In the court of public opinion: the Swift Boat Veterans for Truth in the 2004 election

The Swift Boat Veterans for Truth (SBVT) attacked John Kerry’s Vietnam War record during the 2004 election campaign and questioned his fitness to serve as commander in chief and president. Senator Kerry had been a swift boat officer in the Mekong delta in 1968-69 and had received several medals for his actions in combat. In 1970-71 he became one of the leaders of the Vietnam Veterans Against the War (VVAW), an important organization in the anti-Vietnam war movement. He criticized the Nixon administration’s conduct of the war in many public speeches. In 1971, at a much publicized Senate Foreign Relations Committee hearing chaired by William Fulbright, he argued the anti-war position and asserted that war crimes were committed by the U.S. military. Conservative public opinion and many in the military were offended, including some of the swift boat officers who had served in Vietnam.

In the 2004 presidential campaign, Senator Kerry highlighted his military record. He made campaign appearances with several of the soldiers who had served under him thirty years earlier. David Brinkley wrote Tour of Duty: John Kerry and the Vietnam War, a key campaign publication using Kerry’s war diaries and interviews with close associates. In the book, Kerry explained his growing doubts about the war, described the military engagements that earned him medals, and justified his subsequent anti-war activities. He was highly critical of the competence and motives of several of his superior officers, notably Captain Roy Hoffman who had since retired with the rank of rear admiral and who was personally outraged at being labeled “hotheaded”, “bloodthirsty” and “egomaniacal” [Brinkley, p.105-6]. With the help of Republican operatives and financial contributors, Hoffman and other officers founded SBVT (Swift Boat Veterans for Truth), which mounted a media campaign to discredit Kerry’s military service. From July 22 to election day, they raised twenty-five million dollars, most of it spent on print and electronic ads. The largest donors were Texas financiers T. Boone Pickens and Harold
Simmons, with two million each [Swett and Ziegler, pp. 300-1]. Some poll evidence indicates that the SBVT campaign hurt Kerry, though whether it was decisive in his defeat by President Bush remains questionable. Gallup Poll (August 23-25, 2004) found that 81% of Americans had seen or heard about the political ads criticizing Kerry’s war service, and the Pew Research Center for People and the Pres reported (September 2004) that 50% of the public followed the news story in which swift boat veterans had criticized Kerry’s war service very or fairly closely.

The SBVT campaign affirmed the honor, valor, and integrity of the U.S. military in the Vietnam War, and that of the Swift Boaters in particular. They had long felt victimized by public opinion and blamed the anti-Vietnam war movement. A principal organizer of the SBVT wrote that “The popular view of the Vietnam War as morally wrong, and of Vietnam veterans as misfit drug addicts …has long been enshrined in the popular culture…Isolated, denied access to the media, and reviled by many of their countrymen, Vietnam veterans endured in silence for more than three decades…So matters remained until 2004, when one of the primary architects of the poisonous Vietnam myth suddenly emerged as the Democratic Party’s nominee for President…. This book is the SBVT story of justice and vindication long delayed.” [Scott Swett and Tim Ziegler, To Set the Record Straight, 2008, New American Media, p.ix]. Of 3600 men who served aboard swift boats in Vietnam, about two hundred signed on to the SBVT campaign, yet the SBVT leadership created the impression that it stood for most swift boaters [Kate Zernike, ”Veterans Fight to Reclaim the Name “Swift Boat”, New York Times June 30, 2008].

SBVT made a strategic decision on discrediting John Kerry war service, in particular whether he deserved the medals he had earned. They also denounced his anti-war activities in the VVAW and his war crimes allegations as unpatriotic, false, damaging the armed forces and weakening national security, as Kerry’s critics had done back in 1971-72. John O’Neill, a Swift Boat commander in Vietnam, like Kerry, was a spokesperson for the pro-Nixon administration Vietnam Veterans for a Just Peace. In debates with Kerry at public appearances, O’Neill maintained that “I never saw a war crime
committed…I served in Coastal Division 11 for a year… To say war crimes are commonly committed in Vietnam as a matter of policy is a lie.” [Swett and Ziegler chapter 2; Brinkley p.402-407]. Kerry’s anti-war activities cost him a congressional seat in 1972 in a heavily Democratic district in Massachusetts when he was labeled unpatriotic, a traitor, a radical, and un-American in local media and by his Republican opponent.

In 2004, Kerry’s opponents chose to attack his war record in addition to his anti-war activities with the VVAW thirty years earlier. According to the chief strategist of SBVT, “At the center of the SwiftVets litany of grievances against John Kerry’s actions in Vietnam was the charge that he had systematically falsified reports of his engagements and exaggerated his heroism to acquire medals” [Swett and Ziegler p. 149]. And they chose to confront Kerry in the “court of public opinion” during a hotly contested presidential election campaign.

There is a world of difference between the “court of public opinion” and a “court of law” for ascertaining responsibility for actions, be they crimes and morally reprehensible or, on the contrary, deserving of public acclaim and gratitude. In a court of law, fairness and truthfulness are at the core of the justice process. Evidence is excluded by the judge when it does not contribute to truth, e.g. hearsay; material evidence and witnesses are tested by cross-examination from both sides for veracity, accuracy, bias, omissions; witnesses testify under oath and risk penalties for perjury; both prosecution and defense experts are heard; incriminating evidence has to be disclosed prior to trial; members of the jury are selected from a large pool of citizens and excluded for prejudice, bias and interest; the jury hears all the evidence; the judge instructs them on procedures for reaching a verdict; violation of these fairness norms occasions appeals to a higher court. Even so, despite these safeguards, justice is like all human enterprise subject to error and corruption. Miscarriages of justice do occur. Nevertheless, for attributing responsibility to human agents in contentious actions, seeking truth and justice in a court of law gets to both more surely than alternatives.
The court of public opinion is very different. The venue for debate is the mass media and political sites accessed to the public through mass media reporting, e.g. interviews, press conferences, legislative hearings, talking heads. As one observer notes, echoing the views of Walter Lippmann, [Michael Schudson, 2006, Why Democracies Need an Unlovable Press Polity”, Cambridge p.109]: “News and truth are different…News picks out from the wider world only what its imperfect “searchlight” reveals, and the searchlight is guided by market forces, political wishes, and cognitive blind spots, not by any kind of scientific aspiration to truth.” Alongside probing and objective investigative reporting there is biased, superficial and sensational coverage of the same issues. The jury are members of the public who self-select by partisanship and interest. They are not exposed equally to the arguments of all sides, and exposed only episodically and incompletely as they read and view a few political ads and news stories. Media debate blurs the line between fact, opinion, and interpretation. There are no fairness rules about evidence – misinformation, falsehood, biased selection of facts, fabrication, to mention but a few tactics that impair truth seeking, are fair game. “Balance” in coverage confronts “his story” and “her story”, what media critic Martin Kaplan [“Welcome to the Infotainment Freak Show” in Andras Szanto ed. What Orwell Didn’t Know, 2007, New York Public Affairs, p. 137ff.] describes as “polarized pairs doing battle without a resolution ending with “we are running out of time, we will leave it at that”: the public is left to make up their mind, but has no time, capacity and tools for fact checking and for truth seeking. There is no final verdict, and no appeal. Media norms for truth seeking are weak.

Much of what we know – strictly speaking, “think” that we know – is conventional wisdom, group think, hearsay and information that is lightly probed for truth. It has always been thus. Charles Lindblom [Inquiry and Change 1990, Yale UP, p.78] writes that “I take it as undeniable that what people think about the social world – belief, attitude, value and volition – derive from social interchange far more than direct observation…for answers…you depend almost entirely on other people, including acquaintances, journalists, and other people who reach you through press and broadcasting.” Research indicates that the public selectively exposes itself to media views that are mirrors of peer conversations and informal settings. Consensus in one’s social
milieu rather than truth has priority. Ralph Gomory and William Baumol write that “It is exceedingly difficult to get people to believe things they don’t want to believe…What makes an argument believable to people, or attractive to people, is that they already believe it.” [Gomory and Baumol, 2000, *Global Trade and Conflicting National Interests*, MIT Press,……]. One does not get exposed to both sides of an issue equally, and sometimes only to one side [Diana Muntz, 2006, *Hearing the Other Side*, Cambridge]. Claims, exaggerations, misinformation, contradiction, rumor, opinion and plain lies are not probed and sorted out from arguments. Advocates and partisans among opinion makers have an interest in obscuring or distorting the truth, and creating consensus around an alternative “truth”. The goal is not truth and justice but winning the mind and emotions of the public. Unlike debate within the jury, one talks mostly with those one already agrees with. Conforming to the dominant views in one’s milieu gets rewarded with acceptance and approval. Subjectively one believes that one’s opinions are “the truth” and that other views are mistaken and partisan. The court of public opinion is an imperfect institution for getting at truth, yet that is where the moral character and reputation of public figures is shaped and destroyed.

**John Kerry’s medals**

In a public controversy such as that between SBVT and John Kerry, there were essentially three sources about actions and events that occurred in Vietnam fighting in the Mekong delta 33 years earlier. The first were the after operations reports by the SB commanders to their Navy superiors, and the citations for medals, decorations and honors that describe combat actions and commend individual soldiers, officers and units for courage and success. The second source is the contemporaneous statements, diary records, and letters to families by soldiers in 1968-69. The third source is what participants recalled and said thirty five years later in 2004. The most credible evidence for an action is when a Navy document agrees with a contemporaneous participant source (e.g. diary entry, letter written to family), and is affirmed by the participant subsequently. That is how truth is established at a trial. If the same action is also confirmed by other participants, independently of one another, then the truth is “beyond reasonable doubt.”
Matters are not always quite that straightforward because eyewitnesses to the same event seldom recall the exact same details. Perceptions and memory varies, but it is possible to sort out testimony that is by and large supportive from that which is contradictory or irrelevant.

Testimony may be mistaken, biased and untruthful, but there are tests for that. A skillful attorney will question witnesses for errors, biases, hearsay, and credibility. Hearsay would be ruled unacceptable evidence by a judge. Recall of the event after 33 years may be faulty, e.g. the witness confuses a mission with some other mission. Eyewitnesses who were present at the same event may recall different details because of differences in physical proximity, angle of vision, preoccupation with rescue or combat, visibility at night (under flares) and other factors. Skillful questioning of eyewitnesses will explain discrepancies and a credible scenario can be constructed nonetheless.

Some testimony is suspect, e.g. when a witness has a strong interest to give biased or incomplete testimony. Because witnesses testify under oath and there are penalties for perjury, deliberate falsehood is hazardous and costly in a trial, but is less likely to be so in media interviews and campaign speeches. When a witness has given one account at the time the events occurred and a contradictory account thirty years later, he is suspect, especially if he has an interest to change his account. When several accounts are coordinated by witnesses – they agree on providing the same account – that is suspect, and a judge would disallow such testimony in a trial. When testimony contradicts written records, it calls for scrutiny and explanation. In a court of law, the cross-examination of witnesses would ascertain memory loss and confusion, interest, hearsay, collusion, deliberate lies, contradiction and other factors that impair testimony. Experts testify about matters ordinary people are not expected to know, e.g. the likelihood that a weapon jams or overheats in combat. When witnesses contradict one another, other witnesses are called to clarify the contradiction and establish which account is more credible. In the end, as suspect testimony is challenged and discredited, the jury is left with the most credible facts.
In the court of public opinion, the sorting of opinion, misinformation and outright fabrication from truthful accounts and facts is performed in a haphazard manner, and at times not at all. Truth is not the goal of partisan attackers. As long as they can sow the seeds of doubt, they have won. The stakeholders in the court of public opinion are the reporters, editors, producers and commentators of newspapers and radio and television news. Whether information accumulated from many discrepant sources is sifted for bias, coherence and truthfulness, instead of remaining parallel stories all claiming to be true, is up to the stakeholders. They don’t have a mandate to seek truth. Some may in fact have a partisan interest. Typically, a political advertising, campaign publication, news conference or interview originates charges and counter-charges. An unresolved controversy boosts circulation and audience. The ordinary reader or viewer following a controversy receives a mixture of opinion and disputed fact and not information tested on credibility for a reasoned judgment, as would members of a jury.

Examine what happened in the Kerry swift boat controversy and contrast that to what would have happened in a court of law. Tour of Duty was published in January 2004 as the primary campaign for Democratic nomination was heating up. Kerry’s candidacy stimulated the formation of the SBVT. In an opening salvo, John O’Neill made a CNN appearance on April 20 and charged that “Kerry was not a war hero.” SBVT held a news conference on May 4 at the National Press Club with the same theme, and handed out information packages to reporters attacking Kerry. The controversy gained visibility and heated up when on August 4 the first anti-Kerry political ad, “Any Questions,” was aired and on the tenth when Unfit for Command was published. In “Any Questions”, seventeen swift boat officers were shown making statements such as “I served with John Kerry, he is lying about his record, John Kerry lied to get his Bronze Star, John Kerry has not been honest, John Kerry betrayed the men and women he served with in Vietnam, he dishonored his country, he lacks the capacity to lead.” Although the ads aired only in a few Wisconsin, Ohio and West Virginia markets, the story made national news and earned the SBVT attackers a whirlwind of media appearances. For instance, Van Odell, a gunner on one of the swift boats, had said in the ad: “John Kerry lied to get his Bronze
Star. I know, I was there; I saw what happened.” He got more than two hundred interviews, many on TV [Swett and Ziegler, pp.106, 134].

The second political ad, “Sellout,” charged that John Kerry’s anti-war activities had dishonored the country and the soldiers he had served with. The TV ad campaign was complemented by postings on the website SwiftVets.com, e.g. on July 22, 2004, “John Kerry’s Phony War Crimes Charges” was posted. The Kerry campaign responded by refuting the charges with testimony of swift boat veterans who had served with him. With the exception of one sailor, Kerry’s own crew members remained loyal to him and confirmed the account of Kerry’s combat actions in Tour of Duty. The SBVT attackers tended to be swift boat officers, some of whom like Larry Thurlow and Jack Chenoweth did serve along side of him in the missions in which he earned his medals, but others like John O’Neill and Captain Hoffman were not participants at these events. As ads and counter ads and the TV appearances and newspaper interviews of Kerry attackers and defenders multiplied, Kerry suffered erosion in the polls on “honesty” and “fitness” to serve as commander in chief. The attacks definitely hurt his campaign [www.publicopinionpros.com/features/2005/aug/borick.asp].

Because the Navy’s records supported Kerry’s actions described in Tour of Duty, the SBVT attackers contended that he had falsified the after-mission reports to his superiors in order to earn medals he did not deserve. Swett and Ziegler [2008, pp.125,122,138, 186, 184] write that “it was obvious to anyone with experience that Kerry could in fact have acquired unearned medals by simply filing false after-action reports.” They quote George Elliott, the division commander under whom Kerry served: “Had I known the facts, I would not have recommended Kerry for the Silver Star…” John O’Neill claimed that “Admiral Roy Hoffman wrote Kerry a congratulatory note based on false action report…”, and Jack Chenoweth, another swift boat commander, said “…the only information submitted to the chain of command was falsified by Kerry.” The falsification charge was repeated over and over again; it had to be, since the Navy records contradicted the SBVT critics. However, when investigative reporters for the New York Times and the Washington Post asked the attackers to produce evidence that Kerry had
written the “false” March 13 after-action report, they were unable to do so. O’Neill contended that the initials “KFW” at the bottom of the report identified Kerry, but his initials are “JFK”. Roy Hoffman identified Kerry on the basis of numerical identifiers but admitted the numbers referred to the swift boat unit, not Kerry personally [Michael Dobbs, “Swift Boat Accounts Incomplete” Washington Post August 22, 2004]. In a court of law, based as it was on unsubstantiated opinion, the false reports claim would carry no weight.

The principal attackers’ contention that Kerry lied about and exaggerated his war record would be suspect in a court of law because a short time earlier they actually had praised Kerry for his combat actions and leadership. In March 2003, Roy Hoffmann said in an interview that although he disagreed with Kerry’s antiwar position, “I am not going to say anything negative about him. He’s a good man”. In a June 2003 interview, commenting on Kerry’s Silver Star, Hoffman said “It took guts, and I admire that.” George Elliott, another one of Kerry’s commanders, had supported Kerry’s reelection in 1996 and described Kerry’s Silver Star “as an act of courage”. In 1969, Elliott had given Kerry the highest ranking in eleven categories of an evaluation and the second highest in the remaining five. In a written comment, he called Kerry “the acknowledged leader in his peer group.” Adrian Lonsdale, another 2004 attacker, had told a press conference in 1996 that “He (Kerry) was among the finest of those Swift boat drivers.”[Kate Zernek and Jim Rutenberg, “The 2004 Campaign” New York Times August 20, 2004]. An attorney in a court of law would question the attackers about why they changed their views of Kerry. He would also point out that Kerry’s Tour of Duty was highly critical of Hoffman and Lonsdale, i.e. they had an interest to defend their reputation and diminish Kerry.

Other testimony by SBVT attackers would be suspect in a court of law because it was hearsay. For instance, Bob Elder, a swift boat commander, asked how he could make claims about events at which he wasn’t present, replied “I could fill the studio with people who were eyewitnesses…” but does not mention any. George Elliott stated in an affidavit that “I do not have personal knowledge as to how Kerry shot a wounded fleeing
Vietcong (another attacker John O’Neill, also not present, describes the Vietcong as a teenager in a loin cloth), I rely on many sources.” [Swett and Ziegler, p.138]. Elliott conveniently omits the eyewitness accounts of the incident by the soldiers who were actually at Kerry’s side and who affirm that the VC soldier aimed an armed weapon at the Americans – a live B-40 rocket launcher that Kerry captured after shooting the man [William Rood, “This is what I saw that day” Chicago Tribune August 22, 2004]. John O’Neill, coauthor of *Unfit to Command* who served in the Swift boat unit after Kerry had returned to the U.S. claimed on Fox News that “about sixty vets” had contributed “eyewitness accounts” about Kerry’s actions recorded in the book, but no list of such names was ever provided [Swett and Ziegler, p.193]. Of the SBVT members who frequently spoke on radio and TV against Kerry, Roy Hoffman, Charley Plumly, Bob Elder, Steve Gardner, Joe Ponder, Dr. Louis Letson, Wey Symmes, Larry Thurlow, and Van Odell, only the last two and Gardner participated in a combat mission at which Kerry earned his medals [Swett and Ziegler, p.191]. SBVT was saturating the airwaves with lots of hearsay that would not stand up in a court of law.

Nevertheless, there were discrepant eyewitness accounts, and these would be clarified in a court room by cross-examination under oath, and expert testimony on the “fog of war.” The most controversial event, following which Kerry earned a Bronze Star, was the Bay Hap River ambush on March 13, 1969. Everyone agrees that as five swift boats passed a fishing weir, a mine detonated under Richard Pees’ boat, wrecked it, and injured Pees and his crewmembers. What is disputed is whether the mission came under small arms fire from the river banks, as Kerry claimed in *Tour of Duty* and several eyewitnesses and Navy records maintained, or whether there was no Vietcong small arms fire. The Navy record of the ambush states that “a mine detonated under PCF-3 (Pees’ boat) and at the same time the boats received heavy a/w and s/a (automatic weapons and small arms) from both banks” [exhibit 17], but the SBVT contended there was no enemy fire and Kerry did not deserve his Bronze Star for heroism for lifting Rassmann out of the river with his injured forearm, while under fire. Jim Rassmann, U.S. Army Special Forces, was blown off Kerry’s swiftboat when an explosion shook the boat and injured Kerry’s arm. Kerry’s crew all said that there was small arms fire against them. Rassmann told the
Wall Street Journal (August 10, 2004) “The second blast blew me off the boat. John Kerry exposed himself to enemy fire by pulling me on board…I am a Republican. I had to speak out against the (SBVT) smear campaign.” Wayne Langhofer, the gunner in the boat behind Kerry, said “a lot of firing was going on; it came from both sides of the river.” Jim Russell, a psychological operations officer who was on one of the boats, told the Telluride Daily Planet (August 20, 2004) “Anyone who does not think we were being fired upon must have been on a different river.” Contrary to these eyewitness accounts, three of the swiftboat commanders who had joined SBVT, Thurlow, Chenoweth, and Pees, contended there was no enemy fire. Gunner Van Odell on Chenoweth’s boat agreed: “There was no fire, I did not hear any shots… Kerry lied to get his Bronze Star.” [exhibit 6]. Chenoweth stated that “the only information (about enemy gunfire) submitted to the chain of command was falsified by Kerry”, and Thurlow claimed that “…John Kerry’s report…falsely described the action …that saw small arms fire and automatic weapons from both banks of the river.” [Swett and Ziegler, pp.1183-4]. But an investigate reporter discovered that the Bronze Star citation for Thurlow mentions prolonged enemy fire. A report of battle damage to Thurlow’s boat mentions bullet holes [Dobbs, NYT]. Thurlow claimed that the bullet holes were from the previous day’s action, and charged that the information about enemy fire came from John Kerry’s after-action report, which he had not read, and that he was willing to return his Bronze Star if it was obtained under false pretenses [Swett and Ziegler, p.182-184]. Aside the fact that the SBVT produced no evidence that Kerry wrote the March 13 after-action report and that his own crewman Lambert reported enemy fire, was it credible that Thurlow had not read his Bronze Star citation? In a court of law, Thurlow’s testimony about no enemy fire would be highly suspect.

Faced with conflicting testimony, cross-examination and expert testimony in a court of life might well have cleared up the small arms fire controversy. For instance, given that the swift boats had been in many ambushes in the past months, how likely is it that the Vietcong would not follow up an underwater mine explosion with fire from the banks, which was their usual practice? If there was small arms fire, would the swift boaters hear it? The swift boats’.50 caliber machine guns were blasting the river banks, and as Jim
Russell observed: “The noise was deafening”. It might also be the case that under heavy fire from the boats, the Vietcong would take cover or abandon the banks, or fire only at some of the boats. Compelling evidence is when an eyewitness had no interest to report enemy fire but does so because it is the truth. In fact, there was such an eyewitness, Robert Lambert. Lambert, a career military man who served three tours of duty in Vietnam, did not personally like Kerry and respected Thurlow, the commanding officer he served under. He took issue with Kerry’s anti-war activities (“I don’t like Kerry, I don’t plan to vote for him” and considered Thurlow an “excellent officer, absolutely professional.”) He actually pulled Thurlow out of the river when Thurlow fell in during rescue operations for the disabled PCF-3 boat and crew. Nevertheless, he maintained that there was enemy fire (“I don’t like the man (Kerry) himself, but I think what happened, happened…”) and explained how Thurlow could be mistaken; “he was too distracted with the rescue effort.” [Associated Press, August 26, 2004; Mail Tribune, Oregon, August 26, 2004].

Thanks to some investigative reporting and fact checking, by the end of August, Thurlow was a suspect witness; there was no proof that John Kerry had written false after-action reports to get medals for himself (and others as well); charges that he had killed a wounded, unarmed Vietcong running away were based on hearsay and contradicted by eyewitnesses in the combat; military records indicated enemy fire at the Bay Hap River incident; but there was contradictory eyewitness testimony about it. These facts did not cumulate into a coherent media story about the SBVT against Kerry and his comrades in arms. In the court of public opinion, the same charges and counter-charges were made over and over again. On CNN, October 5, Judy Woodruff confronted Larry Thurlow and Jim Rassmann about enemy fire in the Bay Hap River incident and Kerry’s Bronze Star actions. It boiled down to a “my memory/your memory” interview. Thurlow: “I distinctly remember we were under no fire from either bank”; Rassmann: “I was receiving fire in the water every time I came up for air.” Woodruff did not question the credibility of either. It was as though the New York Times and Washington Post investigative reporting did not exist.
The SBVT campaign just kept repeating the same charges over and over again, regardless of whether the charges had been discredited. The Kerry camp kept making the same accusations about the SBVT being an instrument of the Bush campaign. Election coverage in much of the media has been likened to a sports game. The game itself is a sequence of moves by the offense, countered by the defense, and the sides switch back and forth from one to the other. There is one crucial difference. In sports, there are rules enforced by referees. Both sides play by the same rules, which makes for a fair game. Rules and referees don’t exist in the court of public opinion, and the spectators decide who won, not the referees. Access to the spectators is ruled by money which buys political ads and pays for campaign events. In sports, every time a referee blows the whistle for a violation and awards a penalty, he keeps the game fair. In the court of public opinion, there is no referee for blowing the whistle on falsehood, and there is no convergence on truth.

**John Kerry’s anti-war record**

Had SBVT confronted Kerry only on war crimes and the mode of counterinsurgency warfare in Vietnam, they would have to engage in a debate they well might lose because much documentation wetted by scholars, historians and military experts existed on these topics by 2004. To be sure, there was no unanimity – there never is – but unsupported, counterfactual, ideological and blatantly self-serving positions common thirty years earlier were hard to maintain against the evidence that had accumulated and the reasoned analyses that had been made.

What exactly had John Kerry, the anti-war critic, said and done back in the early seventies? On NBC Meet the Press on April 18, 1971, he had said that “I committed the same kinds of atrocities as thousands of other soldiers that took part in free-fire zones. I conducted harassment and interdiction fire. I used .50 caliber machine guns…which were our only weapon against people. I took part in search and destroy missions, in the burning of villages. All of which is contrary to the Geneva conventions… And I believe that the men who designed these…free fire zones…who ordered us …who signed off the air raid
strike areas…are war criminals.” On the Dick Cavett show on June 30 "we (swift boaters) took part in free fire zones, harassment, interdiction fire and search and destroy missions – we did participate in war crimes.” And again in a speech reported by the Washington Star (June 6, 1971):"We established the American presence by showing the flag and firing on sampans and villages along the banks. Those were our instructions…we discovered we were butchering a lot of innocent people.”

Kerry had praise, admiration and gratitude for his fellow swift boaters, but he was highly critical of the superior officers in charge of Mekong delta warfare during Operation Sealord, and of the civilian leadership, first under President Johnson and then President Nixon. For Kerry, Vietnam did not threaten the U.S. and the domino theory wrong, i.e. if Vietnam falls under communism, so will the rest of Southeast Asia. “Operation Sealord” was meant to interdict Vietcong weapons and troop infiltration, show the flag, and root out the VC from riverside villages. There were 4000 miles of rivers, canals and creeks, and thousands of sampans and boats filled with goods and people. The swift boats were heavily armed and fast river patrol boats with five men crews, and patrolled three to six at a time, often during night hours when VC clandestine movements were taking place. Kerry thought the patrols were absurd and unnecessarily risked the lives of his fellow officers and men: during his entire stint in Vietnam, he never found a single piece of contraband on a junk or sampan [Brinkley, p.201]. On harassment and interdiction operations, he remarked that “it required us to shoot indiscriminately at a target area we couldn’t see…one never knew what was being hit.” The swift boats powerful engines could be heard three miles away. Thus smugglers were warned and the VC would set ambushes. The operations were inconclusive: “when hit, the boats would just shoot back and get the hell out…we never found out what damage had been inflicted.” What else bothered Lt. Kerry about the military leadership, including his immediate superior officers Horne and Hoffman, was the low value they assigned to Vietnamese lives and that they measured success in terms of “enemy bodies counted, huts burned, sampans sunk and medals won.” [Brinkley 167-201]. Other swift boaters had similar doubts and reservations.
If what Kerry said about war crimes in Vietnam was true, he would have to show that specific actions and more importantly the mode of counterinsurgency itself contravened the protections for civilians under the Geneva Conventions. A manual explaining war crimes states that “Free fire zones as defined by the Department of Defense doctrine and rules of engagement are a severe violation of the laws of war for two reasons. First, they violate the rule against direct attack of civilians by presuming that after civilians are warned to vacate a zone, then anyone present may lawfully be attacked. …And second, they violate the rule against indiscriminate attack.” [Crimes of War, p.152] Kerry insisted that U.S. military leadership had command responsibility for avoiding modes of warfare that violated the Geneva Conventions. Contradicting Kerry, the SBVT leadership affirmed a sanitized version of counterinsurgency warfare: “A free fire zone was primarily a way to coordinate between multiple groups sharing a battle area…interdiction fire was used to deny the enemy access to a given location by focusing fire on it…”search and destroy” essentially meant “find and kill the enemy. None of these procedures violate the Geneva Accords…” [Swett and Ziegler, p. 11]. Kerry and SBVT could not both be right.

The army’s own secret, internal, five year CID investigation into war crimes following the My Lai massacre does not support the SBVT [Deborah Nelson The War Behind Me, 2008, Basic Books]. The allegations did not originate with anti-war activists and other left wingers who were promoting the communist cause in North Vietnam, as the SBVT charged, but with ordinary soldiers who were troubled by war crimes committed by their peers which they had witnessed. They reported that in some units officers routinely ordered “kill anything that moves” and “if they move shoot them” or “the order of the day was to search and destroy, and kill anything in the village that moved,” in violation of the protection for civilians in the laws of war.

In the 241 war crimes allegations investigated by the CID, the most frequent actions were killing an unarmed civilian; an unprovoked killing of a civilian; shooting into huts, at fields, at farmers, at fishermen; killing of a suspect and of a prisoner; rape and gang rape; body mutilations (cutting ears, fingers, and other body parts for a souvenir); helicopter
gunship crew shooting up villagers, sampans, people on a road; firing at huts during search and destroy. The records routinely classified these events at “combat related.” Justification for these deaths was expressed by a lieutenant whose unit had been investigated: “you’ve got to be in that environment to really understand what goes through the soldiers’ mind at the time…whatever I did that day was part of my duties, and just for self-preservation…it does not matter if they are little children or not. They might be strapped with explosives…in Vietnam everybody was a combatant.” [Nelson pp35-40].

Of 241 cases with about 800 allegations of war crimes, the CID investigators classified 161 cases as “unsubstantiated”; which meant the case was closed for a number of reasons and not that it did not occur or wasn’t a war crime. Of the 70 “substantiated” cases – where there was probable cause – there resulted 36 courts martial, of which 20 cases involving 31 servicemen ended with convictions and 16 cases with acquittals; the rest were dismissed or otherwise disposed of. The My Lai massacre was handled in special investigations. The risk of punishment was low and the penalties mild. After reviewing these civilian casualties, Nelson faults the incentives of the army’s “body count” criterion for success: promotions, medals, favors, even air support was contingent on producing high body counts. One high ranking army official noted, “It is common knowledge that an officer’s career can be made or destroyed in Vietnam…The pressure to excel is inevitably tremendous, and it is my impression that a primary indicator of such excellence has been in the past the unit’s body count…the pressure to kill indiscriminately, or at least report every Vietnamese casualty as an enemy casualty, would seem practically irresistible.” Lt. General Talbott, a division commander, said “the 9th division insisted on a body count. They did not care what body. I heard about the Americal (division, which was responsible for the My Lai massacre) and the 9th division all the time. The 9th was worse, all on the body count basis” [Nelson, pp79-83]. In pacification operations, the 9th Infantry Division reported 10,898 enemy killed and only 748 weapons recovered, a clear indication that most of the “enemy” had been civilians. [Nelson p.90; also Newsweek, June 19, 1972].
Lawrence Wilkerson, later secretary Colin Powell’s chief of staff, had served with helicopter pilots in Vietnam, and said that “Under the rules of engagement in a free fire zone, the shooting (of an ox cart) was justified…You can shoot anything that moved. Anything…How do you know what is in this vast realm of territory that you declared a free-fire zone?” [Nelson p.101]. Retired Brigadier General John Johns told Deborah Nelson “The Swift Boaters are totally inaccurate (about war crimes in Vietnam) and here’s why: I know and you can confirm this in the National Archives…I was on the committee monitoring the war crimes and I knew all this.” [Nelson p.178].

The 241 cases investigated represents only a fraction of the war crimes that occurred. Not included were some well publicized cases later uncovered. Bob Kerrey, highly decorated and subsequently U.S. Senator from Nebraska and president of the New School University in New York, accepted responsibility for women and children killed by the Navy Seal team he commanded on February 25, 1969 in the Mekong Delta when acting on intelligence reports of a VC leader’s location they raided Thanh Phong village. “I was expecting to find VC soldiers with weapons. Instead I found women and children” he said [New York Times Magazine, April 29, 2001]. Kerrey however denied that the Navy Seals massacred twenty-one villagers after rounding them up, as reported by a member of the team members. The Navy reported the civilian casualties as enemy body counts, which was the standard practice in some units.

Despite such evidence uncovered by the army’s own investigations, the SBVT attack on John Kerry on the Vietnam war crimes issue fared well in the court of public opinion. In fact, Kerry and the Democrats in 2004 avoided making torture and prisoner abuse in the Iraqi war at Abu Ghraib and Guantanamo an issue, and even more so war crimes and civilian casualties in the Iraqi war. Governments deny or justify atrocities and war crimes by their military and security forces, and most of the public supports the denials. It is true in autocracies and it is true in democracies. The U.S. is no exception. Research indicates that the American public turned against the Vietnam and Iraqi wars because of mounting
U.S. military casualties, and not because of civilians killed, war crimes committed, prisoner abuse, and torture.

In the My Lai massacre on March 16, 1968, about five hundred unarmed Vietnamese civilians, many women and children, were killed point blank by a platoon of U.S. soldiers led by Lieutenant Calley. When the incident was brought to the attention of the army command, it immediately tried to cover it up by means of a succession of internal investigations. When some information leaked out and massacre stories were published in Time and Newsweek, and color photos of the victims in Life, the chair of the House Armed Services Committee, L. Mendel Rivers, stated bluntly: “There was no massacre.” Eventually 46 soldiers were investigated for war crimes, 13 were charged, but only one, Lt. Calley, was convicted and sentenced to life in prison. Fifty-one percent of the public thought that President Nixon should free Lt. Calley. The Silent Majority saw no wrong in the deliberate killing of five hundred civilians! In the end, Nixon commuted his sentence and Calley served only three years in comfortable house arrest at his Fort Benning quarters before he was paroled [Linder 2006].

Whistleblowers suffer a miserable fate for truth telling. Joseph Darby who made the Abu Ghraib prisoner abuse photos available to his superiors, was put into protective custody because he and his family had received death threats and moved out of their home. Major General Antonio Taguba who wrote a critical report on prisoner abuse there was reassigned to the Pentagon and forced to resign [Seymour Hirsch, The New Yorker, June 25, 2007]. The Congress and the public were stonewalled by the Defense Department. A member of the Senate Armed Services Committee expressed his frustrations as follows: “We’ve now had fifteen of the highest level officials involved in this operation, from secretary of defense to the generals in command, and nobody knew anything was amiss, nobody approved anything, nobody did anything amiss. We have a general acceptance of responsibility, but there is no one to blame, except for the people at the very bottom in one prison.’ [Danner 2004a]. Captain James Yee, the Muslim chaplain at the Guantanamo, complained to his superiors about prisoner abuse there. He was arrested and
imprisoned on charges of espionage, and accused of adultery and possession of pornography. All charges were later dropped.

Accountability for actions takes place internally in organizations. In the armed forces, the officers in charge of specific operations file a report to superiors about each engagement on goals achieved, soldiers’ actions, casualties, equipment needs, etc. A summary of Operation Silverado in the Iraqi War, on August 16, 2003, by the 3rd battalion of Arkansas’ 39th Infantry Brigade states that it “was designed to sweep through Subak Sur, seize contraband weapons, and detain Mahdi Army militiamen. The four hour operation netted 22 people and a small number of weapons.” The Iraqi war itself consisted of hundreds of such operations, each resulting in a report, and the same was true for the Vietnam war. From these reports, the performance of officers, soldiers and combat units are ascertained, promotions are made, medals awarded. Outsiders knows little about these events except when some important battle occurs, when mistakes are made (as with civilian killed in airstrikes, with photographs or videos of bodies and mourning family members) and when atrocities or other war crimes are uncovered. There is an internal military system of investigation, disciplining and justice which is by and large kept hidden from the public and the media. Public relations and news management by the military hierarchy are successful much of the time, yet some cases do become public and controversial because of whistleblowers, investigative reporting, victims’ stories, and physical evidence of death and destruction.

Large bureaucrcies operate in this manner. Mistakes and crimes are concealed or covered up, conformity to authority is expected, and loyalty to the team and organization is rewarded, and truth telling in public is punished. What is common knowledge and could damage the organization’s reputation stays within the organization. The rationale for keeping silent is expressed by retired Brig. General John Johns, who was on a committee monitoring war crimes investigations during the Vietnam war that was kept from the public: “resigning in protest and speaking out has no impact and it is better to stay in…I consider these things more appropriately handled internally. I have some misgivings about airing dirty laundry. I don’t believe it is good…to go out to the public and
undermine confidence in the military... a strong military is essential for national defense.” [Nelson p.181] Kerry’s anti-war activities were “whistle blowing” on the U.S. military, and resented as all whistle blowing is.

The public accepts and justifies violations of the laws of war in counterinsurgency. The sharp distinction between combatants and civilians in the Geneva Conventions is legalistic and unrealistic from a behavioral standpoint. The Geneva Conventions define the obligations of attackers – usually military forces of the state – in far more detail than the obligations of the defenders – usually the insurgents, this “despite the fact that the level of collateral damage (meaning civilian casualties) incurred in military operations is often determined by where defenders choose to locate…” [Kenneth Anderson, “Who owns the rules of war?” New York Times Magazine April 13, 2003]. A literal interpretation of the Conventions is that armed forces would not be able to root out insurgents from a densely populated neighborhood used as a shield without committing war crimes. At the same time, the insurgents’ obligation not to coerce and terrorize the civilian population they embed in and hold hostage can not be enforced.

In unconventional warfare, as the Vietnam war was for the most part, insurgents do not wear uniforms or identifiable insignia, conceal their weapons when not in combat, and merge into the civilian population when pursued. Auxiliaries who do not carry weapons and are defined as “civilians” play important military support roles: they act as lookouts, supply food for the insurgents, keep weapons caches, and otherwise participate in the insurgency. Under the principle of “discrimination” in the laws of war, it is the responsibility of the combatants to distinguish fighters from civilians, and target combatants only. But how can that be done when combatants and civilians can’t be distinguished in many situations? Frustrated by the inability to tell insurgents from ordinary people and by the lack of cooperation, the security forces resort to collective punishment, searches, mass arrests, detentions, coercive interrogation, forced population removal into camps, and combat operations that risk civilian casualties. In past eras, armies deterred insurgencies and enforced population compliance with mass executions and terrible reprisals [Edward Luttwak, “Dead End. Counterinsurgency warfare as
military malpractice” Harper’s Magazine, February 2007] Modern armies in democratic states do not do that, yet they cannot avoid some war crimes in counter-insurgency. The key issue is whether they make efforts to limit war crimes as much as possible, through instruction, mode of warfare, rules of engagement, and post-combat accountability.

The SBVT contention that the U.S. forces in Vietnam were an exception is untenable. Critics like Kerry maintained that the free fire zones, the search and destroy missions, the body count measure for success, etc. condoned and promoted civilian casualties and war crimes. The extent to which the chain of command monitors, limits and punishes violations makes an enormous difference. Colonel Jared Schopper, who was in charge of the Army’s war crimes files, said “The necessity of the Geneva Conventions cannot be argued. Absolutely there have to be rules of war…we cannot turn combat into scenes of mass murder.” [Nelson p.175]. Nevertheless, any one with political ambitions puts himself in a vulnerable position when he brings up war crimes by the military. On some painful matters, the public supports a wall of denial. John Kerry was vulnerable on this score in the court of public opinion.

Conclusion (provisional)

John Kerry lost the contest with SBVT in the court of public opinion, even though he would have won in a court of law. Freedom of speech is protected in the first amendment to the constitution, and both Kerry and SBVT had ample access to the media and to the public. But freedom of speech and access alone do not ensure convergence on the truth in public affairs. For achieving fairness and truth in a court of law, there are many rules and enforcers. The justice process is protected by four constitutional amendments, numbers five through eight. Citizens must be indicted by a grand jury, and can not be witnesses against themselves; they have a right to a speedy trial and an impartial jury; they must be informed of the accusations against them, confront witnesses against them and obtain witnesses on their behalf; they have a right of assistance by counsel; rules of the trial must conform to the common law; and they are protected against excessive bail and cruel and unusual punishment. Those are a formidable set of rights for fairness and truth
seeking. Public policy controversies can not and should not be debated in a court of law. Policy issues are matters of preferences and value for which there is no true/false answer. Although evaluation of policy alternatives requires facts and understanding of causes, and facts and cause analysis can be mistaken or flawed, the debate raises conjectures about feasibility, cost, and behavior that are inherently uncertain. The SBVT vs Kerry controversy was not a policy debate. The issues were over matters of fact – was there enemy fire during a certain military action or not; did U.S. soldiers commit war crimes in Vietnam. Seeking truth retrospectively in matters of fact and attributing responsibility to human agents is precisely what courts of law and the work of professional historians do well. Yet there was no way for Kerry to shift the contest to a court of law. If slander and libel were charged in a court of law, it would take months or years to resolve. In the meanwhile the SBVT campaign would simply continue. The public expects “dirty” politics in an election campaign and is apprehensive about limits to free speech. Consequently truth seeking in the court of public opinion on matters of fact and personal responsibility is vulnerable to interest, opinion, prejudice, misinformation, lies, and partisanship. Some stakeholders in the media are interested in truth – in the SBVT case the amount of factual truth that investigative reporters for the most reputable newspapers uncovered in short order is impressive. But the SBVT case shows that falsehood and confusion are not discredited when islands of truth exist in the news media.

[I will next examine what might improve truth seeking in the media and by the citizenry when it comes to public affairs.]

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