organisational charts the OSS Presentation Branch prepared not only for the trial itself but also for the benefit of various interrogators attempting to clarify lines of command and responsibility within the complex and overlapping institutional relationships that comprised the chaotic irrationality of the Third Reich.¹⁶

[10] The memorandum from Carl E. Schorsche¹⁷ transmitting this R&A Report to OSS's Maj. William Coogan,¹⁸ reiterates its unedited and incomplete quality, emphasising that it had been released early "in the interests of rapid distribution to the Staff of the War Crimes prosecution in the field,"¹⁹ and needed supplementation from sources only available on that newly liberated continent

The document is still seriously lacking in evidence of probative value, and is consequently ill suited to serve as the basis for an international discussion. ...[P]articular attention is called to the appended list of probable witnesses. These should be contacted as quickly as possible. It is suggested that the interrogators be briefed by a thorough study, and that they should be cognisant not only of the weaknesses made explicit in the text but also of other weaknesses suggested by critics in the field. ...[M]uch of the material on the persecution of the Catholic Church has been obtained from a secondary work entitled *The Persecution of the Catholic Church in the Third Reich* by Burns Gates, London 1940. ... It would be most profitable if a member of the staff in London could discover author ..., and secure the more solid documentary evidence which must be in their possession.²⁰

This memorandum also gives an early indication of why the leadership of the OSS R&A Branch assigned Franz Neumann, its leading specialist on Nazi Germany, to the task of completing a series of interviews with European victims of Nazi religious persecution, and why this work needed to be given such priority.²¹ The OSS appeared to be particularly keen to be in the forefront of the development of completed trial briefs, so redeeming the ambitious promises James Donovan, its General Counsel, had given to Jackson.²²

[11] General Donovan was not, however, entirely dependent upon his R&A specialists for his information on religious persecution. Through his extensive intelligence contacts with members of the German opposition to Hitler, he employed the expert services of Fabian Von Schlabrendorff, who had experienced Nazi persecution at firsthand.²³ One of Schlabrendorff's many memoranda to General Donovan addressed the "Relationship of the German Churches to Hitler."²⁴ This memorandum emphasised that senior members of the Catholic Church had resisted Hitler's policies by insisting - through their priests - on the essentially unchristian character of National Socialism. Schlabrendorff recalled that "quite a number of the lower clerics ended up in prison or in a concentration camp,"²⁵ and that Delp, a leading Jesuit who was ultimately executed by the Gestapo, "participated in the conspiracy that led to 20 July"²⁶ (i.e., the failed assassination attempt on Hitler).

[12] The OSS's extensive contacts with wider networks of Allied intelligence agencies and diplomatic sources also fed General Donovan with additional evidence of religious persecution. For example, Lt. Walter Rothschild, Chief of the OSS's R&A Documentary Research Unit, a specialist section working out of the agency's London field station, supplied information from British Foreign Office sources on the "German Monist Organisations," of potential use "in connection with the prosecution of religious organisations by the Nazi government."²⁷

[13] Donovan's handwritten addition to Rothschild's memorandum indicated that he forwarded it on the 16 July to "Commd'r James Donovan, with special responsibility for organising the OSS's contribution to the Nuremberg project, with the further order: "hold for Neumann." Neumann was about to join the key European side of the OSS's war crimes project. In fact, Donovan's note is referring to Dr Franz Neumann, whose important role within this aspect of the OSS's contribution to the Nuremberg project requires close analysis as a topic in its own right.

Franz Neumann's role

[14] Dr. Franz Neumann was a former trade union lawyer, prominent member of Germany's Social Democratic Party, and member of the famous, or notorious, Frankfurt School of critical social theory.²⁸ This German-Jewish émigré developed his pre-war sociological analysis of the rule of law completed at the LSE between 1936-39 during his period of forced emigration to Britain. Neumann achieved high academic repute with the publication in 1942 of *Behemoth: The Structure and Practice of National Socialism*²⁹ whose widespread scholarly recognition led directly to his recruitment by the R&A Branch of OSS. His analysis on the Nazi's ideological exploitation of one particular aspect of religious / racist

persecution, i.e., anti-Semitism, continues to provoke controversy.³⁰ This controversy has been especially acute with respect to Neumann's supposedly negative influence upon the treatment of the Nazi's persecution of the Jewish faith within the Nuremberg prosecution process, an alleged "downplaying of the singularity of the Holocaust" inspired, his critics maintain, by his overly functionalist analysis of Nazi anti-Semitism.³¹ Whilst this specific aspect of religious and racist persecution has attracted considerable attention, Neumann's positive investigative work on religious persecution of the Christian Churches has been glossed over by both his critics and historians of the three scholarly literatures to which his various engagements made an important contribution: the OSS/CIA, the Frankfurt School of Critical Theory, and constitutional theories of the rule of law.³² Fortunately, however, the Donovan / Cornell files provide additional material enabling a partial reconstruction of this aspect of Neumann's role as "First Chief of Research" within this agency's war crimes work.

[15] One initial question is why did Donovan, a prominent Irish-Catholic and conservative Republican, select Neumann, a German-Jewish socialist émigré, to investigate Nazi religious persecution within Europe during late July and August 1945? For what reasons did the OSS leadership give this topic such a high priority for Neumann's research team, as distinct from, say, issues raised by the Nazi's anti-Semitic extermination campaigns?³³ Did the fact that Neumann alone had been singled out from amongst the formidable array of legal experts that Jackson and Donovan had gathered to provide guidance on the key aspects of the prosecution case against each of the individual defendants allow religious aspects to feed into all appropriate trial briefs? In the eyes of the OSS leadership, did Neumann's Jewish background give the appearance of an enhanced impartiality based on his perceived freedom from intra-Christian sectarianism? These questions will remain open at least prior to the CIA's complete declassification of the OSS personnel files.

[16] However, one aspect of Neumann's qualifications for this task can be partially elucidated. Neumann had personally been responsible for drawing up extensive material for the "Civil Affairs" project on post-war military government of Germany, which Gen. John H. Hilldring, of the Civil Affairs Division of the US War Department, had commissioned from the OSS R&A Branch. This inevitably covered the issue of de-Nazification policies in all sectors of German society, including the German Churches, and, in May 1944, resulted in Neumann's subsection producing a series of pamphlets. One of the pamphlets set out US policy with respect to Christian Churches, including pro-Nazi factions within them.

[17] Not surprisingly, many of the trial briefs against the central agencies of Nazi rule include references to religious persecution. These OSS contributions are largely informed by Neumann's functionalist conception of the political nature of Nazi persecution, which – through a series of escalating stages – was cynically designed to instil fear into actual or potential opponents. For example, Thomas Lambert's draft trial brief on the 'Leadership Corps of the Nazi Party', argues that this body represented a criminal organization whose persecution of the Churches formed one part of a wider conspiracy that aimed to destroy Germany's parliamentary democracy.³⁴ This conspiracy resorted to a variety of illegal and terrorist devices, including the destruction of independent German labor unions, and the plundering and looting of public and private property within occupied Europe.³⁵ This "master plan" culminated in the Nazi's establishment and consolidation of a totalitarian system of government and social control. Through a series of incremental stages, this system abolished the very distinction between the Nazi Party and the institutions of the German State and other public institutions within civil society, including the Churches, which could otherwise mediate or limit the Nazi's political authority. Both in Church affairs and more widely, the Leadership Corp purged the government of non-Party members, who were then replaced by Nazis or Nazi sympathisers, whilst also combining ministerial and Party offices in the same political leader. This criminal organisation's subversion, and planned ultimate destruction of the Christian Churches included a campaign of persecution of the Christian clergy together with "a large body of anti-Semitic and discriminatory laws".³⁶

[18] Evidence of the persecution of the Christian Churches and of the Jewish religion also formed part of a trial brief by Whitney R. Harris³⁷ entitled "The Gestapo and the SD and Ernst Kaltenbrunner."³⁸ This brief charged the Gestapo (Secret State Police), the SD (Intelligence and Security Service) and Ernst Kaltenbrunner, (who was Chief of the Security Police and SD from January 1943), with specific complicity in the overall Nazi conspiracy. Once again, the material on religious persecution is placed in the wider context of how these agencies committed crimes against humanity as an integral part of the Nazi's master plan, its conspiracy to seize and consolidate ideological control and totalitarian power within Germany by eradicating sources of actual and potential opposition. This material formed part of the evidence on which these agencies were judged to be criminal organisations.

[19] Evidence of anti-Christian persecutions is also found in briefs against indicted organisations that were ultimately acquitted. For example, within the brief prepared by OSS's Major Robert G. Stephens and

Charles S. Burdell, USNR on the “Criminality of the Sturmabteilungen” (i.e., the paramilitary SA or “Stormtroopers”).³⁹ By references in part to materials taken from its publication *Der SA-Mann*, this brief reiterates aspects of Neumann’s “spearhead theory.” For instance, it illustrates how the SA persecuted and destroyed Christian and Jewish institutions and other perceived enemies of the Nazi state as an integral part of a militaristic campaign to prepare and train the German people for an inevitable war of aggression.⁴⁰ The brief also identifies Goering and Hess as the SA’s leading figures.

[20] These contributions from OSS lawyers clearly informed Jackson’s overall thinking on the political nature of the Nazi’s persecution of the Churches. For example, the final materials included in *Nazi Conspiracy and Aggression* regarding the “consolidation of control,” clearly reiterates not only key themes within *Behemoth* but also summarizes earlier OSS analysis, including aspects of the early R&A report.

Thus possessed of the machinery of the German State, the Nazi conspirators set about the consolidation of their position of power within Germany, the extermination of potential internal resistance and the placing of the German nation on a military footing.

(a) The Nazi conspirators reduced the Reichstag to a body of their own nominees. ... The conspirators greatly enlarged existing State and Party organizations; established a network of new State and Party organizations; and ‘co-ordinated’ State agencies with the Nazi Party and its branches and affiliates, with the result that German life was dominated by Nazi doctrine and practice and progressively mobilized for the accomplishment of their aims.

(b) In order to make their rule secure from attack and to instil fear in the hearts of the German people, the Nazi conspirators established and extended a system of terror against opponents and supposed or suspected opponents of the regime. ... Among the principal agencies utilized in the perpetration of these crimes were the SS and the GESTAPO, which, together with other favoured branches or agencies of the State and Party, were permitted to operate without restraint of law.

(c) The Nazi conspirators conceived that ...it was [also] necessary to suppress or exterminate certain other movements or groups which they regarded as obstacles to their retention of total control in Germany and to the aggressive aims of the conspiracy abroad. Accordingly:

(1) The Nazi conspirators destroyed the free trade unions in Germany. ...

(2) The Nazi conspirators, by promoting beliefs and practices incompatible with Christian teaching, sought to subvert the influence of the Churches over the people and in particular over the youth of Germany. They avowed their aim to eliminate the Christian Churches in Germany and sought to substitute therefore Nazi institutions and Nazi beliefs and pursued a programme of persecution of priests, clergy and members of monastic orders whom they deemed opposed to their purposes and confiscated Church property.⁴¹

[21] Other documentation within the Donovan/Cornell files argues that the ‘revolutionary’ thrust of the Nazi’s master plan had to struggle to overcome institutional resistance from various traditional sectors of German society, including – according to the statement of five German Army Generals – the Armed forces. For instance, a large document dated November 19, 1945 contains the statement of the five German Generals, Walther von Brauchitsch; Erich von Manstein; Franz Halder; Walter Warlimont; and Siegfried Westphal.⁴² This statement claims that the majority of the Army’s officer corps rejected and opposed many of the Nazi’s domestic policies as “unworthy of the German nation,” including all forms of religious persecution.⁴³ The Nazi’s leadership undertook such persecution with neither the advice nor the consent of the Army, who – in common with many Church leaders -- represented one of the many semi-autonomous institutions of German society that the Nazi regime had to subvert in order to fulfil its own political and genocidal programs.⁴⁴ Once again, the persecution of the Churches is represented as one part

of a wider unacceptable programme involving Hitler's policies on Jews, the indoctrination of youth, "financial manipulation," "muzzling" of the law, and Hitler's breaches of agreements with foreign countries.

[22] General Thomas's account of defendant Schacht's opposition to Nazi domestic policies on religious affairs is supported by Schacht's own written testimony contained in a letter addressed to General Donovan. Donovan had actively solicited this statement, which Schlabrendorff, one of his assistants, had previously helped Schacht compose in terms which, amongst other things, concealed its joint composition. This covert strategy, which also included the self-interested statement that Schacht was only interested in coming to an arrangement with Donovan personally, was, perhaps, deemed necessary as it defied Jackson's prohibition of "doing deals" with the defendants. Captain Norden, one of the General's own personal staff drawn directly from the OSS, then forwarded 'Schacht's' letter to Jackson.

General. May I ask the great favour of writing to you. ...Thanks to my official position I think I know more of the background of Hitler's policy than many others. ... I would therefore be very grateful, if an officer of your high standing, of your experience and wisdom and of your well known international reputation, would be willing to look into a brief summary of the underlying reasons and conditions of the dreadful Nazi regime, as I have experienced them. I would greatly prefer to submit such summary to a man of your judgement and capacity than to any of the lawyers or defence counsels which may appear before courts.⁴⁵

[23] This is followed by Schacht's 13 page handwritten letter to Donovan recalling, for example his opposition to religious persecutions of both Christian and Jewish faiths.⁴⁶

Quite early I had expressed my opposition to these things to Hitler. Early in May 1935 I had handed him a memorandum in which I demanded the stopping the attacks on the Church, legal protection for the Jews, and liquidation of the Gestapo. In spite of the fact that Hitler tried to pacify me by explaining that these as temporary revolutionary phenomena, I repeated my opinions publicly a few weeks later in Königsberg. The publication of this speech, in which I also stood up for freemasonry, was banned by Goebels. I had the speech printed in the printing room of the Reichsbank, and in this way 250,000 copies were distributed all over Germany. ... I had continuous fights with the majority of the Gauleiters, partly concerning questions of maltreatment of Jews, partly concerning encroachments on the state. All of these conflicts were concluded in my favour.⁴⁷

[24] Donovan had not however elicited these lengthy statements from prominent potential defendants to simply document opponents of religious persecution. In the case of the German Generals, his plan was to combat Jackson's plan to criminalise the entire German High Command as a 'criminal organisation', irrespective of the actions or indeed anti-Nazi opposition of a number of leading figures. A further motivation was Donovan's attempt to discredit National Socialism in the eyes of the German people by having Schacht, and other prominent representatives of 'the other Germany', provide damaging oral testimony against Nazi leaders. Jackson opposed both aspects of Donovan's alternative trial strategy, which culminated in the ultimate breakdown of their relationship in late November 1945.

Neumann's engagement with war crimes projects as a leading figure within OSS's Research and Analysis Branch

[25] The intellectual driving force behind OSS / R&A's analysis of Nazi Germany were three scholarly members of a subsection of the R&A Branch: Franz Neumann, Herbert Marcuse and, Otto Kirchheimer.⁴⁸ These were three anti-fascist German-Jewish émigré scholars, affiliated with the Frankfurt School of critical social theory, who, between 1943-45, were employed by the "Central European Section" of OSS's R&A Branch. The OSS employed the scholarly talents of Neumann,⁴⁹ Marcuse, and Kirchheimer to help develop a broad program that addressed war crimes issues as one aspect within the wider context of a program of post-war de-Nazification and democratic reconstruction within Germany. The ideal was to

generate a robust analysis of the causes and nature of Fascism to allow for post-war policies to be formulated that optimised the prospects of its permanent removal from the European scene. Each of these analysts was also committed to a broadly socialist model of democratic reconstruction, with Neumann taking the most pragmatic, or comparatively moderate, social democratic perspective.

[26] These three scholars soon formed the intellectual leadership of the CES, with Neumann playing the pre-eminent role following not only the success of *Behemoth* but also his forceful personality.⁵⁰ Neumann was the leader of this CES group partly in terms of his institutional seniority – despite being an ‘enemy alien’ – he was ultimately promoted to “acting head” of this sub-section. His leading role also depended upon general recognition of his superior expertise in German affairs, including recognition from those who were formally ranked as his immediate superiors within the OSS hierarchy.⁵¹

[27] Before addressing the specific details of the OSS / CES’s involvement of in war crimes work, it is important to provide a brief sketch of the three distinct but interrelated phases of their analysis of Nazi Germany. During the course of 1943, this OSS section was especially interested in describing and analysing the nature and functioning of the National Socialist state on every level. This meant analysing stories from the European press agencies, radio broadcasts from the German Reich, reports from refugees who recently arrived in America and interrogations of German POWs. From such diverse sources, the CES assembled and analysed a detailed picture of the economical, political, social and cultural situation in Nazi-Germany. As Katz notes: “Their studies ... dealt with the potential significance of everything from the effects of bomb damage on civilian morale to changes in ladies fashions.”⁵² From early 1944, a second stage commenced, namely, the detailed preparation of plans for post-hostilities military government and the rapid reconstruction of democracy in Germany. At this time, the CES’s political line, was, according to Katz, “to steer a middle-course between the extremes of a punitive Morgenthauism [mass administrative punishment and penal labour] and a call to rebuild Germany as rapidly as possible as a bulwark against the Soviet Union.”⁵³

[28] The third phase began, in a hesitating way during the autumn of 1944 but intensified in the late spring of 1945. In this phase, Neumann moved away from post-hostilities planning of Military Government to lead a special OSS war crimes research and analysis team addressing key planning and strategic issues. Following a meeting of the OSS Projects Committee, its chairman Richard Hartshorne, recorded that a special War Crimes Committee had now been established, composed of Neumann and a small group of more senior officials.⁵⁴ Neumann also took charge of revising the first draft prosecution brief detailing the personal responsibility of Hermann Goering, the most senior defendant, which was intended to operate as a dry run to test the theory that Jackson and OSS officials had proposed. In order to better demonstrate Goering’s criminal responsibility, Neumann took responsibility for having this draft brief amplified and supplemented with further evidence.⁵⁵

[29] In other words, at an early stage in the trial preparations, Jackson decided that it would be useful to test the strategic thinking that his agency was currently developing against a concrete example of a prosecution brief against one of the leading defendants. The idea here was that any problems that emerged during this “dry run” could then be analysed so that they would not be repeated during the trial itself. This prototype prosecution brief was also supposed to highlight any difficulties within the overall trial strategy, which could then be analysed and corrected long before the start of the full trial. Jackson’s office commissioned Franz Neumann, who had been appointed head of OSS/R&A’s war crimes unit, to prepare a portfolio on Goering’s systematic looting of works of art from across occupied Europe.

[30] During the summer of 1945, Jackson appointed Neumann “First Chief of Research” for his office. In this capacity, Neumann was to oversee the preparation of various prosecution briefs and evidence in first Washington and then Paris, London, and Nuremberg itself. It was as a leading member of the US war crimes staff that Neumann returned to his native Germany for the first time since his escape in 1933.

[31] During the war and immediate post-war period, Neumann was widely recognised as the leading authority on National Socialism both within, and beyond, this small group of émigré scholars.⁵⁶ This recognition extended to his *de facto* institutional leadership both of this sub-section, and ultimately of the specially created OSS’s war crimes unit. This unit formed one part of Justice Jackson’s American prosecution team at Nuremberg, which brought together staff from a number of other government agencies. During the last two years of WW2, CES composed a series of formal R&A Reports on war crimes issues. These early reports concentrated less on the details of trial strategy and evidence of individual proof, than outstanding political and strategic factors. At this time, the very decision to hold a formal trial before an international court, as distinct from resort to summary executions or military tribunals, had not yet been agreed, and was still being strongly opposed by the British.

[32] During the summer and autumn of 1945 as the prosecution chaotically attempted to organise its cases for the Nuremberg trials, Donovan selected Neumann to head a newly-created OSS / R&A research unit.⁵⁷ Neumann formed part of approximately twenty-four OSS staff-members. Neumann's own evaluation of his task becomes clear in a letter which he wrote to Horkheimer on June 26, 1945. "I have been appointed Chief of the War Crimes Unit of OSS in Europe. I do not covet this appointment, but one has to do one's duty."⁵⁸

[33] Neumann was included amongst the "top staff" Jackson included in his advance party to Paris.⁵⁹ This party was "stopping off" at London "long enough to confer with their British opposite numbers and compare information and documents."⁶⁰ This advance party from the American prosecution team was largely responsible for negotiating with other Allied powers the "London Agreement" of August 1945, whose charter provided the legal basis for the Nuremberg trials. Neumann's personal role in relation to these agreements is not clear from the archival record. He is not cited as amongst those conducting face-to-face diplomatic negotiations with the Russian, French, and British delegations.

[34] Later, Neumann was appointed to the post of First Chief of Research within Europe. As Intellmann notes

In the middle of August 1945, Neumann arrives in Europe. He first goes to London and Paris, before 'travelling under heavy guard for fear that he would be recognised' - arriving in Wiesbaden where a section of the R&A Branch is set up since the beginning of July. He heads the OSS/R&A efforts in Nuremberg as First Chief of Research taking charge of a staff whose work it is to examine and analyse complete available documents, in order to compile from this material the charges/indictments for the International Military Tribunal. Justice Jackson and the Allied prosecutors intended to go through the trial process relying primarily upon written exhibits.⁶¹

[35] It is likely that, behind the scenes, Neumann was providing Jackson's prosecutors with strategic and much-needed analytical assistance. Whilst Neumann was leading the OSS war crimes unit in Europe, Marcuse was left behind in OSS's main Washington office to supervise the completion of the remaining OSS war crimes reports.⁶² Working under Neumann's supervision, Marcuse had personal charge for providing an initial draft of the report on the overall "Nazi conspiracy to achieve world domination." The conspiracy device, which was a distinct feature of the American prosecution strategy, was amongst the most important and legally innovative aspect of the Nuremberg indictment. Yet this conspiracy device allowed a series of otherwise disparate events, such as domestic atrocities against the Churches, Jews and others civilians committed from 1933 onwards, to be included alongside both traditional war crimes, and other innovations, such as "crimes against the peace."

[36] One point, which still requires clarification, is why was Neumann, rather than another prosecutor with a Christian background, selected to travel to Europe to gather evidence of religious persecution in order to supplement the gaps within the earlier R&A Report. One possible answer lies in the positive impression he created amongst Jackson's own staff, particularly Telford Taylor, a rising star in Jackson's organisation. Telford Taylor recalls that "[t]he OSS staff included a number of able and learned experts on the Third Reich" and that "these included Franz Neumann, author of *Behemoth*." There is also reliable firsthand evidence that Taylor struck up good interpersonal and professional relations with Neumann.⁶³ In turn, Neumann's positive working relationship with Taylor, and others from Jackson's senior staff, gave Neumann "great freedom of discourse" with the investigating lawyers.⁶⁴ The idea that Taylor's influence played a part in Neumann's project is supported by Taylor's important planning memorandum to Jackson (dated June 2 1945). This concluded that the OSS's background information, although valuable in itself now required further supplementation with "testimonial evidence suitable for court use."⁶⁵ This, in turn, entailed gathering evidence from continental Europe, including prisoner of war interrogations, of a different type from what was currently available in Washington.⁶⁶ Taylor's memoir also notes how once Jackson's team arrived at Europe they were able to draw upon OSS resources, such as Allan Dulles, in order to obtain "valuable evidentiary material" such as the "diary kept by Galeazzo Ciano, Mussolini's son-in-law and Foreign Minister." Taylor's account implies that this agency's senior CES staff were specifically needed to supplement Jackson's team in Europe. The centre of interest had now shifted to Europe, owing to the need to gather evidence suitable for trial testimony.

[37] James Donovan, OSS's General Counsel, impressed upon Jackson's senior team the urgent need to gather such evidence from continental Europe.⁶⁷ Five days later, Jackson acted directly upon Donovan's advice and made plans to travel to Paris on May 22.⁶⁸ Taylor's memoir also recognises that the prosecutors were sufficiently impressed with OSS's strategic R&A Reports that they specifically

requested that Neumann and their other authors should personally form part of the advance party. This party was to travel to Europe to gather empirical testimonial and documentary evidence, which had *only recently* become available following the military defeat of Germany.

[38] In early June 1945, Jackson's office placed considerable pressure upon OSS for support from its CES experts, Neumann, Kellerman, Herz, Doerr, and Eisenberg. The resulting diversion of resources, exerted a detrimental impact upon other types of OSS / CES research and analysis, provoking a degree of internal dissonance within OSS / R&A's memorandum suggests that Neumann was given the overall OSS / R&A responsibility for war crimes analysis across continental Europe, where, with the surrender of German armed forces and military occupation, Allied attention had now focused in earnest.⁶⁹ The memo continues, "[i]n the meantime Schorske, Neumann, the Central Europeans, and the War Crimes staff have been under the impression that the men in question could be summoned by Neumann."⁷⁰

[39] Giving Neumann this responsibility to "hand pick" his own staff from R&A / ETO is also significant as an indicator of the esteem in which he was held by his immediate military and administrative superiors within OSS. It is not clear whether Neumann was, in fact, ever given the opportunity to exercise this personnel aspect of his responsibilities. This memo also refers to a cable from Mr. Morse that "ear-marked a group of R&A/ETO people for war crimes work." This statement could imply either that Neumann had to select from within a helpful short-list, or that Chandler Morse, head of the London outpost of R&A, appointed these staff without any input from Neumann or CES. Langer's memo is clearly animated by his desire to prevent the emasculation of his section's remaining work upon Germany and central Europe more generally, by having his best and most senior CES staff allocated abroad to war crimes work.

[40] Whatever the internal politics, in August 1945, Neumann was sent by General Donovan and Justice Jackson to London and Paris, which had now become the central focus of Nuremberg preparations. As Katz notes,

[t]he end of the European war signalled the third phase of their work which entailed the preparation of materials relating to the prosecution of war criminals. Franz Neumann, regarded by many as the foremost authority on National Socialism in the government, left for Europe, where he served as expert consultant to the American War Crimes Staff.⁷¹

[41] According to an undated financial document within the OSS war crimes file but clearly written during the summer of 1945, Neumann was the most senior civilian officer (and of equal grade with the most senior military employee) "presently engaged in War Crimes" [sic] not only in the CES but in the larger and encompassing European-Africa Division of OSS / R&A.⁷² This document allows for a single "sea trip" and "4 air trips to and from Paris via London." The OSS / R&A field office in London had been assigned war crimes research. Hence, presumably Neumann's visit there was to include a liaison and supervision function.⁷³ Katz suggests

[o]nce they [CES / R&A] had identified the criminals, they returned to the grim task of documenting their crimes. Since the collapse of the German armies, Neumann's legal and political expertise had been in great demand, and in mid-August he returned to Europe for the first time since his flight [from England]⁷⁴ in 1936. His itinerary brought him first to London, where he was given a bracing sense of the gulf that had separated the theorists and policy analysts of R&A / Washington from the chaotic realities of the European theatre, and then to Paris, where the European operations of the R&A had been centred since the Autumn of 1944. Finally ... he entered the American zone of occupied Germany and made for Wiesbaden, where an R&A Mission, set up in an abandoned champagne factory, had been functioning since the beginning of July.⁷⁵

[42] Although not cited, the details of Katz's account about Neumann are supported by additional archival material. This provides not only a helpful overview of the nature and context of OSS's contribution during the months before the trial opened, but also additional insight into the chaotic state of affairs and internal feuding within Jackson's organisation. On August 3, Neumann wrote an urgent memo from the London Field Office of OSS to Sherman Kent, the acting head of the OSS / R&A Branch. This indicates that Neumann may have arrived in England during the last week of July.⁷⁶ In this memorandum,

Neumann presents his “[f]irst report on war crimes Europe”, based upon “extensive discussions with Commander Donovan, Colonel Murray Bernays, Colonel Wheeler, Colonel Amen, Alan Evans and Just Lunning.” This report paints an unpromising picture of the fractious, confused and chaotic “organisational setup” of Jackson’s team. This team not only lacks a “unified direction of research and collection of evidence” but also any clear chain of command and decision-making that integrates its rival sections. Neumann suggested that the top level was preoccupied exclusively with the protracted international agreements currently being negotiated with the French, Soviet, and British legal and diplomatic representatives. Indeed, it is clear from his preliminary review that, at least at this early stage, Justice Jackson had taken neither Neumann nor the remainder of the senior prosecution team into his confidence regarding the obstacles that were impeding progress.

[43] Neumann explains that Bernays, based in London, had successfully appropriated all new staff from Washington, and that his section is responsible for “all documents in Great Britain.” Neumann suggests that part of the London OSS field office, “the Rothschild group,” were acting as “the counterpart of this organisation.” In a severe indictment of Bernays, Neumann remarks that only this OSS group “is able to handle the documents and does so successfully.”⁷⁷ Col. Storey assisted by a former OSS officer, Col. Gill, who performed the role of executive officer, headed the Paris organisation. Neumann reports that the majority of the OSS General Counsel’s staff, including “Commander Albrecht, Major Coogan, Lt. Sprecher and others,”⁷⁸ like Col. Amen, who headed the interrogation section, was receiving assistance from OSS’s “X2 personnel under Sherman.” However, the process of carrying out interrogations of the major defendants had not yet begun.

[44] Whilst the previous discussion should have cast some light on why Neumann was selected to head an OSS / R&A research unit assigned to continental Europe, we have yet to explain why Neumann was given the task of gathering further evidence on religious persecution. It could be argued that his own background as a former-trade union lawyer and labour court judge, and member of the SPD, better equipped Neumann to prepare materials on the exploitation of labour and the economic case more generally. For example, his war crimes unit from OSS / R&A, had produced a series of studies on topics such as “German economic preparation abroad,” and activities of “65 leading industrialists,” which they were particularly keen to draw to Justice Jackson’s notice either directly or through James Donovan.⁷⁹ Neumann was concerned that, notwithstanding his own expertise in the collusion of German industrialists with Nazi war criminality and his supervision of the related ‘Eisenberg project,’ Jackson could remove his OSS / R&A team from playing any leading role in the preparation of the ‘economic case.’ The reason for this exclusion in favour of Jackson’s long-standing friend Francis Shea, may, as already noted, have contained a political element, given the reluctance of the British to approve of any connection between colonialism and war criminality. Hence, Neumann was willing to contest Shea’s assignment, which he notes was the only specific one made to date, directly with Jackson, without seeking prior approval.⁸⁰

[45] Neumann’s opposition to Shea’s control of the economic case, and OSS’s marginalisation of one of the topics this intelligence agency was most suited to contribute was unsuccessful. In fact, Jackson removed from the jurisdiction of OSS their major expertise in the politically sensitive ‘economic aspect’ of war crimes - including the responsibilities of leading German industrialists.⁸¹ Neumann’s interests in war crimes lay not merely in removing the leading personnel of the Nazi regime but in replacing those socio-economic structures that first enabled such individuals to seize and retain power. Jackson’s removal of Neumann’s R&A team from the economic case, combined with partial failures of the wider de-Nazification purges had, in practice, frustrated the practical realisation of the implications of *Behemoth*. This frustration left Neumann with only a limited field in which to exert practical influence in favour of his democratic socialist project. As Herbert Marcuse, his colleague and friend in OSS / R&A, noted

[d]uring his work in the OSS and later in the Department of State (1942-6), Neumann applied the insights gained in these studies [i.e., *Behemoth*] to the analysis and anticipation of German developments. He devoted much of his efforts to plans for the democratisation of Germany which would avoid the failures of the Weimar republic; he tried to demonstrate that denazification, in order to be effective, must be more than a purge of personnel and an abolition of Nazi legislation - that it must strike at the roots of German fascism by eliminating the economic foundations of the anti-democratic policy of German big industry. Neumann says that the efforts to attain this objective failed, but he continued to work for strengthening the genuinely democratic forces in Germany in the narrow field still open for such efforts.⁸²

Therefore, it is reasonable to conclude that Neumann would not have placed the investigation of religious persecution at the forefront of his priorities, and that his research in this area was very much a second best assignment.

[46] Contrary to the idea promoted by Bradley Smith and Aronson that Jackson's senior staff lost faith in OSS / R&A by the early summer of 1945,⁸³ the expertise of Neumann's R&A specialists remained in great demand from "each of the three Colonels." That is from Colonels Amen, Bernays, and Story, each of whom insisted that Neumann's group should be attached exclusively to their section. "[E]ach maintains that his work is vital and each maintains that he controls documents which have to be evaluated."⁸⁴ Neumann realised that he was, therefore, in a strong bargaining position as to both the *type* of work his section would be willing to perform, and for which particular section of Jackson's organisation. He exploited this relative strength by flatly rejecting Bernays' demand that the specialists on Nazi Germany, who comprised the OSS / R&A War Crimes Unit, be simply assimilated in Colonel Bernay's London team. This team was engaged in "merely documentary work ... abstracting and evaluating whatever documents come in."⁸⁵ Neumann insisted that his specialists would be better deployed in more senior positions "writing papers," presumably on the *strategic* and planning aspect of the case. This counter-proposal was initially rejected by Bernays, who may, with good reason, have regarded Neumann as a powerful rival in such strategic matters.

I explained that under no circumstances would I do this work nor would I request the transfer of the [R&A] personnel for this purpose nor would I ever get them over from Washington for this purpose. His answer was that under these circumstances he did not see that I could do anything at all, a reply that made me quite happy. However, in the course of the discussion he retracted, and accepted my view.⁸⁶

[47] Thus, it was clear to both sides that Bernays needed the contribution of Neumann's team more than this team needed Bernays' support. The result of this fraught negotiation was that Bernays was forced to agree to Neumann's request. Having overplayed his hand, Bernays was even forced to accept Neumann's strong criticism of the organisational failure of his office, including their inadequate use of the various OSS / R&A Reports already commissioned by Justice Jackson, such as "the Church paper." Bernays agreed to assign Lt Atherton to redress this perceived failing point, to "start real work" as Neumann expresses it with characteristic self-assurance.⁸⁷ Neumann complained to his superiors in R&A that OSS London field office had not yet received R&A war crimes reports, and that although these were in use within Jackson's office, work was being hampered by a shortage of sufficient copies. He requested that this shortfall of R&A Reports be corrected through the assistance of James Donovan, with Alan Evans playing a co-ordinating role between OSS London and Jackson's office.⁸⁸

[48] It appears that Neumann had built up certain tactical alliances within sections of Jackson's team, particularly with Telford Taylor and Benjamin Kaplan. He concludes this memo by suggesting to Sherman Kent that "Carl [Schorske] may desire to transmit some of this to Taylor and Kaplan. That must be left to his discretion."⁸⁹

[49] The same memo also reveals that Neumann considered himself to be in a strong bargaining position with respect to his immediate superiors in the OSS contingent, such as James Donovan. Donovan sought to encourage Neumann to assign his R&A team to work with Storey, not Bernays. This view was based on the belief that Donovan expected, rightly as it turned out, that Jackson would soon assign Storey the bulk of "the actual preparation of the case". At this time, Neumann appeared sufficiently confident in his own authority to refuse to commit himself: "I expressed merely my willingness to survey the situation in Paris and Germany and to make my mind up after a thorough study of the situation."⁹⁰ Donovan's attempt, in all likelihood, to pressurise Neumann by referring the matter to Jackson was rebuffed since: "The Justice replied that I should make up my own mind after a thorough study of the situation. I shall therefore proceed to Paris on Monday and shall renew my discussion with Colonels Amen, Storey and Gill and also survey the tactical situation in Paris. I shall then report to Mr Justice Jackson and arrive at a decision of what to do."⁹¹ What is remarkable here is Neumann's ability to carve out for his team what was in effect a roving commission, the ability to virtually write his own job specification as "First Chief of Research." No other member of Jackson's office was ever granted this position, a fact that may well have caused a degree of resentment. Indeed, at the end of June 1945 Jackson had specifically authorised Colonels Storey and Bernays the "power to assign members of the staff and consultants engaged by or borrowed from other agencies to specific assignments of search, classification, or other treatment of evidence."⁹² This memo also clarifies, for the first time, the nature of Neumann's proposed role, which he made conditional on Jackson's office agreeing to various internal organisational clarifications.

This R&A unit should be incorporated into a research unit of the Jackson mission to be headed by a high officer, with myself as deputy. This research unit should have complete access to all documents, no matter where they are, and to all interrogations and should assist in the presentation of the case. Whether it will be possible to achieve this I do not know.⁹³

[50] Since within weeks Neumann was appointed First Chief of Research, with his OSS / CES colleague Henry Kellermann as his deputy, it is likely that Neumann's proposal for a freewheeling research division was fully accepted by Jackson. However, this was later termed "the Neumann problem" by his rivals within Jackson's organisation, few of whom were satisfied with the nature, restrictions and status of their assigned tasks. Furthermore, there is little evidence that, with greater exposure, Jackson's senior staff lost faith in their OSS / R&A expert consultants on the Third Reich. For example, in making a case for the supplementation of OSS expertise with that of British officials, who for geographical and other reasons had been better placed to acquire fresh evidence of the structure and operations of German military and police organisations, Taylor continued to praise the competence and "conscientious work" of the OSS contingent.⁹⁴

[51] There is some evidence, however, that during his period of conducting research on religious persecution, Neumann may have over-played his hand in demanding an unprecedented degree of autonomy within Jackson's organisation, a privilege denied even to the most senior figures within it. For example, James Donovan, the General Counsel of OSS, soon became able to "reign in" Neumann's free-wheeling operation, at least to some extent. For example, General Donovan issued an internal OSS memorandum entitled "Responsibility for Work in Connection with War Crimes," ordering that "all war crimes activities undertaken by OSS shall be under the direction of the General Counsel."⁹⁵ It further ordered that all personnel "shall retain their basic branch assignment," and that James Donovan must in the future give prior approval to any future staff re-assignments. It is possible, but by no means certain, that this memo represented a direct response to Neumann's successful negotiations with, and earlier reluctance to accept direct orders from, James Donovan.

[52] There is also considerable evidence that, as the pre-trial preparations moved closer to their final phase, the role of the organisation and its OSS sub-group had to change, leading to a direct restriction upon Neumann's research on the persecution of the Christian Churches. During the late summer of 1945, the entire organisation had to concentrate exclusively upon projects that generated material suitable for use in court, rather than the provision of background and strategic studies. Part of this re-organisation entailed drawing up a new "memorandum of understanding" limiting the OSS group within OCC to two central functions: to "furnish personnel to us at our request, who will be full-time for us, not part-time, and will report either to Colonel Amen or Colonel Storey"; and, secondly to: "work on projects to make studies and furnish us the end results. Aside from this, the outside independent OSS business will stop."⁹⁶ For budgetary reasons, James Donovan had to reduce the cost of OSS's commitments, and therefore did not appear to object to this re-configuration.⁹⁷ The minutes to a meeting in August 11, 1945 of Jackson's Pre-trial Planning Group included a reference to a discussion of the "Neumann problem" in the light of the

Justices comments on experts. The Justice does not want Neumann on the continent examining people about religious matters. Storey suggested that we review the R&A projects and decide which ones should be stopped and which ones further pursued. Then he said organizationally we can decide where Neumann should be located.⁹⁸

[53] It appears that Jackson's senior staff both respected Neumann's expertise of his R&A team more generally, and that – in the fraught context of internal rivalry – sought to appropriate this resource for their own particular division. Such appropriation, which Neumann clearly resisted, would entail his R&A team's subordination and assimilation. It appears from an organisational chart of late summer 1945, that Neumann and associated staff were assigned, at least provisionally, to work under Robert Storey in his role as "Director of Document Procurement, Continent." At this time, the OSS's Drexel Sprecher and Albrecht are also listed as forming part of this section. However, Jackson had then placed reference to "Dr Neumann" in hand-written brackets and crossed out references to "and staff," as presumably the debate as to his exact designation and assignment of further OSS / R&A colleagues was, as noted earlier, still being wrangled over between the three Colonels.⁹⁹

[54] The so-called Neumann problem was part of a wider issue regarding the shifting balance of power between Jackson and General Donovan, which – with the impending break up of the OSS as an early casualty of peace – shifted from the latter to the former. Notwithstanding his dependence on their support,

Jackson regarded OSS as a junior partner in the overall prosecution endeavour, and possibly was concerned that OSS elements would continue to owe their first allegiance to General Donovan. Thus, Jackson's policy was to exploit the expertise and resources of OSS, which was particularly vital during the early and middle stages of pre-trial planning and preparation, without promising OSS personnel a major role in the more glamorous court room presentation of the prosecution's case. The reported comments of Jackson's senior staff during the Planning Meeting of August 11 to similar project, and express a desire to limit Neumann's role to the best exploitation of completed R&A war crimes studies

Taylor said that the R&A projects are only background studies; they are educational, not evidentiary, except that there is a considerable amount of evidence buried in them, as Bernays suggested and Taylor agreed. Such matters as orders, decrees, etc. Colonel Amen had a group of men scrutinising the studies to get out of them what will be useful to interrogators. The Justice read over Taylor's memorandum listing the R&A studies and said that the studies on Taylor's list can now be closed out. We will only further supplement them by Amen's and Storey's work on the continent. From here on, said the Justice, this is a lawyer's job. Taylor recommended, and the Justice agreed, that Neumann [should] stay here in the capacity of a consultant to the lawyers who are analyzing the R&A studies and trying to put them into evidentiary form.¹⁰⁰

[55] This document helps clarify the manner in which OSS / R&A reports, including presumably the Churches Report, were used selectively – and without acknowledgement - as raw material both for the composition of prosecution briefs presenting evidence with probative value, and for the conduct of interrogations.

[56] Furthermore, in an outgoing cable, classified initially as “top secret” and addressed to “109 [General Donovan] & 535 only,” Bill Whitney, an OSS lawyer who had previously held a senior post within OSS / R&A London and had later been seconded to Jackson's organisation, reported on August 14, 1945 that Neumann had now been specifically instructed by Jackson to end his interviews with witnesses to religious persecution in Germany and return back to London. This recall stemmed from a combined attack upon Neumann from Colonels Amen, Storey, and Gill, who clearly resented Neumann's ability to reject their demands that his team be assigned exclusively to one of themselves. Accordingly to this cable, these three senior members of Jackson's office “developed strong complaints ... against OSS men travelling on continent without prior clearance with them.” Although Whitney records that “Justice Jackson showed extremely friendly and appreciative attitude generally towards OSS contribution,” he had drawn the line at Neumann's freewheeling operation.

Jackson gave firm direction that no-one is to employ his name on [the] continent without first reporting to Gill and being approved by him to work either under Storey or under Amen. Justice Jackson has himself taken [the] initiative [and has] sent [a] cable instructing Neumann [to] return to London because Neumann is not to conduct interrogation but is to act in [an] advisory capacity explaining [OSS and other] studies etc. ... OSS interests best served by neither initiating from present any objectives whatsoever under Justice Jackson's name except those specifically approved by him. His attitude is that OSS did excellent work of laying foundation and that there is still room for valuable OSS contribution provided that it is strictly within [the] above policy.¹⁰¹

[57] This cable provoked official 535 (presumably Neumann himself) to take issue with these allegations, and attempted disciplining measures. The response addressed to “Whitney alone,” was that

[l]ocation of Neumann specifically cleared with Jackson, who asked that he go to Paris and then recommend where he could make most effective contribution. Storey was informed. ... Jackson program outlined by you is exactly what we had in mind from [the] outset ... I know nothing which had been done which is not within purview of his original general directives to us, which we have carried out by giving all possible assistance.¹⁰²

[58] Wherever the truth of this matter lies, it is clear that Neumann and his OSS / R&A research team had not lost the confidence of other senior members of Jackson's organisation. A

memorandum from an informal staff meeting involving Telford Taylor, Alderman, Benjamin Kaplan, and Deinard, presented Jackson with the following request. "It is felt that Neumann ... Kellerman, Marcuse, and Eisenberg ... who have assisted him hitherto should be put full-time on the staff of the Chief of Counsel and that they should be assigned to the Colonel Kaplan on the aspect of the case which he is preparing."¹⁰³ This meant that it was planned that Neumann's team were to be explicitly excluded from the economic case, and instead assigned to Colonel Kaplan's small team consisting of Farr, Johnston, and Murray, which had to prepare the criminal organisation charges.¹⁰⁴

[59] With Neumann's departure to Europe in August 1945, responsibility for CES's activities on war crimes within the Washington Office was delegated to Herbert Marcuse, who, according to Katz,

coordinated the section's preparations for the opening of the International War Crimes Tribunal at Nuremberg. During that Summer ... he and his colleagues prepared briefs on Himmler and Goering, on Nazi organisations involving the commission of war crimes, and on 'Nazi Plans for Dominating Germany and Europe' (a nine-part series for the use of the War Crimes Staff)."¹⁰⁵

[60] On his arrival at Berlin, Neumann was confronted with the devastation that accompanied Hitler's military defeat and consequent allied occupation. Katz notes that Neumann had to be provided with military protection from the threat of guerrilla attacks from armed Nazi supporters.¹⁰⁶ During this period, such attacks tended to be sporadic and localised, and were not publicised by the Allied authorities for strategic reasons. These attacks included poisoning the food and water of Allied forces, and at least one successful assassination of an American civilian on the Autobahn. On the other hand, other R&A staff encountered no evidence of any such physical threats, and hence moved freely around Germany without any sense of danger.¹⁰⁷

[61] A further memo, dated 30 August 1945, confirms that Neumann's team "now overseas for War Crimes work"¹⁰⁸ included Wallace Doerr, Elizabeth Fitzgerald, Henry Kellermann, John Herz and Robert Eisenberg. In total, there are 22 R&A Branch analysts cited, supported by a further 19 clerical staff. Other OSS staff involved in war crimes research under James Donovan, plus part-time specialist consultants hired under temporary contract for "one off" projects,¹⁰⁹ and OSS / R&A staff already in post at OSS outposts in London, Paris and Berlin, would also have to be added to any more comprehensive list of OSS staff involved in Nuremberg preparations.

[62] Unfortunately, details of OSS / R&A personnel in London and Paris are not given. The range of responsibilities and specialist knowledge covered is comprehensive with, for example, Dr. Arnold Price, whose expertise was in European Geography, involved in ascertaining and checking details of Nazi land seizures and "illegal German annexations, mostly in the East."¹¹⁰ Other staff prepared material, NSDAP crimes to 1934 (Dr. Emil Gumbel) and NSDAP, SS, SD, Gestapo and Police as Criminal Organisations (Albert Phiebig), which contributed to R&A reports which then fed into specific Nuremberg indictments.¹¹¹ Whilst in Europe during the summer of 1945, Neumann made "a determined effort" to "gain for his group a hearing" amongst the high-level organisation manoeuvres between the Allies and the US Joint Chief of Staffs that were currently taking place over the war crimes issue.¹¹²

[63] Justice Jackson, who lacked any experience of cross-examination within criminal trials, initially preferred reliance upon documentary evidence. Such reliance appeared sensible to Jackson and others partly because it saved considerable time by reducing extended periods of cross-examination whose course was not always predictable.¹¹³ This disagreement contributed to the rift between Jackson and Donovan, his deputy, which then led to Donovan briefing journalists against Jackson. In turn, it is likely that this rift effectively ended Neumann's influence upon how the prosecutor's prepared for the Nuremberg hearings.¹¹⁴ Neumann, whose trial experience was restricted to German labour law, did not form part of the large team of OSS lawyers distinguished themselves at the initial Nuremberg trials, such as James Donovan, Whitney Harris, Drexel Sprecher, and (possibly) Robert Kempner.¹¹⁵ Furthermore, Taylor records how Neumann's undisputed expertise within the empirical aspect of Nazi war crimes was not always used to its best effect, particularly during the rushed process of actually *selecting* defendants for formal indictment. Taylor notes

Jackson involved his staff in drafting the indictment, but for some reason ignored them in the defendant-selection process. He and Aldermann were fine lawyers, but neither was an expert on the structure and hierarchy of the Third Reich. ... Neither I nor ... any of my friends and contemporaries on Jackson's staff were consulted. ... Late in August, hearing rumours of what was afoot, I enlisted Franz Neumann's aid and circulated a

memorandum on defendant selection in which I suggested some criteria.¹¹⁶

[64] Jackson however, largely ignored the joint approach by Taylor and Neumann. According to Taylor, the result that serious deficiencies occurred in the preparation of the cases against Gustav and Krupp “which had serious and continuing consequences.”¹¹⁷ Taylor attributes the blunders associated with the prosecution of Krupp partly due to pressure on the legal teams having to rush the completion of unfamiliar work, and as a result of “Jackson’s and Shawcross’s failures to organise their staffs so that the informational resources of men like Passant and Franz Neumann would be adequately considered when the chief prosecutors made the final decisions.”¹¹⁸

[65] Neumann’s roving assignment included a visit to Biebrich in Wiesbaden at the end of August 1945, stopping off in Paris on the way, where the OSS had, in the meantime, established their central office for Germany.¹¹⁹ Neumann was eventually re-assigned to Nuremberg itself, when Jackson decided at the end of August to move the “evidence collection and analysis section” to this city between September 10 and September 17, 1945.¹²⁰ Thus, from mid-September 1945, Neumann’s R&A team prepared and supervised materials for a series of indictments with other OSS colleagues responsible for both interrogation and document analysis. Stuart Hughes, who worked as an interpreter and historical adviser within the OSS’s sub-section, recalls “the staff of experts the omniscient Franz Neumann was assembling for the great trial,” and his own supporting role for the US prosecution office in “extract[ing] affidavits about the late regime’s atrocities from leading anti-Nazi Germans.”¹²¹ It was towards the end of September 1945 that Neumann resigned from the Nuremberg team in favour of a re-assignment back to Washington as a senior analyst with the State department, to be replaced by his deputy Henry Kellermann, who stayed on to witness the opening week of the trial in November 1945.

[66] The contribution of OSS personnel to the major and subsequent Nuremberg war crimes trials did not, however, end with the formal dissolution of the OSS on October 1, 1945, or with the withdrawal of General Donovan and Ralph Albrecht in December 1945. Instead, documentation recently made available by the CIA, indicates that a substantial residue of OSS staff, 134 in total, continued to be employed as of October 1, 1945. When reporting on the War Department on the progress of the imminent dissolution of OSS, John Magruder provided a helpful table giving a breakdown of the numbers, as of 1 October 1945, of full-time staff from different sections of the OSS supporting these trials.¹²²

[67] Magruder notes that

Jackson enlisted the aid of several branches of OSS; namely, Office of the General Counsel, and the R&A, SI, X-2, Presentation, Field Photographic, and Reproduction Branches. The Office of the General Counsel was designated as a central office to coordinate and correlate these activities, to analyse and screen evidentiary material, including that received from other agencies such as MIS and OID and to recruit prosecution lawyers.¹²³

Magruder confirms that since the initiation of OSS involvement, “a great volume of evidentiary documents and studies, including films, movies, graphic and pictorial exhibits, briefs, interrogations and affidavits have been collected.” These were sent overseas to London, Paris and Nuremberg, where “they are further processed for the trials.”¹²⁴ When further reviewing the progress of SSU as of mid-October 1945, Magruder indicates that Justice Jackson had specifically requested that former-OSS personnel be retained on his staff, and that he intended to approve this request.¹²⁵

Conclusion

[68] This article has addressed the contents of both the recently discovered Donovan/Cornell collection and other related declassified archival sources in order to cast new light on one particular dimension of the OSS’s contribution to the Nuremberg war crimes trials - the persecution of the Christian Churches. As far as available sources permit, we have also clarified why Franz Neumann, a German-Jewish émigré and OSS’s leading expert on Nazi Germany, was selected to gather evidence of religious persecution from continental Europe. We have also illustrated why such supplementation was considered necessary to update the OSS / R&A Report published in the current issue. Finally, our article has shown that central aspects of Neumann’s scholarly analysis of Nazi Germany, articulated most clearly in *Behemoth*, exerted both a direct and indirect influence upon how senior OSS and other Nuremberg prosecutors developed

their trial strategy, particular the idea that the Nazi's pre-war persecution of fellow Germans needed to be seen as one phase of a wider and largely political programme involving the use of law to subvert the rule of law.

¹ See TOM BOWER, *BLIND EYE TO MURDER* (1995); TOM BOWER, *KLAUS BARBIE, BUTCHER OF LYON* (1985); ALAN FINKIELKRAUT, *REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY* (1992).

² See JOHN S. CONWAY, *THE NAZI PERSECUTION OF THE CHURCHES 1933-45*, 474 (1968); MOSHE HERCZL, *CHRISTIANITY AND THE HOLOCAUST OF HUNGARIAN JEWRY* 299 (1993); GUENTER LEWY, *THE CATHOLIC CHURCH AND NAZI GERMANY* 416 (1964). *But see*, *CIA Archives show Pius XII saved Jews and Opposed Nazis*, <http://www.cathtelecom.com/news/109/23.html> (last visited January 8, 2002) (On file with the Rutgers Journal of Law and Religion), for a defence of the Vatican citing declassified OSS/CIA files.

³ See JOHN LOFTUS, *UNHOLY TRINITY: THE VATICAN, THE NAZIS AND THE SWISS BANKS* (1993); RICHARD PATTEE, *THE CASE OF CARDIANL ALOYSIUS STEPINAC* 499 (1953); John L. Jr., Allen, *Croatian Connection Remains Most Debated Aspect of Vatican's World War II Legacy*, 5 NATIONAL CATHOLIC REPORTER Issue 6, (1998) noting that:

In the quest to document the whereabouts of assets looted during World War II, the most contested issue touching the Catholic Church concerns its role in Croatia under the fascist Ustasha movement. ...The Ustashi carried out mass deportations and executions of Serbs, Jews and Gypsies. ... New evidence suggesting a tie between the Vatican and the Ustashi surfaced last July. The key finding was an intelligence report, quoting a 'reliable source,' that looted Ustasha gold, worth approximately \$170 million in today's dollars. It had been held at the Vatican for safekeeping at the war's end, and then moved to Spain and Argentina. The report escaped the attention of U.S. investigators but was uncovered by researchers working on a documentary for the A&E cable channel. ...Greg Bradsher, director of the Holocaust-era Assets Project for the American government, acknowledged ... 'the evidence in many respects is raw intelligence data from primarily OSS ... reports.'

Id. at 5; *Vatican Drawn Into Scandal Over Nazi-era Gold*, <http://cmn.com/WORLD/9707/22/nazi.gold/index.html> (July 22, 1997) (on file with the Rutgers Journal of Law and Religion).

See also, Bruce Johnston, *Vatican Priest was Nazi Spy, Says CIA*, DAILY TELEGRAPH, March 7, 2000.

⁴ These files are now located in Cornell Law School, Ithaca, NY, and will be cited as DONOVAN/CORNELL.

⁵ See Petra Marquardt-Bigman, *Behemoth Revisited: The Research and Analysis Branch of the OSS in the Debate of US Policies towards Germany, 1943-46*, 12 INTELLIGENCE AND NATIONAL SECURITY 91-200 (1997).

⁶ For instance, it was Sprecher who helped organise and present the prosecutions' case against the Defendant Baldur von Schirach, the Hitler Youth Leader and Gauleiter of Vienna. He presented documentary evidence that this defendant had, as Gauleiter of Vienna, initiated wartime measures persecuting the Churches in Austria, administered slave labor programmes and deported remaining Viennese Jews. See DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL* 529 (1998). Sprecher was

assigned a particularly difficult case because Schirach had held no major political office and had little involvement in any military matters. Sprecher was given the difficult task of demonstrating that the promotion of Nazi nationalistic, militaristic, and anti-Semitic ideology amongst the young was directly linked to established legal categories of war crime. *Id.* at 523-531, 997, 1000, 1003, & Ch. 52. Sprecher also assisted in the preparation of aspects of the case against the Julius Streicher, the anti-Semitic Gau Leader of Franconia and Nazi publisher, editor and journalist, incorporating and supplementing relevant parts of an internal OSS report on this defendant. During the summer of 1945, he also observed some of Streicher's interrogations. *Id.* at 515.

⁷ R&A Report 3114.4 (draft for war crimes staff, dated 6th July 1945) (hereinafter "Churches").

⁸ Churches, *supra* note 7, at 1.

⁹ *Id.*

¹⁰ See Geoff Pearson & Michael Salter, *Getting Public Law Back into a Critical Condition: The Rule of Law as a Source for Immanent Critique*, 8 SOCIAL AND LEGAL STUDIES 483-508 (1999).

¹¹ That is, art. 135-140, 149.

¹² Churches *supra* note 7, at 2.

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ Based on R&A Report 3114.4, contained in DONOVAN/CORNELL, Vol. 10, 18.02.

¹⁶ See Barry M. Katz, *The Arts of War: "Visual Presentation" and National Intelligence*, DESIGN ISSUES Vol. 12 1996, at 3.

¹⁷ Carl E. Schorsche was based in R&A Washington, and was later to hold high judicial office within America.

¹⁸ Coogan had been assigned to the newly established European section of Justice Jackson's organisation.

¹⁹ Memo from Carl E. Schorsche USNR to Maj. William Coogan, Churches, *supra* note 7, at Handwritten note "O'Malley."

²⁰ *Id.*

²¹ This is developed further in subsequent sub-sections.

²² Sprecher realised this aim with his brief on Robert Ley, who committed suicide prior to trial.

²³ Fabian Von Schlabrendorff was a lawyer and first lieutenant in the reserves. During his early years as a student at the University of Berlin he was the leader of a small anti-Nazi group. He was arrested for his involvement in the July 20, 1944 assassination attempt on Hitler and served time at various concentration camps including Sachsenhausen, Flossenburg, Dachau and Innsbruck. He was released in early May 1945 by U. S. forces.

²⁴ From Memo to General Donovan, Oct 1945 DONOVAN/CORNELL 3 Vol 10, 18:04. (Translated from the original German on the same day.)

²⁵ *Id.*

²⁶ *Id.*

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- ²⁷ See Memo from Rothschild to Col. M Bernays GSC, German Monist Organisation, 9 July 1945, DONOVAN/CORNELL, Vol. 10, 18.05.
- ²⁸ See Alfons Sollner, *Franz Neumann*, 58 TELOS 171 (1981-82); Alfons Sollner, *Leftist Students of the Conservative Revolution: Neumann, Kirchheimer and Marcuse*, 61 TELOS 55 (1984).
- ²⁹ The first edition was published in 1942 by Oxford University Press, and a 2nd revised edition with extended appendix covering events 1942-44 drawn from Neumann's OSS research was published in 1944.
- ³⁰ See BARRY. M. KATZ, FOREIGN INTELLIGENCE: RESEARCH AND ANALYSIS IN THE OFFICE OF STRATEGIC SERVICES, 1941-1945, 56-57 (1989); PETRA MARQUARDT-BIGMAN, AMERIKANISCHE GEHEIMDIENST ANALYSEN UBER DEUTSCHLAND 1942-1949, 45 Studien zur Zeitgeschichte (1995).
- ³¹ SHLOMO ARONSON, *Preparations for the Nuremberg Trial: The OSS, Charles Dwork and the Holocaust*, 12 HOLOCAUST AND GENOCIDE STUDIES (1998); cf. Michael Salter, *The Visibility of the Holocaust: Franz Neumann and the Nuremberg Trials*, in, SOCIAL THEORY AFTER THE HOLOCAUST 197-218 (Robert Fine & Charles Turner eds. 2000).
- ³² See Salter, *supra* note 31.
- ³³ *Id.* See also, ARONSON, *supra* note 31.
- ³⁴ See DONOVAN/CORNELL Vol. 3, pt. 1, 7.09.
- ³⁵ Lambert's role and final draft is acknowledged by Justice Jackson in his preface to 1 NAZI CONSPIRACY AND AGGRESSION, iii (1946).
- ³⁶ Churches *supra* note 7, at 1.
- ³⁷ Harris was another OSS lawyer and author of TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG (1954).
- ³⁸ Dated 10 November 1945, DONOVAN/CORNELL, Vol. 6, 11.06 forming part of "Subdivision 11 / Storm Troops, Gestapo, SS and SD."
- ³⁹ Dated 10 November 1945, DONOVAN/CORNELL, Vol. 6, 11.05.
- ⁴⁰ *Id.* at 22.
- ⁴¹ *Chapter III: International Military Tribunal, Indictment Number 1: Part 2*, in NAZI CONSPIRACY AND AGGRESSION, *supra* note 27, at 15-21.
- ⁴² DONOVAN/CORNELL, Vol.5 pt.1 10.04 , Subdivision 10, High Command and General Staff. It is referred to in earlier documentation contained in DONOVAN/CORNELL, 10.3.
- ⁴³ *Id.* at 17. It also claims that the Army's own leadership in military affairs was challenged and ultimately subverted by the growth and actions of both the SA [para-military 'brownshirts'] and Himmler's SS.
- ⁴⁴ This document formed part of a series of statements Donovan obtained from senior military officers, including a summary sheet, immediately followed by a transcript, of the interrogation of Georg R. Thomas, a retired general with the German Infantry, conducted on November 9, 1945. This interrogation provides details of Thomas's and Hjarmer Schacht's opposition to Nazi policies of religious persecution after 1937, particularly those of Goering, and their subsequent arrest and detention in Flossenburg and then Dachau concentration camps. See DONOVAN/CORNELL, Vol. 2 6.12. Donovan was clearly attempting to 'turn' these military leaders into witnesses for the prosecution, a policy that Jackson opposed by attempting to criminalize the entire German high command as a criminal organisation.

⁴⁵ Capt. O. N. Nordon, Special Assistant to Major General Donovan, Memo for Justice Robert H. Jackson, 15th November, DONOVAN/CORNELL, 48.05.

⁴⁶ Handwritten in German and then typed in English.

⁴⁷ Memo for Justice Robert H. Jackson, *supra* note 45, at 5.

⁴⁸ Here, it is worth noting that Neumann's colleague Otto Kirchheimer, a criminal law specialist who possessed considerable expertise in the transformation by the Nazis of Germany's criminal justice system, was not assigned to Jackson's organisation. When the renewed attention to war crimes questions began in earnest, during May 1945, Kirchheimer's time was already committed to a pre-existing R&A Report on the Nazis' Changes in Criminal Procedure. This and his direction of two other projects carried out by consultants meant that "he will be tied up on this work for some time." Summary Notes on CES and War Crimes by Richard Hartshorne, 12 May 1945, NA RG226, entry1, box 2, folder 66.

⁴⁹ Neumann finally joined OSS / R&A in March 1943 following 12 month's prolonged negotiations with Walter Dorn. Within six months, Neumann facilitated OSS positions for his two Frankfurt School colleagues in the CES.

⁵⁰ See KATZ, *supra* note 30, at 208 n. 14 (quoting from historian Prof. Harold Deutsch, Neumann's superior in OSS/R&A).

⁵¹ See John J. Herz, VOM ÜBERLEBEN: WIE EIN WELTBILD ENTSTAND (Autobiography) 136 (1984).

⁵² See Barry M. Katz, *Frankfurt School Goes to War* 59 JOURNAL OF MODERN HISTORY 447 (1987).

⁵³ *Id.*

⁵⁴ Sherman Kent, Carl Schorske, Franz Neumann, Phoebe Morrison, and George Young (from Biographical Records) and Frederick Burkhardt and (where necessary) Boris Klosson (from USSR Division. See OSS memorandum, War Crimes Committee, Hartshorne to Carl Schorske, 6 June 1945, NA, RG 226, entry 1, box 2, folder 6.

⁵⁵ Memo to Bernays, June 9, 1945, *Jackson Paper*, Box 85, LOC.

⁵⁶ That is, notwithstanding Marcuse's later prominence within the "new left" and student movements of the late 1960's, a prominence he achieved long after Neumann's pre-mature death in 1954.

⁵⁷ By contrast, the administrative coordination of OSS's war crimes work was assigned to James Donovan, former OSS General Counsel, who also had particular responsibilities for OSS's concentration camp films and other 'visual presentations'. See JAMES DONOVAN, CHALLENGES, (1967).

⁵⁸ Correspondence on this is contained in the Max Horkheimer Archive, Univ. of Frankfurt, MHA, VI 30 (Neumann – Horkheimer 26 June 1945); PETER INTELLMANN, FRANZ NEUMANN: CHANCEN UND DILEMMAN DES POLITISCHEN REFORMISMUS 47 (1995).

⁵⁹ See Jackson's Diary, June 7th 1945, Jackson papers, LOC, box 95.

⁶⁰ See the minutes of Jackson and Donovan's formal meeting with the British at the House of Lords 29th May Jackson Papers, LOC, Box 95.

⁶¹ PETER INTELLMANN, ZUR BIOGRAPHIE VON FRANZ L. NEUMANN 47 (1990).

⁶² Unfortunately whilst there is a growing literature on evolution of Neumann's legal theory, his work on war crimes remains largely neglected. See WILLIAM SCHEUERMAN, BETWEEN THE NORMS AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW (1994); THE RULE OF LAW UNDER SIEGE:

SELECTED ESSAYS OF FRANZ L. NEUMANN & OTTO KIRCHHEIMER (William Scheuerman, ed., 1996); RICHARD KELLNER & HERBERT MARCUSE, WAR AND TECHNOLOGY (1998).

⁶³ This impression, clear from Taylor's flattering references to Neumann, has been buttressed by a telephone interview on July 1, 1998 with Prof. Carl Schorske, who played a leading role within OSS / R&A., and is cited first in an official list of "R&A personnel engaged in war crimes work in Washington," 30 Aug. 1945: NA, RG 226, Correspondence of the Division Chief, 1942-45, entry 37, box 6, Folder: "War Crimes program."

⁶⁴ Telephone interview with Carl Schorske. (July 1, 1998).

⁶⁵ See TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS 49 (1992).

⁶⁶ *Id.* at 52.

⁶⁷ *Id.* at 46.

⁶⁸ *Id.* at 28.

⁶⁹ See memorandum from Sherman Kent, Director of European-African division within OSS / R&A, to William Langer, 16 July, who headed the R&A Branch, NA, RG226, Correspondence of Chief, entry 11, box 2, folder 6.

⁷⁰ *Id.*

⁷¹ Katz, *supra* note 30 at 35.

⁷² He was classified P.7 on a relatively comfortable salary of \$6,500, whereas Marcuse and Kellerman were P.6 and P.5 grades on \$4,600 and \$5, 600 respectively.

⁷³ On the other hand, it should not be assumed that all CES posted to Germany were involved in war crimes research. The OSS / R&A staff from the CES were also charged with a series of intelligence tasks, such as monitoring the reconstruction of the Universities, in order to provide Washington with an up-dated picture of what was happening in the immediate aftermath of the war. This agency had a German-based center. Telephone interview with Carl Schorske. (July 1, 1998).

⁷⁴ In fact, Neumann left Nazi Germany for England in 1933 following his outspoken criticism of Nazi press restrictions and subsequent arrest. He moved to America from England in late 1936.

⁷⁵ Katz *supra* note 30, at 54.

⁷⁶ Neumann to Kent, 3 August 1945, NA, RG226, entry 1, box 2, folder 7.

⁷⁷ Neumann to Kent, 3 August 1945, p. 1, NA, RG226 entry 1, box 2, folder 7.

⁷⁸ *Id.* at 2.

⁷⁹ See Memorandum of James Donovan to Justice Jackson, 29 July 1945, LOC, Jackson papers, box 101, in which Donovan presented the only existing copy of the R&A / CES Report "German Economic Preparation Abroad," with a curious request that it be returned for reproduction and distribution to Jackson's senior staff.

⁸⁰ Neumann to Kent, 3 August 1945, *supra* note 76. "Francis Shea has been put in charge of economic aspects of the prosecution. I hope you have discussed the EISENBERG project with him. ... You will find in a memorandum that I transmitted today to Mr. Justice Jackson an expression of my views in regard to this aspect of the case." *Id.*

⁸¹ Taylor, *supra* note 65, at 80.

⁸² Herbert Marcuse, *Preface to FRANZ L. NEUMANN, THE DEMOCRATIC AND AUTHORITARIAN STATE* viii (1957).

⁸³ See Ian Bryan and Michael Salter, *War Crimes Prosecutors And Intelligence Agencies: The Case For Assessing Their Collaboration*, INTELLIGENCE AND NATIONAL SECURITY, (forthcoming 2002).

⁸⁴ Neumann to Kent, 3 August 1945, *supra* note 76.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² OCC, Assignments for London Phase of the Work, June 1945, LOC, *Jackson Papers*, box 106, p. 1.

⁹³ Neumann to Kent, 3 August 1945, *supra* note 76.

⁹⁴ Taylor to Jackson, “The Obtaining of a Small Group of British Personnel Experts on German Military and Police Organizations”, 28 August 1945, LOC, *Jackson Papers*, box 106, p. 1.

⁹⁵ General Donovan to List S, 27 August 1945, (OSS 77572), NA, RG226 entry 1, box 2, folder 7.

⁹⁶ Minutes of Pre-trial Meeting group August 11, 1945, LOC, *Jackson Papers*, Box 107.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ “Tentative Organisational Chart”, undated, LOC, *Jackson Papers*, Box 106.

¹⁰⁰ Minutes of Pre-trial Meeting group August 11, 1945, LOC, *Jackson Papers*, Box 107.

¹⁰¹ Outgoing Cable 46529, 14 August 1945, LOC, *Jackson Papers*, Box 111.

¹⁰² Incoming Cable from “535”, No. 39079, 15 August 1945, LOC, *Jackson Papers*, Box 111.

¹⁰³ Memorandum for Mr Justice Jackson, August 15 1945, LOC/*Jackson Papers*, Box 107.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 54.

¹⁰⁶ See Katz 1987, *supra* note 52, at 448.

¹⁰⁷ Private correspondence between Michael Salter and Neumann’s former colleague in OSS / R&A H. Stuart Hughes, April 23, 1998.

¹⁰⁸ Capt. Tallalian to Richard Stebbins, R&A Personnel engaged in War Crimes work, NA, RG 226, Entry 37, folder “war crimes program”.

¹⁰⁹ There were at least two such part time consultancy appointments: Dr. Emil Gumbel (NSDAP crimes to 1934) and Albert Phiebig (NSDAP, SS, SD, Gestapo and Police as Criminal Organisations) who were paid \$250 and \$692 respectively, *Id.*

¹¹⁰ Correspondence with the author June 14, 1998; telephone interview with Price, June 5th 1998 which confirmed that Neumann was one of the “main people” involved in OSS war crimes work.

¹¹¹ This is derived from an undated document in the OSS war crimes file listing staff grades and costs during 1945 (including travel between London and Paris), which are cited as amount to a not inconsiderable total of \$49,143.64. NA, RG 226, Entry 37, folder “war crimes program.”

¹¹² Katz, *supra* note 30 at 212, n. 63.

¹¹³ I am indebted to a telephone interview with Drexel Sprecher on 5/5/1998 for this important point.

¹¹⁴ Taylor, *supra* note 65, at 186, 238-40.

¹¹⁵ There is evidence that Kempner was once employed by OSS’s Foreign Nationalities branch on a consultancy basis.

¹¹⁶ Taylor, *supra* note 65 at 90.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 117.

¹¹⁹ See NA, RG 226 Director's Office and Field Station Records, entry 190, box 283, folder 1244; War Crimes Commission May-August 1945, entry 190, box 29, folder 6; entry 190, box 284, folder 1247; OSS Mission to Germany August 1945, folders 1251-1253; OSS Mission to Germany, August 1944-May 1945, entry 190, box 29, folder 7 and entry 190, box 286, folder 1266; OSS Mission to Germany October 1944-April 1945: entry 190, box 9, folder 29; entry 190, box 293, folder 1365.

¹²⁰ See point 12, “Move to Nuremberg” Notes of a Staff Meeting, 31 August 1945, p. 3, LOC, Jackson Papers, box 110.

¹²¹ STUART HUGHES, GENTLEMAN REBEL 175-76 (1990). Hughe’s help for Neumann Including securing a deposition from Theodor Heuss, who four years later was to be elected the first President of the Bonn Republic.

¹²² Brig. Gen. John Magruder (Director of the Strategic Services Unit) to McCloy (Assistant Secretary of War, Department of War), Strategic Services Unit as of 1 October 1945, Washington, October 9, 1945 CIA Historical Files, HS/HC-265, http://www.state.gov/www/about_state/history/intel/95_99.html (on file with the Rutgers Journal of Law and Religion). The table below shows, numerically, the personnel who were actively engaged in War Crimes work in Washington and in ETO, and the wide range of OSS Branches and sections that comprised its overall contribution to the Nuremberg and related projects. Magruder’s memorandum also indicates that the figure of 138 understates the total staff OSS devoted to these trials, which included other part-time and locally recruited auxiliary personnel. Magruder’s memo also provides the following breakdown of the different Branches of OSS contributing to the Nuremberg project:

<i>Office of General Counsel</i>	Washington	10
	<i>ETO</i>	37
<i>Research & Analysis</i>	<i>ETO</i>	8
<i>Presentation</i>	<i>ETO</i>	8

<i>Field Photographic</i>	Washington	21
	ETO	26
<i>Reproduction</i>	ETO	4
<i>SI</i>	ETO	12
<i>X-2</i>	Washington	1
	ETO	7
Total		138

“The above does not include the large number of SSU personnel devoting part time to War Crime work or related activities, nor does it include the group of British nationals employed full time on this project by SSU.”

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Brig. Gen John Magruder (Director of the Strategic Services Unit) to McCloy (Assistant Secretary of War, Department of War), “Strategic Services Unit as of mid-October, 1945”, Washington, October 25, 1945, CIA Records, Job 83-00036, Box 3, Folder 16. Secret; http://www.state.gov/www/about_state/history/intel/95_99.html.