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“"I Am A Bit Sickened”: Examining Archetypes of Congressional War Crimes Oversight after My Lai and Abu Ghraib

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“I Am A Bit Sickened” ¹
Examining Archetypes of Congressional War Crimes
Oversight after My Lai and Abu Ghraib

By Samuel Brenner*

Following both the My Lai massacre during the Vietnam conflict and the Abu Ghraib prisoner abuse scandal during the Iraq War, many senators and representatives reacted in certain predictable ways by condemning atrocities and expressing horror or disgust at the evidence they had seen. At the same time, some of those same legislators denied that American forces had been involved with atrocities, attempted to foist blame on the victims or on a “small number” of bad soldiers, or suggested that examining American atrocities would be dangerous for American servicemen and for the United States generally. What is most startling about congressional reaction to these war crimes, however, is that in both cases, despite the radically different historical, political, and societal contexts in which these allegations came to light, members of Congress faced with exercising oversight over the Executive Branch (and hence the military) responded in remarkably similar ways.

This Article examines the history of and congressional response to the incidents at My Lai and Abu Ghraib, and argues that this history suggests the existence of seven archetypes that have emerged, and might continue to emerge, at times when the United States Congress is faced with the prospect of engaging in oversight of war crimes. Three of these archetypes – those of the Whistleblowers, the Muckraking Media, and the Activated Public – emerged before Congress had taken any action, and help to explain why Congress, which arguably operates under a “fire alarm” model of oversight, has chosen and might choose to engage in war crimes oversight in any particular case. The four remaining archetypes – those of the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives – emerged after Congress had been spurred into some sort of action. The historical existence and continued viability of these four post-action archetypes might be explained by the political structure of the United States government, and specifically the separation of powers between the Legislative Branch and the Executive Branch, the relationship between the House of Representatives and the Senate, and the relationship between congressional leaders and less powerful senators and representatives.


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There is no question but that a tragedy of major proportions involving unarmed Vietnamese, not in uniform, occurred at My Lai 4 on March 16, 1968, as a result of military operations of units of the Americal Division.2

Our report, however, discusses the failure of a relatively small number of soldiers who served at Abu Ghraib prison . . . . [and] misconduct (ranging from inhumane to sadistic) by a relatively small group of soldiers and civilians . . . .3

The language of 2004 was eerily similar to the language of 1969. When the members of Congress emerged from the slideshows and spoke with reporters in November of 1969, they were still “shocked and sickened” by the photographs of victims that they had seen at the private, Pentagon-sponsored congressional briefings on the March 1968 massacre of South Vietnamese civilians at My Lai by American soldiers under the command of Captain Ernest Medina and Lieutenant William Calley.4 Illinois Republican Representative Leslie C. Arend left the House briefing early, only an hour after it began, explaining that he has “one of those queasy stomachs” and that “the pictures were pretty gruesome.”5 “Having been in combat myself,” said Hawaii Democratic Senator Daniel K. Inouye, who lost an arm and won the Medal of Honor while serving in the Army during World War II, “I thought I would be hardened, but I am a bit sickened.”6 Thirty-five years later, legislators sounded similar notes after congressional briefings on the abuse of Iraqi detainees in the fall of 2003 by American military policemen in the prison at Abu Ghraib. Senate Majority Leader Bill Frist, Republican of Tennessee, and Minority Leader Tom Daschle, Democrat of South Dakota, termed the images they viewed “appalling”7 and “horrific”8 respectively. “My stomach gave out,” explained Republican Georgia Senator Saxby Chambliss, adding that some senators gasped at the


6 Id.


pictures.9 “There’s no definition of the Geneva convention or human decency” that would permit these “disgusting, depraved acts,” concluded Democratic Representative Jane Harman, the top-ranking Democrat on the House Intelligence Committee.10

This Article examines the startling similarities – highlighted by the similarity of the language of 2004 to the language of 1969 – between congressional responses to My Lai and alleged war crimes11 in Vietnam and congressional responses to Abu Ghraib and alleged war crimes in Iraq. After both My Lai and Abu Ghraib, for example, some congressional leaders (generally in the House of Representatives) supportive of the president or of military action arguably used their oversight functions to obscure the facts, hobble potential prosecutions of high military officials, and shuffle embarrassing episodes off the national and international stage as quickly as possible.12 Similarly, in both instances some powerful and influential legislators (generally in the Senate) in the majority party, such as

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9 Kiely & Welch, supra note 7, at A4; see also Demetri Sevastopulo, Senators See New Photographs, FINANCIAL TIMES (UK), May 13, 2004, at 7.

10 Kiely & Welch, supra note 7, at A4.

11 War crimes during both the Vietnam conflict and the Iraq War are “alleged” in the sense that many of them have not been proven in court. In part, this is because American military and political leaders acted to block effective prosecutions, or because some accused military personnel have gotten off on legal technicalities. See, e.g., Josh White, Officer Acquitted of Mistreatment in Abu Ghraib Case, Wash. Post, Aug. 29, 2007; infra notes 106-129 and accompanying text. It must also be recognized that some number of alleged war crimes, especially during the Vietnam conflict, simply never happened, and were manufactured by conspiracy theorists and opponents of the war. See infra note 135. Some war crimes have been proven in courts: on March 29, 1971, for example, a military court martial found Lieutenant William L. Calley guilty of murdering twenty-two Vietnamese civilians at My Lai and of assaulting a two-year-old boy with the intent to kill. Michael J. Davidson, Congressional Investigations and Their Effect on Subsequent Military Prosecutions, 14 BROOK. J.L. & POL’Y 281, 300 (2005). After Abu Ghraib, a number of relatively low-ranking military police of the 372nd Military Police Company, including most notably Specialists Charles Graner and Lynndie England, either pled guilty to or were found guilty of offenses such as dereliction of duty and maltreatment of prisoners. See, e.g., Specialist L. B. Edgar, Court Sentences England to 3 Years, ARMY NEWS SERVICE, Sept. 28, 2005; Graner Gets 10 Years for Abu Ghraib Abuse, ASSOCIATED PRESS, Jan. 16, 2005.

12 See, e.g., infra notes 79-130. This of course does not mean that American politicians are insensitive to world opinion, or are willing to condone atrocity. In 1996, for instance, Congress took a firm stance against atrocities – or, at least, atrocities committed against or by American servicemen or nationals – by passing the War Crimes Act, 18 U.S.C. § 2441 (2006), which provided for the fining, imprisonment, and even execution of anyone committing a war crime. While some commentators have objected to the War Crimes Act as not going far enough in holding commanders responsible for the actions of their subordinates, see, e.g., Victor Hansen, What’s Good for the Goose is Good for the Gander: Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own, 42 GONZ. L. R. 335 passim (2007), or in expanding American jurisdiction to the entire world, Congress clearly signaled its disapproval of exactly the sorts of actions for which American servicemen and servicewomen have been responsible in Vietnam and Iraq.
the Democratic Mississippi Senator John C. Stennis and the Republican Virginia Senator John Warner, who initially claimed that they wanted to use congressional oversight powers to focus attention on alleged American atrocities (in Warner’s case bucking doubters in his own party), ultimately seemed to bow to political pressure or political and nationalist considerations and curtailed investigations and hearings severely. Both during the Vietnam conflict and during the past few years of the Iraq war, those congressmen and congresswomen who wanted, for whatever reasons, to buck the congressional party-line and focus increased attention on incidents of alleged American atrocities and war crimes were required to act in informal ways, by holding unofficial hearings, writing letters to more-powerful congressmen, or attempting to speak directly to the American people through the media.

This Article argues that despite the starkly different political situations during Vietnam and Iraq – during the late 1960s and early 1970s, for instance, the Republican President Richard Nixon had to contend with a staunchly Democratic congress, while for most of the post-9/11 era President George W. Bush was supported by both a Republican House and a Republican Senate – the history of congressional oversight of the alleged war crimes at My Lai and Abu Ghraib suggests the existence of seven important archetypes of congressional oversight of war crimes. Three of these archetypes – those of the Whistleblowers, the Muckraking Media, and the Activated Public – emerged before Congress had taken any action in response to allegations of war crimes, and help to explain why Congress,

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14 See, e.g., Editorial, Abu Ghraib Whitewash, INT’L HERALD TRIBUNE, July 27, 2004 (“[Warner] is showing signs of losing appetite for the fight.”); The Truth About Abu Ghraib, WASH. POST, July 29, 2005, at A22 (“When the Abu Ghraib scandal erupted, GOP leaders such as Sen. John W. Warner (Va.) loudly vowed to get to the bottom of the matter – but once the bottom started to come into view late last year, Mr. Warner’s demands for accountability ceased.”).

15 See, e.g., THE DELLUMS COMMITTEE HEARINGS ON WAR CRIMES IN VIETNAM (Citizens Comm’n of Inquiry, eds., 1972) [hereinafter DELLUMS HEARINGS]; 4 In House Plan Hearings on War, N.Y. TIMES, Apr. 7, 1971, at 10.

16 See, e.g., letter from Henry A. Waxman (D-CA), Ranking Minority Member, House Comm. on Gov’t Reform, to Tom Davis, Chairman (R-VA), House Comm. on Gov’t Reform (May 4, 2004) (available at http://www.henrywaxman.house.gov/news_letters_2004.htm).

17 In recent years, however, those in Congress interested in exercising increased oversight over war crimes have been further hindered by an across-the-board reduction in congressional oversight during the Bush administration. E.g., Susan Milligan, Congress Reduces its Oversight Role, BOSTON GLOBE, Nov. 20, 2005; Henry A. Waxman, Op-Ed., Free Pass From Congress, WASH. POST, July 6, 2004, at A19.
which arguably operates under a “fire alarm” model of oversight,\(^\text{18}\) has chosen and might choose to engage in war crimes oversight in any particular case. The four remaining archetypes – those of the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives – emerged after Congress was spurred into some sort of action by the Whistleblowers, the Muckraking Media, or the Activated Public, and suggest how war crimes oversight might proceed in Congress. This Article concludes that the historical existence and continued viability of these four post-action archetypes might be explained by the political structure of the United States government, and specifically the separation of powers between the Legislative Branch and the Executive Branch and the relationship between the House of Representatives and the Senate and between congressional leaders and those in positions of less power. Part I of this Article describes the events of the My Lai massacre and examines congressional responses to alleged American war crimes in Vietnam. Part II summarizes the history of the prisoner abuse at Abu Ghraib, and examines congressional oversight after news of the abuse entered the public eye. Part III draws upon the history of congressional responses to American war crimes during the Vietnam conflict and the Iraq War, identifies the common archetypes that have emerged during congressional war crimes oversight, and suggests that these archetypes in part owe their existence to the political structure of the United States government.

**PART I. VIETNAM ERA WAR CRIMES**

During the late 1960s, a story broke in the United States about a massacre by soldiers of the Americal Division of unarmed Vietnamese civilians in the hamlet of My Lai (4).\(^\text{19}\) The story emerged after Ronald Lee Ridenhour, a former soldier who had witnessed the massacre, wrote letters to American military and political leaders and eventually to news organizations,\(^\text{20}\) and after Seymour Hersh, a young maverick journalist working at the same time, tracked down William Calley, the commander of the soldiers who had allegedly committed the massacre, and published news reports based on Calley’s recollections.\(^\text{21}\) In response to the allegations

\(^{18}\) See *infra* notes 342-344 and accompanying text.

\(^{19}\) “My Lai” is properly known as “My Lai (4)”; it was simply one of four hamlets surrounding the Son My village in the Son Tinh district of Quang Ngai province.


(which were quickly followed up by additional news stories and interviews), several distinguished senators initially called for congressional hearings, but quickly backed off. Powerful conservative, hawkish representatives on both sides of the aisle, meanwhile, perhaps anxious to maintain American strength against what they believed was the implacable foe of world communism, used tools of congressional oversight to minimize the effects of war crimes testimony, hinder military prosecution, and even harass those soldiers responsible for exposing American atrocities. Eventually at least one congressman, Democratic Representative Ronald V. Dellums of California, an avowed radical and socialist, used the allegations as a springboard to buck his party’s leadership and serve his own political agenda by holding unofficial hearings attempting to discredit American policy in Vietnam by highlighting additional allegations (at least some of which were manufactured) of American war crimes. Section I.A describes the events of March 16, 1968, when soldiers from the Americal Division attacked My Lai (4), and the emergence of knowledge about the massacre into the public eye. Section I.B examines congressional oversight of the My Lai massacre and Dellums’ attempts to engage in “gadfly” oversight of American war crimes more generally. Section I.C briefly describes the aftermath of the My Lai investigation and oversight.

A. “A tragedy of major proportions involving unarmed Vietnamese”

“No one will ever know exactly what happened at My Lai on March 16, 1968,” declared former military prosecutor William George Eckhardt in a 2000 article. While Eckhardt, the chief trial counsel in the My Lai courts-martial, might have been overstating the problem, it is true that the sources of facts are numerous and include news accounts, journalistic books, the report of the official military investigation (the “Peers Report”), congressional testimony, trial testimony, and historical works. Both the South Vietnamese, many of whom viewed the destruction of a nest of Viet

Hersh, Lieutenant Accused of Murdering 109 Civilians, St. Louis Post-Dispatch, Nov. 13, 1969.

22 See, e.g., infra note 135.


Cong supporters with pleasure, or who were at least unsurprised at the incidence of atrocity in wartime, and the North Vietnamese and the Viet Cong, who were themselves attempting to turn the attack into a propaganda coup, further muddied the waters by distributing vast amounts of propaganda, which often bore very little resemblance to the truth. While much of the history of the incident is thus confused or unclear, certain parts of the historical record are more than sufficiently clear to allow for historical analysis.

1. Massacre at My Lai: March 16, 1968

On March 16, 1968, United States soldiers from Charlie (C) Company of Task Force Barker, a unit of the Americal Division, under the command of Captain Ernest Medina, attacked the South Vietnamese hamlet of My Lai (4), which they suspected of harboring the 48th Viet Cong Battalion. The soldiers of Charlie Company, who, like other American soldiers, referred to the entire area around Son My as “Pinkville,” were upset by having received several casualties from mines and booby-traps in the days before the attack. Although the company had not seen much actual combat, as one soldier remarked after the deaths caused by mines and booby-traps, “the company . . . had revenge on its mind.” On the evening before the attack, immediately after the memorial service for a popular sergeant, Captain Medina briefed his platoon commanders, including Lieutenant William L. Calley, and the soldiers of Charlie Company on the operation planned for March 16th. While there are sharply conflicting

25 See, e.g., Testimony of Mr. Ta Linh Vien, Dec. 8, 1970, Folder 45, Box 01, My Lai Collection, The Vietnam Archive, Texas Tech University (a former senior South Vietnamese intelligence officer testifying that My Lai was the base of a powerful Viet Cong unit, and that the Americans destroying My Lai (4) were engaging a legitimate military target).

26 See, e.g., Hersh, My Lai 4, supra note 21, at 144-50.

27 See, e.g., PAVN Political Section Report on Massacre at My Lai, Mar. 1968, Folder 14, Box 38, Douglas Pike Collection: Unit 03 – War Atrocities, The Vietnam Archive, Texas Tech University (propaganda distributed by the People’s Army of North Vietnam painting a picture of a bucolic, peaceful, and productive village invaded by brutish, U.S. soldiers, “with thick bearded faces filled with anger”).

28 For the reaction of the government of South Vietnam in attempting to cover up the massacre, see Hersh, My Lai 4, supra note 21, at 145-50.

29 Lewy, supra note 16, at 325-26; Eckhardt, supra note 15, at 675.

30 According to Hersh, the name derived from the fact that the area’s higher population density caused it to appear in red on Army maps, and had nothing to do with the suspected political leanings of its residents. Hersh, My Lai 4, supra note 21, at 23.

31 Hersh, My Lai 4, supra note 21, at 33-38; Eckhardt, supra note 15, at 675.

32 Hersh, My Lai 4, supra note 21, at 38-39.
opinions about what Medina said, all sides (including Medina himself) agree that the captain at least ordered his troops to destroy all crops, kill all livestock, burn all houses, and pollute the water wells of the village. As the Peers Commission noted, Medina additionally “created the impression in the minds of many men in the company that they were to kill or destroy everything in the area. He also reminded them that... this operation was their chance to get even.”

The next morning, Medina, along with Calley’s 1st Platoon and elements of the 2nd Platoon under Lieutenant Stephen K. Brooks, flew by helicopter into My Lai, where the Americans encountered essentially no resistance. Over the next several hours, Medina’s soldiers rounded up and executed hundreds of residents of the village, almost all of whom were unarmed civilians. At least a few of the victims were tortured and raped. The Peers Commission arrived at what it called “a very conservative figure” of 175 to 200 women, children, and old men, all noncombatants, killed by Charlie Company, though many news reports placed the death toll much higher. Calley himself allegedly personally slaughtered over 100 Vietnamese civilians. Not all the Americans at My Lai committed atrocities: three American soldiers, a helicopter crew commanded by Warrant Officer Hugh Thompson, not only refused to take part in the slaughter, but even held off American troops by pointing weapons while the crew rescued some Vietnamese civilians and flew them to safety. Despite

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33 BELKNAP, supra note 16, at 58.
34 Eckhardt, supra note 15, at 675, 678-680.
35 PEERS, supra note 16, at 170.
36 See, e.g., Eckhardt, supra note 15, at 675-76.
37 See BELKNAP, supra note 16, at 68-69 (“According to Michael Bilton and Kevin Sim, several members of Charlie Company became ‘double veterans,’ GI slang for raping a woman and then murdering her.”); PEERS, supra note 16, at 175 (“With this kind of action going on it seems incredible, but at least two rapes were committed by the 2nd Platoon, and in one case the rapist is reported to have then shoved the muzzle of his M-16 rifle into the vagina of the victim and pulled the trigger... this kind of barbarity was very difficult to comprehend.”).
38 PEERS, supra note 16, at 180.
40 BELKNAP, supra note 16, at 60, 69 (The soldier responsible for killing the most Vietnamese was Lieutenant Calley.”). According to Belknap, sources confirm that Calley personally fired numerous fresh clips of ammunition into his M-16 in order to kill Vietnamese civilians he had ordered thrown into a ditch, and Calley even ran after a bloody but unhurt two-year-old boy who had managed to crawl out of the ditch, threw him back in, and shot him. BELKNAP, supra note 16, at 72.
Thompson’s angry protests to his commander about the killings, however, and despite evidence that the Peers Commission suggested “should have alerted responsible individuals at every higher level of command . . . that something was seriously wrong,” the massacre remained relatively unknown for almost a year after the incident.

2. The Whistleblowers, the Media, and the Public

“I have considered sending this to newspapers, magazines and broadcasting companies,” explained 23-year-old college student and Vietnam veteran Ronald Lee Ridenhour in a March 29, 1969 letter he sent to the dovish Democratic Arizona Congressman Morris Udall, with copies to President Richard Nixon, the secretaries of defense, state, and the army, the chairman of the Joint Chiefs of Staff, and 22 other congressmen, “but I somehow feel that this investigation and action by the Congress of the United States is the appropriate procedure.” “As a conscientious citizen,” Ridenhour added, “I have no desire to further besmirch the image of the American serviceman in the eyes of the world.” This letter, which Ridenhour decided to mail at the urging of one of his former high school and college writing instructors, helped to instigate a massive military investigation, international protests, congressional hearings, courts-martial, and, ultimately, a sea-change in American attitudes about the Vietnam conflict.

It seemed to Ridenhour that, while his letter drew some attention from military and congressional investigators – one Army investigator came to speak with him, and Congressman Udall expressed some personal interest – the Army was going to try to “whitewash” the case and keep his

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42 PEERS, supra note 16, at 180.
43 For contemporary background on Ridenhour, see Christopher Lydon, ‘Pinkville’ Gadfly, N.Y. TIMES, Nov. 29, 1969, at 14.
46 According to Hersh, Ridenhour was at first interested in using the story of what happened at My Lai as his entry into a career as a journalist, but was convinced by his former teacher Arthur A. Orman to give the story to governmental investigatory agencies. Hersh, My Lai 4, supra note 21, at 105. Together, Orman and Ridenhour decided to send the letters to leading members of both the House and Senate, in addition to the White House, Pentagon, and Senate. “I had been drafted and worked for the Army’s Adjutant General’s Corps for a while,” explained Orman, “and I knew how responsive the Army was to Congress.” Hersh, My Lai 4, supra note 21, at 106.
evidence secret. He hired a literary agent and contacted the Arizona Republic, but found that only Ramparts magazine was interested in his story. “[T]hose people have a reputation for being radical and nutty,” Ridenhour explained to New York Times reporter Christopher Lydon. “They’re not taken seriously by the public at large. And, let’s face it, it’s the public at large – the silent majority – that has to face this sort of thing.”

Ridenhour, however, was not the only person working on breaking the story. Prompted by an anonymous tip on October 22, 1969, independent journalist Seymour M. Hersh began investigating a report that the Army was trying to “court-martial some guy in secret at Fort Benning for killing seventy-five Vietnamese civilians.” Hersh traveled to Fort Benning, where he met Calley, and then returned to Washington to write his story exposing the official military investigation. With Life and Look magazines uninterested, Hersh turned to the obscure Dispatch News Service, which offered the story by cable on November 12th to fifty newspapers around the country. More than thirty, including the Boston Globe, San Francisco Chronicle, and Saint Louis Post-Dispatch, printed the article the following day. A few days later, having been granted permission by the Army to visit an area near My Lai for a single hour, Henry Kamm, the New York Times’ roving Southeast Asia correspondent, published a front-page story in which he reported that a small group of South Vietnamese survivors claimed that “a small American infantry unit

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47 Christopher Lydon, ‘Pinkville’ Gadfly, N.Y. TIMES, Nov. 29, 1969, at 14. In fact, the letter was receiving serious attention at the highest levels of the military and the Congress. As is perhaps normal in the case of unsolicited letters from non-constituents, of the thirty offices to which Ridenhour sent a copy of his letter, twenty-two later said they had no record of having received the communication. Hersh, My Lai 4, supra note 21, at 109-110. When Congressman Udall heard about the letter from one of his aides, Roger Lewis, however, Udall immediately wrote to both Secretary of Defense Laird and Representative L. Mendel Rivers, the chair of the House Armed Services Committee. Rivers’ staff had already received a copy of the letter, and Rivers responded by sending a letter on April 7, 1969, urging the Department of the Army to investigate Ridenhour’s claims; Laird, reportedly, had already forwarded his own copy of the letter to the Army several days earlier. Belknap, supra note 16, at 104. It was only after the Army informed Ridenhour about Lieutenant Calley’s forthcoming court-martial that Ridenhour became convinced that the Army was attempting to make Calley a scapegoat for everything that had happened at My Lai, and so began trying to interest national media outlets in his story. Id. at 117. But see Peter Osnos, Mylai Story Almost Went Unnoticed, Wash. Post, Dec. 1, 1969, at A10.


49 Belknap, supra note 16, at 117-120; Hersh, My Lai 4, supra note 21, at 132; see, e.g., Robert M. Smith, Two in Congress Ask Study of Massacre Report, N.Y. TIMES, Nov. 21, 1969, at 1.

50 Hersh, My Lai 4, supra note 21, at 133.

killed 567 unarmed men, women, and children as it swept through their hamlet on March 16, 1968.\footnote{52}

Over the next two weeks, Hersh followed up his initial story about the Army investigation with reports on personal interviews with former members of Charlie Company,\footnote{53} including Paul Meadlo, a 22-year-old Indianan who was deeply psychologically troubled by the events at My Lai.\footnote{54} On November 20, 1969, the same day that newspapers carried Hersh’s second Dispatch News Service story about the massacre, the \textit{Cleveland Plain Dealer}, ignoring warnings from one of the prosecutors in the Calley court martial, published photographs of the killings that had been taken by Ronald L. Haeberle, the Army combat photographer who had been assigned to Charlie Company.\footnote{55} Inspired by his feelings of guilt, Meadlo agreed to speak on the \textit{CBS Evening News with Walter Cronkite}; Meadlo’s interview with Mike Wallace of the CBS evening news aired on November 24th.\footnote{56} When asked “how do you shoot babies?” by a stunned Wallace, Meadlo, the father of two children, replied “I don’t know. It’s just one of those things.”\footnote{57} “It just seemed like a natural thing to do at the time,” Meadlo explained when Wallace pressed him on what he was thinking while killing civilians.\footnote{58} While some newspapers remained cautious\footnote{59} for several days or weeks, in light of the evidence Hersh coaxed from participants such as Meadlo, Michael Bernhardt, and Michael Terry, the national mood began to change.\footnote{60}


\footnote{54}HERSH, MY LAI 4, supra note 21, at 140.


\footnote{56}‘So I ... Killed 10 or 15’: Killings in Mylai Still Haunt Vietnam Veteran, WASH. POST, Nov. 25, 1969, at A1.

\footnote{57}Transcript of Interview of Vietnam War Veteran on His Role in Alleged Massacre of Civilians at Songmy, N.Y. TIMES, Nov. 25, 1969, at A16.

\footnote{58}Bill Richards, \textit{My Lai Participant Tries to Forget; Ex-GI Meadlo, a Decade After the Massacre, Says He Feels Ashamed}, WASH. POST, Nov. 13, 1979, at A4.

\footnote{59}E.g., Pentagon Says Viet Killings Exaggerated, WASH. POST, Nov. 17, 1969, at A16; see also HERSH, MY LAI 4, supra note 21, at 136-138.

B. Congressional Investigations and Hearings into Vietnam War Crimes

Within days of Seymour Hersh breaking the story about the Army’s ongoing investigation and prospective court martial of Lieutenant Calley, legislators began to agitate for Congress to take up an investigation into what had happened and into whether the military had sought to cover up the actions of American soldiers.\(^{61}\) On November 21, for instance, Republican Ohio Representative William E. Minshall announced that he was asking the Democratic chairman of the House defense subcommittee to hold hearings. New York Republican Senator Charles E. Goodell added that he was interested in the Senate Armed Services Committee launching a “full investigation.”\(^{62}\) Two days later, Senate Majority Leader Mike Mansfield, echoing Goodell, called for a “full and independent inquiry” into charges that United States soldiers had committed atrocities in Vietnam.\(^{63}\) “The Senate armed services committee ought to look into it, find out what happened, and get to the bottom of it,” Mansfield explained.\(^{64}\) The Peers Commission noted that “several committees of the Senate and the House of Representatives were vying for the right to conduct an investigation into the incident,”\(^{65}\) but that the senators and congressmen ultimately settled on the Senate and House Armed Services committees under the chairmanship of Senator John C. Stennis and Congressman L. Mendel Rivers, respectively, as the proper venues for an investigation.

1. False Start Senators and Our-Soldiers-First Legislators

Even in the immediate aftermath of Congress’ decision to make the Senate and House Armed Services Committees responsible for investigating war crimes at My Lai, numerous senators – including John C. Stennis, the chairman of the Senate Armed Services Committee – helped nip in the bud the prospect of hearings in the Senate by calling for a non-congressional investigation and by coming out strongly against holding American servicemen responsible for alleged war crimes.

Not all members of Congress were happy with the notion of congressional inquiry; Democratic senators in particular seemed interested

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\(^{64}\) Id.

in somehow avoiding taking on personal or even institutional responsibility for holding the hearings. Speaking in England, Maine Senator Edmund S. Muskie announced that “It’s even conceivable . . . that in order to get into the larger questions, as part of the process of self-analysis, we should have a commission of inquiry like the President’s commission on violence.” Far more surprisingly, Senator John Stennis, the man put forward two weeks before by Majority Leader Mansfield as the perfect leader of a war crimes investigation, proposed at the beginning of December that Nixon create a special commission to investigate the killings. “I frankly think this is the most effective way to get at this,” Stennis announced, adding that “a private study by an impartial group of ‘outstanding men’ would be preferable to a Congressional hearing.” Put another way, Stennis was attempting to foist off the Legislative Branch’s oversight authority and responsibility onto a commission appointed by the Executive Branch.

Stennis’ desire to involve Nixon and the Executive Branch in the investigation might have had its roots in the fact that in the month between Hersh’s breaking the story on November 13 and Stennis’ statement to the press on December 8, the issue of My Lai had become more complicated and had taken on significant international overtones. On November 26, the House and Senate Armed Services Committees had summoned Secretary of the Army Stanley R. Resor to testify. It was Resor’s testimony the next day, accompanied by slides of Ronald Haeberle’s pictures, that sickened the queasy Representative Arend and combat-hardened Senator Inouye. Even before Resor testified, however, it was becoming clear that Pentagon and Executive branch officials could not agree on something as simple as when they had learned about the alleged war crime. The day before Resor testified, House Republican Leader Gerald R. Ford said that the attack “was known about by top Army officers,” though he added that he did not “have

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66 Cf. Belknap, supra note 16, at 136 (describing token Democratic staffer Daniel Patrick Moynihan’s support for the proposal by former Supreme Court Justice and Ambassador to the United Nations Arthur Goldberg and thirty-three other attorneys and professors for the president to appoint a special commission of “distinguished civilians and military general officers” to launch an investigation of American military policy and rules of engagement in Vietnam).


69 Id. Perhaps Stennis’ hesitation explained why it seemed to the Peers Commission that “the House Armed Services Committee (HASC), with its investigation subcommittee, had the higher prerogative,” and why Representative Rivers took the lead in shaping the congressional investigations into My Lai. PEERS, supra note 16, at 19.


it first hand” or “know them by name.”\textsuperscript{72} The same reporter pointed out, however, that Clark M. Clifford, who was the Secretary of Defense in March of 1968, claimed never to have heard of the event until the story broke in the newspapers in November.\textsuperscript{73} One Pentagon spokesman carefully explained that no high Army or Defense Department officials had been aware of the alleged massacre until March or April of 1969.\textsuperscript{74}

Attempts in the Senate to pursue hearings into the events at My Lai were further complicated by the reactions of those conservative senators who vigorously opposed holding Medina, Calley, and their soldiers accountable. On November 25, South Carolina Democratic Senator Ernest F. Hollings, speaking to a nearly empty chamber, demanded to know whether “every soldier who had committed ‘a mistake in judgment’ during the heat of combat was ‘going to be tried as common criminals, as murderers? [sic]’\textsuperscript{75} Colorado Republican Peter H. Dominick meanwhile attacked CBS for carrying the interview with Meadlo, and warned that the broadcast might jeopardize both Calley’s and Meadlo’s legal rights. “What kind of country have we got,” Dominick asked, “when this kind of garbage is put around?”\textsuperscript{76} In an interview on January 15, 1970 – reported the next day by Walter Cronkite – Louisiana Democrat Allen Ellender tersely announced that the slain Vietnamese “got just what they deserved.”\textsuperscript{77} (Conservatives and War Hawks in the House echoed such attacks on the My Lai investigation and prosecution. Louisiana Democrat John R. Rarick, for instance, a state colleague of the man who ultimately presided over the House hearings and a former supporter of George Wallace’s presidential campaign, “consistently described My Lai 4 as the ‘massacre hoax,’ and warned, ‘The American people are daily becoming more aware that the news media is being used as a weapon of psychological warfare against them.’\textsuperscript{78}) Congressional leaders, including Stennis, could clearly see that few colleagues were enthusiastic about the prospect of drawn-out hearings –


\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textsc{Hersh}, \textit{My Lai 4}, supra note 21, at 155.

\textsuperscript{78} \textsc{Hersh}, \textit{My Lai 4}, supra note 21, at 156. Rarick, along with many other house members, later wrote to the White House after Calley’s conviction to protest the verdict. \textit{See Belknap}, supra note 16, at 197.
and were fully aware that conservatives such as Hollings and Elleander would oppose such hearings every step of the way.

2. Obstructionism: the Rivers and Hébert Committee House Hearings

While Stennis was arguably attempting to avoid presiding over drawn-out hearings into war crimes by calling for the creation of a presidential commission, Representative L. Mendel Rivers, the chair of the House Armed Services Committee, was following an entirely different path in attempting to minimize the damage caused by stories of American atrocities. As the Peers Commission had noted, Rivers’ committee appeared to have a higher priority (i.e. Congress viewed the House Committee as more important than the Senate Committee) than even Stennis’ in investigating events at My Lai. Rivers, a Democrat, was far more interested in using his committee to provide unquestioned support for the military than he was in engaging in any sort of partisan struggle. As New York Times reporter Neil Sheehan noted after Rivers’ death in 1970, even the views of the few dissenters on the Committee, none of whom could be classified as pacifists, were anathema to Rivers, who “suppressed them by maintaining a bipartisan majority of older conservative members.”

Rivers was an unabashed supporter of both the United States military and the United States’ involvement in Vietnam: after one meeting, General Peers, the head of the Peers Commission, noted that he thought that “the obvious bias of Rivers, ‘who always supported the men and women in uniform,’ made it unlikely that Congress would conduct an objective inquiry into the My Lai incident.” Recounting a meeting that he had had with Rivers on December 11, moreover, Peers, who had “always admired Mr. Rivers,” reported that while talking about the My Lai operation, Rivers “said, in effect, ‘You know our boys would never do anything like that.’” Four days later, even while members of his committee were still hearing testimony about the horrific crimes committed by some American soldiers, Rivers, joined by 140 other congressional hawks, pushed through a House resolution praising “each serviceman and veteran of Vietnam for his individual sacrifice, bravery, dedication, initiative, devotion to duty . . .”

79 PEERS, supra note 16, at 19.
81 BELKNAP, supra note 16, at 138. On November 24, Secretary of the Army Resor announced the creation of the all-military Peers Commission to investigate My Lai. “Not about to be upstaged by an army inquiry,” id. at 137, Rivers hastily convened a hearing of the full Armed Services Committee.
83 HERSH, MY LAI 4, supra note 21, at 157 (emphasis added).
Rivers began holding hearings in earnest on December 9 before the fourteen members of the Committee’s special investigating subcommittee; after the first day of testimony, Rivers announced that he was not yet ready to say that a massacre had taken place. The following day, however, the subcommittee heard testimony from Hugh Thompson, the former warrant officer who had tried to halt the massacre. Once again, Rivers emerged from the closed hearing to announce that his subcommittee “had not been given information that would lead members to believe that American troops had engaged in a massacre” and that Thompson “did not report” that he had seen unnecessary civilian killings at My Lai. Some fellow committee members and a number of military officers were aghast at Rivers’ claims. “I didn’t know he could say that,” exclaimed one amazed congressman who had heard the testimony. The Washington Evening Star, citing an unidentified committee member, reported that Thompson had repeated his allegations about the events at My Lai. Rivers in turn denounced the anonymous source as “a damned liar,” and said that his own version of the testimony was accurate. Despite the tension between Rivers and subcommittee members who apparently accepted that Charlie Company had committed a massacre, support in the subcommittee for the military – even those elements responsible for war crimes – remained high: the next day, for example, the entire subcommittee reportedly jumped up and applauded Captain Medina, Calley’s direct superior and the man who had ordered the attack on My Lai, during his testimony. Amid rumors that Rivers was attempting to “whitewash” the military, Secretary of Defense Melvin Laird convinced Rivers to call off the hearings before the full subcommittee; Rivers then appointed a four-member panel, chaired by Louisiana Democrat F. Edward Hébert, one of his closest supporters, to investigate in greater depth.

84 Id. at 167.
86 HERSH, MY LAI 4, supra note 21, at 168-69.
87 Id. at 168.
89 Id.
90 HERSH, MY LAI 4, supra note 21, at 168.
91 BELKNAP, supra note 16, at 136; HERSH, MY LAI 4, supra note 21, at 169; Rivers Picks Four to Study Songmy, N.Y. TIMES, Dec. 13, 1969, at 13 (“Asked about the ‘whitewash’ rumors, Mr. Rivers responded, ‘I ought to count 10 before I answer this.’ He added: ‘I am not in that business, but neither am I in the business of trying to cater to some people who want to gut the military and destroy it during this time when we should be backing them up.”). (RIVERS PICKS FOUR TO STUDY SONGMY, N.Y. TIMES, Dec. 13, 1969, at 13. The other members of the panel were Samuel S. Stratton (D-NY), William L. Dickinson (R-
Possibly concerned about the leaks from the full subcommittee that had hindered Rivers’ attempt to hold hearings, Hébert announced that all sessions of the special subcommittee would be closed, that witnesses would be prohibited from discussing their testimony outside of the hearing room, and that not even photographs of the witnesses would be permitted without the witnesses’ permission. "Secrecy is Imposed on Mylai Hearings," N.Y. TIMES, Apr. 12, 1970, at 5. Despite Resor’s and Peers’ urgent requests that the Hébert panel refrain from questioning those witnesses either charged with crimes or scheduled as material witnesses at the courts-martial of those already charged, Hébert, saying that his subcommittee was “right on the edge of revolt,” subpoenaed and heard testimony from 150 witnesses over the following months. "In June, the subcommittee issued a 53-page report concluding that “a tragedy of major proportions” had taken place, and that military and civilian officials in Vietnam had attempted to “cover up” what had happened. "The committee was hampered by the Department of the Army in every conceivable manner,” Hébert told the New York Times. New York Democrat Samuel Stratton added that the committee was “stymied at every step of the way by the Secretary of the Army and top Army brass.”

93 Secrecy is Imposed on Mylai Hearings, N.Y. TIMES, Apr. 12, 1970, at 5.
94 BELKNAP, supra note 16, at 139.
95 HÉBERT REPORT, supra note 1, at 5.
97 BELKNAP, supra note 16, at 139. Explaining why the Rivers Committee did not hold hearings between November 26, 1969, and early December, the report states that “Further hearings were delayed because of the failure of the army to supply all of the information requested by Chairman Rivers, and also because of the Army's reluctance to make witnesses available to the Subcommittee until after they had testified before the Peers Inquiry.” HÉBERT REPORT, supra note 1, at 2. This explanation conflicts with Belknap’s contention that Rivers was “not about to be upstaged by an army inquiry” and so rushed into calling Resor to the Hill. BELKNAP, supra note 16, at 137.
98 PEERS, supra note 16, at 22.
100 Id.
Exactly who was trying to stymie whom, however, remains an open question. Belknap argues that “Hébert’s subcommittee seemed more interested in discrediting those who had exposed the war crimes committed at My Lai than ensuring that those responsible for them were punished.”

General Peers observed that, in reading the quotes from Hugh Thompson’s testimony, which took up approximately one-fourth of the entire subcommittee report, he felt that Thompson had been subjected to “more of an inquisition than an investigation.” In its final report, moreover, Hébert’s subcommittee seemed overly focused on criticizing (by implication) those, including Ridenhour, Thompson, and Haeberle, who had exposed the events as My Lai, rather than on criticizing those who had allowed the “tragedy of major proportions” to unfold: the subcommittee, for instance, devoted several of its relatively few recommendations to such suggestions as one (presumably in response to Haeberle’s retaining possession of My Lai photographs) that the Secretary of the Army should “require official Army photographers to submit all photographs taken while on assignment” and (presumably objecting to the Distinguished Flying Cross awarded to Thompson) should “review the practices and procedures in awarding medals and decorations . . . .”

While Hébert, claiming the preeminence of congressional oversight, publicly objected to what he characterized as the military’s lack of cooperation, Pentagon officials and military prosecutors were desperately warning that, by calling witnesses and refusing to release witness transcripts, Hébert was fatally crippling future My Lai prosecutions. Secretary Resor was particularly concerned, writing to Hébert in January of 1970 that “[w]hile it may theoretically be possible for the Committee to interview such witnesses without prejudicing prosecutions, there are a number of potential pitfalls in such a course of action.” Resor was specifically worried about the danger to the My Lai prosecutions posed by an application of the Jenks Act. Under the Jenks Act, after a witness in a criminal trial or court-martial has been called by the United States, the court must, upon motion of the defendant, order the United States to produce any

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101 See, e.g., Davidson, supra note 53, at 302 (“The motivation behind Hébert’s refusal to release the transcripts has been the subject of dispute.”).

102 BELKNAP, supra note 16, at 140.

103 PEERS, supra note 16, at 242.

104 HÉBERT REPORT, supra note 1, at 4.

105 HÉBERT REPORT, supra note 87, at 7-8.


material pre-trial statements that the witness made and that are in the possession of the United States.\textsuperscript{109} If the United States elects not to comply with the court’s order, “the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.”\textsuperscript{110} Despite the pleas of Resor and numerous congressmen,\textsuperscript{111} as well as a more scholarly appeal by Congressman (and later Chief Judge of the Federal Court of Appeals for the District of Columbia) Abner J. Mikva,\textsuperscript{112} Hébert was determined not to release the transcript, ostensibly because he was “protecting the prerogatives of the House, the right of Congress to investigate and the rights of the Government and the defendant to proceed with a fair trial.”\textsuperscript{113} Even writing over thirty years later, former Chief Trial Counsel Eckhardt is hard-pressed to restrain his anger at what he clearly viewed as an intentional congressional plan to sabotage the My Lai prosecutions:

But by far the most serious interference came from the military’s congressional “friends.” Representatives F. Edward Hébert and L. Mendel Rivers of the House Armed Services Committee decided that prosecution of the events at My Lai was not in the national interest. Having reached that conclusion, they calculatingly used their considerable power to sabotage the trials. Their plan was technical, simple, and almost effective. They held hearings (calling all the necessary prosecution witnesses), placed a congressional security classification on this testimony, and refused to release it. Despite vigorous and varied protests, Congress adhered to this refusal, intending that this refusal would prevent the Government from calling any witness who had testified before the Committee. If the Government could not call

\textsuperscript{109} 18 U.S.C. § 3500(b)

\textsuperscript{110} 18 U.S.C. § 3500(c)


\textsuperscript{112} Letter from Abner J. Mikva, member of Congress, to Honorable L. Mendel Rivers, Chairman, Committee on Armed Services 4 (Dec. 7, 1970) (cited in Eckhardt, supra note 15, at 684 n.50) (“[M]y review of the relevant cases and statutory provisions leave me more convinced than before that the Committee's decision to withhold from a defendant put to trial by the United States evidence which may be necessary to his defense and simultaneously deny to the prosecution testimony of important witnesses is a decision that can reflect credit on neither the Committee nor the Congress. It must seem a sorry spectacle to the citizens of this nation to see the foremost lawmaking body in the land obstructing administration of the very laws it writes.”).

necessary witnesses, it would be prevented from prosecuting the My Lai Incident.\textsuperscript{114}

Not surprisingly, Resor’s and Eckhardt’s concerns about the implications of the Jenks Act proved to be well-founded.\textsuperscript{115} In October of 1970, the military judge in the court-martial of Sergeant David Mitchell announced that because of the Hébert subcommittee’s refusal to release transcripts, he would not allow the prosecution to call any soldiers who had appeared before Hébert’s panel to testify.\textsuperscript{116} The military prosecutor, Captain Michael Swann, was able to call only three of the dozens of witnesses he had intended to have testify, while the defense was able to call over twenty former soldiers.\textsuperscript{117} The military panel returned a verdict of “not guilty” within several hours – and by some accounts, only waited that long because “longer deliberations would look better.”\textsuperscript{118} When confronted with the judge’s decision, members of Hébert’s committee evinced no concern about the fate of the military prosecutions, with Representative Dickinson describing defense requests for a transcript of the House hearings as “a defense ‘ploy.’”\textsuperscript{119} Dickinson’s ostensible confidence in the power of the military justice system might have appeared more plausible had he not immediately added to the reporter interviewing him that he would personally be pleased if none of the soldiers involved were brought to trial.\textsuperscript{120} The military judge’s decision in Sergeant Mitchell’s case hinted at one of the issues that would dog Calley’s trial over the next few years.\textsuperscript{121} “[M]uch like the Nixon Tape Case,” explained Eckhardt, “there was a fundamental clash between governmental branches, with the Congress attempting to veto an executive branch prosecution.”\textsuperscript{122} After an extensive trial, on March 29, 1971, a military court martial found Lieutenant Calley guilty of murdering twenty-two Vietnamese civilians and assaulting a two-

\textsuperscript{114}Eckhardt, supra note 15, at 684-685.

\textsuperscript{115}See, e.g., Davidson, supra note 53, at 303 (“Hébert’s refusal to release the transcripts affected at least three courts-martial, and in the court-martial of Staff Sergeant David Mitchell, the refusal proved fatal for the prosecution.”).


\textsuperscript{117}BELKNAP, supra note 16, at 224.

\textsuperscript{118}Id. at 224-225.

\textsuperscript{119}Richard Halloran, Sonny Trial Move is Called a ‘Ploy,’ N.Y. TIMES, Oct. 18, 1970, at 10.

\textsuperscript{120}Id.

\textsuperscript{121}For descriptions of the Calley court-martial, see Belknap, supra note 16, at 168-190; LEWY, supra note 16, at 356-64; Davidson, supra note 53, at 304-308.

\textsuperscript{122}Eckhardt, supra note 15, at 684-686.
year-old boy with the intent to kill.\footnote{Davidson, supra note 53, at 304.} Soon after his conviction, Calley started his case on a tortuous path of review by appealing to the Army Court of Military Review, citing in part the alleged violation of the Jenks Act.\footnote{Id. at 305 (citing United States v. Calley, 46 C.M.R. 131, 1338, 1184-95 n.14 (A.C.M.R. 1973), aff’d, 48 C.M.R. 19, 22 (C.M.A. 1973)).} During the trial, the Hébert panel had ignored two different subpoenas; the trial judge, however, denied Calley’s demand that the testimony of any witness who had testified before the panel be stricken from the court-martial record.\footnote{High Court Gets Calley’s Appeal, N.Y. TIMES, Nov. 29, 1975, at 13.} The Army Court of Military Review, agreeing with the judge in Calley’s case and disagreeing with the judge in Mitchell’s case, held that the Jenks Act “did not pertain to statements given to Congress,”\footnote{Id. at 306 (citing Calley, 46 C.M.R. at 1192).} but that even if it did apply, any error by the trial court in failing to enforce it was harmless.\footnote{Id.} The following year, however, a federal district court hearing Calley’s petition for habeas corpus relief found Calley’s convictions “constitutionally invalid,” once again citing the Jenks Act requirements.\footnote{Id. at 307 (citing Calley v. Calloway, 382 F. Supp. 650, 700-01 (M.D. Ga. 1974).} “Congress in effect granted amnesty to Lieutenant Calley. Congress did so, moreover, in a backhanded way that was not known to most Americans and probably even most Congressmen,” declared one 1975 op-ed in the \textit{New York Times}.\footnote{Daniel J. Kornstein, Op-Ed., \textit{Amnesty and Calley}, N.Y. TIMES, Mar. 22, 1975, at 31.}

The serious constitutional question posed by the Hébert subcommittee’s refusal to release transcripts of the House hearings was finally resolved after yet another appeal, with the Fifth Circuit, sitting en banc, holding eight to five that – given the many pretrial statements that had been made by all of the witnesses – the \textit{Calley} trial judge’s decision not to strike the testimony of prosecution witnesses was in fact harmless error.\footnote{Calley v. Calloway, 519 F.2d 184, 184 (5th Cir. 1975).}

\section*{3. Gadflies: The Dellums Committee House Hearings}

The massacre at My Lai, of course, was not the only atrocity committed by American soldiers – and the hearings in the House and Senate Armed Forces Committees thus do not represent the extent of congressional oversight response to allegations of American war crimes. Despite the backlash against men including Ridenhour, Haeberle, Meadlo, and Thompson, the My Lai hearings and courts-martial had the effect of drawing more American atrocity stories out into the open. As Seymour Hersh observed in 1970, “the disclosure of the My Lai massacre cleared the
way for published accounts of previously witnessed American atrocities in South Vietnam. Suddenly reporters were finding out that their newspapers were eager to print stories about the shooting of civilians in Vietnam.\footnote{HERSH, MY LAI 4, supra note 21, at 140.}

Despite the numerous allegations – many coming from the alleged perpetrators – that groups such as the Citizens Commission of Inquiry\footnote{Contra LEWY, supra note 16, at 313-315 (suggesting that “standards of evidence, decorum, and impartiality” were noticeably lacking at December 1970 hearings sponsored by the National Committee for a Citizens’ Commission of Inquiry on U.S. War Crimes in Vietnam at the DuPont Hotel in Washington, D.C.).} and the Vietnam Veterans Against the War (VVAW) aired over the following few years,\footnote{See, e.g., VIETNAM VETERANS AGAINST THE WAR, THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES (1972).} however, it is a mistake to believe that all or even most Americans in Vietnam committed war crimes or atrocities.\footnote{Contra Robert N. Strassfeld, American Innocence, 37 CASE W. RES. J. INT’L L. 277, 290-291 (2006) (“While some returning veterans may have exaggerated or fabricated their stories of torture, abusive conduct, and murder of prisoners, there are too many accounts of such behavior to deny that sometimes American soldiers and marines tortured their Vietnamese prisoners.”).} While American servicemen clearly were responsible for committing some war crimes, the number and prevalence of such atrocities committed by Americans has probably been somewhat exaggerated, both by contemporary witnesses and by more recent popular culture portrayals of Vietnam-era soldiers.\footnote{See, e.g., LEWY, supra note 16, at 223; MYRA MACPHERSON, LONG TIME PASSING: VIETNAM AND THE HAUNTED GENERATION 481-91 (1984). There were and are many serious allegations that some American soldiers committed horrific acts during the Vietnam conflict; it is clear that war crimes were committed by United States military personnel. Some of the most lurid allegations were publicized by Mark Lane, a controversial lawyer, anti-war activist, and former member of the New York Legislature. In 1970 Lane published Conversations With Americans, a compilation of interviews with thirty-two American soldiers who detailed at length the war crimes and atrocities in which they claimed to have taken part. MARK LANE, CONVERSATIONS WITH AMERICANS (1970). Conversations With Americans eventually led to the “Winter Soldier” hearings supported by John Kerry (who was not present at the hearings) and others in the anti-war movement, during which American soldiers and veterans testified about atrocities they had seen and committed themselves. Ultimately, many (though not all) of the stories in Conversations With Americans were demonstrated to be false. E.g. Neil Sheehan, Book Review, Conversations With Americans, N.Y. TIMES, Dec. 27, 1970. (After publishing Conversations With Americans, Mark Lane became involved with numerous fringe organizations and individuals. At one point he was a lawyer for Jim Jones’ “People’s Temple” in Jonestown, Guyana, and in 1978 escaped from the Jonestown compound immediately before Jones ordered his 900 adherents to commit suicide or be massacred. More recently, Lane served as a lawyer for the anti-Semitic Liberty Lobby headed by Willis Carto.)} Still, the specter of Americans committing and getting away with rampant war crimes – and with American generals and political leaders ordering such war crimes – was clearly too much for some anti-war
activists to bear. Newspaper editors might be willing to publish atrocity stories, but these activists wanted official government recognition. While powerful conservative Democrats such as Rivers and Hébert had little interest in listening to such anti-war activists, and while (with rare exceptions) major congressional committees refused to hold hearings into allegations of war crimes committed by American troops in Vietnam, these activists were able to turn to several congressmen and congresswomen who, while not nearly as powerful as the established hawks on the House Armed Services Committee, were open to any strategy that might bring about an early end to the war. Particularly important to this group was an African-American radical from Berkeley, California, Ronald V. Dellums, who was elected to Congress in 1970, at the height of Congressional interest in the Calley court martial and the My Lai investigation. Precisely because he was outside the traditional congressional power structure and was interested in opposing the Nixon administration’s policies in Vietnam, Dellums was willing to listen to and actually work with the sorts of anti-war activists who were dismissed with disdain by more established politicians such as Rivers and Hébert.

“If the label of radical disturbs Mr. Dellums, he does not show it,” observed a reporter for the New York Times in 1970, shortly after Dellums had startled political observers by winning a heavily contested primary against Jeffery Cohelan, an experienced and steadfastly liberal, but (unlike Dellums) pro-war, representative from Berkeley and Oakland, California. “If your definition of radical means a departure from the status quo, then yes, I am a radical,” Dellums, a Marine Corps veteran and

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138 See, e.g., John F. Kerry, testimony before the Senate Committee on Foreign Relations on April 22, 1971. The Senate Committee on Foreign Relations heard Kerry’s testimony during a week of mass anti-war demonstrations in Washington, D.C., at the same time the Dellums Committee was meeting ostensibly without the permission of House leadership. James M. Naughton, 200,000 Rally in Capital to End War, N.Y. TIMES, Apr. 25, 1971, at 1.

139 4 In House Plan Hearings on War, N.Y. TIMES, Apr. 7, 1971, at 10.


141 Steven V. Roberts, Birch Member and Black Among Victors on Coast, N.Y. TIMES, June 4, 1970, at 29. According to Roberts, in his six terms, Representative Cohelan had amassed “a voting record of 93 percent as rated by the liberal Americans for Democratic Action.” Id. This suggests the Dellums was elected largely on the strength of his anti-war views – and he went to Washington committed to expressing those views as loudly as he could. Earl Caldwell, Black Insurgent Who Won Berkeley Race Is an Outspoken Radical, N.Y. TIMES, June 14, 1970, at 46.
former Berkeley city councilman, retorted to challengers.\textsuperscript{142} Even under less equivocal definitions, Dellums was certainly a radical. When John E. Healy, Dellums’ Republican opponent in the general election, attacked Dellums’ attendance record as a councilman and depicted Dellums as “a creature of the Black Panthers . . . and of ‘the lunatic left wing,’” Dellums refused to denounce his associations with the Black Panthers, an organization which was founded in Oakland, California.\textsuperscript{143} Dellums did, however, go so far as to say that he considered violence, “particularly ‘bombing’ and ‘trashing’ [property destruction]” to be “really counter-productive.”\textsuperscript{144}

Upon arriving in Washington, Dellums, who was interested in opposing the Nixon administration on many grounds, immediately set about pursuing the anti-war agenda he had proposed when running for Congress.\textsuperscript{145} Within months after taking office, Dellums announced plans to conduct public, informal hearings into the “command responsibility” for United States “war atrocities” in Vietnam.\textsuperscript{146} Dellums, along with three other liberal, anti-war Democrats, announced that he was proceeding with the informal hearings “because of the refusal of the Congressional leadership and committee chairmen to [sic] a full-scale Congressional


\textsuperscript{144} \textit{Id}. Dellums went on to have a landmark career in Congress, later serving as the chair of the House Armed Services Committee and the Congressional Black Caucus, and holding office for almost three decades until announcing his retirement in 1997. After spending several years as a lobbyist, Dellums recently reentered the political arena, taking office as the mayor of Oakland, California, succeeding former California Governor and now California Attorney General Jerry Brown. J. Douglas Allen-Taylor, \textit{Ron Dellums Takes the Helm in Oakland}, BERKELEY DAILY PLANET, Jan. 9, 2007, available at http://www.berkeleydailyplanet.com/article.cfm?archiveDate=01-09-07&storyID=26048. For controversy during the mayoral race over Dellums’ post-congressional career as a lobbyist, see Phillip Matier and Andrew Ross, \textit{In Oakland, Dellums Draws Fire in Mayor’s Race}, S.F. CHRON., Mar. 27, 2006.

\textsuperscript{145} There is some debate about whether Dellums was acting on his own anti-war initiatives, or whether he was responding to the prodding of organizations such as the Citizens’ Commission of Inquiry. \textit{See, e.g.}, Tod Ensign, \textit{Organizing Veterans Through War Crimes Documentation}, in V IET NAM GENERATION, Mar. 1994, available at http://www3.iath.virginia.edu/sixties/HTML_docs/Texts/Narrative/Ensign_War_Crimes.html (“Within days after arriving in Washington, Ron agreed to turn over part of his office for an exhibition of war crime materials. We also convinced him that another large hearing under Congressional auspices was needed.”); \textit{DELLUMS HEARINGS, supra} note 12, at ix (“We were somewhat disconcerted by the generally indifferent, and in some cases hostile, attitude displayed by nearly all the congressmen and staff members with whom we spoke . . . Only one Congressman, Ronald V. Dellums, a newly elected Black man from Oakland, California, systematically supported our demand that Congress conduct a massive inquiry.”).

\textsuperscript{146} \textit{4 In House Plan Hearings on War}, N.Y. TIMES, Apr. 7, 1971, at 10.
inquiry into American war crimes in the Indochina war.\footnote{147} In April of 1971, Dellums, along with Manhattan Representative Bella S. Abzug, Michigan Representative John Conyers Jr., and Maryland Representative Parren J. Mitchell, held four mornings of unofficial hearings on Capitol Hill.\footnote{148} “We believe it to be the function of Congress to undertake open study of the responsibilities for war atrocities,” Dellums explained. “Of course, we would rather have official inquiry, but Congressional leadership has ignored all our requests. So, we are calling ad hoc hearings.”\footnote{149}

The Dellums Committee hearings, which were attended by up to twenty congressmen at various times,\footnote{150} drew significant national media attention,\footnote{151} but were also plagued by the same sorts of concerns about accuracy that had discredited Mark Lane’s \textit{Conversations with Americans}.\footnote{152} One former army sergeant, Danny S. Notley, testified that he took part in the killing of about 30 Vietnamese men, women, and children in a village called Truong Kahn, near My Lai, in April of 1969.\footnote{153} While five Vietnamese women later came forward with a story that, in some particulars, seemed to match Notley’s,\footnote{154} Notley refused to provide more information to Army investigators than he had given to the Dellums Committee, and so prevented the military from further investigating the case.\footnote{155} “Typically, the Army responded by trying to get Notley to ‘name names,’” Tod Ensign of the Citizens’ Commission of Inquiry later wrote.

\footnote{147} Id.

\footnote{148} See, e.g., Ensign, \textit{supra} note 137; Robert N. Stassfeld, “\textit{Lose in Vietnam, Bring the Boys Home}”, 82 N.C. L. REV. 1891, 1922-1923 (2004) (“And to shake a nation from its denial of the brutality of the war we were fighting, they held hearings to expose war crimes that American soldiers had committed in our name.”).

\footnote{149} \textit{4 In House Plan Hearings on War}, N.Y. TIMES, Apr. 7, 1971, at 10.

\footnote{150} Ensign, \textit{supra} note 137.


\footnote{152} See, e.g., \textit{LEWY, supra} note 16, at 317-318. \textit{But see} Robert N. Strassfeld, \textit{American Innocence}, 37 CASE W. RES. J. INT’L L. 277, 291 (2006) (“Veterans who testified at the Winter Soldier Investigation, organized by Vietnam Veterans against the War, and at the Congressional hearings on war crimes, organized by Congressman Ron Dellums, gave ample examples of a wide array of torture practices and techniques including, beatings, threatened rapes, water torture, electric shocks to the genitals and other parts of the body, and locking prisoners in a room to spend the night with a python.”).


derisively. “No less a luminary than Nixon's Counsel Fred Buzhardt contacted me seeking Notley's cooperation in identifying the guilty (read: low-ranking) parties.” Ensign, and presumably Notley, were interested in using the evidence garnered from public hearings such as the Dellums Committee hearings and Winter Soldier hearings to indict the Nixon administration and the United States’ military leadership for setting war crimes policies, rather than using such hearings to gather evidence to use against the low-level grunts who had pulled the triggers. To some observers, however, Notley’s silence simply confirmed their suspicion that he had been making the whole story up in the first place, and perhaps as a result gravely wounded and discredited Dellums’ atrocity oversight efforts in the eyes of Nixon’s still-extant “silent majority.”

C. The Aftermath of the My Lai Oversight

In the aftermath of the Calley guilty verdict, many in the United States responded by defending Calley and his men for doing their jobs or by insisting that, while Calley was guilty, the upper echelons of the military and the administration were using Calley as a scapegoat so as to avoid close scrutiny of the war. In other words, even many Americans who disapproved of the war and were horrified by the massacre focused criticism on the military and political higher-ups rather than on Calley or his men. Popular support for Calley was overwhelming: on April 7, 1971, for example, the Gallup Poll reported that only 9 percent of Americans

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156 Ensign, supra note 137.

157 Id. Ensign and many other anti-war activists were convinced that the United States military was making scapegoats of men like Calley in order to protect America’s political and military leadership.

158 See, e.g., LEWY, supra note 16, at 317-318.

159 E.g. The Clamor of Calley: Who Shares the Guilt?, TIME, Apr. 12, 1971, available at http://www.time.com/time/magazine/article/0,9171,904957,00.html (“The most extraordinary demonstration against the verdict from the antiwar side was staged in Manhattan's Wall Street by the Viet Nam Veterans Against the War. Smack in front of the New York Stock Exchange, a dozen veterans in fatigue jackets passed out leaflets next to a big white van showing a film of American atrocities in Viet Nam. John Kerry, a former gunboat skipper who won a Silver Star in Viet Nam and was wounded three times, read a prepared statement: ‘We are all of us in this country guilty for having allowed the war to go on. We only want this country to realize that it cannot try a Calley for something which generals and Presidents and our way of life encouraged him to do. And if you try him, then at the same time you must try all those generals and Presidents and soldiers who have part of the responsibility. You must in fact try this country.’”); Men at Pentagon Decline to Comment on Verdict, N.Y. TIMES, Mar. 30, 1971, at 12 (quoting Representative Dellums complaining that Calley was “scapegoated”). Anti-war activists, including the director of the American branch of the Bertrand Russell Peace Foundation, had introduced the theme of Calley as a scapegoat long before the conviction. See, e.g., Peace Group to Set UP Panels on Atrocity Charges, N.Y. TIMES, Nov. 30, 1969, at 30.
approved of the court-martial’s findings, while 79 percent disapproved. "Terry Nelson and C-Company” released (on the Plantation Label) a particularly hagiographic record entitled The Battle Hymn of Lieutenant Calley. The album reportedly sold 202,000 copies in the first three days after the verdict. In response to the national mood, President Nixon announced that he was going to review Calley’s sentence, and that during the review Calley would be confined to his quarters at Fort Benning. While Nixon never pardoned him, Calley was ultimately released on parole after his case had wound its way through the courts. In the end, Calley served only a few months in prison.

PART II: IRAQ WAR CRIMES AND OVERSIGHT

“The photographs did not lie,” wrote New York Times reporter Craig R. Whitney. In the spring of 2004, a story broke alleging that American military personnel stationed at Saddam Hussein’s infamous Abu Ghraib prison had engaged in acts of prisoner abuse – and that the military personnel had taken and passed around pictures of that abuse. In many ways, the scandal unfolded just as the My Lai scandal had unfolded thirty-five years before. The military began investigating after Joseph M. Darby, an Army Reserve soldier with the 372nd Military Police (MP) Company, anonymously sent an agent of the U.S. Army Criminal Investigation Command some of the pictures he had been given by one of the perpetrators of the abuse. The story emerged in the public eye after the relatives of

160 BELKNAP, supra note 20, at 193.

161 The Clamor of Calley: Who Shares the Guilt?, TIME, Apr. 12, 1971, available at http://www.time.com/time/magazine/article/0,9171,904957,00.html. According to the article, “After a voice-over about ‘a little boy who wanted to grow up and be a soldier and serve his country in whatever way he could,’ the song begins: My name is William Calley, I'm a soldier of this land/I've vowed to do my duty and to gain the upper hand/But they've made me out a villain, they have stamped me with a brand/As we go marching on . . .” See also BELKNAP, supra note 16, at 191; The Battle Hymn of Lieutenant Calley, available at http://www.youtube.com/watch?v=iXNsXIxBkqs, Oct. 24, 2008.


163 See, e.g., Linda Charlton, President Orders Calley Released From Stockade, N.Y. TIMES, Apr. 2, 1971, at 1.

164 See BELKNAP, supra note 16, at 225-256.

165 Id.


one of the accused soldiers, concerned that the soldier would be scapegoated to cover for higher-up officers and officials, contacted CBS News’ *60 Minutes II* with photographs and information about the alleged war crimes. At around the same time, someone leaked a critical report on the incident to Seymour Hersh, the journalist who had broken the My Lai story, and who was now a regular contributor to the *New Yorker*.

In response to the allegations, which were quickly followed by additional news stories and interviews, some members of Congress immediately called for Congress to engage in significant oversight; given the highly-polarized political scene between Democrats and Republicans, especially in an election year, it is not surprising that a number of those suggesting hearings were Democrats who opposed President George W. Bush’s handling of the Iraq War. It was not only Democrats, however, who were seemingly interested in congressional oversight: Republican Senator John Warner of Virginia, the Chairman of the Senate Armed Services Committee, initially indicated that he was interested in holding extensive hearings. After he came under enormous political pressures from his own party, however, Warner eventually limited his investigation into the culpability of the chain of command. In the House, California Representative Duncan Hunter, the conservative and hawkish Chairman of the House Committee on the Armed Services, was seemingly never interested in pursuing effective oversight, and instead arguably used the tools of congressional oversight to minimize the effects of war crimes testimony and to prevent fellow congressmen from gaining additional information or questioning witnesses. Marginalized by the Republicans, California Democratic Representative Henry Waxman and other powerful members of the relatively powerless Democratic minority in the House bucked the official hearing process and fixed upon Abu Ghraib oversight as a means of gaining increased national prominence, opposing the Bush administration, and jockeying for political power. Ultimately, congressional oversight of Abu Ghraib essentially petered out, and only a few enlisted men and women were held accountable for the torture at the prison. Section II.A briefly describes the events that occurred on Cell Block I of the Abu Ghraib prison in the fall of 2003, when soldiers from the 372nd MP Company abused and tortured Iraqi prisoners, and the emergence of knowledge about the prisoner abuse into the public eye. Section II.B examines congressional oversight of the Abu Ghraib abuse, including

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Waxman’s attempts to engage in oversight outside the normal congressional committee system. Section II.C briefly describes the aftermath of the Abu Ghraib investigation and oversight.

A. "The failure of a relatively small number of soldiers who served at Abu Ghraib"

Like the historical record of the My Lai massacre, which is obscured by the existence of numerous conflicting accounts written by observers intent on twisting history to fit particular agendas, the historical record of the abuses at Abu Ghraib is unclear. Similarly, the lack of a probing and significant congressional investigation has resulted in confusion about the roles played by high-ranking military officers and high-level administration officials in giving the orders to “Gitmo-ize” Abu Ghraib and subject detainees to torture.\footnote{Given that the events at Abu Ghraib happened so recently, moreover, passions have had no time to cool, and so those events have not yet been exposed to historical scrutiny by scholars detached from the political battles of the “War on Terror.” That said, given the numerous news reports on the abuses, the evidence available from the Pentagon’s investigations (and especially the report of Army Major General Antonio M. Taguba, which is probably the most trustworthy of the investigations\footnote{Douglas Jehl, Head of Inquiry on Iraq Abuses Now in Spotlight, N.Y. Times, May 11, 2004 (“The unflinching report on abuses at Abu Ghraib prison in Iraq that General Taguba completed in March, people who know him say, was shaped by that strong moral compass and by his vision of the Army as a noble calling.”); see also MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE [hereinafter TAGUBA REPORT] (2004); Seymour M. Hersh, The General’s Report, NEWSWEEK, June 25, 2007 (“If there was a redeeming aspect to the [Abu Ghraib] affair, it was in the thoroughness and the passion of the Army’s [Taguba’s] initial investigation.”).}} Given that the events at Abu Ghraib happened so recently, moreover, passions have had no time to cool, and so those events have not yet been exposed to historical scrutiny by scholars detached from the political battles of the “War on Terror.” That said, given the numerous news reports on the abuses, the evidence available from the Pentagon’s investigations (and especially the report of Army Major General Antonio M. Taguba, which is probably the most trustworthy of the investigations\footnote{Cf. Scott Wilson & Sewell Chan, As Insurgency Grew, So Did Prison Abuse, WASH. POST, May 10, 2004.}), and the pictures that were seared into the memories of many around the world,\footnote{See, e.g., Ugly Americans, CHICAGO TRIBUNE, May 5, 2005 (“Those pictures are going to be seared into the minds of jihadists and the young jihadists of the future for 50 years.”) (quoting Democratic West Virginia Senator John D. Rockefeller)).} it is possible to describe at least some of what happened in Cell Block I in the fall of 2003 – what General Paul Kern, the Commanding General of United States Material Command, later concluded was “the failure of a relatively small number of soldiers who served at Abu Ghraib prison.”\footnote{Statement by General Paul Kern, Commanding General, U.S. Army Material Command, before the Armed Services Comm., U.S. House of Representatives, on the Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq, Second Session, 108th Congress, Sept. 9, 2004.}
In October of 2003, the 320th MP Battalion, under the command of Lieutenant Colonel Jerry Phillabaum, took up the mission of guarding all prisoners at what the military referred to as “Forward Operating Base (FOB) Abu Ghraib.” Phillabaum in turn assigned the 372nd MP Company, a reserve unit based out of Cresaptown, Maryland under the command of Captain Donald Reese, the mission of guarding the prisoners in Abu Ghraib’s Cell Block I. By that fall, the 372nd, which had been called up in March of 2003, was, along with the entire 800th MP Brigade, tired and frustrated. The soldiers of the 800th had apparently believed that they would be sent home shortly after the end of hostilities in May of 2003. Instead, in late May or early June of 2003, the Brigade was given the mission of managing the Iraqi penal system and several detention centers. On June 30, 2003 Brigadier General Janis L. Karpinski assumed command of the 800th MP Brigade, thus becoming the first female United States general to command troops in a combat theater. Karpinski had no experience with running a prison; with rare exceptions, her 3400 subordinates were equally inexperienced. The 372nd MP Company, for example, which had been handling traffic and police duties, was entirely untrained and unprepared for its mission of guarding prisoners.

The 372nd MP Company, moreover, found itself stepping into a confused situation at Abu Ghraib. Karpinski was putatively responsible for guarding all detainees in Iraq, but at the end of August Major General Geoffrey D. Miller, the commander of the military detention center at Guantanamo Bay, had arrived with interrogators from Guantanamo “experienced in strategic interrogation” on an advisor trip with (according to Karpinski) the goal of “Gitmoizing” detention practices in Abu Ghraib.

174 TAGUBA REPORT, supra note 171, at 16, 36.
175 TAGUBA REPORT, supra note 171, at 16; Former Abu Ghraib Reserve Unit Returns Home, N.Y. TIMES, Aug. 3, 2004, at A8. The 372nd MP Company was one of three companies comprising the 320th MP Battalion, which was one of eight MP battalions comprising the 800th MP Brigade. TAGUBA REPORT, supra note 171, at 16, 36.
176 TAGUBA REPORT, supra note 171, at 36.
177 TAGUBA REPORT, supra note 171, at 36.
178 TAGUBA REPORT, supra note 171, at 36.
179 TAGUBA REPORT, supra note 171, at 37 (“There is abundant evidence . . . that soldiers through the 800th MP Brigade were not proficient in their basic MOS [Military Occupational Specialty] skills, particularly regarding internment/resettlement operations.”).
181 TAGUBA REPORT, supra note 171, at 7.
This meant that MPs would essentially be involved in “preparing” and “softening-up” detainees for interrogation. During that trip, Miller also suggested that the guard force should “be actively engaged in setting the conditions for successful exploitation of the internees.” And reportedly suggested that the prison guards at Abu Ghraib obtain military working dogs for use in interrogations – which they did shortly thereafter. The situation, and the chain of command, was further confused after November 19, 2003, when the commander of the 205th Military Intelligence (MI) Brigade was given command of FOB Abu Ghraib, while Karpinski as the commander of the 800th MP Brigade remained in control of detainee operations within the base. As Major David W. DiNenna, the 320th MP Battalion’s operations, training, and intelligence officer, later testified, the command situation at the base in the fall of 2003 was “extremely confusing.”

As a result of the absence of training, Taguba reported, “Brigade personnel relied heavily on individuals within the Brigade who had civilian corrections experience, including many who worked as prison guards or corrections officials in their civilian jobs.” On Cell Block I, this meant that MPs in the 372nd MP Company looked to Specialist Charles A. Graner, a 35-year-old former state prison guard, and Staff Sergeant Ivan L. “Chip” Frederick II, who had similarly worked as a corrections officer in Pennsylvania. Unfortunately, what their fellow soldiers apparently
learned from Graner and Frederick was how to abuse prisoners, either in order to “soften” them up for interrogation or perhaps simply for fun. As Major General Taguba later noted, between October and December of 2003, “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees.”\textsuperscript{190} The incidents, Taguba concluded, were “intentionally perpetrated by several members of the military police guard force,” and constituted a “systematic and illegal abuse of detainees.”\textsuperscript{191} Among those participating in the abuse and torture were, in addition to Graner and Frederick, Specialists Sabrina Harman, Megan Ambuhl, and Roman Krol, Sergeants Santos Cardona\textsuperscript{192} and Michael Smith, and Private First Class Lynndie England, who was Graner’s girlfriend.\textsuperscript{193} It was England who appeared in some of the most iconic of the Abu Ghraib photographs, in one of which she was shown holding a detainee on a leash and in another of which she was shown pointing at a detainee’s exposed genitals.

Apparently, the fact that detainees were being abused, humiliated, and even physically attacked was common knowledge among the soldiers
of the 372nd in the fall of 2003.\(^{194}\) As the New York Times later reported, “[m]istreatment was not only widely known but also apparently tolerated, so much so that a picture of naked detainees forced into a human pyramid was used as a screen saver on a computer in the interrogations room.”\(^{195}\) The abuse was reportedly even known to some of the families and friends of the MPs. When Sabrina Harman, who later pled guilty to abusing detainees, returned to Virginia on leave in November of 2003, she gave a disk containing photographs of detainee abuse to a friend, “saying she wanted to present it to higher-ups when she returned permanently.”\(^{196}\) Lynndie England’s lawyer told a writer for Marie Claire that when on leave in December of 2003, England had talked to him about her discomfort with the things that the guards were doing at Abu Ghraib.\(^{197}\) More startlingly, Graner apparently shared all his photographs by email with his family, seemingly convinced that there was nothing inappropriate about his behavior. “He sent me every picture,” explained his mother to a sympathetic reporter in December of 2008. “I saw the rope. I saw the naked guy.”\(^{198}\) As Mark Benjamin, the reporter to whom she was speaking, noted, Graner added commentary to his pictures that “described the routine brutality at Abu Ghraib in quotidian language that would have seemed strange unless you knew, as we do now, that the soldiers there were mostly doing what they were told to do by the various authority figures who were issuing orders.”\(^{199}\)

Much of the fault for Abu Ghraib can undoubtedly be laid at the feet of Lieutenant Colonel Phillabaum, Brigadier General Karpinski, and a number of other officers, who, according to the Taguba Report, were simply not up to the task of training and commanding their respective units. Indeed, the entire 800th MP Brigade appeared to be a dysfunctional unit. In his report, Taguba explicitly found that Phillabaum, the commander of the 320th MP Battalion, was “an extremely ineffective commander and

\(^{194}\) Kate Zernike, *Only a Few Spoke Up on Abuse As Many Soldiers Stayed Silent*, N.Y.TIMES, May 22, 2004 (“[M]any other people, including medics, dog handlers and military intelligence soldiers -- and even the warden of the site where the abuses occurred -- saw or heard of similar pictures of abuse, witnessed it or heard abuse discussed openly at Abu Ghraib months before the investigation started in January.”).

\(^{195}\) Id.

\(^{196}\) Id.


\(^{199}\) Id. Despite Benjamin’s sympathy for Graner, Graner had a seriously checkered past, which included allegations that he had beaten both his wife and an inmate at the Pennsylvania prison where he was once a guard. “This guy is in one of the most notorious prisons in the world?” asked Pennsylvania Democratic Representative John Murtha rhetorically, shortly after the Abu Ghraib story broke. “Outrageous. The damage that they did was irreparable.” Paul von Zielbauer & James Dad, *Guard Left Troubled Life for Duty in Iraq*, N.Y. TIMES, May 14, 2004, at A9.
leader.”200 “Despite his proven deficiencies as both a commander and leader,” Taguba added, Karpinski allowed Phillabaum “to remain in command of her most troubled battalion guarding, by far, the largest number of detainees in the 800th MP Brigade.”201 In Taguba’s view, the 800th MP Brigade’s adjutant and logistics officers were both “essentially dysfunctional,” the Brigade Command Judge Advocate “was unwilling to accept responsibility for any of his actions,” and the Brigade’s executive officer failed to properly supervise the Brigade staff effectively.202 Many soldiers in the 800th MP Brigade and the 372nd MP Company ignored uniform standards and failed to regularly salute officers203 – both indications of a breakdown in unit discipline.204 Karpinski, for her part, demonstrated a “complete unwillingness to either understand or accept that many of the problems inherent in the 800th MP Brigade were caused or exacerbated by poor leadership and the refusal of her command to both establish and enforce basic standards and principles among its soldiers.”205 Lieutenant General Ricardo Sanchez, the commander of coalition forces in Iraq during the Abu Ghraib scandal, clearly pins all blame on the dysfunctions of the 800th MP Brigade. “The problem,” he explained in 2006, was “a catastrophic failure in leadership within the MP brigade, beginning with the brigadier general.”206 When asked about claims that those above Karpinski in the chain of command bore responsibility for actually ordering some of the abusive techniques employed at Abu Ghraib, Sanchez responded by attacking the American Civil Liberties Union

200 TAGUBA REPORT, supra note 171, at 39.
201 TAGUBA REPORT, supra note 171, at 39-40.
202 TAGUBA REPORT, supra note 171, at 40-41.
203 TAGUBA REPORT, supra note 171, at 41, 43.
204 Not all officers of the 800th MP Brigade were negligent in their duties. Major Stacy Garrity, the Brigade Finance Officer, who actually received mention in the Taguba Report after being brought up on charges for consuming alcohol with a non-commissioned officer, TAGUBA REPORT, supra note 171, at 42, became known as “the Angel of the Desert” for her special care for detainees. See, e.g., Ari Shapiro, “The Angel of the Desert”, NPR ALL THINGS CONSIDERED, June 18, 2004, available at http://www.npr.org/templates/story/story.php?storyId=1964381. In his report, Taguba specifically noted that several subordinate units under the 800th MP Brigade, including the 744th MP Battalion under the command of Lieutenant Colonel Dennis McGlone, the 530th MP Battalion, under the command of Lieutenant Colonel Stephen J. Novotny, and the 165th MI Battalion, under Lieutenant Colonel Robert P. Walters, Jr., “persevered in extremely poor conditions, and upheld the Army Values.” TAGUBA REPORT, supra note 171, at 49-50. Taguba also cited three individual military personnel, including Specialist Darby, who should be “favorably noted.” Id. Master-at-Arms First Class William J. Kimbro, a Navy dog handler, “refused to participate in improper interrogations,” and First Lieutenant David O. Sutton reported abuse to his chain of command. Id. at 50.
205 TAGUBA REPORT, supra note 171, at 40.
(ACLU) as “a bunch of sensationalist liars, I mean lawyers, that will distort any and all information that they get to draw attention to their positions.”

What remains unclear even after the Taguba investigation and the media investigations into Abu Ghraib was to what extent official military or Bush administration policy and orders contributed to the culture of abuse and torture on Cell Block I. “It is challenging to summarize the overwhelming mountain of evidence that pins the blame for the prisoner abuse squarely on the upper ranks of the Bush administration rather than the lower ranks of the Army,” concluded Benjamin in an article for Salon. “On Dec. 2, 2002, [Secretary of Defense Donald] Rumsfeld signed a memo authorizing the use of a panoply of abusive interrogation tactics at Guantánamo Bay, Cuba, including stress positions, exploitation of phobias such as a fear of dogs, forced nudity, hooding, isolation and sensory deprivation.” While perhaps not going as far as Benjamin, Taguba himself believed that the MPs responsible for inflicting the abuse and torture did not come up with the tactics on their own, but he was not permitted to investigate anyone beyond the soldiers and their immediate superiors. “These M.P. troops were not that creative,” Taguba told Hersh. “Somebody was giving them guidance, but I was legally prevented from further investigation into higher authority. I was limited to a box.”

2. The Whistleblowers, the Media and the Public

On January 13, 2004, Specialist Joseph M. Darby slipped an anonymous note and a CD-ROM containing shocking evidence of the Abu Ghraib abuses under the door of the United States Army’s Criminal Investigation Division (CID), thus setting in motion the chain of events that would lead to public exposure of the Abu Ghraib torture and abuses. Graner had given Darby a CD-ROM containing numerous images of prisoner abuse; the images had been circulating among personnel in the 372nd MP Company, but no one had yet officially reported the existence of

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207 Id.
209 Id.
211 Id.
these particular images to the CID. While Darby was not the first to raise concerns about detainee abuse by American military personnel, the evidence he provided was so explosive that it generated immediate results. “Darby,” Hersh explained in his 2004 book *Chain of Command*, “did what the world’s most influential human rights groups could not . . . [w]hen they were presented with Darby’s computer disk containing the graphic photographs . . . . [t]he Army’s senior commanders immediately understood they had a problem.”213 Hours after Darby handed over the images, the Army detained Staff Sergeant Frederick, the senior enlisted man captured in the photographs in Cell Block I, and began searching Frederick’s computer equipment for more images. Within days, Lieutenant General Sanchez suspended Karpinski and sixteen others pending investigation. On January 31, Lieutenant General David D. McKiernan, the Commander of Coalition Forces Land Component Command, appointed Taguba to conduct that investigation.214

While Darby was undoubtedly the most important whistle-blower, Darby apparently never approached the media, and instead communicated only with the CID and Taguba’s investigation. News about what had happened at Abu Ghraib broke in the American and international media only after at least two other sets of whistleblowers approached the media with the story.215 While it is not clear what happened first, shortly after Taguba submitted his report someone apparently leaked the report to Seymour Hersh, who began writing an article for *Newsweek*. (Hersh later maintained, in another *Newsweek* article, that he did not get the report from Taguba himself.216) At the same time, Staff Sergeant Frederick’s father, who was also named Ivan Frederick, concerned that his son would be made a scapegoat by high-ranking officers after being ordered to soften up prisoners for interrogation, went to his brother-in-law, William Lawson, for assistance. Lawson reportedly first tried to contact seventeen different members of Congress,217 but after receiving no replies to his letters he approached David Hackworth, a retired colonel, former writer for *Newsweek*, and muckraking journalist, with the story.218 With Hackworth’s help, Lawson and the senior Frederick then tried to contact a number of media figures, beginning with Bill O’Reilly of the conservative Fox News

213 Hersh, *Chain of Command*, supra note 212, at 25.


215 But see James Ridgeway, *Congress Questions Rummy’s Coverup*, The Village Voice, May 7, 2004 (“Time and again, Rumsfeld returned to the line that this is an old story: ‘The idea that this is a story broken by the media is simply not the fact.’”).


218 Id.
O’Reilly Factor, but “nobody wanted to touch the story.” Eventually, however, they made contact with CBS and 60 Minutes II, which interviewed Staff Sergeant Frederick and somehow obtained some of the Abu Ghraib photographs. Even then, the military managed to delay publication of the story. While CBS was prepared to air the story on April 14, 2008, the network’s executives held the story back two weeks after repeated calls from the Pentagon expressing concern that airing the photographs before the invasion of Fallujah would be extremely harmful to American military forces. General Richard B. Myers, the chairman of the Joint Chiefs of Staff, reportedly even called CBS Evening News anchor Dan Rather personally to tell him that broadcasting the story “would endanger national security.” According to a lawsuit Dan Rather later filed against CBS after essentially being fired, the network only gave approval to air the story on April 28, 2004, when it became clear that Hersh was close to publishing his article in Newsweek. Even then, Rather maintained in the lawsuit, “CBS imposed the unusual restriction that the story would be aired only once, that it would not be preceded by on-air promotion, and that it would not be referenced on the CBS Evening News.”

Despite the delay in airing the story, the media attention created a firestorm of public concern and attention – a firestorm for which at least some administration officials were apparently simply unprepared. According to Taguba, when he first met Secretary Rumsfeld on May 6, 2004, the night before Rumsfeld was scheduled to testify to Congress about Abu Ghraib, Rumsfeld claimed neither to have received a copy of Taguba’s

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219 Brendan O’Neill, Leaking Self-Doubt, SPIKED, May 13, 2004. Spiked, a successor to the online magazine LM (Living Marxism), frequently adopts positions against multiculturalism and environmentalism. According to its website, “spiked is an independent online phenomenon dedicated to raising the horizons of humanity by waging a culture war of words against misanthropy, priggishness, prejudice, luddism, iliberalism and irrationalism in all their ancient and modern forms.” About Spiked, http://www.spiked-online.com/index.php?/about/article/336/. Brendan O’Neill, the magazine’s editor, claimed to have spoken to Hackworth directly.


222 Sidney Blumenthal, Dan Rather Stands By His Story, SALON.COM, Sept. 27, 2007.


224 Id.
three-month-old report nor to have seen any of the photographs from the
investigation. Among others at the meeting that night were Deputy
Secretary of Defense Paul Wolfowitz, Under-Secretary of Defense for
Intelligence Stephen Cambone, Chairman of the Joint Chiefs of Staff
General Richard Myers, and Army Chief of Staff General Peter
Schoomaker. Apparently, not one of the officials or officers had read
Taguba’s report or seen any evidence. “At best,” Taguba told Hersh,
“Rumsfeld was in denial.” In denial or not, Rumsfeld was decidedly not
pleased with Taguba. When Taguba first entered the room, Rumsfeld
declared, in a mocking voice, “Here . . . comes . . . that famous General
Taguba—of the Taguba report!” During the meeting, Rumsfeld also
seemed particularly concerned about how Taguba’s report had become
public. What all this meant was that when Rumsfeld went to testify to
the Senate the following day to explain exactly what had happened at Abu
Ghraib, many of the senators were probably more familiar with the facts of
what had happened than was the man they were hoping to question.

Unfortunately, unfamiliarity with the facts did not prevent Rumsfeld
from releasing information he should have instead kept quiet. Joseph Darby
had been assured by army investigators that the information he had given
against his friends and unit-members was anonymous, and so was shocked
on May 7 when, while sitting with hundreds of fellow soldiers watching
Rumsfeld testify before Congress, Darby heard Rumsfeld congratulate him
by name for his courage in coming forward. Worried for his safety,
Darby was rushed out of Iraq, and he and his wife were immediately
moved to an undisclosed location, where they were guarded around the clock for
six months.

B. Congressional Investigations and Hearings into Abu Ghraib

Shortly after news of the Abu Ghraib abuse came to light, President
Bush appeared on Al Arabiya television and announced that he wanted to

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226 Id.
227 Id.
228 Id.
229 See, e.g., James Ridgeway, Congress Questions Rummy’s Coverup, The
Village Voice, May 7, 2004 (“But under questioning . . . Rummy began to crumble,
able to describe for the senators such basic things as the chain of command and what
instructions the guards had been given.”).
230 Id. According to Justine Sharrock, “Seymour Hersh had already published
his name, but as Darby says, ‘Who reads the damn New Yorker?’” Justine Sharrock, Am
231 Justine Sharrock, Am I a Torturer?, MOTHER JONES, Mar. 3, 2008; Dawn
Bryan, Abu Ghraib Whistleblower’s Ordeal, BBC NEWS, Aug. 5, 2007, available at

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tell the people of the Middle East that the abuses “represent the actions of a few people.” Bush added, “that in a democracy that [sic] there will be a full investigation.” In the eyes of numerous legislators, this meant that there would be significant congressional oversight, and that both the House and the Senate would have the opportunity to hold probing hearings and investigate thoroughly. “When this situation broke,” explained Senator John Warner, the Republican Chairman of the Senate Armed Services Committee, “I felt it was the responsibility of the Congress, a co-equal branch of government, to start hearings.” Warner was echoed by Arizona Republican Senator John McCain, who explained that a trustworthy congressional investigation was necessary in order to maintain public confidence in the war in Iraq. “The way you do that,” explained McCain, “is by having hearings, find out who is responsible, get it done and get it behind us.” Despite Bush’s assurances, Warner’s views on the co-equality of the legislative branch, and McCain’s confident conclusion that Congress should hold hearings and put Abu Ghraib in the past, in fact congressional oversight of the Abu Ghraib abuses was sorely lacking. While a number of senators, including most importantly Warner, but also Republicans such as McCain, Susan Collins of Maine, and Lindsey Graham of South Carolina and Democrats such as Edward Kennedy of Massachusetts and Carl M. Levin of Michigan initially supported holding hearings in the Senate, ultimately Warner apparently buckled to party pressure, effectively suspended hearings for the election season, and ultimately ended the hearings after only four sessions. In the House, meanwhile, California Republican Duncan Hunter, the chairman of

234 See, e.g., Ugly Americans, CHICAGO TRIBUNE, May 5, 2004 (“There will be an investigation, there will be a prosecution, and heads will roll.”) (quoting Republican Kansas Senator Pat Roberts, Chairman of the Senate Intelligence Committee)).
236 Id.
237 Id.
239 Editorial, Abu Ghraib Whitewash, INT. HERALD TRIB., July 27, 2004 (“Warner has admirably resisted pressure from the White House and Republican leaders in Congress to stop his investigation. But he is showing signs of losing appetite for the fight.”). But see Editorial, No Accountability on Abu Ghraib, N.Y. TIMES, Sept. 10, 2004 (“[W]ith due respect to Mr. Warner -- who has bravely continued his hearings and seems willing to keep going for months more -- the answers are in.”).
the House Armed Services Committee, accused Warner and other Senate members of becoming “mesmerized by cameras,” and essentially blocked hearings, allowing a total of only 14 hours of sworn testimony about Abu Ghraib over the course of two years. In part, this lack of congressional oversight can be ascribed to a striking across-the-board decrease in congressional oversight during the Bush administration’s heyday. The lack of extensive hearings in either the Senate or the House meant that much of the congressional noise about Abu Ghraib came instead from less-powerful legislators, including the very-junior Senator Graham and the marginalized Democrats, especially California Representative Henry Waxman, the ranking Minority Member of the House Committee on Government Reform.

1. False Start – Or Perhaps Slow-Running – Senators

In the immediate aftermath of the Abu Ghraib photographs being aired on 60 Minutes II and published in Newsweek, a number of senators, led by members of the Senate Armed Services Committee, including Republicans John Warner, John McCain, Susan Collins, and Lindsey Graham and Democrats Carl Levin and Edward Kennedy, made it clear that they were extremely interested in holding extensive Senate hearings into the abuses at Abu Ghraib. While the Armed Services Committee, chaired by Warner, made a good start, angering Secretary of Defense Rumsfeld and sparking intense criticism from some Republican legislators, Warner apparently eventually gave in to party pressure and sharply limited the scope and public nature of the hearings without determining the culpability of high-ranking military officers or administration officials. Interestingly, while the Armed Services Committee appeared to abandon its oversight, and certainly sharply limited public hearings into Abu Ghraib, the committee left open its investigation, and in December of 2008 – more than


241 Susan Milligan, Congress Reduces its Oversight Role, BOSTON GLOBE, Nov. 20, 2005. (In contrast, during the 1990s the Republican-controlled House “logged 140 hours of sworn testimony into whether former president Bill Clinton had used the White House Christmas card list to identify potential Democratic donors.”) Id.

242 E.g. id. (“An examination of committees’ own reports found that the House Government Reform Committee held just 37 hearings described as ‘oversight’ or investigative in nature during the last Congress, down from 135 such hearings held by its predecessor, the House Government Operations Committee, in 1993-94, the last year the Democrats controlled the chamber.”); Henry A. Waxman, Op-Ed, Free Pass From Congress, WASH. POST, July 6, 2004, at A19; Charles Babington & Helen Dewar, Lawmakers Demand Answers on Abuses in Military-Run Jails, Wash. Post, May 6, 2004, at A12 (“In the Republican-controlled Congress, [House Minority Whip Steny H. Hoyer (D-Md.)] told reporters earlier, ‘there is a disinclination for oversight, particularly as it relates to this administration.’”).
four years after beginning its investigation – released a report concluding that Rumsfeld and other senior U.S. officials shared much of the blame for the detainee abuse. 243

From the first moments when news of the Abu Ghraib abuses emerged, a number of senators, including both Democrats and Republicans, began calling for extensive congressional hearings. On May 4, 2004, for example, Democratic Virginia Senator Robert C. Byrd called in the Congressional Record for “full and open hearings into prisoner abuse” by American military forces.244 “Secret, closed door meetings on a subject of such enormous import smack of damage control and cover-up – and that is the last impression the Senate should be conveying,” Byrd declared. “We must ensure that Congress accedes to no ground rules in its investigations that could further taint this deplorable situation. The time for public hearings on prisons run by the U.S. armed forces is now.”245 It was John Warner, however, as chairman of the Armed Services Committee, who was clearly the most influential senator in terms of determining whether the Senate would hold oversight hearings – and the Virginia senator, a veteran of both the Navy and the Marine Corps and a former Secretary of the Navy, was apparently incredibly angry about what had happened at Abu Ghraib. “It contradicts all the values we Americans learn,” Warner declared when the Senate opened hearings on May 7. “Let me be as clear as one senator can be: This is not the way for anyone who wears the uniform of the United States of America to conduct themselves.”246 The Armed Services Committee, he explained, has a “solemn responsibility” to discover what went wrong and “to make sure it never, never happens again.”247 Warner did not confine his anger to the men and women of the 372nd MP Company, who had actually participated in the torture and abuse. “Behind closed doors, however,” noted a reporter for Salon, “[Warner] has surprised observers with occasional flashes of anger at Donald Rumsfeld's evasions.”248 According to his Senate colleagues, Warner was determined not to be intimidated into halting hearings. “He is motivated by a strong sense of duty to get to the bottom of a scandal that has deeply scarred American credibility in the world,” added the Salon reporter.249 He shows

245 Id.
249 Id.
“a penchant for bucking his party, taking heat and surviving,” concluded the Washington Post.\(^{250}\)

Shortly after the Abu Ghraib news broke, Rumsfeld agreed to testify before Warner’s committee for two hours and then to brief all senators in a closed session thereafter. Warner made his anger clear by requiring Rumsfeld to testify under oath – a requirement usually waived as a courtesy for the Secretary of Defense.\(^{251}\) About a week and a half after hearing from Rumsfeld, Warner announced that the Senate Armed Services Committee was summoning General John P. Abizaid, Lieutenant General Ricardo S. Sanchez, and Major General Geoffrey D. Miller to testify in an open session.\(^{252}\) “Daily we see from your press a number of new avenues that have to be explored,” Warner told the media, “and we have also on our own initiative found a number of new avenues that need to be explored.”\(^{253}\) As of May 21, Warner had “a lengthy list of Pentagon officials he would like to call” to testify before the committee.\(^{254}\) “The Armed Services Committee . . . has served notice that it would not pull back, as the House Armed Services Committee has done,” concluded the Los Angeles Times on May 17.\(^{255}\) “When this situation broke,” Warner explained, “I felt it was the responsibility of the Congress, a co-equal branch of government, to start hearings.”\(^{256}\) Despite holding hearings, however, the Armed Services Committee was unable to get many answers from the testifying officials and officers; each senator had only six minutes to ask questions of each witness,\(^{257}\) and as the witnesses claimed to know little about key documents and events, the senators asking questions were unable to follow up.\(^{258}\) Still, Warner was certainly not the only senator – or even the most forceful


\(^{252}\) Carl Hulse, Senate Panel Will Summon 3 Generals For Hearing, N.Y. TIMES, May 18, 2004.

\(^{253}\) Id.


\(^{257}\) See, e.g., John Tierney, Hot Seat Grows Lukewarm Under Capital’s Fog of War, N.Y. TIMES, May 20, 2004 (“The senators were stymied in part by the six-minute limit on each questioner, which often left little time for questions after an introductory proclamation.”).

\(^{258}\) See, e.g., id. (“But General Sanchez said that he had never even seen this list [of approved interrogation techniques], let alone authorized any of the harsher techniques. Mr. Byrd and other senators spent much of the morning in confusion trying to figure out where the list had come from.”).
senator – on the committee pushing the investigation. “Warner's style of questioning at times has been overshadowed by the more aggressive probing and criticism of other senators on the committee,” noted the Washington Post, specifically citing questioning from Republican Senators Collins, Graham, and McCain.259

Despite their earnest desire to fully explore what had led to the torture at Abu Ghraib, Warner and his Republican colleagues were not without political leanings and were not unaffected by political concerns. Warner “is also a Republican supporter of President Bush,” noted two reporters in the New York Times, “and as he conducts the hearings, he is dancing a fine line between members of his party who want him to back the White House and Democrats . . . .”260 Indeed, a number of senators, including Oklahoma Republican James Inhofe and Texas Republican John Cornyn explicitly criticized Warner for continuing to hold hearings and Democrats for calling for additional investigation.261 “With top Iraq battlefield commanders scheduled to testify about the prison abuse scandal before the Senate Armed Services Committee on Wednesday, a major rift has developed among Republicans as to whether Congress is taking the inquiry into the issue too far,” reported the New York Times on May 19.262 These hearings, Cornyn explained, represent “a real distraction from trying to win the war, especially at this most fragile time.”263 “I think [Warner] feels it’s necessary to have these hearings, and I’m sure his reasons are good reasons,” Inhofe had told New York Times reporters a week earlier.264 “I can’t tell you what they are because I don’t know. I have to wonder what good is served by putting it in public, to the extent that those people who have a political agenda can use this.”265

Within two months of the scandal’s emergence, it became apparent that the investigation in the Senate was losing steam, in large part because of Bush administration foot-dragging and pressure from Republicans in both the Executive and Legislative branches of government. “When the


261 See infra Part II.B.2.


265 Id.
Abu Ghraib scandal broke,” Seymour Hersh later reported, “Senator John Warner, then the chairman of the Armed Services Committee, was warned ‘to back off’ on the investigation, because ‘it would spill over to more important things.’” Warner’s spokesman acknowledged that Warner had been pressured, but said that Warner had resisted that pressure. Nonetheless, as the *New York Times* noted in the summer of 2004, “[t]he Congressional investigation into the abuse of Iraqi detainees at Abu Ghraib prison has virtually ground to a halt.” Numerous factors, including “the calendar, the preferences of some of Mr. Warner’s Republican colleagues and the pace of the military investigations, many of which are behind schedule,” contributed to prevent Warner from holding new hearings. By July there was also less interest from senators in what had happened at Abu Ghraib; only ten senators from both parties attended a briefing to update lawmakers on the status of pending inquiries. Perhaps most importantly, Warner faced criticism from fellow Republicans, who felt that were Warner to hold more hearings he “would only hand Democrats an explosive campaign issue” during a critical presidential and congressional election cycle. In an editorial, the *Washington Post* noted that Warner’s vow “to continue probing the abuse of detainees in Iraq despite pressure from leading congressional Republicans to stop” had come to nothing, as since March Warner had failed to hold a single public hearing, partly “because of the Bush administration’s resistance to supplying key witnesses and documents.” “Warner has admirably resisted pressure from the White House and Republican leaders in Congress to stop his investigation,” concluded the *International Herald Tribune* at the end of July, “[b]ut he is showing signs of losing appetite for the fight.”

In September of 2004, Warner suddenly announced that he was going to hold another day of hearings, but many media outlets had concluded that the Senate’s oversight had essentially petered out. “After

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267 Id.
269 Id.
270 Id.
271 Id.
272 Editorial, *Unanswered Questions*, WASH. POST, July 11, 2004; see also Editorial, *Abu Ghraib Whitewash*, INT. HERALD TRIB., July 27, 2004 (“The Defense Department has consistently tried to stymie Warner’s investigation. It “misplaced” thousands of pages from Major General Antonio Taguba’s report on Abu Ghraib, the only credible military account so far. It stalled the completion of a pivotal look at army intelligence by two other army generals. And it ignored Senate demands for the Red Cross reports on American military prisons for months.”).
months of Senate hearings and eight Pentagon investigations, it is obvious that the administration does not intend to hold any high-ranking official accountable for the nightmare at Abu Ghraib,” concluded the New York Times in an editorial.274 “It was pretty clear yesterday that Senator John Warner’s well-intentioned hearings of the Armed Services Committee are not going to do it either.”275 Some observers, however, such as the Washington Post’s Jackson Diehl, were nonetheless surprised. “What was remarkable about the latest round of congressional hearings,” Diehl noted, “were the signs that a handful of Republicans in both congressional houses are unwilling to play by the script. In spite of the dictates of partisanship, they . . . insisted that lowly prison guards and interrogators should not be the only ones to face consequences.”276 Still, despite the day of hearings in September – and despite at least one suggestion in 2006 that senators were still interested in investigating277 – it seemed clear that the Senate hearings had amounted to little; witnesses had testified while saying almost nothing, and there seemed no clear path towards finding out whether anyone above Karpinski in the chain of command had had anything to do with formulating a policy of torture and abuse in Cell Block I. “The topic,” concluded Salon writer Mark Benjamin, “has sparked little formal inquiry since an initial round of hearings were held during the spring of 2004.”278

While Warner and his fellow interested members of the Armed Services Committee appear to fit the mold of the False Start Senators in that they passionately indicated their interest in holding oversight hearings and in fact called several high-ranking officials and officers to testify, but then gradually drew back from pressing the issue, such a judgment might be premature. Instead, it might be more accurate to view them as slow-running senators instead, as it appears that the investigation into Abu Ghraib continued, though almost entirely outside the public eye. On December 11, 2008, for example, over four and a half years after beginning their investigation, the Armed Services Committee released a report, approved of by 17 of the 25 members, that was harshly critical of Rumsfeld and other senior military officers.280 “The abuse of detainees in U.S. custody cannot

275 Id.
277 Mark Benjamin, Not so Fast, General, SALON.COM, Mar. 7, 2006 (“The bipartisan Warner-Levin letter [preventing General Miller from resigning, and so keeping him available for the investigation] signals that Congress’ anemic probe of abuse at Abu Ghraib might have a pulse after all.”).
278 Id.
279 See infra Part III.4.
simply be attributed to the actions of ‘a few bad apples’ acting on their own,” the report’s Executive Summary states.\textsuperscript{281} “The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”\textsuperscript{282} Despite this evidence suggesting that at least some senators were interested in continuing oversight, the oversight investigation was clearly hindered and delayed by political concerns almost from the beginning. Even the timing of the release of the new report appears to have been guided by partisanship: the report was not released until the Democrats had been in control of the Senate for two years – and until after the presidential election of 2008. More importantly, the majority of the report is still classified, such that the public and the media cannot see the Senate’s findings.\textsuperscript{283}

2. Our-Soldiers-First Legislators and Republican Critics

Senators such as Warner, Collins, Graham, McCain, Levin, and Kennedy, all of whom were interested in pursuing probing oversight investigations into what had happened at Abu Ghraib, found themselves facing significant criticism from a number of legislators who suggested both that the detainees at Abu Ghraib deserved what they had gotten and that investigation into the abuses at Abu Ghraib was harmful to American military personnel, the United States’ mission in Iraq, and – not surprisingly, given the political landscape in which the Abu Ghraib oversight played out – the president of the United States. Certainly the two most important and vocal such legislators were Oklahoma Senator James Inhofe, a Republican member of the Armed Services Committee, and California Representative Duncan Hunter, the Republican chairman of the House Armed Services Committee.

Perhaps because it was the Senate Armed Services Committee initially leading the charge to investigate what had happened at Abu Ghraib, Senator Inhofe’s comments about whether the Abu Ghraib detainees deserved the abuse they had received and to what extent the members of the 372nd deserved to be punished seemed particularly out of place to his colleagues. When it came his turn during a committee hearing to question Taguba, for example, Inhofe “began by expressing puzzlement at ‘this


\textsuperscript{282} Id.

\textsuperscript{283} David Morgan, U.S. Senate Report Ties Rumsfeld to Abu Ghraib Abuse, REUTERS, Dec. 11, 2008.
outrage everybody seems to have about the treatment of these prisoners.”

“I'm probably not the only one up at this table that is more outraged by the outrage than we are by the treatment.”

“[T]hese prisoners – they're murderers, they're terrorists, they're insurgents,” Inhofe announced. “Many of them probably have American blood on their hands. And here we're so concerned about the treatment of those individuals.”

Noting that pictures of American military personnel mistreating prisoners should be accompanied by pictures of the executions of prisoners under the regime of Saddam Hussein, Inhofe declared that he was “also outraged that we have so many humanitarian do-gooders right now crawling all over these prisons looking for human rights violations while our troops, our heroes, are fighting and dying.”

CNN observed that Senators Hillary Rodham Clinton and Evan Bayh “appeared surprised” at Inhofe’s remarks, that “some other Republicans disavowed them,” and that McCain actually left the committee room while Inhofe was speaking. “Asked outside the meeting room whether he agreed with Inhofe, McCain replied, ‘No way.’”

Inhofe’s remarks about whether the oversight investigation was going to be harmful for American troops in Iraq were certainly less offensive to his fellow senators, but nonetheless seemed to make light of what had happened at Abu Ghraib. “Quite frankly, I'm sorry that you guys are here,” Inhofe told Generals Abizaid and Sanchez during their May 19 testimony. “I'd rather be handling this in some way where we can get your statement, get it in the record and have that done with, because you have an awesome responsibility. I know that you're anxious to get back to the battlefield and that's where your mind is today and that's where your heart is.”

“I think he [Warner] should stop the hearings at this point; we've heard enough,” Inhofe added near the end of May. “We have a war to win, and we need to keep our talents concentrated on winning the war as opposed to prisoner treatment.”

Inhofe was not the only senator suggesting that the congressional investigation was harming American troops and the American military mission in Iraq. “It begins to look like we are engaged in some collective hand-wringing,” said Texas Republican

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285 Id.


287 Id.

288 Id.

289 Id.


John Cornyn, a member of the Armed Services Committee, “which can be a distraction from fighting and winning the war.”

Unlike Inhofe, who seemed to think that the detainees at Abu Ghraib had deserved the abuse and torture they suffered, Representative Duncan Hunter focused both on the effect that he believed the Senate’s hearings would have on the American military mission in Iraq and on the political fortunes of Republican congressmen and the Bush administration. “The Senate has become mesmerized by cameras,” Hunter declared, and “they have given now probably more publicity to what six people did in the Abu Ghraib prison at 2.30 in the morning than the invasion of Normandy.” The Senate committee is “basically driving the story” of prisoner abuse, Hunter concluded. “We are at this point disserving our military operation in theater,” he added. “It is time to refocus on winning the war and not pull our battlefield leadership out of the theater.” Speaking after hearing about the beheading of American captive Nicholas Berg, Hunter explicitly connected the continuation of oversight investigations to harm to individual Americans. “We’ve got to make a decision on precisely how to handle [releasing new photos], especially in light of what’s occurred today,” Hunter announced. “From my own perspective, it validates Secretary Rumsfeld and General Myers’ attempt to keep these initial photos from being published . . . I think it shows they were trying to save American lives when they did that. Unfortunately, those pictures were released.” Just as Inhofe was not alone in the Senate in protesting that the investigations were harming American military interests, Hunter was not alone in the House.

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293 Walter Shapiro, Op-Ed, Senator “Outraged” by Reaction to Prisoner Abuse, USA TODAY, May 11, 2004 (“Referring to current interrogation tactics, Inhofe said, ‘You’ve just got to be tough, and you’ve got to try to get the information out. If you don’t get the information out, more Americans can be killed. And then you’d really hear squealing about it.’”).


298 Senators to View Abuse Images Wednesday, CNN, May 12, 2004.
“We should not allow [an investigation] to distract us from the war at hand,” Texas Republican Tom DeLay agreed.\textsuperscript{299}

3. Obstructionism: The Republicans in the House of Representatives

While representatives such as Hunter and DeLay were openly criticizing the Senate investigation into what occurred at Abu Ghraib and were expressing their concern for the effect that the investigation would have on American troops and the American military mission in Iraq, Republican leaders in the House (including Hunter) were doing more than talk by minimizing any oversight in their chamber and obstructing attempts by Democrats to investigate Abu Ghraib more closely.

Just as John Warner in the Senate was the most important senator for determining the course of oversight hearings into Abu Ghraib, Duncan Hunter, the chairman of the House Armed Services Committee, was the most important representative. Unlike Warner, of course, Hunter had little interest in holding hearings, and repeatedly suggested that congressional investigation of Abu Ghraib would be harmful for American interests and United States forces, and was intended to harm Republican politicians.\textsuperscript{300} “Maybe we should cancel every piece of Congressional business for the entire year so that the issue at Abu Ghraib can be milked until the election,” Hunter suggested rhetorically, arguing that Congress had “given undue attention to the abuse of prisoners.”\textsuperscript{301} Apart from refusing to hold more than one public hearing,\textsuperscript{302} Hunter, who set the schedule for the Armed Services Committee, also turned down requests from both Democrats and Republicans at a committee meeting for access to executive branch documents and reports on Abu Ghraib. Concluding that the committee should first read the Army’s entire 6,000-page report on Abu Ghraib before asking for more material from the Executive branch, Hunter was openly contemptuous. “The idea that we're going to send a message back now, that somehow we have been stonewalled when they sent us 6,000 [pages] and only four members of the committee have had the time to read them so far, does not make sense,” he announced. “It also sends a false message, it implies that somehow that we're not getting facts, in fact we're getting more facts then we can digest. So I don't think we should start doing business by


\textsuperscript{302} See, e.g., id. (“The issue burst into the open in recent days as the Senate and House took starkly different approaches to the prison abuse inquiry, with the Senate holding a series of high-profile hearings and the House one public session.”).
resolutions of inquiry.” Hunter’s obstructionism was particularly effective. “In the past two years, a House committee has managed to take only 12 hours of sworn testimony about the abuse of prisoners at Iraq’s Abu Ghraib prison,” noted *Boston Globe* reporter Susan Milligan in 2005.

Hunter was not the only House Republican seeking to stymie or avoid significant congressional oversight of the Abu Ghraib allegations. During the week of May 11, 2004, the ranking Democrats on the International Relations, Armed Services, and Government Reform committees, at the request of House Minority Leader Nancy Pelosi, all sent letters to their respective Republican chairmen requesting that the committees “exercise their full oversight responsibilities and hold further hearings into the abuses at prisons in Iraq.” Not surprisingly, given Waxman’s penchant for impassioned letter-writing, the letter to Tom Davis, which was signed by all of the Democrats on the House Committee on Government Reform, as well as by Vermont Independent Bernard Sanders, was particularly strong. The decision “not to investigate these abuses” and to “defer instead to the Administration’s internal investigations” is “an abdication of Congress’ constitutional oversight responsibility,” the letter concluded. The chairmen who received the letters, however, simply refused to engage in additional oversight, with Davis’ spokesman dismissing Waxman’s letter as “partisan mudslinging.” “We’re not afraid to ask difficult questions,” added the spokesman, “but Mr. Davis determines the agenda, not Mr. Waxman, and we’re not going to craft our hearing schedule on Mr. Waxman’s partisan blueprint.”

Finally, frustrated by the responses (or lack of responses) they were getting from the House committee chairmen, and presumably also interested in creating additional fodder for the campaign season, Democratic Minority Leader Nancy Pelosi of California, Democratic Whip Steny Hoyer of Maryland, and Democratic Caucus Chairman Robert Menendez of New

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303 *US Congressional Democrats Blocked in Effort to Widen Prison Torture Probe*, VOA NEWS.COM, June 15, 2004; see also Susan Milligan, *Congress Reduces its Oversight Role*, BOSTON GLOBE, Nov. 20, 2005;

304 E.g., Susan Milligan, *Congress Reduces its Oversight Role*, BOSTON GLOBE, Nov. 20, 2005.


306 *See infra* Part II.B.4.

307 Letter from Representative Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, et al to Representative Tom Davis, Chairman, House Comm. on Gov’t Reform, May 11, 2004.


309 *Id.*
Jersey sent a letter directly to Speaker J. Dennis Hastert of Illinois. Complaining that there did “not seem to be an investigative agenda” anywhere in the House, the three Democratic leaders noted that they believed “that the House will be derelict in its institutional oversight responsibilities unless this situation changes soon.” Hastert’s response was surely not what the Democrats were looking for: he noted that the Republican majority “had actively kept abreast of developments in Iraq, even though it might not be conducting the ‘show trials’ he said Democrats would prefer.”

While the Republican claim that the Democrats were simply interested in manufacturing an issue for an important election year was not without some validity, perhaps more telling of the attitudes of House Republicans than either Davis’ rejection of Waxman’s request or Hastert’s disdain for “show trials” were the comments of Ohio Republican Bob Ney, the chairman of the House Administration Committee. The week before the Democrats sent their letters, Ney declared that he “absolutely” disagreed with the Senate members who believed that Congress should investigate Abu Ghraib. “America’s reputation has been dealt a serious blow around the world by the actions of a select few,” Ney announced. “The last thing our nation needs now is for others to enflame this hatred by providing fodder and sound bites for our enemies.” As Susan Milligan reported in 2005, in the aftermath of the Abu Ghraib scandal Republican leaders attempting to hinder Democratic efforts to investigate the Bush administration took such steps as refusing to give the Democrats a room in which they could interview witnesses and seeking to reverse a law allowing any group of seven House members to demand documents without the approval of the majority party.


Marginalized by the Republicans, stymied by chairmen such as Duncan Hunter, and explicitly criticized by Speaker Hastert, a number of Democrats in the House, including most importantly California Representative Henry Waxman, attempted to irritate the Republican


311 Id.

312 Id.


314 Susan Milligan, *Congress Reduces its Oversight Role*, BOSTON GLOBE, Nov. 20, 2005 (“Since the minority party does not have subpoena power, the law is one of the few tools Democrats have to influence investigations.”).
majority, gain additional media exposure, and even engage in effective oversight by pushing for additional hearings, holding unofficial hearings, publishing editorials in newspapers, and especially waging letter-writing campaigns.

By the time news of Abu Ghraib broke, Waxman, who as a member of the minority in the House no longer had the power of the subpoena, was already noted for attempting to engage in oversight by writing open letters to fellow legislators, government agencies, and government contractors. In seeking stir up additional public concern about the Abu Ghraib investigation, Waxman both wrote letters to Republican congressmen and published an op-ed in the Washington Post—though it seems likely he knew that neither tactic would in fact convince Republicans in the House to open hearings into what had happened at Abu Ghraib. On May 4, 2004, Waxman wrote to Tom Davis, the chairman of the House Committee on Government Reform, to request that the committee look into the actions of private contractors at Abu Ghraib. (While the Armed Services Committee had primary responsibility for investigating the armed forces, the Government Reform Committee was tasked with investigating, among other things, individuals who contracted with the government.) In the letter, Waxman summarized some of the evidence (some from the New Yorker, some from CBS, and some from the Los Angeles Times) about what American forces had done to detainees at Abu Ghraib. “Other committees may examine the military’s involvement in this inexcusable episode,” Waxman concluded. “I hope you agree with me that our Committee has a unique responsibility to investigate the involvement of private contractors in this incident.”

Two months later, in an editorial in the Washington Post, Waxman publicly decried the manner in which Congress during the Bush

315 See, e.g., id. (“Waxman, who held his own unofficial hearing into Iraq contracting, has been rebuffed in his efforts to conduct bipartisan investigations on a number of topics that involve members of the administration and powerful industries. The rejected list includes: the administration role, if any, in condoning detainee abuse at Abu Ghraib and Guantanamo Bay . . . .”).

316 See, e.g., Letter from Representative Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, to Donald H. Rumsfeld, U.S. Sec’y of Def., Apr. 30, 2003 (“I am writing about Halliburton’s ties to countries that sponsor terrorism.”); Letter from Representative Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, to W.J. Tauzin, Chairman, House Comm. on Energy and Commerce , & James C. Greenwood, Chairman, Subcomm. On Oversight and Investigations, Comm. on Energy and Commerce, Apr. 17, 2003 (“I am writing to urge you to investigate what appears to be two years of document destruction by Philip Morris Incorporated, in violation of a federal court order.”).

317 Letter from Representative Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, to Representative Tom Davis, Chairman, House Comm. on Gov’t Reform, May 4, 2004.

318 Id. at 1-2.

319 Id. at 3.
administration had “abdicated oversight responsibility altogether,” concluding that oversight during the Clinton and Bush years had “been driven by raw partisanship.”\footnote{320} “The House is even refusing to investigate the horrific Iraq prison abuses,” Waxman added, clearly hoping to anger and activate the \textit{Washington Post}’s readers. “Compare the following: Republicans in the House took more than 140 hours of testimony to investigate whether the Clinton White House misused its holiday card database but less than five hours of testimony regarding how the Bush administration treated Iraqi detainees.”\footnote{321}

Perhaps taking a page from Waxman’s playbook, in the spring and early summer of 2004 Democratic leaders in the House wrote a number of open letters to prominent Republicans urging increased oversight of the Abu Ghraib abuse. During the week of May 11, 2004, for example, ranking Democrats on the International Relations, Armed Services, and Government Reform committees sent letters to their respective committee chairmen asking for additional oversight.\footnote{322} The following week, the three senior Democrats in the House sent a similar, though more general, letter to Dennis Hastert.\footnote{323} On June 4, 2004, the ranking minority members of the House committees on Government Reform, the Judiciary, Appropriations, Armed Services, International Relations, Intelligence, Energy and Commerce, and Ways and Means, all followed up with a letter sent directly to President Bush requesting assistance in learning more about what had happened in Iraq.\footnote{324} “We are writing to inform you of our determination to investigate the prison abuses at Abu Ghraib,” the Democrats wrote.\footnote{325} “While we would prefer to participate in committee investigations with our respective chairs, we cannot allow the refusal of the Republican leadership and committee chairs to pursue these matters to obstruct Congress’ access to essential information.”\footnote{326} The eight ranking Democratic committee members who signed the letter\footnote{327} surely knew that their letter requesting

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\item \footnote{320}{Henry A. Waxman, Op-Ed, \textit{Free Pass From Congress}, \textit{WASH. POST}, July 6, 2004, at A19.}
\item \footnote{321}{Id.}
\item \footnote{322}{Michael S. Gerber, \textit{House Dems Demand More Iraq Hearings}, \textit{THE HILL}, May 12, 2004; see also supra notes 305-309 and accompanying text.}
\item \footnote{323}{Carl Hulse, \textit{Even Some in G.O.P. Call for More Oversight of Bush}, \textit{N.Y. TIMES}, May 21, 2004; see also supra notes 310-312 and accompanying text.}
\item \footnote{324}{Letter from Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, et al to George W. Bush, President of the U.S., June 3, 2004.}
\item \footnote{325}{Id. at 1.}
\item \footnote{326}{Id.}
\item \footnote{327}{Those signing the letter were Waxman, Michigan Representatives John Dingell and John Conyers, Jr., Wisconsin Representative David R. Obey, Missouri Representative Ike Skelton, California Representatives Tom Lantos and Jane Harman, and New York Representative Charles B. Rangel. \textit{Id.} at 5-6.}
\end{itemize}
\end{footnotesize}
that Bush provide the Democratic minority with documents about Abu Ghraib would amount to nothing – just as their letters to their committee chairmen had amounted to nothing. The Bush administration, which appeared to be largely indifferent to public pressure to release documents, might have been more receptive to a private Democratic approach; surely much of the communication among legislators and between legislators and the Executive branch happens in phone calls and face-to-face meetings, rather than in the pages of formal open letters. Like Waxman, however, by writing these letters Democrats were trying to make noise about Abu Ghraib, probably hoping to stoke public concern over American war crimes, and perhaps seeking to alter the balance of power in the House and between the House and the Executive branch.

C. The Aftermath of the Abu Ghraib Oversight

In the aftermath of the Abu Ghraib prisoner abuse scandal many Americans were not especially willing to view England, Graner, Frederick, and their colleagues on the night shift at Abu Ghraib’s Cell Block I as additional victims in the Calley mold, or to identify with the perpetrators while criticizing the military and political elite. There were limited exceptions: some drew explicit comparisons between what they admitted were the unpleasant and illegal practices of the Abu Ghraib jailors and the murdering and graphic beheadings practiced by the United States’ enemies in Iraq, and concluded that the actions of the Abu Ghraib jailors had not been all that bad in relative terms. On his May 4, 2004 show, the conservative radio host Rush Limbaugh went further, and suggested that the members of the 372nd MP Company were simply “having a good time” to relax from the pressure of being under fire. “This is no different than what happens at the Skull and Bones initiation,” Limbaugh exclaimed, “and we're going to ruin people's lives over it and we're going to hamper our military effort, and then we are going to really hammer them because they had a good time... you ever heard of emotional release? You ever heard of need to blow some steam off?” 328 Even those Americans not willing to go as far as Limbaugh in the wake of the scandal were nonetheless divided on how vile the guards’ actions had been, with 60 percent of respondents in an ABC/Washington Post poll classifying what happened at Abu Ghraib as “abuse”, and only 29 percent classifying what happened as “torture”. 329


Majorities identify three specific coercive practices as acceptable: sleep deprivation (66 percent call it acceptable), hooding (57 percent) and so-called “noise
“Some people are upset with what [Joseph Darby] did – ratting them out – and also because of what happened to those contractors, the beheading,” explained Robert Ewing, a veteran and Darby’s former high school history teacher, describing a discussion from Ewing’s current class of high school seniors. “They might say what the guards did pales in comparison.”

Even if they accepted that the MPs at Abu Ghraib had acted inappropriately, Americans were divided on who should be punished and what form that punishment should take. Many in the military and in Congress closed ranks around the military hierarchy and the Bush administration. As Seymour Hersh noted in 2005, “despite the subsequent public furor over Abu Ghraib, neither the House nor the Senate Armed Services Committee hearings led to a serious effort to determine whether the scandal was a result of a high-level interrogation policy that encouraged abuse.” Nonetheless, at least some observers (including Major General Taguba, who became something of a pariah in the military after completing his report) were convinced that the enlisted MPs of the 372nd MP Company had been punished while their superiors, equally responsible, had inappropriately escaped repercussions entirely. Retired Army Colonel Lawrence Wilkerson, for example, Secretary of State Colin Powell’s former chief of staff, stated in October of 2008 that he believed that torture “was being tolerated by some along the chain of command” and implied that those convicted for their actions at Abu Ghraib were held to a different standard than were their higher-ups. “The president and the vice president, God forbid, were letting go with an umbrella of policy that said bombing” (54 percent), in which a suspect is subjected to loud noises for long periods. Far fewer Americans accept other practices. Four in 10 call it acceptable to threaten to shoot a suspect, or expose a suspect to extreme heat or cold. Punching or kicking is deemed acceptable by 29 percent. And 16 percent call sexual humiliation – alleged to have occurred at the Abu Ghraib prison in Baghdad – acceptable in some cases.

Id.

Hanna Rosin, When Joseph Comes Marching Home: In a Western Maryland Town, Ambivalence About the Son Who Blew the Whistle at Abu Ghraib, WASH. POST, Mar. 17, 2004.


Id.

Derrick Z. Jackson, The Buck Stops with Lynndie: But What About Those At the Top?, CHICAGO TRIB., Oct. 3, 2005. Secretary Rumsfeld, for example, ostensibly accepted “full responsibility” for “the terrible activities that happened at Abu Ghraib.” The abuse “occurred on my watch,” he explained, “and as secretary of defense I am accountable for them, and I take full responsibility.” Jim Garamone, Rumsfeld Accepts Responsibility for Abu Ghraib, AM. FORCES PRESS SERV., May 7, 2004. Despite this claim, however, Rumsfeld faced no penalties and continued to serve as secretary of defense until just after the 2006 off-year elections. Apart from his statement to Congress, it is hard to see how he was “accountable” or how he took “full responsibility” for the prisoner abuse.

you could do what you want and that the gloves were off,” Wilkerson noted.\footnote{Id.}

In the end, of the twelve soldiers convicted of various charges as a result of the abuse at Abu Ghraib, only three (Graner, who received a sentence of ten years in Federal prison, Frederick, who received a sentence of eight years in prison, and Lynndie England, who received a sentence of three years of confinement) served sentences of longer than ten months.\footnote{See, e.g., TA Badger, \emph{Pfc. England Sentenced to 3 Years}, A.P., Sep. 28, 2005; Josh White, \emph{Army Dog Handler Gets Six Months in Prison; Penalty One of Lightest for Detainee Abuse}, \emph{WASH. POST}, Mar. 23, 2006, at A15. No officers were convicted of any wrongdoing, though several were demoted or were punished in ways that effectively ended their careers. Derrick Z. Jackson, \emph{The Buck Stops with Lynndie: But What About Those At the Top?}, \emph{CHICAGO TRIB.}, Oct. 3, 2005.}

As of the end of 2008, only Graner remained in prison – where he was repeatedly complaining about being forced to stay in a cell where the lights were kept on twenty-four hours a day.\footnote{Mark Benjamin, \emph{Sympathy for Charles Graner}, \emph{SALON.COM}, Dec. 1, 2008.}

Brigadier General Karpinski was reprimanded and relieved of her command of the 800th MP Brigade in April of 2005 and demoted to colonel a month later, ostensibly for dereliction of duty, making a “material misrepresentation” to investigators, failing to obey a lawful order, and shoplifting a $22 bottle of perfume at MacDill Air Force Base in Florida in 2002 – an allegation she denies.\footnote{Shoplifting Charge Dogs Iraq Gen, CBS, June 2, 2004; Ex-Abu Ghraib General Denies Shoplifting, \emph{ASSOCIATED PRESS}, May 13, 2005. In October of 2005, Karpinski released a book in which she claimed that she had been scapegoated by her superiors because of her gender. \emph{Janis Karpinski, ONE WOMAN’S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY} (2005).}

Major General Taguba, only the second Filipino ever to achieve the rank of general in the United States Army, received a lateral transfer to the Pentagon to work in the office of the Assistant Secretary of Defense for Reserve Affairs, where, he was later told, he could “be watched.”\footnote{Seymour M. Hersh, \emph{The General’s Report}, \emph{NEWSWEEK}, June 25, 2007.}

In January of 2006, he received a call from General Richard Cody, the Army’s Vice-Chief of Staff and a long-time acquaintance, who without exchanging any pleasantries or offering any explanations informed Taguba that Taguba needed to resign by January of 2007.\footnote{Id.} “They always shoot the messenger,” Taguba explained to Seymour Hersh. “From the moment a soldier enlists, we inculcate loyalty, duty, honor, integrity, and selfless service. And yet when we get to the senior-officer level we forget those values.”\footnote{Id.}
PART III: IDENTIFYING ARCHETYPES OF CONGRESSIONAL WAR CRIMES OVERSIGHT

Thucydides’ famous suggestion that “an exact knowledge of the past [is] an aid to the understanding of the future, which in the course of human things must resemble if it does not reflect it” is of great interest to political scientists, who look for recurrent patterns in disparate events. This concept is more problematic for historians, however, who tend to suspect that events do not repeat so neatly in different contexts. The history of congressional oversight of war crimes after My Lai and Abu Ghraib suggests that in this instance the political scientists are correct: that history demonstrates that similar archetypes emerged just before and just after times when Congress was faced with the choice of whether to engage in war crimes oversight. Part III.A discusses the archetypes of the Whistleblowers, the Muckraking Media, and the Activated Public – three archetypes that emerged before Congress took explicit war crimes oversight action, and that explain, together with the concept of the “fire-alarm” model of congressional oversight, how archetypes operated to spur congressional action. Part III.B examines the archetypes of the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives – four archetypes that emerged after Congress was spurred into action by the media and the public – and suggests that these archetypes sprang from the political structure of the United States government, the separation of powers between the Executive and Legislative Branches, and the relationships both between the Senate and the House of Representatives and between the powerful and largely powerless members of Congress.

A. Archetypes Prior to Congressional Involvement

The Whistleblowers, the Muckraking Media, and the Activated Public, the three archetypes that emerged prior to congressional involvement in war crimes oversight after My Lai and Abu Ghraib, are archetypes of congressional oversight because all three were necessary to spur Congress into exercising its oversight function. Put another way, under a traditional “fire-alarm” model of congressional oversight, Congress will generally not turn its attention to war crimes oversight until required to do so by some motivating force such as a whistleblower, a muckraking journalist, or an interested public. These three archetypes evolved over the decades between My Lai and Abu Ghraib as technology developed and as American society adjusted to the realities of the post-


Vietnam, post-Watergate, and even post-Monica Lewinsky world. They nonetheless remain effective archetypes in understanding how Congress might be forced to focus publicly on allegations of war crimes committed by American forces.

1. Fire-Alarm Oversight

The “fire-alarm” model of congressional oversight helps explain why Congress did not, after either My Lai or Abu Ghraib, engage in war crimes oversight until motivated to do so by the Whistleblowers, the Muckraking Media, and the Activated Public. In an influential 1984 article in the Journal of American Political Science, Mathew McCubbins and Thomas Schwartz argued that what had previously appeared to scholars to be neglect of oversight was instead really “a preference for one form of oversight over another, less-effective form.” Under the “fire-alarm model” of congressional oversight McCubbins and Schwarz proposed or identified,

Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself. . . . Instead of sniffing for fires, Congress places fire-alarm boxes on street corners, builds neighborhood fire houses, and sometimes dispatches its own hook-and-ladder in response to an alarm.

The fire-alarm model, argue McCubbins and Schwarz, is more cost-effective than is a police-patrol model, under which “at its own initiative, Congress examines a sample of executive-agency activities, with the aim of detecting and remedying any violations . . . and by its surveillance, discouraging such violations.” Perhaps more importantly, at least in the politically-loaded and controversial context of war crimes oversight, engaging in oversight under the fire-alarm model might bring more credit to a legislator than would engaging in oversight under the police-patrol model. “Justly or unjustly,” McCubbins and Schwarz note, “time spent putting out

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344 Id. at 165.

345 Id. at 166. McCubbins and Schwartz were admittedly talking about oversight of legislative goals, rather than oversight of Executive branch military actions. The principle, however, remains the same: Congress gets more accomplished in an oversight sense when it relies upon others to pull fire alarms than it does if it engages in active policies. Id. at 171-72. But see id. (“[W]e do not contend that a predominantly fire-alarm policy is more likely than a predominantly police-patrol policy to serve the public interest, only that it is likely to secure greater compliance with legislative goals; whether such compliance serves the public interest depends on what those goals are.”).

346 Id. at 166.
Put another way, congressmen who are operating primarily under the fire-alarm likely will not engage in war crimes oversight until and unless their alarms are pulled by whistleblowers, media gadflies, or an increasingly concerned public.

2. The Whistleblowers (Archetype 1)

The first archetype that emerged after My Lai and Abu Ghraib was that of the Whistleblowers. While it is possible to conceive of journalists stumbling upon stories about war crimes, or even to conceive of Congress investigating and finding such stories independently, it is obviously easier for those interested in atrocity news to learn about alleged war crimes from whistleblowers than from independent digging. Participants in atrocities generally attempt to cover up those atrocities; observers of war crimes try to cover up their involvement. After both My Lai and Abu Ghraib, it was whistleblowers who initially raised questions about possible war crimes: in 1969, it was Ridenhour, who had been a helicopter door gunner at the time of the massacre and who only joined Lieutenant Calley’s former unit after Charlie Company “had been through ‘Pinkville’.” After Abu Ghraib, it was Specialist Joseph M. Darby, a member of the 372nd Military Police Company who had not taken part in the abuse, who reported the story to Army investigators.

347 Id. at 168.


350 See, e.g., Dawn Bryan, Abu Ghraib Whistleblower’s Ordeal, BBC NEWS, Aug. 5, 2007, available at http://news.bbc.co.uk/2/hi/middle_east/6930197.stm; Tom Bowman, Army Tightly Guarded Pictures of Prison Abuse, BALTIMORE SUN, May 6, 2004; Hanna Rosin, When Joseph Comes Marching Home: In a Western Maryland Town, Ambivalence About the Son Who Blew the Whistle at Abu Ghraib, WASH. POST, Mar. 17, 2004. Ridenhour and Darby were the initial whistleblowers, but the history of the investigations into My Lai and Abu Ghraib suggests that once military investigators and journalists begin digging into the stories, initial whistleblowers might quickly be joined by additional whistleblowers. Shortly after news of My Lai broke, for example, journalists quickly found that members of Charlie Company and those (including Calley, Paul Meadow, Michael Bernhardt, Michael Terry, and photographer Ronald L. Haeberle) were willing to give additional details into the massacre. Peter Berastrup & Stephen Klaiderman, Three Vietnam Veterans Tell of Hamlet Slayings, WASH. POST, Nov. 20, 1969, at A1; The My Lai Massacre, TIME, Nov. 28, 1969, available at http://www.time.com/time/magazine/article/0,9171,840403,00.html. After Darby helped lead to the Taguba investigation, Ivan Frederick’s family approached 60 Minutes II and an unknown whistleblower passed the Taguba Report to Seymour Hersh. James Dao & Eric Lichtblau, Soldier’s Family Set in Motion Chain of Events on Disclosure, N.Y. TIMES, May 8, 2004.
The history of oversight after My Lai and Abu Ghraib also suggests that the archetypical Whistleblowers were partly ostracized from their military communities, threatened by their military and civilian peers, and occasionally even reprimanded by the authorities that should have been praising them for their actions. By the time he wrote to military and political officials regarding the My Lai massacre, Ridenhour was already out of the military, and so was not subject to the same sorts of pressures as were some other My Lai and Abu Ghraib whistleblowers. As he later recounted, however, one night while on patrol he spoke about My Lai to his long-time friend and military teammate Michael Terry, who on March 16, 1969, “after the pork and beans but before the peaches” of his meal, had been responsible for gunning down wounded survivors in the My Lai kill-trench. “Mike, Mike,” Ridenhour asked. “Didn't you know that was wrong?” Terry answered that he didn’t know, and that it was “just one of those things.” After that conversation, however, Terry walled Ridenhour off—a potential problem in their six-man Long-Range Reconnaissance and Patrol unit. The response to Hugh Thompson was far more serious than was the response to Ridenhour. Thompson, for example, was subjected to what Peers regarded as “more of an inquisition than an investigation,”  and was in some ways criticized by congressmen speaking to the media. Ridenhour, Thompson, and Haeberle were also clearly the targets of several of the Hébert subcommittee’s recommendations, including especially the recommendation that the military should “review the practices and procedures in awarding medals and decorations.” The implication, that the military should reconsider the Distinguished Flying Cross it had awarded to Thompson, was clear.

Because of the manner in which his whistle-blowing came to light, Darby faced perhaps the most dangerous situation. He had been assured that the information he had given against his friends and unit-members was anonymous. “I was afraid for retribution not only from them, but from

351 See, e.g., comments by Ron Ridenhour at the conference on My Lai held at Tulane University, December, 1994.
353 Id.
354 Id.
355 Id. (“We never talked about My Lai again after that, though we pulled four more LRRP missions together and finished the remaining seven months of our tours in Vietnam in the same company. We continued to be cordial, but we were not close after that.”).
357 HÉBERT REPORT, supra note 87, at 7-8.
other soldiers,” he later told the BBC. He was therefore shocked on May 7, 2004 when, while sitting with hundreds of fellow soldiers watching Secretary Rumsfeld testify before Congress, Darby heard Rumsfeld congratulate him by name for his courage in coming forward. Immediately, Darby later recalled, he “felt 400 pairs of eyes on him.” While most of the soldiers in his unit “shook his hand,” Darby was rushed out of Iraq, and he and his wife were immediately moved to an undisclosed location, where they were guarded around the clock for six months. His protectors were not being paranoid: at least some of the residents of Darby’s hometown were highly critical of Darby’s decision to step forward, and many in his hometown “called him a traitor.” “I call him a rat,” announced Mike Simico, who was visiting relatives in Cresaptown. “If I were [Darby], I'd be sneaking in through the back door at midnight,” added Janette Jones, who lived just across the border from Cresaptown in Pennsylvania. Jones explained that she believed that if Darby had not stepped forward then Islamic insurgents would not have killed Nicholas Berg, the American beheaded on tape by Abu Musab al-Zarqawi, then the leader of Al-Qaeda in Iraq, ostensibly in response to American abuse of Iraqi prisoners at Abu Ghraib. “[W]hen you go against your fellow man like that, I don’t know. Some people won’t like it,” concluded Alan St. Clair, who lived down the road from Darby’s high-


359 Id. According to Justine Sharrock, “Seymour Hersh had already published his name, but as Darby says, ‘Who reads the damn New Yorker?’” Justine Sharrock, _Am I a Torturer?_, MOTHER JONES, Mar. 3, 2008.

360 Justine Sharrock, _Am I a Torturer?_, MOTHER JONES, Mar. 3, 2008.


363 Hanna Rosin, _When Joseph Comes Marching Home: In a Western Maryland Town, Ambivalence About the Son Who Blew the Whistle at Abu Ghraib_, WASH. POST, Mar. 17, 2004.


365 Hanna Rosin, _When Joseph Comes Marching Home: In a Western Maryland Town, Ambivalence About the Son Who Blew the Whistle at Abu Ghraib_, WASH. POST, Mar. 17, 2004.

366 Id.

school home. Colin Engelbach, the commander of Cumberland's Henry Hart VFW Post 1411, went the furthest, calling Darby a “borderline traitor” on national television and announcing that people should “get him.”

3. The Muckraking Media (Archetype 2)

The second archetype that emerged after My Lai and Abu Ghraib was that of the Muckraking Media. In one sense this archetype might almost be thought of as the “Seymour Hersh” archetype. In 1969, it was Seymour Hersh who went door to door at Fort Benning looking for William Calley, and in 2004 it was the imminent publication of Hersh’s article in the New Yorker that caused CBS to broadcast the Abu Ghraib photographs at the end of April. Nonetheless, the race between the New Yorker and 60 Minutes II to break the Abu Ghraib story – and, for that matter, the decisions by newspapers to publish pictures of My Lai, despite warnings from the prosecutors in the Calley court-martial – demonstrates that after both My Lai and Abu Ghraib there was certainly more than one muckraking journalist interested in chasing down the news about alleged American war crimes.

The Muckraking Media operated best after receiving information from the Whistleblowers. Given the military’s desire to avoid any public dishonor, whistleblowers operating without the support of muckraking journalists were far less effective in spurring either public attention or congressional action. After seeing the massacre at My Lai, and in fact putting his helicopter crew and his own body between the bullets of Charlie Company and Charlie Company’s victims, Hugh Thompson reported the atrocity to his superiors, to little effect. Ridenhour, in contrast, was concerned even after writing to numerous political and military officials that the Army would whitewash the historical record, and so he sent his

368 Hanna Rosin, When Joseph Comes Marching Home: In a Western Maryland Town, Ambivalence About the Son Who Blew the Whistle at Abu Ghraib, WASH. POST, Mar. 17, 2004.


370 See, e.g., Hersh, CHAIN OF COMMAND, supra note 212, at xii (“With his stories on My Lai, Hersh joined a tradition of muckrakers . . . .”); Seymour M. Hersh, Lieutenant Accused of Murdering 109 Civilians, ST. LOUIS POST-DISPATCH, Nov. 13, 1969.

371 Hersh, CHAIN OF COMMAND, supra note 212, at x.


story to Ramparts magazine despite his misgivings about the magazine’s reputation.\(^{374}\)

The job of the Muckraking Media in identifying instances of war crimes deserving of congressional oversight and encouraging Congress to act has evolved and in many ways has been made far easier since My Lai by two trends: (1) the increasing media and public interest in muckraking stories or exposés of scandals and war crimes and (2) the increasing ease and speed of mass publication. The first trend can be ascribed in part to the public loss of confidence in authority after the Vietnam conflict and Watergate.\(^{375}\) Crusading investigative journalists Bob Woodward and Carl Bernstein had proven that there were scandals to be found even at the very highest levels of the United States government.\(^{376}\) The effect on the media of the second trend, which can be ascribed to technological developments, is hard to overestimate, especially in the age of the blogosphere. In 1969, Hersh found that mainstream news magazines such as Life and Look were uninterested in publishing a story exposing the massacre at My Lai. As a result, he was forced to publish with the Dispatch News Service, which was an untested, year-old marketing service for reporters working in Vietnam.\(^{377}\) After the initial story of Abu Ghraib broke, in contrast, hundreds of websites, online newspapers, and blogs immediately began chasing down leads and publishing additional pictures. The increased speed of mass publication has significantly accelerated the news cycle, and continues to blur the distinction between journalists and the public at large.\(^{378}\) As a result, in the future Congress might find that its decision about whether to engage in war crimes oversight is even more heavily influenced by muckraking “journalists” (or muckraking somebodies) than it was in the past.

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\(^{375}\) See, e.g., JAMES T. PATTERSON, GRAND EXPECTATIONS 769 (1996) (“More generally the war undercut the standing of political elites. . . . Popular doubt and cynicism about ‘the system’ and the Washington Establishment lingered long after the men came home.”); id. at 782 (“Watergate, [many Americans] believed, proved – yet again – the deviousness and arrogance of government officials who claimed to serve the public interest.”).

\(^{376}\) See, e.g., CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT’S MEN (1974).

\(^{377}\) Hersh, Chain of Command, supra note 212, at ix; see also Reporting Vietnam, Part Two: American Journalism 1969-1975 13-27 (Milton J. Bates et al. eds., 1998); Hersh, My Lai 4, supra note 21, at 135.

\(^{378}\) See, e.g., Editorial, Who Is A Journalist?, CHRISTIAN SCIENCE MONITOR, Mar. 18, 2005 (“But in the Internet age, the cost of distributing news has become minimal. Almost anyone can set up a web log (‘blog’) or send a mass e-mailing, and present themselves as someone who surveys the public scene and presents ‘news.’ Some of these lone-wolf reporters are a refreshing challenge to the usual pack journalism of old media. Reputable reporters hear the howl and see if the yapping is worth pursuing.”). At the same time, of course, the proliferation of unedited “news” sources has clearly reduced the trustworthiness of many individual pieces of reported information.
4. The Activated Public (Archetype 3)

The third common archetype that emerged – third, at least, in that it necessarily followed the archetypes of the Whistleblower and the Muckraking Media, though it was probably more important than the other two in terms of spurring congressional action – was that of the Activated Public. Whistleblowers and muckrakers are relative easy to identify after the fact, as by definition whistleblowers need to communicate with authorities and by definition journalists need to publish. An activated public is a far harder thing to define, identify, and quantify. The events surrounding the My Lai massacre and the prisoner abuses at Abu Ghraib demonstrate, however, that the public became activated in response to either the reports of whistleblowers or the stories of muckrakers, or some combination of the two. The activated public quickly made its presence known by demanding additional news coverage, communicating with its elected representatives, responding to polling questions, writing letters of support to the accused or their victims, and even threatening the whistleblowers and muckrakers who broke the stories in the first place.

While members of Congress do not always respond to public opinion in crafting legislative agendas, members of Congress often seek to respond to public concern and interest so as to maintain electability. Once the public was activated after My Lai and Abu Ghraib, senators and representatives found it hard to avoid engaging in war crimes oversight without being criticized by the media and attacked by at least part of the


380 See infra notes 160-164 and accompanying text (describing the enormous public support for Lieutenant William Calley in the wake of the court martial guilty verdict).

381 See, e.g., supra notes 358-369 and accompanying text (describing threats made against Joseph Darby for blowing the whistle on Abu Ghraib); Hersh, CHAIN OF COMMAND, supra note 212, at x (describing how a Pentagon reporter for the Washington Post assigned to follow up on Hersh’s initial My Lai story called Hersh a “son of a bitch” and asked “where do you get off writing a lie like that?”). See also id at xvii (quoting Richard Pearle, the former chairman of the President’s Defense Policy Board, stating that “Sy Hersh is the closest thing American journalism has to a terrorist, frankly.”).

382 See, e.g., STEPHEN E. FRANTZICH, WRITE YOUR CONGRESSMAN: CONSTITUENT COMMUNICATIONS AND REPRESENTATION 77 (1986) (“No observer truly believes that issue mail controls legislative output, nor does anyone believe that congressional decision making goes on isolated from the input of constituent letters.”).

383 See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 64 (1974) (“Outside the roll call process, the congressman is usually able to tailor his positions to suit his audiences. A solid consensus in the constituency calls for ringing declarations.”).
public. To return to the fire-alarm model of congressional oversight: the public concern over My Lai and Abu Graib demonstrated that an activated public was the equivalent of thousands or tens of thousands of fire alarms all being pulled, all at exactly the same moment.

The archetype of the Activated Public not only helps explain Congress’ decisions regarding war crimes oversight after My Lai and Abu Ghraib, but also might help explain why congressional oversight of My Lai and Abu Ghraib (however poorly accomplished) was not mirrored by congressional oversight of alleged atrocities during the Second World War or the Korean conflict. American forces committed a number of war crimes during those conflicts. In 1943, for example, Americans massacred 74 surrendered Italian soldiers and 2 surrendered German soldiers after the capture of Biscari airfield in Sicily; during the Second World War in the Pacific, some American soldiers killed surrendering Japanese soldiers and collected body parts from Japanese dead; and early in the Korean War, American soldiers allegedly indiscriminately killed Korean civilians at No


385 RICK ATKINSON, THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943-1944, 117-20 (2007). After General Omar Bradley, along with two journalists who had witnessed the killings, complained to General George Patton, whose men had massacred the prisoners, Patton reluctantly agreed to investigate. “I told Bradley that it was probably an exaggeration,” Patton wrote in his journal, “but in any case to tell the officer to certify that the dead men were snipers or had attempted to escape or something, as it would make a stink in the press and also would make the civilians mad. Anyhow, they are dead, so nothing can be done about it.” Id. at 119. In the end, after attempting to suggest to General George Marshall that the killings had been “thoroughly justified,” Patton agreed to try the two men most responsible. Id. According to Atkinson, the two correspondents who saw the massacre accepted Patton’s assurances that such massacres would never happen again, and “never printed a word.” Id. Sergeant Horace T. West admitted that he had participated in shooting 36 POWs, was found guilty, and was stripped of rank and sentenced to life in prison. Captain John T. Compton, who was charged in a second incident of executing 40 POWs, claimed to be following orders, and was acquitted. See also James J. Weingartner, AMERICANS, GERMANS, AND WAR CRIMES: CONVERGING NARRATIVES FROM "THE GOOD WAR", 94 J. AM. HIST. 1164 (2008).

386 See, e.g., JOHN W. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 35 (1986) (“[b]y the final years of the war against Japan, a truly vicious cycle had developed in which the Japanese reluctance to surrender had meshed horrifically with Allied disinterest in taking prisoners.”); Ben Fenton, American Troops ‘Murdered Japanese PoWs’, LONDON TELEGRAPH, Aug. 6, 2005; RICHARD ALDRICH, THE FARAWAY WAR (2005);

NIALL FERGUSON, THE WAR OF THE WORLD: HISTORY'S AGE OF HATRED 546 (2007) (“Boiling the flesh off enemy skulls to make souvenirs was a not uncommon practice. Ears, bones and teeth were also collected.”); Simon Harrison, SKULL TROPHIES OF THE PACIFIC WAR: TRANSGRESSION OBJECTS OF REMEMBRANCE, 12 J. ROYAL ANTHROPOLOGICAL INSTITUTE 817 (2006).
Gun Ri. The atrocities at My Lai and Abu Ghraib occurred during wars or conflicts that were enormously contentious and unpopular to large segments of the United States population. Both world wars were viewed as far more necessary and even “good” wars, and the American public clearly did not view the Korean police action as “bad” in the way that it later viewed Vietnam as bad. Perhaps the answer lies in the fact that the American public was not “activated” about war crimes or atrocities – or at least about American war crimes or atrocities – during earlier conflicts. When the public was united behind war aims, or perhaps was truly worried that the fate of the United States was at risk in a particular conflict, it was presumably far less likely to be concerned or activated by allegations of American war crimes, or at least to be activated in such a way as to demand scrutiny of such war crimes.

387 See, e.g., Charles J. Hanley & Martha Mendoza, AP Updates Its 'No Gun Ri' Pulitzer Winner: New Document Reveals Order to Shoot Refugees, ASSOCIATED PRESS, May 29, 2006; Jeremy Williams, ‘Kill ‘em All’: The American Military in Korea, BBC, Jan. 2, 2002, available at http://www.bbc.co.uk/history/worldwars/coldwar/korea_usa_01.shtml. The Associated Press won the Pulitzer Prize for breaking the No Gun Ri story in 1999, after which the issue sparked a long-running historical debate, particularly between Hanley and Robert Bateman, an Army-officer-turned-historian. See, e.g., ROBERT BATEMAN, NO GUN RI: A MILITARY HISTORY OF THE KOREAN WAR INCIDENT (2002); Robert Bateman, Did the Associated Press Misrepresent the Events that Happened at No Gun Ri?, HISTORY NEWS NETWORK, Feb. 23, 2004; Michael Taylor, A War of Words on a Prize-Winning Story/No Gun Ri Authors Cross Pens on First Amendment Battlefield, San Francisco Chronicle, April 7, 2002. Interestingly, one of the supposed-whistleblowers the Associated Press relied on (twelve were interviewed for and quoted in the initial article) in breaking the story, Edward Lee Daily, who claimed to have been a highly-decorated soldier who took part in the massacre, turned out to be lying about his presence in the unit accused of involvement with the incidents at No Gun Ri. In March of 2002, Daily pled guilty to defrauding the government for claiming to have been a former prisoner of war and to have been wounded in combat. See John Gerome, No Gun Ri Veteran Admits to Defraud, ASSOCIATED PRESS, March 4, 2002. Despite the existence of the archetypes of the Whistleblowers, the Muckraking Media, and the Activated Public (as measured by furious debate among at least veterans of the Korean War), the incident at No Gun Ri has still not spurred congressional oversight – though this may be about to change. See, e.g., Charles J. Hanley & Jae-Soon Chang, Commission Seeks U.S. Compensation for War Crimes, ASSOCIATED PRESS, Aug. 4, 2008.


389 See, e.g., DAVID HALBERSTAM, THE COLDEST WAR 2 (2007) (“Korea would not prove a great national war of unifying singular purpose, as World War II had been, nor would it, like Vietnam a generation later, divide and thus haunt the nation. It was simply a puzzling, gray, very distant conflict, a war that went on and on and on, seemingly without hope or resolution, about which most Americans, save the men who fought there and their immediate families, preferred to know as little as possible.”).
B. Archetypes Following Congressional Involvement

The four archetypes that emerged following the beginnings of congressional involvement in war crimes oversight after My Lai and Abu Ghraib – the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives – help explain how senators and representatives have responded and might respond to allegations that American military personnel have committed atrocities or war crimes. These archetypes clearly shift and evolve over time: the archetype of the Gadfly Representatives, for example, evolved from being about struggles between marginalized members of the majority party and their party leaders during the Vietnam era to being about struggles between a marginalized minority and the leaders of the majority in the House of Representatives after Abu Ghraib. Nonetheless, the origins of each of these archetypes appear to lie in the political structure of the United States government, the separation of powers between the Executive and Legislative Branches, and the relationships both between the Senate and the House of Representatives and between the powerful and the largely powerless members of Congress. This suggests that when faced with future opportunities for congressional oversight of war crimes, legislators will again fill the general archetypal roles seen after My Lai and Abu Ghraib.

1. The False Start Senators (Archetype 4)

A fourth archetype that emerged after My Lai and Abu Ghraib was that of the False Start Senators. Some senators from both parties were clearly concerned by reports about My Lai and Abu Ghraib and interested in discovering exactly what had happened, while some other senators were likely interested in using hearings into war crimes as political tools. The events following exposure of and public interest in My Lai and Abu Ghraib, however, suggest that even those key senators who wanted the truth about American war crimes to come out were, after initial enthusiasm, very reluctant to actually pursue congressional inquiry – or at least public, prompt congressional inquiry.

Immediately after news of My Lai and Abu Ghraib broke, a number of senators made it clear that they saw a need for timely, probing hearings. In 1969, for example, Republican Senator Charles E. Goodell called for the Senate Armed Services Committee to open a “full investigation,” and Democratic Senator (and Majority Leader) Mike Mansfield agreed, noting that the committee ought to look into it, find out

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390 See supra Part I.B.1; supra Part II.B.1.

what happened, and get to the bottom of it.” In 2004, Democratic Senator Robert C. Byrd similarly called for “full and open hearings into prisoner abuse” by American military forces. Byrd’s sentiment was echoed by a number of key senators on the Armed Services Committee, including John Warner, Lindsey Graham, John McCain, Edward Kennedy, Carl Levin, and Susan Collins.

Despite the early enthusiasm expressed by senators for oversight hearings into allegations of American war crimes after both My Lai and Abu Ghraib, some of those same senators quickly pulled back from their stated goals of holding “full,” presumably public, hearings. Shortly after Goodell and Mansfield called for hearings in 1969, for example, Senators Edmund S. Muskie and John Stennis, the chairman of the Armed Services Committee, came out in favor of turning over oversight to a presidential “commission of inquiry” instead of holding hearings in the Senate. Stennis’ observation that “a private study by an impartial group of ‘outstanding men’ would be preferable to a Congressional hearing” was not unreasonable, but, given Congress’ role as the overseer of the Executive branch, it indicated that at least some Democrats in the Senate were not interested in probing publicly into the Johnson and Nixon administrations’ handling of the war. After Abu Ghraib, senators pulled back more slowly than Muskie and Stennis had in 1969. In 2004, a number of members of the Armed Services Committee, led by John Warner, continued to push strongly for more answers, even after hearing from Secretary of Defense Donald Rumsfeld on May 7. Warner, for example, angered some fellow Republicans when he demanded that three of the top generals in Iraq testify before the committee – in televised hearings – on May 19. Still, after holding three days of televised hearings, Warner pulled back, such that by the end of June the International Herald Tribune was observing in an editorial that Warner was “showing signs of losing appetite for the fight.”

While the committee held a fourth day of open hearings in September of

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396 Id. Perhaps Stennis’ hesitation explained why it seemed to the Peers Commission that “the House Armed Services Committee (HASC), with its investigation subcommittee, had the higher prerogative,” and why Representative Rivers took the lead in shaping the congressional investigations into My Lai. PEERS, supra note 16, at 19.
2004, thereafter it appeared to abandon its oversight investigation. Like the Senate of the My Lai period, the Senate of the Abu Ghraib period seemed content to let the incident slide gently into the past. Appearances, of course, can be deceiving, and recent events, most notably the December 2008 release of a report by the Senate Armed Services Committee about administration failures after Abu Ghraib, have suggested that the Senate never truly abandoned the investigation into the Abu Ghraib abuses.\(^\text{400}\) In light of the publication of this report, it might be reasonable to describe senators such as Warner, Graham, Collins, McCain, Levin, and Kennedy more as “slow running” senators than as “false starting” senators. It nonetheless seems clear that senators facing the prospect of engaging in oversight of contentious, politically-sensitive allegations of war crimes tend to back off or back down from initial enthusiasm for engaging in probing oversight. While it is impressive and notable that the Senate Armed Services Committee ultimately produced a report that focuses on the responsibility shared by high-ranking military officers and officials in the Department of Defense for the abusive interrogation techniques employed at Abu Ghraib, it is equally notable that it took over four and a half years for even twenty pages of that report to see the light of day, and that the Senate conducted almost all of its investigation out of the public eye.

The purpose, function, and design of the Senate help to explain the development of the archetype of the False Start (or Slow-Running) Senators. As the responses in the Senate after My Lai and Abu Ghraib suggest, senators are often interested in avoiding entanglement in extremely contentious public issues. In part, this might be due to the nature of the Senate, which from the framing of the Constitution was designed to be more of a reflective and sober body than the House of Representatives – which was one reason why the framers mandated that senators serve a six-year term and not be eligible for election until the age of 35.\(^\text{401}\) “By contrast


\(^{401}\) See, e.g., Adam Clymer, Senate’s Role as “Saucer” Defines Clinton Strategy, N.Y. Times, Dec. 21, 1998 (describing the Senate’s “considerable sense of self-importance and dignity”); Richard F. Fenno, Jr., The Senate through the Looking Glass: The Debate over Television, 14 Legislative Stud. Q. 313, 335 (1989) (“In the language of the familiar colloquy about bicameralism, the Senate certainly acted as the “cooling saucer’’”); RICHARD F. FENNO, JR., THE UNITED STATES SENATE: A BICAMERAL PERSPECTIVE 5 (1982) (describing an anecdote about George Washington comparing the Senate to a saucer, as “hot” legislation could be poured into the Senate to cool just as hot tea could be poured into a saucer to cool).
with the impersonal, hierarchical, and disciplined House, the Senate has long tolerated and even promoted individualism, reciprocity, and mutual accommodation,” observed political scientists Colton Campbell and Nicol Rae in 2000. “So while the popularly elected House was liable to succumb to partisan public passions, the Senate would always provide a brake, a second look, a longer-run view, and a well-deliberated decision.”

This is not a universal rule: in the 1950s, Wisconsin Senator Joseph McCarthy was able to ride concern and even hysteria about communist infiltration in government to achieve national prominence. Such demagoguery, however, was very much out of character for members of the Senate, who have in the modern period been less interested in using hearings to advance their individual careers. Even in the 1970s, for example, Senator Sam Ervin, a Democrat from North Carolina who achieved fame as “Senator Sam” while chairing the Watergate Hearings, did not attempt to use the hearings as a stepping-stone to higher office. While the Senate floor saw moments of antagonism and strife during the 1990s, even at times of enormous partisan strife, such as the impeachment hearings for President Clinton, the Senate has retained some sense of decorum, civility, and courtesy.

2. The Obstructionist House Leaders (Archetype 5)

A fifth archetype that emerged after My Lai and Abu Ghraib was that of the Obstructionist House Leaders. Unlike in the Senate, in the House both obstructionist hearings after My Lai and the obstruction of hearings after Abu Ghraib proceeded in a carefully regimented fashion. What is most striking about the House’s war crimes oversight is that after both My Lai and Abu Ghraib, hearings were dominated by conservative,

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403 Cf. James R. Dickenson, Sen. Sam Ervin, Key Figure In Watergate Probe, Dies, WASH. POST, Apr. 24, 1985, at A01 (“Ironically, it was because he was a strict constitutionalist whose interpretation of a document he revered defied ideology or party lines - the sort of person Nixon professed to admire - that Ervin was the choice of then-Senate Majority Leader Mike Mansfield (D-Mont.) to head the special committee.”).


pro-administration, and pro-military representatives seemingly intent on doing all that was possible to *obstruct* any real inquiry into the events of 1968 and 2003 respectively.

After news of My Lai and Abu Ghraib broke in the national and international media, powerful leaders in the House of Representatives moved to reduce the duration, scope, and possibly import of any investigations into American atrocities. In 1969, for example, Congressman L. Mendel Rivers apparently sought to forestall effective hearings by claiming that the Armed Services Committee’s special investigations subcommittee “had not been given information that would lead members to believe that American troops had engaged in a massacre” – and this was after the subcommittee had spent the day listening to Hugh Thompson testify about seeing American soldiers indiscriminately shooting down civilians. 406 It was this comment that caused one of Rivers’ own committee members to exclaim in amazement that he did not know how Rivers could say that.407 At that point, amid rumors that he was interested in whitewashing the military, Rivers was convinced to call off the hearings before the full subcommittee – but he then appointed a four-member panel, chaired by Louisiana Democrat F. Edward Hébert, one of his closest supporters, and staffed by conservative military hawks, to investigate in greater depth.408 The Hébert Report’s recommendations certainly focused just as much on ways in which the military could prevent *news* of events such as My Lai from breaking as it did on how to actually prevent American atrocities in combat.409 Perhaps more importantly, by questioning all potential prosecution witnesses in closed session, the Hébert panel nearly – in the face of clear warnings from military prosecutors – derailed all prosecutions arising from the events at My Lai (4).410

In 2004, Representative Duncan Hunter, chairman of the House Armed Services Committee, acted far more circumspectly than had Rivers and Hébert thirty-five years earlier, but he still managed to stymie anything more than the gloss of oversight. Convinced that additional oversight would be damaging for both American and presumably Republican interests,411 Hunter limited the committee to one day of televised hearings, and successfully prevented committee members from requesting additional

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407 *Hersh, My Lai 4*, supra note 21, at 168.
408 *Rivers Picks Four to Study Songmy*, N.Y. TIMES, Dec. 13, 1969, at 13. The other members of the panel were Samuel S. Stratton (D-NY), William L. Dickinson (R-AL), and Charles S. Gubser (R-CA). “All are considered politically moderate to conservative,” noted the *Times*. *Id.*
410 *See, e.g.*, Eckhardt, supra note 15, at 684-685.
documents from the Bush administration by ridiculously insisting that all committee members read the Army’s 6,000-page report in its entirety before asking for different materials. Following Hunter’s lead, other Republican committee chairmen in the House also refused requests from committee members (many of whom were Democrats) for additional hearings, with Tom Davis’ spokesman declaring that the requests were simply “partisan mudslinging.” Finally, Speaker J. Dennis Hastert, the ultimate authority in the hierarchical House, rejected similar calls from the Democratic leadership for increased oversight, with Hastert suggesting that the Democrats were actually seeking a series of “show trials” rather than additional oversight.

Just as the emergence of the archetype of the False Start Senators can be explained by the nature of the United States Senate, the emergence of the archetype of the Obstructionist House Leaders can be explained by the nature of the United States House of Representatives. The House, with its two-year term of office and its unwieldy size, is governed both by the whims of the public and the discipline of the political parties. Writing in their 1993 Legislative Leviathans, for example, Gary W. Cox and Mathew D. McCubbins argued that political parties “are a kind of legislative cartel that seizes the structural power of the House” in order to pass party-defined collective policies and minimize member defection. If Cox and McCubbins are correct, then (as Campbell and Rae observed in 2000) the procedural atmosphere (as opposed to personal atmosphere, which can be notably rancorous and undisciplined) in the House can be “impersonal, hierarchical, and disciplined.” Both after My Lai and after Abu Ghraib those representatives wanting to expand the oversight investigations were stymied by powerful conservative committee chairmen “loyal” to the United States military and interested more in whitewashing or minimizing than in exposing the truth behind allegations of American war crimes. For example, as New York Times reporter Neil Sheehan noted after Rivers’ death in 1970, Rivers carefully suppressed dissenters on his committee “by maintaining a bipartisan majority of older conservative members.”

412 US Congressional Democrats Blocked in Effort to Widen Prison Torture Probe, VOANEWS.COM, June 15, 2004; see also Susan Milligan, Congress Reduces its Oversight Role, BOSTON GLOBE, Nov. 20, 2005;


414 Id.


416 CAMPBELL & RAE, supra note 402, at xi. But see id. (questioning whether this reputation is a myth).

417 See infra note 443.

disciplined and hierarchical nature of the House – which would never, for example, allow the undisciplined[^419] minority-rights tool of the filibuster – enables these sorts of chairmen to gain power and set committee and House agendas in almost dictatorial fashion.

### 3. The Our-Soldiers-First Legislators (Archetype 6)

A sixth archetype that emerged after My Lai and Abu Ghraib was that of the Our-Soldiers-First Legislators. There is significant overlap between the Our-Soldiers-First Legislators and both the False Start Senators and the Obstructionist House Leaders: both Representatives Rivers and Hébert, for example, along with the entire subcommittee that applauded Captain Medina’s testimony after My Lai, clearly filled more than one archetypal role. Nonetheless, some legislators made it clearer than did others that they would quite simply oppose any attempt to hold American troops responsible for war crimes or to criticize soldiers for actions on the battlefield – and that they had disdain for those legislators who felt otherwise[^420]. As with the emergence of both other archetypes, the development of the archetype of the Our-Soldiers-First Legislators is explained by the structure of American democracy, which has encouraged the election of military veterans, and especially by the manner in which political parties redistrict in order to create “safe” congressional districts.

In the aftermath of the events at My Lai and Abu Ghraib, as public concern over the actions of American troops grew and congressional investigations appeared to gather steam, some extremely pro-military legislators, in both the Senate and the House, took the position that either no American military personnel could ever have committed the alleged acts, or else that the victims deserved whatever had been done to them. After My Lai, for example, Senator Ernest F. Hollings objected to “every soldier who had committed ‘a mistake in judgment’ during the heat of combat” being “tried as common criminals [sic].”[^421] Representative John R. Rarick

[^419]: See, e.g., Franklin L. Burdette, Filibustering in the Senate 4 (1965) (describing how in 1935 Democratic Senator Huey P. Long of Louisiana verbally entering recipes for Roquefort cheese salad dressing into the Congressional Record in order to pressure his colleagues in an attempt to reduce the size of the proposed National Recovery Administration).

[^420]: At a meeting of the House Armed Services Committee in the early 1970s, for example, then-chairman Louisiana Representative F. Edward Hébert, sarcastically told Colorado Congresswoman Patricia Schroeder to “support our boys like you would support our enemy.” ROBERT DAVID JOHNSON, CONGRESS AND THE COLD WAR 194 (2006).

[^421]: HERSH, MY LAI 4, supra note 21, at 155.

referred to My Lai as “the massacre hoax.”" On December 15, 140 conservative congressmen, including Representative L. Mendel Rivers, pushed through a House resolution praising “each serviceman and veteran of Vietnam for his individual sacrifice, bravery, dedication, initiative, devotion to duty . . .” The wording was intentional; what “each” of those servicemen had done did not matter, because they were American servicemen. Representative Allen Ellender made the same point in a different way by focusing on the nature of those slain at My Lai — who, he announced, “got just what they deserved.”

After the news of My Lai broke Senator Hollings and Representatives Ellender, Rarick, and Rivers focused on praising and defending military personnel as individuals. After the initial round of hearings about Abu Ghraib, however, several Our-Soldiers-First legislators generally focused instead on the collective welfare of United States military personnel and the success of the military mission in Iraq. Legislators including Senator James Inhofe and Representative Duncan Hunter did mention the well-being of individual American personnel. Inhofe, for example, implied that the detainees had deserved whatever treatment they received and criticized what he called the “humanitarian do-gooders right now crawling all over these prisons looking for human rights violations while our troops, our heroes, are fighting and dying.” Hunter, for his part, announced after the murder of Nicholas Berg that he believed that Rumsfeld had been right to try to keep the Abu Ghraib pictures from being published, and that it was “unfortunate” that the pictures had been released, as Rumsfeld was simply “trying to save American lives.” Still, Inhofe and Hunter, along with Senator John Cornyn and Representative Tom DeLay, focused primarily on their stated belief that serious oversight hearings would damage the American war effort in Iraq. Noting that he thought that Warner should stop the hearings, Inhofe declared that “we need to keep our talents concentrated on winning the war as opposed to prisoner treatment.” Cornyn similarly criticized the “collective hand-wringing”

**References**

422 Hersh, My Lai 4, supra note 21, at 156. Rarick, along with many other house members, later wrote to the White House after Calley’s conviction to protest the verdict. See Belknap, supra note 16, at 197.

423 Hersh, My Lai 4, supra note 21, at 157 (emphasis added).

424 Hersh, My Lai 4, supra note 21, at 155.


426 Id.

427 Senators to View Abuse Images Wednesday, CNN, May 12, 2004.

that he believed was distracting from “fighting and winning the war.”\textsuperscript{429} Hunter argued that Congress was “disserving our military operation in theater”\textsuperscript{430} by “pull[ing] our battlefield leadership out of the theater” instead of letting them prosecute the war.\textsuperscript{431} DeLay was somewhat more circumspect, observing that Congress should not allow an investigation “to distract us from the war at hand.”\textsuperscript{432}

The emergence of the archetype of the Our-Soldiers-First Legislators after My Lai and Abu Ghraib can be explained both by the nature of United States political culture, which until recently had historically favored the election of veterans,\textsuperscript{433} and also by the methods that political parties use to draw “safe” congressional districts. “[U]p until the 1990s, there were more veterans in Congress than would be expected, given the number and age distribution of veterans in the general population,” observed political scientists William Bianco and Jamie Markham in 2001. “This veterans' surplus ended in the mid-1990s in both the house and the Senate. Now, veterans are under-represented in both chambers.”\textsuperscript{434}

Seeking to understand what effects this change might have had, political scientists Christopher Guelpphi and Peter D. Feaver observed that as the percentage of veterans serving in the executive branch and the legislature increases, “the probability that the United States will initiate militarized disputes declines. Once a dispute has been initiated, however, the higher the proportion of veterans, the greater the level of force the United States will use in the dispute.”\textsuperscript{435} If veterans in Congress are generally more comfortable than are non-veterans with greater amounts of force, then it is also possible that veterans in Congress may tend to have less empathy for detainees and enemy combatants and sympathizers than do non-veterans. Despite evidence that the overrepresentation of veterans in Congress flipped in the mid-1990s, the historic over-representation of veterans also means that even during the Bush administration, many of the more senior members


\textsuperscript{432} Id.


\textsuperscript{434} Id. at 276

of Congress, both in the House and in the Senate, were probably more likely than not to be military veterans. This fact cuts both ways: after Abu Ghraib, it was John Warner, a veteran of both the United States Navy and the United States Marine Corps and of both World War II and the Korean War, who led the calls for real oversight. The fact that a legislator has served in the armed forces clearly does not require that legislator to embody the Our-Soldiers-First archetype — but it may make it more likely that he or she will do so.

The emergence of the archetype of the Our-Soldiers-First Legislators, at least in the House of Representatives, can also be explained by the developing redistricting practices of political parties, which have in recent decades resulted in fewer and fewer ideologically contested districts. As was highlighted by the conflict in the early 2000s over the successful attempts by Texas Republicans to redraw congressional districts so as to ensure continued Republican domination of the Texas congressional delegation, party leaders routinely redistrict in order to increase the power of one party or another in districts, and so effectively take many districts out of electoral play. This suggests that incumbents have an enormous electoral advantage over challengers, and that nominees of the majority party in a “safe” district are likely to be more conservative or more liberal than would be the case if the district were not slanted one way or another. In other words, if a candidate does not need to appeal to swing voters to be elected, but does need to appeal strongly to a conservative or liberal base, then that candidate is more likely than not to have powerful conservative or liberal tendencies. What this means is that at least some districts are likely to elect extremely conservative representatives more interested in protecting their constituents, many of whom have been in the military or have family in the military, than in ferreting out information about alleged American atrocities. Not surprisingly, almost all of the Our-Soldiers-First Legislators who spoke out during oversight into My Lai and Abu Ghraib respectively, came from either Louisiana, Texas, Oklahoma, or South Carolina — states with strong conservative traditions and populations with significant military experience.

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436 Helen Dewar & Spencer S. Hsu, Warner Bucks GOP Right On Probe of Prison Abuse, WASH. POST, May 28, 2004, at A01. Warner was also joined by two other Republicans, John McCain and Lindsey Graham, with extensive military experience.

437 Senators Hollings and Inhofe and Representatives Ellender, Rarick, and Hunter all served in the military; Senator Cornyn came from a military family.


440 Senator Hollings represented South Carolina; Representatives Rivers, Ellender, and Rarick represented Louisiana; Senator Inhofe represents Oklahoma; and
4. The Gadfly Representatives (Archetype 7)

A seventh archetype that emerged after My Lai and Abu Ghraib was that of the Gadfly Representatives. After both My Lai and Abu Ghraib, marginalized members of the House of Representatives turned to less formal means of applying pressure to the forces governing the House, such as holding unofficial public hearings, writing open letters, and publishing editorials. This emergence and development of this archetype is similarly explained by the hierarchical and disciplined nature of the House of Representatives, which marginalizes those representatives not in positions of power and leaves marginalized representatives almost no “official” channels through which to conduct oversight, jockey for power, or even simply make themselves heard. The development of this archetype demonstrates that there is no necessary link between the party affiliation of gadflies and the identity of the majority party in the House: after My Lai, for example, the gadflies were all marginalized members of the majority party, while after Abu Ghraib the gadflies were generally powerful members of marginalized minority party.

During the congressional oversight into both My Lai and Abu Ghraib a number of less-powerful, “radical” or “renegade,” or simply marginalized representatives in the House defied and worked outside of the normal congressional channels and instead seized upon investigations into and allegations of American war crimes to attack the Nixon and Bush administrations respectively, gain national exposure, and presumably jockey for political power. After My Lai, the most notable among these representatives included California Democrat Ron Dellums, New York Representative Bella S. Abzug, Michigan Democrat John Conyers Jr., and Maryland Democrat Parren J. Mitchell, who helped plan the Dellums Committee Hearings into War Crimes in Vietnam.441 While Dellums, Abzug, Conyers, and Mitchell were all Democrats, all four extremely liberal, anti-war, and even radical legislators442 found that in the late 1960s


[442] Dellums, Abzug, Conyers, and Mitchell were clearly not mainstream or sedate politicians. Dellums, for example, apparently embraced the “radical” label – though he noted that he considered violence, “particularly ‘bombing’ and ‘trashing’ [property destruction]” to be “really counter-productive.”. See, e.g., Earl Caldwell, Black Insurgent Who Won Berkeley Race Is an Outspoken Radical, N.Y. TIMES, June 14, 1970, at 46; R.W. Apple Jr., Negro Candidate Succeeds Too Well, N.Y. TIMES, Sept. 24, 1970, at 32. Abzug, who was popularly known as “Battling Bella,” similarly gloried in
and early 1970s they were relatively powerless in a House that, while governed by a Democratic majority, was nonetheless dominated by conservative Southern committee chairmen and senior members. As former Louisiana Representative Billy Tauzin later observed, “[t]here was a time when Southerners just got re-elected and re-elected over and over again. You stick around long enough, you get powerful.” Writing in 2001, Dellums noted that he faced a “daunting challenge” as “a ‘left-wing radical’ elected to a Democrat-controlled Congress - a Congress significantly influenced by its ‘Southern Barons.’” In part to gain attention, and presumably in part because they held their anti-war views.


See, e.g., Ben Evans, Southern Clout in Congress Hits Low, ASSOCIATED PRESS, Mar. 31, 2007 (“[T]he South was so dominated by conservative Democrats . . . [who] could hold office virtually as long as they wanted, earning seniority and privileges. . . . Committee chairmen held far more power and independence than they do under today’s centralized system, and Southerners often made clear their disdain for contrary views from other parts of the country.”). The power of the chairman was almost unchallenged: when in 1973 Dellums, with the backing of the Congressional Black Caucus, which he helped found, finally won a seat (and became the first African American ever to serve) on the House Armed Service Committee, Chairman F. Edward Hébert showed his enormous displeasure in a particularly humiliating way. When Dellums, whom Hébert called a “black male bomb-thrower from Berkeley,” and Colorado Representative Pat Schroeder, who had been elected in 1972 and whom Hébert called “the white woman bomb-thrower from Denver,” arrived at the organizing meeting of the committee (on which Schroeder was the first woman ever to serve), they found that Hébert had mandated that they be provided with only one chair, so that they had to share. Massachusetts Democratic Representative Barney Frank later referred to this as “the only half-assed thing Ron and Pat ever did in their political lives.” RON DELLUMS, LYING DOWN WITH THE LIONS: A PUBLIC LIFE FROM THE STREETS OF OAKLAND TO THE HALLS OF POWER 149-50 (2001); PATRICIA SCHROEDER, 24 YEARS OF HOUSE WORK . . . AND THE PLACE IS STILL A MESS: MY LIFE IN POLITICS 40 (1998); ROBERT DAVID JOHNSON, CONGRESS AND THE COLD WAR 194 (2006).


DELLUMS, supra note 443, at 4.
sincerely, Dellums, Abzug, Conyers, and Mitchell scheduled the hearings with Dellums announcing: “we believe it to be the function of Congress to undertake open study of the responsibilities for war atrocities . . . but Congressional leadership has ignored all our requests.” The four specifically criticized “the refusal of the Congressional leadership and committee chairmen to [sic] a full-scale Congressional inquiry into American war crimes in the Indochina war.” The hearings attracted significant attention and served both to further the anti-war movement and to advance the careers of those legislators involved with holding them.

Unlike Dellums, Abzug, Conyers, and Mitchell, who were marginalized within their own party (which controlled Congress), California Democrats Henry Waxman and Minority Leader Nancy Pelosi, along with the remainder of the Democratic leadership who functioned as gadflies during the Abu Ghraib hearings, were actually influential Democrats who had been marginalized because they were in the minority party. During the early years of the Bush administration, Republicans exercised enormous control over the House of Representatives. The marginalized Democrats, unable to hold hearings, to gather documents, or to subpoena witnesses, instead turned to writing letters and editorials to draw public attention to the Abu Ghraib oversight. Frustrated by Republican stalling on the Abu Ghraib hearings, for example – and certainly interested in making the Republicans look bad during a critical election year – Waxman penned an editorial in the Washington Post in which he declared that the House “is even refusing to investigate the horrific Iraq prison abuses.” Waxman, Pelosi, and numerous other Democratic House leaders also wrote open letters to Republican committee chairmen, then House Speaker Hastert, and finally President Bush. While they could not have hoped that the letters would


448 Id.

449 See, e.g., DELLUMS, supra note 443; SCHROEDER, supra note 443; JOHNSON, supra note 443.


452 See, e.g., Michael S. Gerber, House Dems Demand More Iraq Hearings, THE HILL, May 12, 2004; see also supra notes 305-309 and accompanying text; Carl Hulse, Even Some in G.O.P. Call for More Oversight of Bush, N.Y. TIMES, May 21, 2004; see also supra notes 310-312 and accompanying text; letter from Henry A. Waxman,
have any real effect, they presumably believed that the letters would help the Democrats return to power as the 2004 elections approached.

The archetype of the Gadfly Representative emerged from the hierarchical and disciplined nature of the House of Representatives, and represents the flip side of the archetype of the Obstructionist House Leaders. That hierarchical and disciplined nature\textsuperscript{453} rewards seniority, party loyalty, and identification with strong majorities. Given the need for elected officials to be re-elected, marginalized legislators, whether powerless members of the majority party or powerful members of a powerless minority party, need to find ways to pursue their legislative agendas, achieve legislative and public relations “victories,” and gain access to increased visibility in the media. For Dellums and his colleagues after My Lai, and for Waxman and the Democratic House leaders after Abu Ghraib, the best strategy – quite apart from whatever true feelings they had about the nature of American war crimes or atrocities, or the need to hold higher-ups accountable – was to be as vocal as possible on the largest stage available.

\textbf{CONCLUSION}

The history of political oversight of war crimes during the Vietnam era and the Iraq War reveals that such oversight was exactly that – political. Perhaps it would be naïve to expect anything different. The archetypes that marked congressional oversight into My Lai and Abu Ghraib emerged from the well-understood world of United States political relationships. The three archetypes that emerged before Congress engaged in war crimes oversight – the archetypes of the Whistleblowers, the Muckraking Media, and the Activated Public – sprang from a traditional model of congressional oversight. The four archetypes that emerged after Congress turned its attention to war crimes oversight – the archetypes of the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives – arose out of the traditional struggles between the Executive Branch and the Legislative Branch, the Senate and the House of Representatives, and the powerful and powerless members of Congress. These archetypes will likely continue to transform in the face of the advancement of technology, the changing nature of the media, and the evolution of the understanding of the separation of powers under the United States Constitution. In the event of future allegations that American forces have committed war crimes, however, these archetypes will probably nonetheless emerge in recognizable form once again. Members of Congress might therefore use insight into these archetypes to develop more focused responses to allegations of American war crimes, so that in the future senators and representatives have more to offer when

\textsuperscript{453} See supra notes 415-416 and accompanying text.
contemplating or overseeing war crimes investigations than that they were “a bit sickened” by the photographs.\textsuperscript{454}