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State crimes against democracy in the war on terror: applying the Nuremberg principles to the Bush–Cheney Administration

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This article asks whether, in waging war in the Middle East, the Bush–Cheney Administration developed and executed a conspiracy comparable to the one for which Nazi leaders were tried, convicted, and executed at Nuremberg after World War II. To meet the Nuremberg standards, such a conspiracy must include efforts to subvert the constitutional order. Today, scholars refer to these actions as 'state crimes against democracy' (SCADs). After explicating the Nuremberg standards, the article applies them to the Bush–Cheney Administration's 'war on terror'. The conclusion reached is that evidence of a SCAD-driven conspiracy is extensive and certainly adequate by the Nuremberg standards to warrant investigations and trials.

Keywords: state crimes against democracy; Nuremberg principles; Bush–Cheney Administration

Whatever else may be learned in the future about the Bush–Cheney Administration, the available evidence shows the administration led the USA into an unnecessary war with Iraq (Isikoff and Corn 2006, Rich 2006) and authorized cruel, unusual, and degrading treatment of suspected terrorists (McCoy 2006, Goldsmith 2007, Greenwald 2007, Paust 2007, Mayer 2008). What remains unclear is whether these or related actions warrant prosecution as violations of national and international law. Depending on how the circumstances are construed and what legal principles are applied, the interrogation practices and military actions of the administration can be viewed as completely lawful or, conversely, as crimes of the most serious kind – high crimes (de la Vega 2006), murder (Bugliosi 2008), and/or war crimes (Paust 2007).

Opponents of trials argue prosecution would amount to 'criminalizing policy differences' because Bush and Cheney's decisions, even if mistaken or counterproductive, were based on their best judgments at the time about what was necessary to keep America safe (Feith 2009). They also say the invasion of Iraq was authorized by the US Congress and the UN (CNN.com 2009).

For their part, advocates of trials counter that even if Bush and Cheney were trying to protect Americans, torture and aggressive war are clearly war crimes and should be punished, both to deter similar crimes in the future and to uphold the rule of law nationally and internationally (Goitein 2009). They point out that the 2002 Congressional authorization to initiate military action in Iraq may itself have been unconstitutional (because it delegated to the president Congress' power to decide whether to go to war) and in any event was based on administration

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claims which the administration knew were false or uncertain (Fisher 2004). Similarly, UN Security Council Resolution 1441 did not specifically authorize an invasion of Iraq but said only that 'serious consequences' would follow if the Iraqis remained in breach of its obligations under a UN resolution after the 1991 Gulf War (Moghalu 2008, pp. 158–159). President Bush and British Prime Minister Tony Blair initially sought a second UN resolution authorizing military action, but they withdrew their request because the UN wanted to allow more time for inspections and France indicated its intention to veto the resolution if it was passed (Pfiffner 2004).

The legal context for evaluating the Bush–Cheney interrogation practices and military actions is uncertain because of the complex, nested relationship between US law, the US Constitution, US treaties, and international law. For example, Article VI of the Constitution mandates that officials abide by the nation's treaties, and the USA is a party to the Geneva Conventions, but Article II makes the president Commander-in-Chief, a role which arguably authorizes the president to decide (as Bush did in 2002) that the conventions do not apply to suspected terrorists (Sands 2008, pp. 30–36, Senate Committee on Armed Services 2008, p. xiii). Similarly, in some circumstances the president's national security responsibilities as Commander-in-Chief may supersede domestic and/or international law prohibiting military aggression – at least this was the argument made in 2002 by Justice Department lawyers, who concluded that using force against Iraq could be justified as 'anticipatory self-defense' (Bybee 2002c, p. 1).

To begin untying this legal and philosophical Gordian knot, the present essay applies a less legalistic and more holistic standard to the Bush–Cheney record. It asks whether the administration developed and executed a conspiracy comparable to the one for which Nazi leaders were tried, convicted, and executed at Nuremberg after World War II. To the extent the Bush–Cheney actions mirror the crimes of the Nazis, the administration's moral guilt becomes rather clear even if Bush, Cheney, and other responsible persons are for some reason beyond the reach of the national and international legal systems as they are now constituted.

In the Nuremberg war crimes trials, the defendants were charged with, among other crimes, conspiring to wage aggressive war. However, the alleged conspiracy involved much more than secret plans for unprovoked military aggression. According to the indictment presented to the International Military Tribunal (IMT), the defendants intended, first, to transform democratic Germany into a police state by contriving and exploiting threats to the nation's stability and security (Harris 1954, Conot 1983, Tusa and Tusa 1983, Persico 1994, Marrus 1997). Hitler and his associates were charged with staging acts of domestic terrorism, issuing false warnings of impending coups, conducting false-flag attacks on the nation's frontiers, and in other ways mobilizing mass support for authoritarian government and aggressive war.

Today, scholars refer to such actions as state crimes against democracy (SCADs). SCADs are concerted actions or inactions by government insiders intended to manipulate democratic processes and undermine popular sovereignty (deHaven-Smith 2006, 2010, deHaven-Smith and Witt 2009). As thus defined, SCADs include not only election tampering, vote fraud, government graft, political assassinations, and similar crimes when they are initiated by public officials, but also more subtle violations of democratic processes and prerequisites. The IMT did not use the term 'state crimes' or 'crimes against democracy', but its jurisdiction and judgments prefigured the SCAD construct, and the latter can clarify how and to what extent Nuremberg's principles apply to the Bush–Cheney policies in question.

The present essay assesses the evidence of a SCAD-driven conspiracy in the Bush–Cheney Administration. It is divided into three main sections. The first section summarizes the Nuremberg trials, principles, and judgments. In so doing, it identifies the types of SCADs and

the evidence for them that supported the convictions of Nuremberg defendants for conspiracy to wage aggressive war. Section 2 examines the evidence that a comparable conspiracy was developed and executed by the Bush–Cheney Administration. The conclusion reached is that the evidence of such a conspiracy is extensive and certainly adequate by the standards established at Nuremberg to warrant investigations and trials. The essay's third section is a brief discussion of the implications of the analysis for policy, governance, and research.

Principles from Nuremberg

Nuremberg marked the first application of the legal concept of conspiracy to crimes of the state and of political organizations (Harris 1954, especially pp. 514–536). Article 6 of the Charter of the IMT authorized prosecution of individuals for 'participating in the formulation or execution of a Common Plan or Conspiracy' to wage aggressive war (Marrus 1997). The charter stipulated that everyone who had been a party to such a plan or conspiracy was responsible for all crimes committed in the plan's execution, including any 'Crimes against Peace', 'War Crimes', and 'Crimes against Humanity'. It also provided for the IMT to designate entire groups as 'criminal organizations' (Article 9). Anyone who had belonged to an organization so designated was automatically guilty of any crimes committed by any of the group's members (Harris 1954, p. 23, Persico 1994, p. 396).

Trials and verdicts

The IMF indicted 22 members of the Nazi Party leadership for participating in a common plan or conspiracy to wage aggressive war, and for committing various crimes in the execution of this plan. Eight 'Nazi conspirators' were convicted of the conspiracy charge, and four organizations in which one or more of these individuals had been members were designated as criminal: the Party leadership; the SS (special military units and guards for the concentration camps); the SA (the 'brown shirts', a paramilitary division of the Nazi Party); and the Gestapo (the government's secret police) (Tusa and Tusa 1983, p. 50, Persico 1994, p. 396). In the IMT's rulings, three of the defendants were acquitted; 12 were sentenced to death; three to life in prison; and four to terms ranging from 10 to 20 years (Harris 1954, pp. 346–354, Tusa and Tusa 1983, p. 504).

The conspiracy

The changes made to international law by the Nuremberg trials have been widely noted (e.g. see Harris 1954, pp. 555–568), but the means and aims of the conspiracy proscribed by the Nuremberg judgments have received much less attention. The form taken by the conspiracy was spelled out in the first count of the indictment submitted to the IMT (Marrus 1997, pp. 59–60). The conspiracy included: common objectives; organizations for cohesion and action; doctrines to secure maximum control of the German state and society; and detailed plans for military aggression.

The evidence offered at Nuremberg to prove the existence of this conspiracy mostly focused on documenting the conspirators' aims, but the evidence of common objectives was buttressed at key points by evidence of criminal or treasonous attacks on the constitutional order – SCADs. The most compelling evidence of the conspirators' common objectives comprised two documents (Harris 1954, pp. 37–44): *Mein Kampf* and the Nazi Party Program published in 1923. The former called for overturning the Versailles Treaty, rearming Germany's military, depriving Jews of their property and civil rights, and using force to expand Germany's territory to provide 'living space' for racial Germans ('Aryans'). The 1923 Nazi Party Program espoused similar objectives and remained unchanged throughout Hitler's years of rule.

SCADs to gain control of parliament

Before Germany's democratic institutions were eviscerated by Hitler and his supporters, the Nazis were unable to win control of parliament through the electoral process. In the 1932 elections, they received only 37% of the total vote and gained only 230 of 608 seats (Harris 1954, p. 43).

The Nazis acquired control of parliament by committing a number of SCADs in 1933 after President Hindenburg selected Hitler to head the cabinet as Chancellor of the Reich. First, on February 24, Herman Goering, with Prussian police forces under his command, raided the Communist Party headquarters in Berlin and afterwards announced in an official communiqué that documents seized in the raid proved the communists were about to launch a 'Bolshevik revolution' in Germany (Shirer 1959, p. 191). Second, just 3 days later, Nazi conspirators set fire to the parliament's headquarters (the Reichstag) and pinned the blame on a feebleminded communist who they had planted at the scene (Harris 1954, pp. 45–46, Shirer 1959, pp. 191–193, Conot 1983, pp. 118–119). Third, claiming the next day communists were planning similar terrorist attacks nationwide to initiate their revolution, Hitler convinced Hindenburg to sign a decree suspending those sections of the Constitution which protected civil liberties (Harris 1954, p. 47, Shirer 1959, p. 194). Fourth, Hitler immediately took advantage of this decree by outlawing the Communist Party and arresting its leaders (Harris 1954, pp. 47–48, Shirer 1959, p. 194). Fifth, on 23 March, Hitler pushed through legislation ('The Law for the Protection of the People and the Reich') which delegated legislative powers to Hitler and his cabinet (Harris 1954, p. 48, Shirer 1959, p. 194).

In Nuremberg, all but one of these actions could be easily proved with documents. The documents submitted included Goering's communiqué; Hindenburg's decree; Hitler's ban of the Communist Party; and the law, giving legislative powers to the Chancellor and cabinet. However, no paper trail could be found to confirm the Nazis' role in the Reichstag fire. Their alleged complicity in this act of terrorism was of great significance, because it was what made all the other acts in the series components of an overarching criminal conspiracy; if the fire had in fact been part of a communist plot to destabilize the republic, the other actions by the regime were legitimate efforts to protect the nation.

The evidence presented of collusion in the Reichstag fire was weak. The IMT heard the testimony by a Nazi official that Goering had boasted publicly of his involvement (Conot 1983, p. 342). Similar claims were made in affidavits from three members of the SA (Tusa and Tusa 1983, p. 280). Reinforcing this hearsay evidence was the fact that Goering's office at the time was connected to the Reichstag by an underground passageway for a heating vent (Harris 1954, p. 46). However, in his own testimony to the Tribunal, Goering flatly rejected the accusation (Conot 1983, p. 342, Tusa and Tusa 1983, p. 276, Persico 1994, p. 107). Nevertheless, the IMT found the evidence of Nazi involvement in the fire convincing in the context of the Nazis' stated intentions to centralize power in the Fuhrer. Also incriminating was the speed with which the Nazis moved in presenting a draft decree to Hindenburg, arresting opponents, and introducing legislation to consolidate power, a rapidity which suggested plans had been developed in advance for exploiting the supposedly unexpected events (Harris 1954, pp. 46–48).

The SA purge

In 1934, a second SCAD spree allowed Hitler to gain the support of the officer corps and, upon Hindenburg's death, establish himself as Fuhrer. The Nazi SA or 'brown shirts' had been organized in the 1920s as a paramilitary division of the Nazi Party. After Hitler became Chancellor, top commanders in the military grew concerned that the SA might supplant the officer corps' leadership of the armed forces. To allay these fears, Hitler made a pact with the military to

decapitate and subordinate the SA in return for the military commanders' allegiance (Shirer 1959, pp. 207–208). On 30 June 1934, claiming the SA was preparing to overthrow the government, groups of Hitler's loyalists in different parts of Germany assassinated or executed the SA's leaders (Shirer 1959, pp. 207–208, 211–213, Conot 1983, p. 128, Persico 1994, pp. 178–179). When Hindenburg died less than 2 months later, the German officer corps acquiesced as the Cabinet enacted legislation combining the offices of chancellor and president in a single office (Fuehrer and Reich Chancellor), thus making Hitler head of state and Commander-in-Chief of the Armed Forces (Harris 1954, p. 48, Conot 1983, p. 333).

At Nuremberg, evidence of the SA purge came mainly from a single witness, Hans Bernd Gisevius (Conot 1983, pp. 390–395, Tusa and Tusa 1983, pp. 329–330, Persico 1994, pp. 325–327). Gisevius was a career professional who went to work for the Gestapo in 1933, quickly concluded it was criminally corrupt, and reported specific crimes to his superiors, only to be fired. At Nuremberg, he testified about Hitler's and Goering's role in the purge, and also about rumors of Nazi involvement in the Reichstag fire.

SCADs to wage war

Finally, a third series of SCADs tied the Nazi conspiracy to aggressive war. On 5 November 1937, Hitler announced to his inner circle that Germany could not autonomously feed its population without more territory, and that a war for expansion would have to be underway no later than 1943–1945. After that, he explained, Germany's emergent military advantage over its rivals would have been overtaken (Shirer 1959, pp. 305–308, Conot 1983, pp. 134–137, Tusa and Tusa 1983, pp. 99–100). Hitler called for a rapid incursion into surrounding territories that would present the rest of Europe with a fait accompli. By 1939, Germany had indeed moved into Austria and Czechoslovakia in swift actions that Britain, France, and others protested but did not contest militarily.

Hitler turned next to Poland. To develop a pretext to justify an invasion, Hitler ordered false-flag attacks on several German towns near the Polish border (Harris 1954, p. 124). One of these attacks was on a German radio station in the town of Gleiwitz. Germans who were condemned to a concentration camp were dressed in Polish military uniforms, drugged, and taken to the scene of the staged attack, where they were shot and killed. When Hitler invaded Poland, he defended the invasion as a 'counterattack'.

At the Nuremberg trial, evidence of Hitler's secret plan and the false-flag attack on Gleiwitz was contained in two documents. One was a memo written by Colonel Friedrich Hossbach summarizing Hitler's statements on 5 November 1937. The Hossbach memo, as it was referred to at Nuremberg, had been dated 10 days after the meeting had occurred. Moreover, only a Photostat of the memo was introduced into evidence; the original had been misplaced and has never been found (Tusa and Tusa 1983, pp. 99–100). The other document was an affidavit by the Gestapo agent Alfred Naujocks, who claimed to have staged the attack on Gleiwitz under orders from the Gestapo Chief Reinhard Heydrich (Harris 1954, pp. 124–126, Shirer 1959, pp. 518–520).

The IMT's judgments

To the charge of conspiracy to wage aggressive war, only one of the Nazi conspirators tried by the IMT (Albert Speer) confessed guilt; all of the other defendants vigorously defended their actions (Conot 1983, pp. 473–478, Tusa and Tusa, 1983, pp. 441–442, Persico 1994, pp. 376–379). They argued the concentration of power in the Fuhrer was necessary to maintain order in a nation racked by inflation, burdened by war reparations, and threatened by communist

revolutionaries; they said they had believed at the time the invasion of Poland was in fact a legitimate response to aggression; they denied knowledge of the holocaust and war crimes against prisoners; and they presented evidence showing Nazi policies had been formally developed and approved through legally mandated procedures. Despite the defendants' arguments and claims, the Tribunal found them guilty.

Policy development in the war on terror

The verdicts handed down by the IMT provide standards for assessing the evidence Bush, Cheney, and others developed and executed a Nazi-like conspiracy to wage war in the Middle East. First, the alleged common plan must be more than a vague outline; it must include shared objectives, doctrinal techniques, instruments of cohesion, and specific plans, all related to the subsequent aggression. Documents and statements of a propagandistic nature are sufficient proof of these elements. Second, the common plan or conspiracy must be shown to include one or more direct attacks on the constitutional order – SCADs – in furtherance of the plan's objectives. Circumstantial evidence is sufficient to demonstrate guilt if the effects of the alleged SCADs actually served the objectives of the plan (which itself must be independently established) and if the defendants quickly exploited these effects in furtherance of the plan. Third, accused conspirators must be shown to have been connected to the conspiracy at a time close to the initiation of military aggression. The IMT ruled that anyone who had left the Nazi Party prior to September 1939 (when Germany invaded Poland) was not guilty of participating in the conspiracy (Harris 1954, p. 543).

Arguments in support of the Bush–Cheney Administration

It is generally accepted that the justification for invading Iraq was based on false premises; the Iraqis did not possess weapons of mass destruction and were not developing nuclear weapons (CNN.com 2004a), nor had they harbored Osama bin Laden or supported al Qaeda (Senate Select Committee on Intelligence 2006, pp. 67–68, 105). It is also widely acknowledged that the policies authorizing 'aggressive interrogations' and 'extraordinary renditions' of suspected terrorists not only violated US laws and international laws and treaties (Paust 2007), but also may have been counterproductive in the effort to reduce the long-term threat of terrorism (Shane 2009b). At issue is whether these policies were made through appropriate procedures and for legitimate reasons of national security, or instead were part of a common plan to subvert American democracy and wage aggressive war.

Bush, Cheney, and others in the administration claim their actions were both lawful and prudent given the destruction of 9/11 and the possibility terrorists might gain access to weapons of mass destruction. Vice President Cheney's principle for assessing threats after 9/11 has been called the 'one percent doctrine' (Suskind 2006). Cheney believed, and is reported to have convinced Bush, that even if the probability of a terrorist attack were very small – even just one in one hundred – the administration had to treat it as a certainty (Suskind 2006, pp. 61–62, 79, 166–168, 307–308).

To some extent reflecting Cheney's position, the invasion of Iraq was preceded by an explicit change in US policy for the use of military force. In September 2002, President Bush issued a National Security Strategy statement asserting that the USA had the right to act preemptively 'against emerging threats before they are fully formed' (Bush 2002, transmittal letter). The policy paper acknowledged that, historically, international law condoned preemption only in the face of an imminent threat, 'most often a visible mobilization of armies, navies, and air forces preparing to attack', but the paper argued the concept of imminent threat needed to be

adapted to adversaries who 'rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning' (Bush 2002, p. 15). Announcing that the USA would identify and destroy such threats before they reached America's borders, the National Security Strategy said 'our immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursors' (Bush 2002, p. 6). Thus, if Iraq possessed WMD or was seeking to develop nuclear weapons, this new policy of preemption suggested US military action would be a legitimate act of self-defense.

In October 2002, the Office of Legal Counsel (OLC) employed this same reasoning in an official memorandum to the president that said using force against Iraq would be consistent with national and international law.

> We observe, therefore, that even if the probability that Iraq itself would attack the United States with WMD, or would transfer such a weapon to terrorists for their use against the United States, were relatively low, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if we do not use force, the threat will increase, could lead the President to conclude that military action is necessary to defend the United States. (Bybee 2002c, p. 47)

The administration reasoned further that Iraq presented an extraordinary threat because it was ruled by a brutal dictator with a history of aggression. In a speech on 7 October 2002, President Bush explained why Iraq was 'different from other countries or regimes that also have terrible weapons'.

> Iraq's weapons of mass destruction are controlled by a murderous tyrant who has already used chemical weapons to kill thousands of people. The same tyrant has tried to dominate the Middle East, has invaded and brutally occupied a small neighbor, has struck other nations without warning and holds an unrelenting hostility toward the United States. (Associated Press 2002)

At the time this speech was delivered, Congress was considering a resolution to authorize the use of military force in Iraq, and some members were calling for UN weapons inspectors to be allowed time to conduct an exhaustive search for WMD. However, the president stressed the need for swift action. 'If we know Saddam Hussein has dangerous weapons today – and we do – does it make any sense for the world to wait to confront him as he grows even stronger and develops even more dangerous weapons?' (Associated Press 2002).

Later, after Iraq had been invaded and no WMD had been found, officials in the administration argued their fears of Iraqi WMD, while ultimately shown to be groundless (CNN.com 2004a, Associated Press 2005), were supported by intelligence deemed trustworthy at the time (CNN.com 2009) and in any event Iraq and the world were better off without Saddam Hussein (Garamone 2007). They added that, when they decided to authorize harsh interrogations, they feared another attack like 9/11 was imminent. In a memorandum dated 1 August 2002, in which the OLC deemed waterboarding and other cruel and unusual interrogation methods legal under national and international law, the OLC noted 'intelligence indicates that there is currently a level of "chatter" equal to that which preceded the September 11 attacks' (Bybee 2002a, p. 1).

The OLC legal opinions do not automatically make the decision to invade Iraq and authorize harsh treatment of detainees legal under national and international law; the president was ultimately responsible for assessing whether circumstances warranted these actions. But the opinions do show the president's constitutional responsibility to protect the nation could be construed as overriding legal restrictions that might otherwise apply. They also are documentary evidence in support of claims by the administration that the policies in question were developed in response to perceived threats and in accordance with mandated procedures.

Furthermore, even if the president misjudged the need for preemptive military action and the legality and value of cruel, unusual, and degrading treatment of prisoners, he would not be guilty of committing SCADs or violating the principles established at Nuremberg. He might be considered negligent and incompetent, but his actions would not be criminal.

Evidence of a conspiracy

However, these arguments fail to consider and explain much countervailing information. Considerable evidence suggests Bush, Cheney, and others in the administration did, in fact, conspire to evade constitutional checks, mislead Congress, the UN, and the public, and fabricate a pretext for aggressive war.

Direct evidence of a plan or conspiracy to launch a war of aggression against Iraq comes from reports by members of the administration about the reactions of President Bush in the immediate aftermath of the destruction on 9/11. Paul O'Neill, Secretary of the Treasury, revealed that Bush, Cheney, and others in the administration were preoccupied with regime change in Iraq soon after taking office (Suskind 2004, pp. 72–75). One of their motivations was to gain access to oilfields for US oil companies (McClellan 2008, pp. 127, 139, 145, Suskind 2004, pp. 96, 129). O'Neill also reported Bush and others immediately saw 9/11 as a possible pretext for military action against Iraq (Suskind 2004, pp. 72–75, 82–86, 2006, pp. 22–23). Similarly, Clarke (2004, p. 32), a career professional and, at the time, the government's top expert on terrorism, reported President Bush ordered him on the day after 9/11 to look for evidence linking Iraq to the attacks.

The Bush–Cheney Administration responded similarly to the anthrax mailings in October 2001. By 9 November 2001, the FBI had concluded the letters had probably been prepared by a scientist working in a lab in the USA with access to anthrax and/or specialized equipment for producing finely powdered anthrax spores (Rosenbaum and Johnston 2001). By December, the mailed anthrax had been matched to the 'Ames strain', which was cultivated in the USA (Wade 2008). These developments should have caused the administration to consider that the anthrax threat might have been staged by US military–industrial interests to boost spending on bio-weapons and antidotes. Instead, Bush and others in the administration initially pressed the FBI to prove the anthrax had originated with al Qaeda, and Bush and Cheney made statements that al Qaeda was suspected of involvement in the anthrax attacks (Meek 2008). When the FBI quickly concluded otherwise, top officials in the administration simply quit talking about the anthrax mailings and acted as if they had never happened.

Troubling questions remain about the defense failures on 9/11. The report of the 9/11 Commission concluded the administration had simply been caught off guard by the attacks (National Commission on Terrorist Attacks Upon the United States 2004, pp. 339–348), but the commission's investigation was compromised by conflicts of interest, government obstruction of justice, and reliance on unreliable confessions extracted under torture (Shenon 2008). Documentary and eyewitness evidence casts doubt on the thesis that the 9/11 attacks were unexpected. The administration received many warnings a terrorist attack was imminent and it might include hijackings (Clarke 2004, p. 17, CNN.com 2004b). Some officials appear to have received warnings not to fly on 9/11 (Thomas and Hosenball 2001). In addition to opposing an independent inquiry into the attacks, the administration withheld evidence once the investigation was underway (Morgan and Henshall 2005, pp. 94–98, Shenon 2008, pp. 25, 29–31, 36–38).

A common objective: oil

Circumstantial evidence suggests the administration viewed Afghanistan, as well as Iraq as targets for military action long before 9/11. In July 2001, envoys of the new administration

met in Berlin with a conduit to the Taliban to discuss building a pipeline to move oil across Afghanistan (Arney 2001, Brisard 2002). At the meeting were (among others) Robert Oakley, former US ambassador and lobbyist for the oil company Unocal; Karl 'Rick' Inderfurth, former US assistant secretary of state; and Niaz Naik, former Foreign Minister of Pakistan who had ties to the Taliban. One of the US participants reportedly asserted the Taliban could either allow the pipeline to be constructed and receive a 'carpet of gold', or they could oppose the pipeline and get 'a carpet of bombs' (Brisard and Dasquie 2002, p. 43).

The administration's interest in gaining control over Middle Eastern oil is further evidenced by the creation in January 2001 of the National Energy Policy Development Group (NEPDG), a task force established by President Bush and chaired by Vice President Cheney. The administration litigated to keep from revealing the substance of the NEPDG's deliberations, and the deliberations remain secret to this day. But in 2003, a few materials from the task force meetings were released by the Commerce Department, and they included maps and charts, dated March 2001, of Iraq's, Saudi Arabia's, and the United Arab Emirates' oil fields, pipelines, refineries, tanker terminals, and development projects (Milbank and Blum 2005).

Manipulation of intelligence

There is considerable evidence the administration fabricated, twisted, or exaggerated intelligence to make a case for invading Iraq. The first person to expose the administration's prevarication about WMD was Wilson (2003), who pointed out in a *New York Times* editorial that the president may have intentionally misled Congress and the public when he claimed in his 2003 State of the Union Address that Iraq had sought to purchase uranium in Africa. In response to Wilson's article, Bush and Cheney appear to have initiated a concerted effort to discredit Wilson by leaking to the press that Wilson's wife was an agent of the Central Intelligence Agency (CIA) (McClellan 2008, pp. 4–8, 166–173, 293–295).

On 12 June 2003, Cheney informed his chief of staff Lewis 'Scooter' Libby that Wilson's wife worked at the CIA (Office of Special Counsel 2005, Count One, paragraph 9). Between 8 July and 12 July, Libby spoke with several reporters, including Judith Miller of the *New York Times* and Matthew Cooper of *Time Magazine* (Office of Special Counsel 2005). Libby told them Wilson's wife, Valerie Plame, worked for the CIA, and he suggested Wilson could not be trusted because Plame played a role in selecting him to investigate the Africa uranium issue. On 14 July, Plame's status as a CIA officer was reported by Novak (2003) in an editorial in the *Washington Post*. The investigation of the leaks about Plame failed to implicate Bush and Cheney because Libby lied to investigators and refused to testify against others in the White House (McClellan 2008, pp. 305–308). After Libby was convicted of obstruction of justice, the president granted him clemency. Unlike a pardon, clemency, although voiding Libby's prison sentence, prevented him from being compelled to testify to Congress about the scandal.

The closest thing to a smoking gun proving the administration distorted intelligence to develop a pretext for invading Iraq comes from the so-called Downing Street Memos. Leaked to the *London Times* and published in May 2005, the memos were prepared by the administration of Prime Minister Tony Blair to summarize meetings between high-level members of the Bush and Blair Administrations (Wright and Dixon 2008, p. 5). The earliest of these meetings took place in March 2002. The memos reveal a pattern of cynical calculation and deception by top officials to build and maintain legislative and popular support for actions that were known by these officials to constitute a war of aggression. Whereas Bush and Blair claimed throughout the 2002 war with Iraq would be initiated only as a last resort, the memos say that in April 2002, Bush and Blair began planning for a war against Iraq and looking for a pretext to

justify it (Wright and Dixon 2008, p. 6). One of the memos states specifically that 'the intelligence and the facts are being fixed around the policy' so that Saddam Hussein's removal can be 'justified by the conjunction of terrorism and WMD' (Wright and Dixon 2008, p. 217).

Interrogation policy for selling the war

The Bush–Cheney policy allowing waterboarding and other harsh methods of interrogation was developed precisely during this period when Bush and Blair were making plans to invade Iraq. Initially, the administration had used surrogates to torture captives who were suspected of terrorism. For example, Ibn Sheikh al-Libi, who had been captured in December 2001, was turned over to Egypt, where under torture he made statements (subsequently recanted) about al Qaeda ties to Iraq (Ross and Esposito 2005, Senate Select Committee on Intelligence 2006, pp. 80–81). However, the Defense Intelligence Agency voiced doubts about al-Libi's statements because the statements had been coerced (Senate Select Committee on Intelligence 2006, pp. 107–108).

Consequently, when Abu Zubaydah was captured in March 2002, he was sent to the prison at Guantanamo Bay (CNN.com 2002). At the time, he was thought to be the 'operations chief' of al Qaeda. From March through June 2002, traditional (non-coercive) methods were used in his questioning. He was cooperative, but he insisted al Qaeda had no connection with Iraq. Officials in the White House then began to pressure interrogators to be more aggressive.

Major Paul Burney, a US Army psychiatrist assigned to interrogations in Guantánamo Bay in the summer of 2002, later told Army investigators: 'A large part of the time we were focused on trying to establish a link between Al Qaeda and Iraq and we were not being successful'. As higher-ups became more 'frustrated' at the inability to prove this connection, the Major said, 'there was more and more pressure to resort to measures' that might produce that intelligence' (Senate Committee on Armed Services 2008, p. 41, Rich 2009).

A similar account of events has been reported by Wilkerson (2009), former State Department Chief of Staff under Secretary Colin Powell. Wilkerson has stated that, months before the Justice Department rendered any legal opinion on interrogation methods, harsh methods were authorized by the administration. 'Its principal priority for intelligence was not aimed at pre-empting another terrorist attack on the U.S. but discovering a smoking gun linking Iraq and al-Qa'ida'.

After interrogators still failed to find links between Iraq and al Qaeda, the OLC issued a memorandum to the CIA on 1 August asserting waterboarding and other harsh methods of interrogation did not constitute torture. The memorandum was authored by Bybee. It declared harsh interrogation methods legal under national and international law. The memo concluded

> [F]or an act to constitute torture as defined in [the federal torture statute], it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under [the federal torture statute], it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. (Bybee 2002b, p. 1)

Before the end of August, Zubaydah had been waterboarded 83 times (Shane 2009a).

Other efforts to sell the war

Also in August 2002, the White House Iraq Group (WHIG) was organized by the White House Chief of Staff Andrew H. Card Jr. The group met weekly. Regular participants included Karl Rove, Karen Hughes, Mary Matalin, Condoleezza Rice, Stephen J. Hadley, and Scooter Libby (Pincus 2008). The purpose of the group was 'to coordinate the marketing of the war to the public' (McClellan 2008, p. 142).

In September and October 2002, Bush and Blair coordinated their actions in an effort to pressure their governments into approving military action. Blair published an intelligence dossier claiming Iraq could launch weapons of mass destruction within 45 minutes. This claim was based on dubious evidence which the dossier exaggerated and falsely presented as well confirmed (Wright and Dixon 2008, pp. 9–10). For their part, officials in the Bush–Cheney Administration, including the president himself, began making statements warning there might be some uncertainty about how quickly Iraq could acquire a nuclear weapon but no doubt that it was trying to do so (Eisner 2007, Wright and Dixon 2008, pp. 2–3). On 26 August 2002 in a speech in Nashville to the 103rd national convention of the Veterans of Foreign Wars, Cheney declared with no equivocation that Saddam Hussein had 'resumed his efforts to acquire nuclear weapons' (guardian.co.uk 2002). On 8 September 2002, Cheney appeared on *Meet the Press*, warning about Iraqi WMDs and claiming there have been a 'number of contacts over the years' between al Qaeda and Iraq (Eisner 2007). In September 2002, Condoleezza Rice said on CNN, 'There will always be some uncertainty about how quickly [Saddam] can acquire a nuclear weapon. But we don't want the smoking gun to be a mushroom cloud' (Wright and Dixon 2008, p. 2). On 7 October 2002, President Bush declared that Iraq under Saddam Hussein 'possesses and produces chemical and biological weapons' and is 'seeking nuclear weapons' (Associated Press 2002).

This was the context in which, just a few weeks before Congressional elections, Bush pushed a resolution through Congress giving him authority to initiate military action against Iraq (Authorization for Use of Military Force Against Iraq Resolution of 2002). The resolution effectively delegated the war-declaring power of Congress to the president (Fisher 2004).

Efforts to sell the war against Iraq continued through the first months of 2003. In January, Bush and Blair met and agreed UN inspectors were unlikely to find WMD in Iraq in the coming weeks. Bush suggested various ways they might provoke Hussein so as to justify American and British 'retaliation'. One of his ideas was to paint a US drone with UN colors to tempt Hussein to shoot it down (Wright and Dixon 2008, p.12). On 28 January 2003, Bush delivered the State of the Union Address, which included the statement, 'The British Government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa' (CNN.com 2003a). A week later, Secretary of State Colin Powell addressed the UN and claimed Iraq offered 'chemical or biological weapons training for two al Qaeda associates beginning in December 2000' (CNN.com 2003b). This claim was based on the dubious statements made by al-Libi when he was tortured in Egypt, statements rejected a year earlier by the DIA (Ross and Esposito 2005).

Parallels to Nuremberg

In short, extensive evidence suggests that Bush and Cheney conspired to wage aggressive war and that their conspiracy was comparable in important respects to that for which the top leaders of Nazi Germany were tried, convicted, and executed. Table 1 compares the two conspiracies. The parallels between them are straightforward and are confirmed by evidence comparable in quality to (or better than) the evidence accepted as compelling at Nuremberg.

The evidence indicates Bush and Cheney took office with a goal of increasing access to petroleum in the Middle East and were inclined to wage war for this purpose; conveyed an ultimatum to the Taliban in July 2001 about building a pipeline across Afghanistan; ignored warnings in August 2001 that terrorist attacks were imminent; pushed agencies after 9/11 to link Iraq to 9/11 and the anthrax mailings; used 9/11 as a pretext for invading Afghanistan; conspired with a foreign power to deceive the American people and entangle US military forces in an illegal war; formulated doctrines to justify torture and military 'preemption'; authorized

Table 1. Bush–Cheney parallels to the IMT judgments.

	Judgment at Nuremberg	Evidence	Bush–Cheney	Evidence
Nature and origins of common plan or conspiracy for aggressive war	Rearm and then invade surrounding nations to secure 'living space' for racial Germans	*Mein Kampf* by Adolf Hitler; Hossbach Memorandum	Invade Iraq (and perhaps Afghanistan) to gain control of dwindling oil supplies	Downing Street Memos
Instrument of cohesion	Nazi Party and various subsidiary organizations (SA, SS, Gestapo, and the Nazi Party leadership)	Similar statements by Nazi Party leaders about the Versailles Treaty, Jews, 'living space', and other elements of the common plan	Core leaders of Bush–Cheney Administration; subsidiary groups include WHIG, OLC, and the National Security Council	Uniform statements by Bush, Cheney, and Rice about Iraqi WMD and Iraqi links to al Qaeda; August 2002 memos from OLC (Bybee 2002a, 2002b)
Common objectives of conspiracy	Rearm; overthrow Versailles Treaty; acquire territories for 'living space'	Statement of Nazi Party Program of February 1920; surreptitious rearmament after 1932	Overthrow Gulf War treaty; gain control of oil supplies in Afghanistan and Iraq	Cheney meetings with oil industry executives in 2001; ultimatum to Taliban in July 2001 about pipeline across Afghanistan; statements by Bush immediately after 9/11 seeking links to Iraq
Doctrinal techniques of the common plan	Race theories; glorification of war for Germans; thesis that German politicians sold out the military in the Versailles Treaty	*Mein Kampf* by Adolf Hitler; numerous public statements by Nazi officials	The Bush Doctrine of preemptive war; the 'one percent' doctrine as a justification for torture	*The national security strategy of the United States* (Bush 2002); OLC memos by Yoo (2001) and Bybee (2002c) on the president's authority to use military force preemptively; the OLC interrogation memos (Bybee 2002a, 2002b)
Subversion of democratic processes and popular control of government (SCADs)	Setting the Reichstag fire as a pretext for suspending constitutional rights; fomenting social panic with warnings of impending communist revolution	Testimony by a Nazi official that Goering had boasted publicly of his involvement; similar claims in affidavits from three members of the SA; underground passageway from Goering's office to Reichstag; immediate arrests of political opponents; mental incompetence of the accused arsonist compared with the scope and sophistication of the arson	Ignoring warnings of impending terrorist attacks in the USA; exploiting 9/11 as a pretext for opportunistic military aggression; fomenting social panic about terrorism	Bush's and Rice's false claims after 9/11 that no one could have imagined/envisaged terrorists using planes as weapons (CNN.com 2004c, Komarow and Squitieri 2004); Bush's efforts immediately after 9/11 to link the attacks to Iraq; Bush, Cheney, and Rice statements about Iraq WMD; misrepresentation of intelligence findings and coerced confessions to Congress and the UN; bogus terror alerts in the run-up to the 2004 election (Hall 2005)

Securing passage of a law, giving legislative powers to Hitler and his cabinet	'Law for the Protection of the People and the Reich'	Securing passage of legislation delegating Congress' war making powers to the president for the invasion of Iraq	Authorization for Use of Military Force Against Iraq Resolution of 2002
The SA purge and other actions against critics	Testimony of Hans Bernd Gisevius	Program to punish and discredit Wilson by 'outing' Valerie Plame	Special prosecutor's findings plus revelations by administration officials (Office of Special Counsel 2005)
Staging 'incidents' at the border between Germany and Poland to 'justify' an invasion of Poland	Affidavit by Gestapo agent Alfred Naujocks	Using torture to obtain confessions alleging Iraq WMD and Iraq links to 9/11 and al Qaeda	OLC memos of August 2002 (Bybee 2002a, 2002b); *Inquiry into the treatment of detainees in U.S. custody* (Senate Committee on Armed Services 2008)
Concealing from the German people the Nazi plans for aggressive war and genocide	The Hossbach memo	Misrepresenting intelligence findings of Iraq WMD and Iraq links to 9/11 and al Qaeda	Downing Street Memos; use of claim in Bush's 2003 State of the Union Speech that Iraq sought uranium in Africa (CNN.com 2003a), a claim removed from Bush's 7 October 2001 speech in Cincinnati (Burchfield 2003, Milbank 2003); use of al Libi confession in Powell's speech to the UN without revealing that his confession was extracted by torture

torture of prisoners to obtain bogus confessions linking Iraq to al Qaeda, Osama bin Laden, and 9/11; organized a campaign and made fraudulent statements about Iraqi WMD to sell the invasion of Iraq to Congress and the public; exposed the identity of a CIA officer to defend those fraudulent statements; obstructed investigations of 9/11 defense failures, pre-9/11 warnings, and the CIA officer's 'outing'; and pressured Congress to delegate to the president its constitutional power to decide whether to go to war.

Implications

The USA and the world now face the challenge of responding to the evidence of high crimes and war crimes by the Bush–Cheney Administration. Actions in at least four areas are called for. First, the USA should conduct criminal investigations of the administration and should initiate prosecutions if the evidence warrants. Investigations are necessary to determine, among other things, who beyond Bush and Cheney participated in the conspiracy. The available evidence points to lawyers in the OLC, members of the WHIG, Secretary of Defense Donald Rumsfeld, and Tony Blair and others in his administration. However, the conspiracy may have also have included Secretary of State Powell, members of Congress (Democrats as well as Republicans), and many others.

The responsibility to investigate falls on the USA for practical, moral, and legal reasons. As a practical matter, courts outside the country are unlikely to move against former American officials, and in any event, such courts would probably be unable to enforce their warrants, subpoenas, and verdicts (Moghalu 2008, pp. 171–178). Morally, America has an obligation to hold its own leaders to the same standards to which it held Nazi leaders after World War II. As a matter of law, President Obama has sworn an oath to faithfully execute the nation's laws, and substantial evidence indicates crimes have been committed. Failure to investigate and prosecute the high crimes and war crimes of the Bush–Cheney Administration is itself a crime as well as a betrayal of American ideals.

The second area where action is needed involves current policies by America and its allies in the so-called war on terror. Although the Bush–Cheney Administration has been replaced, its strategy of 'taking the war to the terrorists' has not been questioned, much less abandoned, and America remains committed to global military 'preemption'. This policy is based on narratives shaped by the Bush–Cheney Administration in the aftermath of 9/11 and the anthrax mailings. The administration attributed these attacks to al Qaeda and bin Laden, connected the latter to Iraq, and generally depicted Islamic terrorism as a grave, unprovoked, and irrational threat to the domestic security of the USA. When popular support for the occupation of Iraq waned after no weapons of mass destruction were found, these narratives and the social panic they engendered were reinforced by a series of bogus terror alerts in the run-up to the 2004 presidential election (Hall 2005). To the extent the war on terror was based on false premises, uncertain intelligence, coerced confessions, and other grounds of dubious validity, America's policies to address the threat of global terrorism should be reconsidered and revised.

Third, statutory and constitutional reforms should be adopted to strengthen democratic governing institutions so that future presidents cannot repeat past abuses. If, as the evidence indicates, the Bush–Cheney Administration succeeded in hijacking American democracy, the political system was and remains quite vulnerable to SCADs by top officials. Statutory and constitutional reforms are needed to expand Congressional oversight of intelligence gathering and estimation; require thorough and independent investigations of defense failures like 9/11; prevent secrecy classifications and declassifications from being used for political purposes; and restrict the president's pardon powers in cases where the president or vice president is implicated in the crimes.

Finally, the experience with the Bush–Cheney Administration calls for scholars of public administration to revise their assumptions about modern representative democracy. Scholars have traditionally advocated a separation of politics and administration and have, with a few notable exceptions, paid little attention to the responsibility of administrators to the constitutional order (Wamsley 1990). This technocratic orientation ignores the possibility of antidemocratic conspiracies in high office and leaves practitioners woefully unprepared to defend the constitutional order against abuses of power (Farmer 2005). The high crimes of the Bush–Cheney Administration show that representative democracy is quite vulnerable to antidemocratic conspiracies in high office. The implications of this conclusion for the research, theory, and practice are far-reaching. The administrator's role must be reconceptualized to include constitutional and democratic, as well as administrative responsibilities; research must be directed at SCADs and other forms of elite political criminality; and administrative mechanisms must be developed for SCAD detection and prevention.

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