

[Contents of Issue Menu](#)

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**Prosecuting For War Crimes: as Lincoln Said,
The Battle of Today is not for Today Alone, but for A Vast Future
National Affairs**

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In the last essay he wrote before his death, Arthur Schlesinger spoke of "national stupidity." Here is what he said:

Sometimes, when I am particularly depressed, I ascribe our behavior to stupidity - the stupidity of our leadership, the stupidity of our culture. Thirty years ago we suffered military defeat - fighting an unwinnable war against a country about which we knew nothing and in which we had no vital interests at stake. Vietnam was bad enough, but to repeat the same experiment thirty years later in Iraq is a strong argument for a case of national stupidity.

This writer has expressed the same thought here many times, perhaps in more Runyanesque language. It has been said, on several occasions, "After Viet Nam, who would've thunk it?"

"[N]ational stupidity." "Who would've thunk it?" Yet it happened a second time. After Viet Nam no one thought it *could* happen again, and Congress took steps to *assure* it couldn't, such as enacting the War Powers Act, reining in the CIA, and banning

electronic eavesdropping of Americans by the NSA. But it did happen again and worse - worse because today we not only have a years-long unwinnable war, but also torture, kidnappings and renderings to foreign countries for torture, many years of detention without trial of people who are innocent, the use of massive private armies to help carry out Executive policies, electronic spying on anyone and everyone the Executive wishes, suppression of the media far beyond anything experienced during Viet Nam, reducing Congress to an impotency exceeding that of Viet Nam, the use of Executive Branch lawyers to write professionally incompetent, secret memoranda giving clearance to awful policies, and the use of retired generals who are making a fortune from the Pentagon to spread its gospel on the mainstream media.

Once again, as occurred after Viet Nam, people are likely to reflexively think it cannot happen again. But what assurance is there that five or ten or twenty or thirty years down the road, when some militarists or reactionaries might again come to power, we will not get Iraq redux, just as Iraq was Viet Nam redux? We have been shocked once. What is to prevent the possibility of being shocked again? There are cultural reasons for a potential Iraq redux that go back to the very beginning of American history. They have been written of extensively in two journal articles that are now on the internet, with shortened versions of them having been picked up by numerous websites. (The articles are by Professor Michael Sherry of Northwestern University and by me.) Briefly put, the reasons for another possible redux include:

- The nation largely does not know, and ignores, history.
- A national penchant for violence.
- Hubris.
- Misbegotten, factually incorrect philosophies.
- Lies, distortions, and delusions.
- To the extent we consider history, viewing it through the prism of wars.
- A desire to maintain American power at a preeminent level.
- Congressional abdication of responsibility and congressional cowardice, coupled with Executive seizure of power.
- The fact that America itself has not suffered the ravages of war internally in any extensive way since the Civil War.
- Hollywood (i.e., The John Wayne syndrome).
- The South's military culture coupled with its political power.
- Massive standing military forces and the added possibility of a draft.
- Public gullibility.
- The tenets of religious fundamentalism.
- Nearly uncontrolled nationalism.
- The fact that leaders' families face no risks.
- Lack of accountability.

Because of these reasons we have, over the course of our history, fought, often repeatedly, the Indians, the French, the British, the Barbary States, the Mexicans, each other (in the Civil War), the Spanish, the Germans, the Japanese, the Chinese, the North Koreans, the Russians (at the end of World War I and in the air over Korea), the Viet Nameese, the Panamanians, the Serbs, the Iraqis, and many others as well, such as the Haitians and the Grenadians. There are few other peoples who can "boast" such a historical record of wars, except perhaps imperial Rome and imperial Great Britain.

So the idea that in future we will not repeat the mistakes of Iraq would appear, on the basis of cultural factors and history, to be as likely to prove forlorn as the idea that World War I was the war to end all wars or the idea that we would not repeat Viet Nam. The forlornness is only the greater because American politicians, media and citizens continue to see the world as a place that could require military action against countries ranging from middle eastern theocracies and/or autocracies, like Iran, to China. Any politician who took a different position, a more pacific position, would be derided as "soft," and probably could not win election.

What to do then to try to increase the possibility that America will *not* get into more misbegotten wars in the future and, if it does get into war, will not torture people, kill prisoners, spy on its own citizens, and commit other atrocious acts. There is only one thing *to* do: that is to hold American leaders to account for their actions so that in future other leaders will not repeat the actions for fear that *they* will likewise be held to account.

But domestic politics has proven useless in holding our leaders to account - Lyndon Johnson retired to his ranch, George Bush was reelected and will retire to his, Nixon received a pardon and went back to San Clemente, McNamara became the long time President of the World Bank, Kissinger became richer and richer (and secretly advised Bush and Cheney on Iraq), nobody expects Rumsfeld to suffer, Wolfowitz was given a sinecure (which he blew) at the World Bank, lawyers who facilitated the misdeeds, such as Jay Bybee and John Yoo, are federal judges or professors at leading law schools.

Because domestic politics are obviously useless for holding the guilty accountable, we must try to do what was done in the 1940s to the leaders of nations who committed evil; we must try to do what was done to the German and Japanese leaders from top Nazis and Tojo right down to lawyers and judges. We must try to have them held accountable in courts of law. And we must insist on appropriate punishments, including, if guilt is found, the hangings visited upon top Germans and Japanese.

America's Chief Prosecutor at Nuremburg, Justice Robert Jackson, said we were invoking principles that would govern our nation as well as our defeated enemies. We must attempt to make a truth teller of Jackson, instead of allowing our leaders to make a liar of him.

Today, there is no accountability for our leaders, nor do their own families face death on the front lines as occurred during the Civil War (when several Cabinet officials' sons or brothers faced battle) and World War II (when one of FDR's sons participated in extraordinarily dangerous missions in the Pacific). Today there are, rather, only very different factors - factors that make it easy and safe for leaders to fight wars: there are half trillion dollar appropriations, huge standing military forces which the President orders into combat all around the world at the proverbial drop of a hat, a compliant Congress that refuses to do its duty, and an incompetent, if not venal, mainstream

media. Not unless leaders fear prison or the gallows for actions that violate law will there be anything to check the next headlong rush to war for allegedly good reasons that later prove false, as with Mexico, Spain, Viet Nam or Iraq, a headlong rush to war regardless of whether it occurs under a McCain (who never met a war he didn't like), an Obama, or someone whose name has not yet surfaced, and regardless of whether the headlong rush were otherwise to occur one year from now or five years from now or twenty years from now or thirty years from now.

There will, of course, be those who say that even if a precedent for punishment is established, future leaders will ignore the possibility of criminal punishment. Not so. Even the current crop of leaders was *very* concerned that they might be legally held to account, notwithstanding that American leaders have never *before* been held to account. It was the fear of being held to account in courts even though this had never happened before that led the Executive to commission exonerating legal memoranda from the John Yoos and their ilk in the Department of Justice and the Pentagon. For George Bush, Richard Cheney, Don Rumsfeld and Henry Kissinger to swing, or even for them to spend years in jail, would be a powerful lesson to future American leaders. It is not amiss to note that leaders of Germany and Japan from the end of World War II until today have never advocated the kinds of policies advocated by *generations* of their predecessors. There are several reasons for this, but one cannot discount the importance of the leaders' knowledge that their predecessors swung in the 1940s.

There are also those who will say that American courts will never call this country's leaders, or their minions like John Yoo, to account. That almost surely is true now and will likely remain true for at least ten or twenty years, even though library stacks and internet servers *already* are fairly bulging with books, journal articles, internet essays, legal complaints, newspaper articles and other materials showing that horrendous crimes have been committed, and more evidence of and reasons for guilt are in process of being written down. (Our courts are unlikely to act because, unlike in Germany or Iraq, our courts will be branches of the same government which committed the horrible acts, and will include deeply conservative political and judicial supporters of the acts.) But, as we have already seen in the last few years, in Italy, Germany and France, there *are* courts, and there also are international tribunals, that *will* prosecute these people, either in person if they dare venture abroad so they can be caught there, or in absentia if necessary. Even trials and convictions in absentia of current leaders would send a powerful message to future ones. And who knows, perhaps someday in the distant future even American courts may be willing to punish the criminal miscreants, or to at least admit that serious crimes have been committed (just as American judges ultimately admitted defacto, decades later, the horribly miscreant nature of the internment of Japanese Americans in World War II).

There will also be those who say, as is so typically American, that we should simply put Iraq behind us, should not seek "revenge" upon those responsible for it, and should just get on with life. But that was said about Viet Nam in its day, helped lead to Iraq, and was largely responsible for the pardon of Nixon which taught American leaders like Bush and Cheney that they can evade punishment for horrible actions. The "forget the past and get on with life" philosophy should not be indulged now any more than we indulged it with the Germans and Japanese. Otherwise we will get more Viet Nams and more Iraqs because leaders will know they can get away with anything, will suffer no consequences to themselves.

In his own time, in the vast cauldron of the Civil War, Lincoln said that the battle of today is not for today alone, but for a vast future. That is equally true of the necessity of bringing to book the men who have led us to disaster twice in one lifetime, in Viet

Nam and Iraq. The battle to impose criminal responsibility upon them is not for today alone, but to safeguard a vast future. Otherwise the future will be threatened by Executive lawlessness undertaken because of knowledge that leaders need fear no personal consequences, the future will be threatened by the possibility of more Viet Nams, more Iraqs, more violent denials of basic civil liberties because leaders - especially leaders of a militaristic or highly conservative cast of mind - will know they need fear no personal consequences.

It is for all these reasons that I have called a conference to be held in Andover, MA on September 13 and 14, 2008. The conference is entitled *Planning For The Prosecution Of High Level American War Criminals*. The Conference is not intended to be only a discussion of violations of law that have occurred. Although discussions of ideas and facts showing violations of law *will* take place, library stacks and the internet are, as said, already bulging with materials showing violations (although in the last analysis decisions on violations will be made by judges if leaders are brought to justice). The Conference, rather, is intended to also be a *planning* conference, one at which plans will be laid, and necessary organizational structures will be set up, to pursue the guilty as long as necessary and to the ends of the earth in order to bring them before the bar of justice. The underlying law and facts will be discussed in the context of laying plans to pursue the guilty in courtrooms so that in future there may be no more Viet Nams, no more Iraqs.

The topics which will be discussed, and subjects on which plans will be laid, already include the following:

1. Brief introductory remarks stressing that the crimes and misconduct have now occurred twice in forty years - in Viet Nam and then again in Iraq - and that the high level perpetrators need to be punished (as occurred at Nuremberg and Tokyo in 1946) in order to insure that people will not do these things again (as the Germans and Japanese have not committed their crimes again).
2. A discussion of his recent book, *The Torture Team*, by Philippe Sands, including how Executive Branch lawyers failed in their duties (yet remained in power or gained soft landings (as, e.g., federal judges and professors at leading law schools)).
3. What domestic and international crimes were committed, which facts show crimes under which laws, and what punishments are possible.
4. What high level Executive officials (and federal judges and legislators too, if any) are chargeable with crimes.
5. What international tribunals, foreign tribunals and domestic tribunals (if any) can be used, and how to begin and prosecute cases in front of them.
6. What cases have already been brought, with what results and the reasons for the results.
7. What must be done to make the question of prosecutions an issue in the 2008 political campaign and to have the question become a significant subject in the media and on the internet.
8. a.) Creating an umbrella coordinating committee with representatives from the various - and increasing number of - organizations that are involved in cases.

8. b.) Creating a Center to keep track of and organize compilations of relevant briefs, articles, books, opinions, facts, etc.
9. The possibility of having a Chief Prosecutor's office ala Nuremberg.
10. Review and summary of the action items that have been decided upon.

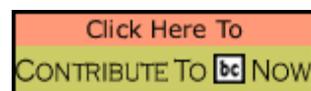
Both experts and the public are invited to the Conference. It will be held at 500 Federal Street in Andover, Massachusetts, from 10 in the morning until 4:30 in the afternoon on Saturday and Sunday, September 13 and 14. Breakfasts, lunches and dinners will be provided, and will be covered by a conference charge of \$125. Hotel rooms will be available a mile away, at the Wyndham Hotel, for 99 dollars per night, with buses available to take attendees to and return them from the conference.

Anyone who wants to attend the conference should contact my special assistant, Jeff Demers, at demers@mslaw.edu or at (978) 681-0800.

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