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**“I AM A BIT SICKENED”<sup>1</sup>:  
EXAMINING ARCHETYPES OF CONGRESSIONAL WAR  
CRIMES OVERSIGHT AFTER MY LAI AND ABU GHRAIB**

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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.<sup>2</sup>*

*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 . . . .<sup>3</sup>*

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<sup>1</sup> Robert M. Smith, *White House Says U.S. Policy Bars Any Mass Slaying*, N.Y. TIMES, Nov. 27, 1969, at 1 (printing the statement of Hawaii Senator Daniel K. Inouye, upon seeing pictures of the My Lai massacre).

<sup>2</sup> ARMED SERVS. INVESTIGATING SUBCOMM. OF THE COMM. ON ARMED SERVS., H.R., NINETY-FIRST CONG., 2ND SESS., UNDER AUTHORITY OF H. RES. 105, INVESTIGATION OF THE MY LAI INCIDENT 4 (1970), available at [http://www.loc.gov/rr/frd/Military\\_Law/ML\\_investigation.html](http://www.loc.gov/rr/frd/Military_Law/ML_investigation.html) [hereinafter HÉBERT REPORT].

<sup>3</sup> Statement by General Paul Kern, Commanding General, United States Army Materiel Command, before the Armed Services Committee, United States House of Representatives, on the Investigation of the 205th Military Intelligence Brigade at Abu

The above language—used respectively by a legislator in 1969 and a senior military official in 2004—to describe wartime atrocities was eerily similar. When the members of Congress emerged from the slide shows 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 regarding 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.<sup>4</sup> Illinois Republican Representative Leslie C. Arend left the House briefing early, only an hour after it began, explaining that he had “one of those queasy stomachs” and that “the pictures were pretty gruesome.”<sup>5</sup> “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.”<sup>6</sup> 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, characterized the images they viewed as “appalling”<sup>7</sup> and “horrific,”<sup>8</sup> respectively. “My stomach gave out,” explained Republican Georgia Senator Saxby Chambliss, adding that some senators gasped at the pictures.<sup>9</sup> “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.<sup>10</sup>

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 crimes in Vietnam

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Ghraib Prison, Iraq, Second Session, 108th Cong. 2d Sess. (Sept. 9, 2004) [hereinafter Kern Statement].

<sup>4</sup> E.g., William Greider, *Senators Shocked by Pictures*, WASH. POST., Nov. 27, 1969, at A1.

<sup>5</sup> Smith, *supra* note 1, at 1.

<sup>6</sup> *Id.*

<sup>7</sup> Kathy Kiely & William M. Welch, *Abu Ghraib Photos Cause Gasps in Congress*, USA TODAY, May 13, 2004, at A4 (citing Sen. Frist).

<sup>8</sup> Carl Hulse & Sheryl Gay Stolberg, *The Struggle for Iraq: Congress; Lawmakers View Images from Iraq*, N.Y. TIMES, May 13, 2004 (citing Senator Daschle).

<sup>9</sup> Kiely & Welch, *supra* note 7, at A4; *see also* Demetri Sevastopulo, *Senators See New Photographs*, FIN. TIMES (UK), May 13, 2004, at 7.

<sup>10</sup> Kiely & Welch, *supra* note 7, at A4.

and congressional responses to Abu Ghraib and alleged war crimes in Iraq.<sup>11</sup> 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.<sup>12</sup> Similarly, in both instances some powerful and influential legislators (generally in the Senate) in the majority party, such as 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

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<sup>11</sup> 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 125–48 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 154. Some war crimes have been proven in courts; on 29 March 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 SERV., Sept. 28, 2005; *Graner Gets 10 Years for Abu Ghraib Abuse*, ASSOCIATED PRESS, Jan. 16, 2005.

<sup>12</sup> *See, e.g., infra* notes 98–149 and accompanying text. 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. REV. 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.

bucking doubters in his own party),<sup>13</sup> ultimately seemed to bow to political pressure or political and nationalist considerations and curtailed investigations and hearings severely.<sup>14</sup> 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,<sup>15</sup> writing letters to more powerful congressmen,<sup>16</sup> or attempting to speak directly to the American people through the media.<sup>17</sup>

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

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<sup>13</sup> See, e.g., Helen Dewar & Spencer S. Hsu, *Warner Bucks GOP Right on Probe of Prison Abuse*, WASH. POST, May 28, 2004, at A01; Mary Jacoby, *The Patriot*, SALON, June 2, 2004, available at [http://archive.salon.com/news/feature/2004/06/02/john\\_warner/index\\_np.html](http://archive.salon.com/news/feature/2004/06/02/john_warner/index_np.html).

<sup>14</sup> See, e.g., Editorial, *Abu Ghraib Whitewash*, INT'L HERALD TRIB., July 27, 2004 [hereinafter Editorial, *Abu Ghraib Whitewash*] (“[Warner] is showing signs of losing appetite for the fight.”); Editorial, *The Truth About Abu Ghraib*, WASH. POST, July 29, 2005, at A22 [hereinafter Truth Editorial] (“When the Abu Ghraib scandal erupted, GOP leaders such as Sen. John W. Warner (R-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.”).

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

<sup>16</sup> 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](http://www.henrywaxman.house.gov/news_letters_2004.htm).

<sup>17</sup> 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.

allegations of war crimes, and help to explain why Congress, which arguably operates under a “fire alarm” model of oversight,<sup>18</sup> 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 U.S. 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 addresses Congress’s authority and mandate to engage in oversight, explores the unique nature of war crimes oversight, and summarizes the seven war crimes oversight archetypes. Part II describes the events of the My Lai massacre and examines congressional responses to alleged American war crimes in Vietnam. Part III describes the history of the prisoner abuse at Abu Ghraib, and examines congressional oversight after news of the abuse entered the public eye. Part IV 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 U.S. Government. A short conclusion addresses what lessons military attorneys in particular might take from this sort of analysis.

## I. Congressional Oversight Authority and the Archetypes

Any article examining the history of congressional oversight of the Executive Branch’s handling of war crimes allegations and investigations—and concluding that there is historical precedent, and often good political reason, for powerful senators and representatives to *avoid* engaging in meaningful oversight of those investigations—should begin with at least some discussion of what sort of oversight is permitted

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<sup>18</sup> See *infra* notes 377–82 and accompanying text.

or required, either by the Constitution or by statute. Congress's underlying authority to engage in oversight of the Executive Branch is derived from its implied powers in the Constitution.<sup>19</sup> Under its enumerated powers, Congress has the authority to raise and support armies, provide and maintain a navy, and "make Rules for the Government and Regulation of the land and naval Forces."<sup>20</sup> Congress, moreover, has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>21</sup> The Supreme Court has repeatedly recognized Congress's oversight authority where either the Senate or the House has a legitimate legislative function.<sup>22</sup>

To fulfill the responsibilities created by its broad implied constitutional authority, Congress has enacted statutes and various Senate and House rules requiring Congress itself to engage in oversight. The Legislative Reorganization Act of 1946, for example—an act often viewed as laying the basis for the modern, well-defined congressional committee system—mandated that "each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee . . . ."<sup>23</sup> Under current law, this mandate has been revised to read that "each standing committee of the Senate and the House of Representatives shall review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee."<sup>24</sup> While the Senate has no specific rule requiring the Senate Armed Services Committee (or any other committee the work of which would touch on war crimes) to engage in any particular sort of oversight,

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<sup>19</sup> Frederick M. Kaiser, *Congressional Oversight 1* (2006), available at <http://www.fas.org/sgp/crs/misc/97-936.pdf>.

<sup>20</sup> U.S. CONST. art. I, § 8.

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.,* *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. . . . But, broad as is this power of inquiry, it is not unlimited.").

<sup>23</sup> Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 136, 60 Stat. 812.

<sup>24</sup> 2 U.S.C. § 190d (2006).

the House, in contrast, explicitly requires its standing committees to oversee the areas within their jurisdictions.<sup>25</sup> In addition, every standing committee of the House is required to adopt an oversight plan by 15 February of the first session of each Congress.<sup>26</sup> In its plan for the 110th Congress, the House Armed Services Committee, observing that “[t]he military tribunals and the detainees at Guantanamo Bay and elsewhere raise a number of critical issues that fall within the jurisdiction of the committee,” concluded that it would “conduct thorough oversight of, among other things, the possible implication of members of the armed services in alleged incidents of detainee abuse.”<sup>27</sup>

The language of the enacted Legislative Reorganization Acts and of the House Rules is, of course, open to interpretation, and does not explicitly require the Armed Services committees of either the House or the Senate to inquire into how the Executive Branch is administering and executing laws against war crimes, prisoner abuse, or atrocity. In its oversight plans for the 111th Congress, moreover, the House Armed Services Committee dropped the language announcing oversight of “alleged incidents of detainee abuse,” and instead restricted itself to more general language stating that it would “take other necessary actions and conduct related oversight.”<sup>28</sup> While it is authorized by the Constitution, by statute, and by Senate and House rules to engage in broad legislative oversight, and despite the statutory mandate that each standing committee in the House and the Senate “review and study” the application and execution of laws within its jurisdiction, Congress is not explicitly bound to engage in extensive oversight of the Executive Branch’s or military’s handling of allegations of or investigations into war crimes. Provided that the members of Congress believe—or claim to believe—that the military and the Executive Branch are handling such investigations correctly, the topic of war crimes need never arise in the Senate chamber or on the floor of the House. This conclusion is unsurprising, and helps to explain why it is that *archetypes* of war crimes

<sup>25</sup> See Rules of the United States House of Representatives, R. X, cl. 2(b)(2) (“Each committee . . . shall establish an oversight subcommittee, or require its subcommittees to conduct oversight in their respective jurisdictions . . .”).

<sup>26</sup> *Id.* R. X, cl. 2(d).

<sup>27</sup> U.S. House of Representatives, House Armed Services Comm., Oversight Plan for the 110th Congress, available at <http://armedservices.house.gov/oversight110.shtml>.

<sup>28</sup> U.S. House of Representatives, House Armed Services Comm., Oversight Plan for the 110th Congress, available at [http://armedservices.house.gov/oversight\\_plan.shtml](http://armedservices.house.gov/oversight_plan.shtml). In taking focus away from allegations of detainee abuse or war crimes, the Committee mirrored its stance in the oversight plans it adopted for the 105th through 109th Congresses as well.

oversight have emerged: given that Congress has the discretion to engage in such oversight, and clearly chooses at times not to do so, it makes sense that open discussion and hearings into alleged war crimes will only take place when senators and representatives have incentives to engage in this sort of oversight. Under what has been a relatively stable system of congressional organization, we should expect incentives to motivate similar sorts of behavior by similar types of congressional actors—whether established and powerful committee chairs or insurgent representatives eager to make names for themselves.

The question of Congress's authority to engage in oversight in general and war crimes oversight in particular segues neatly into the question of what it is that makes war crimes oversight unique and deserving of special attention from academics, political actors, and military personnel alike. First, like some other forms of oversight, war crimes oversight highlights one aspect of the system of checks and balances between branches of the Government established by the Constitution. When engaging in war crimes oversight, the Legislative Branch is explicitly weighing and judging both the military's actions and the Executive Branch's handling of situations fraught with legal and moral concerns. In part because of the extremely sensitive nature of war crimes investigations, congressional oversight in this context has the potential to affect or alter significantly the balance between the Legislative and Executive Branches—especially if the Legislative Branch highlights or uncovers attempts to conceal allegations or incidents of atrocity.

Second, incidents, allegations, and investigations of war crimes implicate serious national security concerns, on both what might be termed the "tactical" and "strategic" levels. On the tactical (or battlefield) level, published allegations or proofs of war crimes or atrocities committed by American military personnel clearly provide useful propaganda material to enemies of the United States, and may also inspire or encourage those enemies to publicize or commit atrocities of their own against American military personnel or civilians.<sup>29</sup> At the

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<sup>29</sup> Following the publication of information about the abuse of prisoners at Abu Ghraib, for example, al-Qaeda in Iraq released a horrific video showing a man who claimed to be Abu Musab al-Zarqawi, a key al-Qaeda figure, sawing off the head of Nick Berg, a twenty-six-year-old American who had been looking for work in Iraq. On the tape, the murderer stated that "the dignity of the Muslim men and women in Abu Ghraib and others is not redeemed except by blood and souls." See Roland Watson & Tom Baldwin, *American Civilian Seen Beheaded on Terror Website*, *TIMES* (London), May 12, 2004.



same time, of course, the knowledge not only that American personnel had allegedly committed war crimes, but also that military officers and American political actors were attempting to cover up or conceal those allegations, might inflame anti-American passions even more. On the strategic level, similarly, both the public dissemination of war crimes allegations and the willingness of the United States to police its own and hold accountable those responsible have implications for international alliances and partnerships.<sup>30</sup>

Third, congressional oversight of war crimes clearly implicates less pragmatic and more existential concerns over what role the United States wishes to play in world affairs and what moral place the United States wishes to maintain among the powers of the earth; at the very least, it would seem disingenuous for any nation fighting for liberty and freedom for all the world's people to cover up war crimes or to refuse to hold accountable those responsible for atrocities committed against civilians or military personnel.

Put another way, investigations into allegations of war crimes, and congressional oversight of war crimes and war crimes investigations, have the potential to affect dramatically U.S. policy and even performance on the battlefield.<sup>31</sup> War crimes investigations have the potential to see the United States at both its worst (when American military personnel commit atrocities) and its best (when those responsible for such atrocities are held accountable and atrocities are

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Concern over the effect of publicizing news of war crimes or allegations of war crimes is regularly invoked by members of the Executive and Legislative Branches. In deciding to fight the release of additional photographs from Abu Ghraib, for example, President Barak H. Obama announced that, in his view, “[t]he most direct consequence [of releasing such images] would be to further inflame anti-American opinion and put our troops in greater danger.” Editorial, *Obama Defends Reversal on Releasing Detainee Photos*, FOXNEWS.COM, May 13, 2009, <http://www.foxnews.com/politics/2009/05/13/obama-defends-reversal-releasing-detainee-photos/>. See also VICTORIA FONTAN, VOICES FROM POST-SADDAM IRAQ 97–99 (2009) (“In all the insurgency videos that have been collected, there is a clear before-and-after Abu Ghraib effect to be found.”).

<sup>30</sup> See Watson & Baldwin, *supra* note 29 (“The beheading [of Berg] will increase the pressure on Tony Blair to distance Britain not only from the actions of American troops, but also from the more general policies being pursued.”).

<sup>31</sup> See, e.g., Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939 (1998); MICHAEL W. ALEXANDER, COHESIVE TACTICAL UNITS ARE EFFECTIVE COMBAT UNITS 15–16 (1994) (“[Strong leadership and strict discipline were quite lacking in [Task Force Barker from the 23rd Americal Division]. Eventually, at My Lai 4 this lack of cohesion would cause this unit to commit a horrible war crime.”).

strongly and uniformly denounced). The military itself, of course, has a special role to play in investigating war crimes. As in many other contexts, it is the military that is on the front line when allegations of war crimes become known—and it is the military that understandably becomes a focus of congressional investigators when Congress chooses to engage in war crimes oversight. Military investigators and prosecutors themselves thus have a heightened duty in the war crimes context: Where the reputation of the U.S. military, and the United States itself, has been tarnished by war criminals, it is the duty—and the privilege—of those investigators and prosecutors not only to enforce the laws, but also to show the rest of the military, the country, and the world community that the United States will not condone atrocity, even when it is committed in the heat of battle. Should military investigators and prosecutors fail in this duty, they have the potential to cause as much damage to United States' interests (and create as much danger to American soldiers on the battlefield) as did those who committed the original war crimes.

An archetype is an original pattern or model of which all things of the same type are representations or copies; the term “archetype” can thus describe similar-seeming figures, such as the Hero,<sup>32</sup> the Sage, or the Trickster, who reappear throughout history and across cultures in different incarnations. As a historical tool, archetypes are useful and important both because political actors often attempt to invoke them (as George Washington consciously sought to emulate Cincinnatus, the Roman general who returned to his farm rather than retain dictatorial power<sup>33</sup>) and because the structures of political and social systems create opportunities for familiar figures and events to emerge at different points in history.<sup>34</sup> This article argues that historical studies of the war crimes at My Lai and the prisoner abuse scandal at Abu Ghraib demonstrate that seven archetypes of war crimes oversight have emerged consistently in the past when Congress ultimately engages in serious or significant oversight, and that, for reasons relating to the structure of the U.S. Government, those archetypes seem likely to be replicated in future instances in which American troops are alleged to have committed war crimes. While these seven archetypes are discussed at length in Part IV,

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<sup>32</sup> See, e.g., JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (1949).

<sup>33</sup> See, e.g., GARY WILLS, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* (1984).

<sup>34</sup> For more on archetypes, especially in psychology and mythology, see CARL GUSTAV JUNG, *IX COLLECTED WORKS OF C.G. JUNG: THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS* (1959).

in examining the history of My Lai and Abu Ghraib in depth, it is useful to understand and keep in mind the nature and definitions of each of these archetypes:

- The Whistleblowers (Archetype 1): The initial archetype, the Whistleblower—who is often a member of the military—is the participant or observer who, disgusted or disturbed by the war crimes or atrocities, attempts to alert his or her military superiors or members of the Executive and Legislative Branches. The Whistleblowers can face disbelief, opposition from those who wish to conceal allegations of war crimes, and even danger from military personnel and those who believe that the Whistleblowers have betrayed their fellows. The Whistleblower informs legislators, who may then choose whether to engage in oversight, but has little impact on the oversight itself.
- The Muckraking Media (Archetype 2): Regardless of whether a Whistleblower successfully communicates with his or her superiors or with Congress, in order for congressional oversight of war crimes to be sparked, usually some journalist must seize upon the story and publicize the allegations on a broad scale. While in a previous era such journalists might have faced opposition from major media outlets, in the modern era (and especially in light of technological changes), there are few, if any, barriers to widespread publication. As the Whistleblower informs legislators and media, the Muckraking Media disseminates allegations of war crimes to the public (as well as to legislators); while legislators can still choose whether to engage in oversight, publication of allegations by the Muckraking Media obviously raises the political risk should they choose not to do so.
- The Activated Public (Archetype 3): Even with the existence of a Whistleblower and the Muckraking Media widely disseminating a story about allegations of war crimes, Congress will likely not engage in serious oversight of war crimes in the absence of an

Activated Public, which for some reason cares deeply about the allegations or the current military mission. Historically, the public's activation in this context correlates with opposition to or concern about the extent of U.S. military involvement in a particular conflict. Given the risks and rewards inherent to political actors in the U.S. system, effective oversight is far less likely in the absence of an Activated Public.

The first three archetypes are best thought of as general prerequisites to legislative action and effective oversight. Such oversight is far less likely to occur in the absence of any one of the three, but the presence of any of the three probably yields little information about what sort of oversight observers should expect. The nature of the oversight sparked by these three archetypes is better predicted by the remaining four:

- The False Start (or Slow-Running) Senators (Archetype 4): When considering whether to engage in serious or significant war crimes oversight, the False Start Senators, while perhaps initially quite enthusiastic about the notion of Congress engaging in such oversight, pull back from that initial enthusiasm and attempt to take a much less central role or else avoid engaging in oversight altogether. As the investigation into Abu Ghraib demonstrates, however, in some instances these senators may actually wish to continue with war crimes oversight, but in a much slower and—above all—politically quieter process.
- The Obstructionist House Leaders (Archetype 5): Historically, congressional war crimes oversight in the House of Representatives has been hindered by powerful, politically conservative (both Democrat and Republican), pro-administration, pro-military Representatives who seem to be intent on obstructing any *real* inquiry into allegations of atrocities. Effective war crimes oversight—and, particularly galling in the My Lai context, perhaps even effective prosecution by military attorneys—must therefore take place in spite of these leaders.

- The Our-Soldiers-First Legislators (Archetype 6): Congressional war crimes oversight has historically also brought forth Our-Soldiers-First Legislators, who make clear that they will oppose any attempt to hold American military personnel accountable for war crimes regardless of the facts, simply because they will always support American soldiers. There is significant overlap between the Our-Soldiers-First Legislators and both the False Start Senators and the Obstructionist House Leaders, but the Our-Soldiers-First Legislators are generally less openly concerned about national security issues or questions of U.S. policy than they are about promoting the view that American soldiers are uniformly virtuous.
- The Gadfly Representatives (Archetype 7): Given the strong structural elements weighing against effective congressional war crimes oversight, much of what might be termed “oversight” results from the less formal efforts of marginalized, less-powerful members of the House of Representatives who are eager either to remain in the public eye or else to oppose what they might view as absolute conservative, majoritarian control of the House’s powers.

While the fact that consistent archetypes have emerged in past instances of congressional war crimes oversight does not, of course, mean that they will again emerge in the future, the very consistency of these archetypes over time suggests that future war crimes investigations will likely see the emergence of, at the least, *similar* archetypes. If that is true, then it seems possible to use the existence of these archetypes in the future to help determine when and whether particular war crimes allegations or investigations will become as important in the national consciousness as My Lai or Abu Ghraib, or, instead, be largely ignored and ultimately forgotten.

## II. 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).<sup>35</sup> 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,<sup>36</sup> and after Seymour Hersh, a young maverick journalist working at the same time, tracked down Lieutenant William Calley, the commander of the soldiers who had allegedly committed the massacre, and published news reports based on Calley's recollections.<sup>37</sup> In response to the allegations, 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)<sup>38</sup> of American war crimes. Part II.A describes the events of 16 March 1968, when soldiers from the Americal Division attacked My Lai (4), and the emergence of knowledge about the massacre into the public eye. Part II.B examines congressional oversight of the My Lai massacre and Dellums's attempts to engage in "gadfly" oversight of American war crimes more generally. Part II.C briefly describes the aftermath of the My Lai investigation and oversight.

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<sup>35</sup> "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.

<sup>36</sup> Editorial, *Songmy 1: American Troops Are Accused of A Massacre*, N.Y. TIMES, Nov. 23, 1969, at E2 (citing the Ridenhour letter of April 1969); MICHAEL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY 103 (2002).

<sup>37</sup> See REPORTING VIETNAM, PART TWO: AMERICAN JOURNALISM 1969–1975, at 13–27 (Milton J. Bates et al. eds., 1998); SEYMOUR M. HERSH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH 135 (1970); Seymour M. Hersh, *Lieutenant Accused of Murdering 109 Civilians*, ST. LOUIS POST-DISPATCH, Nov. 13, 1969.

<sup>38</sup> See, e.g., *infra* note 154.

A. “A tragedy of major proportions involving unarmed Vietnamese”<sup>39</sup>

“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.<sup>40</sup> 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.<sup>41</sup> Both the South Vietnamese, many of whom viewed the destruction of a nest of Viet Cong supporters with pleasure,<sup>42</sup> or who were at least unsurprised at the incidence of atrocity in wartime,<sup>43</sup> and the North Vietnamese and the Viet Cong, who were themselves attempting to turn the attack into a propaganda coup,<sup>44</sup> further muddied the waters by distributing vast amounts of propaganda, which often bore very little resemblance to the truth.<sup>45</sup> 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.

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<sup>39</sup> HÉBERT REPORT, *supra* note 2.

<sup>40</sup> William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 675 (2000).

<sup>41</sup> *Id.* Compare *id.* at 674–78 (the former prosecutor’s theory of events), with GUENTER LEWY, *AMERICA IN VIETNAM* 325–26 (paperback ed. 1980) (1978) (providing a conservative view in a book arguing that most so-called “war crimes” actually did not violate the laws of war). For short summaries of the action, see VIETNAM WAR CRIMES 63–64 (Samuel Brenner ed., 2006); NEIL SHEEHAN, *A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM* 689 (Vintage Books ed. 1989) (1988). For book-length treatments of the subject, see BELKNAP, *supra* note 36; MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* (1992); WILLIAM L. CALLEY & JOHN SACK, *LIEUTENANT CALLEY: HIS OWN STORY* (1974); HERSH, *supra* note 37; WILLIAM R. PEERS, *THE MY LAI INQUIRY* (1979).

<sup>42</sup> 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 (providing the account of a former senior South Vietnamese intelligence officer 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).

<sup>43</sup> See, e.g., HERSH, *supra* note 37, at 144–50.

<sup>44</sup> 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 (containing 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”).

<sup>45</sup> For the reaction of the government of South Vietnam in attempting to cover up the massacre, see HERSH, *supra* note 37, at 145–50.

*1. Massacre at My Lai: 16 March 1968*

On 16 March 1968, U.S. 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.<sup>46</sup> The soldiers of Charlie Company, who, like other American soldiers, referred to the entire area around Son My as “Pinkville,”<sup>47</sup> were upset by having received several casualties from mines and booby traps in the days before the attack.<sup>48</sup> 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.”<sup>49</sup> On the evening before the attack, immediately after the memorial service for a popular sergeant, Captain Medina briefed his platoon leaders, including Lieutenant William L. Calley, and the soldiers of Charlie Company on the operation planned for March 16th. While there are sharply conflicting opinions about what Medina said, all sides (including Medina himself)<sup>50</sup> agree that the captain, *at the least*, ordered his troops to destroy all crops, kill all livestock, burn all houses, and pollute the water wells of the village.<sup>51</sup> 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.”<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> The Peers Commission arrived at what it called “a very

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<sup>46</sup> LEWY, *supra* note 41, at 325–26; Eckhardt, *supra* note 40, at 675.

<sup>47</sup> 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, *supra* note 37, at 23.

<sup>48</sup> *Id.* at 33–38; Eckhardt, *supra* note 40, at 675.

<sup>49</sup> HERSH, *supra* note 37, at 38–39.

<sup>50</sup> BELKNAP, *supra* note 36, at 58.

<sup>51</sup> Eckhardt, *supra* note 40, at 675, 678–80.

<sup>52</sup> PEERS, *supra* note 41, at 170.

<sup>53</sup> *See, e.g.*, Eckhardt, *supra* note 40, at 675–76.

<sup>54</sup> *See* BELKNAP, *supra* note 36, at 68–69 (“According to Michael Bilton and Kevin Sim, several members of Charlie Company became ‘double veterans,’ GI slang for raping a



conservative figure” of 175 to 200 women, children, and old men, all noncombatants, killed by Charlie Company,<sup>55</sup> though many news reports placed the death toll much higher.<sup>56</sup> Calley himself allegedly personally slaughtered over 100 Vietnamese civilians.<sup>57</sup> Yet, 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.<sup>58</sup> Despite Thompson’s angry protests to his commander about the killings and despite evidence that the Peers Commission suggested “should have alerted responsible individuals at every higher level of command . . . that something was seriously wrong,”<sup>59</sup> 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<sup>60</sup> in a 29 March 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 twenty-two other congressmen, “I somehow feel that this investigation and action by

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woman and then murdering her.”); PEERS, *supra* note 41, 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.”).

<sup>55</sup> PEERS, *supra* note 41, at 180.

<sup>56</sup> *E.g.*, Henry Kamm, *Vietnamese Say G.I.’s Slew 567 in Town*, N.Y. TIMES, Nov. 17, 1969, at 1.

<sup>57</sup> BELKNAP, *supra* note 36, 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. *Id.* at 72.

<sup>58</sup> *Id.* at 73–79; Eckhardt, *supra* note 40, at 700–03; David Montgomery, *30 Years Later, Heroes Emerge From Shame of My Lai Massacre*, WASH. POST, Mar. 7, 1998.

<sup>59</sup> PEERS, *supra* note 41, at 180.

<sup>60</sup> For contemporary background on Ridenhour, see Christopher Lydon, ‘*Pinkville*’ *Gadfly*, N.Y. TIMES, Nov. 29, 1969, at 14.

the Congress of the United States is the appropriate procedure.”<sup>61</sup> “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.”<sup>62</sup> This letter, which Ridenhour decided to mail at the urging of one of his former high school and college writing instructors,<sup>63</sup> 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 evidence secret.<sup>64</sup> He hired a literary agent and contacted the *Arizona Republic*, but found that only *Ramparts* Magazine was interested in his story.<sup>65</sup> “[T]hose people have a reputation for being radical and nutty,” Ridenhour explained to *New York Times* reporter

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<sup>61</sup> Editorial, *Songmy 1*, *supra* note 36, at E2 (citing Ridenhour letter); BELKNAP, *supra* note 36, at 103.

<sup>62</sup> Editorial, *Songmy 1*, *supra* note 36, at E2 (citing Ridenhour letter); HERSH, *supra* note 37, at 109 (same).

<sup>63</sup> 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, *supra* note 37, 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.” *Id.* at 106.

<sup>64</sup> Lydon, *supra* note 60, 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, *supra* note 37, at 109–10. 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’s staff had already received a copy of the letter, and Rivers responded by sending a letter on 7 April 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 36, 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.

<sup>65</sup> Lydon, *supra* note 60, at 14.

Christopher Lydon.<sup>66</sup> “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.”<sup>67</sup> Ridenhour, however, was not the only person working on breaking the story.<sup>68</sup> Prompted by an anonymous tip on 22 October 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.”<sup>69</sup> Hersh traveled to Fort Benning, where he met Calley, and then returned to Washington to write his story exposing the official military investigation.<sup>70</sup> 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.<sup>71</sup> 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 killed 567 unarmed men, women, and children as it swept through their hamlet on March 16, 1968.”<sup>72</sup>

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,<sup>73</sup> including Paul Meadlo, a 22-year-old Indianan who was deeply psychologically troubled by the events at My Lai.<sup>74</sup> On 20 November 1969, the same day that newspapers carried Hersh’s second Dispatch News Service story about the massacre, the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> BELKNAP, *supra* note 36, at 117–20; HERSH, *supra* note 37, at 132; *see, e.g.*, Robert M. Smith, *Two in Congress Ask Study of Massacre Report*, N.Y. TIMES, Nov. 21, 1969, at 1.

<sup>69</sup> HERSH, *supra* note 37, at 133.

<sup>70</sup> *Id.* at 135; Hersh, *supra* note 37.

<sup>71</sup> *See* REPORTING VIETNAM, PART TWO: AMERICAN JOURNALISM 1969–1975, at 13–27 (Milton J. Bates et al. eds., 1998); HERSH, *supra* note 37, at 135; Hersh, *supra* note 37.

<sup>72</sup> Kamm, *supra* note 56, at 1.

<sup>73</sup> *See, e.g.*, Seymour M. Hersh, *Hamlet Attack Called “Point-Blank Murder,”* ST. LOUIS POST-DISPATCH, Nov. 20, 1969, *reprinted in* 2 REPORTING VIETNAM: AMERICAN JOURNALISM 1969–1975, at 417–21 (Milton J. Bates et al., eds., 2000); Seymour M. Hersh, *Ex-GI Tells of Killing Civilians at Pinkville*, ST. LOUIS POST-DISPATCH, Nov. 25, 1969, *reprinted in* REPORTING VIETNAM, *supra*, at 422.

<sup>74</sup> HERSH, *supra* note 37, at 140.

*Cleveland Plains 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.<sup>75</sup> Inspired by his feelings of guilt, Meadlo agreed to speak on the *CBS Evening News with Walter Cronkite*; Meadlo's interview with Mike Wallace of the CBS evening news aired on November 24th.<sup>76</sup> 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."<sup>77</sup> "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.<sup>78</sup> While some newspapers remained cautious for several days or weeks,<sup>79</sup> in light of the evidence Hersh coaxed from participants such as Meadlo, Michael Bernhardt, and Michael Terry, the national mood began to change.<sup>80</sup>

#### 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.<sup>81</sup> On November 21, for instance, Republican Ohio Representative William E. Minshall announced that he

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<sup>75</sup>*Id.* at 137–38; Editorial, *The My Lai Massacre*, TIME, Nov. 28, 1969, <http://www.time.com/time/magazine/article/0,9171,840403,00.html>.

<sup>76</sup> Editorial, 'So I . . . Killed 10 or 15'; *Killings in Mylai Still Haunt Vietnam Veteran*, WASH. POST, Nov. 25, 1969, at A1.

<sup>77</sup> *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.

<sup>78</sup> Bill Richards, *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.

<sup>79</sup> E.g., Editorial, *Pentagon Says Viet Killings Exaggerated*, WASH. POST, Nov. 17, 1969, at A16; see also HERSH, *supra* note 37, at 136–38.

<sup>80</sup> Peter Braestrup & Stephen Klaidman, *Three Vietnam Veterans Tell of Hamlet Slayings*, WASH. POST, Nov. 20, 1969, at A1. Hersh later criticized this story for, in his view, partially diminishing the impact of Haeberle's photographs and Bernhardt and Terry's eyewitness reports by "suggesting that the hardships suffered by Charlie Company might be responsible for its actions." HERSH, *supra* note 37, at 138–39. See also Richard Harwood & Laurence Stern, Op-Ed., *Pinkville Symbolizes Brutalization That Inevitably Afflicts Men at War*, WASH. POST, Nov. 26, 1969, at A13 (suggesting that the story of "Pinkville" and the words of Paul Meadlo "will symbolize the brutalization that inevitably afflicts men at war.").

<sup>81</sup> See, e.g., Davidson, *supra* note 11, at 300.

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.”<sup>82</sup> Two days later, Senate Majority Leader Mike Mansfield, echoing Goodell, called for a “full and independent inquiry” into charges that U.S. Soldiers had committed atrocities in Vietnam.<sup>83</sup> “The Senate armed services committee ought to look into it, find out what happened, and get to the bottom of it,” Mansfield explained.<sup>84</sup> 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,”<sup>85</sup> 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’s 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 in somehow avoiding taking on personal or even institutional responsibility for holding the hearings.<sup>86</sup> Speaking in England, Maine Senator Edmund S. Muskie announced, “It’s even conceivable . . . that

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<sup>82</sup> Smith, *supra* note 68, at 1.

<sup>83</sup> Editorial, *Mansfield Asks Congress Study Into Alleged Vietnam Massacre*, N.Y. TIMES, Nov. 23, 1969, at 3.

<sup>84</sup> *Id.*

<sup>85</sup> PEERS, *supra* note 41, at 19.

<sup>86</sup> *Cf.* BELKNAP, *supra* note 36, at 136 (describing token Democratic staffer Daniel Patrick Moynihan’s support for the proposal by former Supreme Court Justice and Ambassador to the U.N. 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).

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."<sup>87</sup> 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.<sup>88</sup> "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."<sup>89</sup> 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's 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 13th and Stennis's statement to the press on December 8th, the issue of My Lai had become more complicated and had taken on significant international overtones. On 26 November 1969, the House and Senate Armed Services Committees had summoned Secretary of the Army Stanley R. Resor to testify.<sup>90</sup> It was Resor's testimony the next day, accompanied by slides of Ronald Haerberle's pictures, that sickened the queasy Representative Arend and combat-hardened Senator Inouye.<sup>91</sup> 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 it first hand" or "know them by name."<sup>92</sup> 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

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<sup>87</sup> Anthony Lewis, *Study of Songmy Urged by Muskie*, N.Y. TIMES, Nov. 30, 1969, at 26.

<sup>88</sup> Editorial, *Stennis Urges a Panel Study of Vietnam Slayings*, N.Y. TIMES, Dec. 8, 1969, at 3.

<sup>89</sup> *Id.* Perhaps Stennis's 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 41, at 19.

<sup>90</sup> E.W. Kenworthy, *Resor Called to Testify About Alleged Massacre*, N.Y. TIMES, Nov. 26, 1969, at 1.

<sup>91</sup> *E.g.*, Greider, *supra* note 4, at A1.

<sup>92</sup> Kenworthy, *supra* note 90, at 1.

the story broke in the newspapers in November.<sup>93</sup> 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.<sup>94</sup>

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 subordinates accountable. On November 25th, 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 murders? [*sic*]’”<sup>95</sup> 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?”<sup>96</sup> In an interview on 15 January 1970—reported the next day by Walter Cronkite—Louisiana Democrat Allen Ellender tersely announced that the slain Vietnamese “got just what they deserved.”<sup>97</sup> (Congressional leaders, including Stennis, could clearly see that few colleagues were enthusiastic about the prospect of drawn-out hearings—and were fully aware that conservatives such as Hollings and Elleander would oppose such hearings every step of the way.)

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<sup>93</sup> *Id.* Ronald L. Ziegler, President Nixon’s press secretary, announced that Nixon had learned about the allegations several months before Hersh published his story in November of 1969. Smith, *supra* note 1, at 1.

<sup>94</sup> Smith, *supra* note 1, at 1.

<sup>95</sup> Kenworthy *supra* note 90, at 1.

<sup>96</sup> *Id.*

<sup>97</sup> HERSH, *supra* note 37, at 155. 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.’” *Id.* 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 36, at 197.

2. *Obstructionism: The Rivers and Hébert Committee House Hearings*

While Stennis was arguably attempting to avoid presiding over drawn-out war crimes hearings 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's committee appeared to have a higher priority (i.e., Congress viewed the House Committee as more important than the Senate Committee) than even Stennis's in investigating events at My Lai.<sup>98</sup> 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's 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."<sup>99</sup>

Rivers was an unabashed supporter of both the U.S. military and the United States' involvement in Vietnam: After one meeting, General William 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."<sup>100</sup> Recounting a meeting that he had had with Rivers on 11 December 1969, 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.'"<sup>101</sup> 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

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<sup>98</sup> PEERS, *supra* note 41, at 19.

<sup>99</sup> Neil Sheehan, *Rivers's Death Unlikely to Alter Views of House Unit on Military*, N.Y. TIMES, Dec. 29, 1970, at 11.

<sup>100</sup> BELKNAP, *supra* note 36, 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.

<sup>101</sup> PEERS, *supra* note 41, at 20–21.



serviceman and veteran of Vietnam for his individual sacrifice, bravery, dedication, initiative, devotion to duty . . . .”<sup>102</sup>

Rivers began holding hearings in earnest on 9 December 1969 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.<sup>103</sup> 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.<sup>104</sup> Some fellow committee members and a number of military officers were aghast at Rivers’s claims.<sup>105</sup> “I didn’t know he could say that,” exclaimed one amazed congressman who had heard the testimony.<sup>106</sup> The *Washington Evening Star*, citing an unidentified committee member, reported that Thompson had repeated his allegations about the events at My Lai.<sup>107</sup> Rivers, in turn, denounced the anonymous source as “a damned liar,” and said that his own version of the testimony was accurate.<sup>108</sup> Despite the tension between Rivers and subcommittee members who apparently accepted that Charlie Company *had* committed a massacre, support remained high in the subcommittee for the military—even those elements responsible for war crimes. 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.<sup>109</sup> 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;<sup>110</sup> Rivers then appointed a four-member panel,

<sup>102</sup> HERSH, *supra* note 37, at 157 (emphasis added).

<sup>103</sup> *Id.* at 167.

<sup>104</sup> Editorial, *Pilot’s Testimony Is Cited by Rivers*, N.Y. TIMES, Dec. 11, 1969, at 16.

<sup>105</sup> HERSH, *supra* note 37, at 168–69.

<sup>106</sup> *Id.* at 168.

<sup>107</sup> See, e.g., Editorial, *Rivers Picks Four to Study Songmy*, N.Y. TIMES, Dec. 13, 1969, at 13.

<sup>108</sup> *Id.*

<sup>109</sup> HERSH, *supra* note 37, at 168.

<sup>110</sup> BELKNAP, *supra* note 36, at 136; HERSH, *supra* note 37, at 169; Editorial, *supra* note 107, 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

chaired by Louisiana Democrat F. Edward Hébert, one of his closest supporters, to investigate in greater depth.<sup>111</sup>

Possibly concerned about the leaks from the full subcommittee that had hindered Rivers's 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.<sup>112</sup> Despite Resor's and Peers's 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.<sup>113</sup> In June of 1970, the subcommittee issued a fifty-three-page report concluding that "a tragedy of major proportions"<sup>114</sup> had taken place, and that military and civilian officials in Vietnam had attempted to "cover up" what had happened.<sup>115</sup> The subcommittee's report "was not the favorable assessment of its handling of the My Lai matter for which the army had hoped," historian and law professor Michael Belknap observed in 2002.<sup>116</sup> Hébert was ostensibly incensed by what he saw as the Army's lack of cooperation, although—as Peers, albeit hardly an unbiased observer, points out—the panel had no time limit on its investigation, while the military report needed to be completed in time to bring prosecutions in a timely manner.<sup>117</sup> "The committee was hampered

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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.").

<sup>111</sup> Editorial, *supra* note 107, 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.*

<sup>112</sup> Editorial, *Secrecy Is Imposed on My Lai Hearings*, N.Y. TIMES, Apr. 12, 1970, at 5.

<sup>113</sup> BELKNAP, *supra* note 36, at 139.

<sup>114</sup> HÉBERT REPORT, *supra* note 2, at 5.

<sup>115</sup> Editorial, *House-Panel Says the Army Hampered Investigation Into Songmy Incident*, N.Y. TIMES, July 16, 1970, at 15.

<sup>116</sup> BELKNAP, *supra* note 36, at 139. Explaining why the Rivers Committee did not hold hearings between 26 November 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 2, 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 36, at 137.

<sup>117</sup> PEERS, *supra* note 41, at 22.

by the Department of the Army in every conceivable manner,” Hébert told the *New York Times*.<sup>118</sup> 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.”<sup>119</sup>

Exactly who was being stymied, however, remains an open question.<sup>120</sup> 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.”<sup>121</sup> 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.”<sup>122</sup> 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 at My Lai, rather than on criticizing those who had allowed the “tragedy of major proportions”<sup>123</sup> 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.”<sup>124</sup>

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.<sup>125</sup> Secretary Resor was particularly concerned, writing to Hébert in January

<sup>118</sup> Editorial, *supra* note 115, at 15. See also *House Panel Calls 6 in Songmy Inquiry*, N.Y.TIMES, Apr. 17, 1970, at 13.

<sup>119</sup> *House Panel Calls 6 in Songmy Inquiry*, *supra* note 118.

<sup>120</sup> See, e.g., Davidson, *supra* note 11, at 302 (“The motivation behind Hébert’s refusal to release the transcripts has been the subject of dispute.”).

<sup>121</sup> BELKNAP, *supra* note 36, at 140.

<sup>122</sup> PEERS, *supra* note 41, at 242.

<sup>123</sup> HÉBERT REPORT, *supra* note 2, at 4.

<sup>124</sup> *Id.* at 7–8.

<sup>125</sup> See, e.g., TRENT ANGERS, THE FORGOTTEN HERO OF MY LAI: THE HUGH THOMPSON STORY 155–76 (1999) (cited in Eckhardt, *supra* note 40, at 684 n.50).

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.”<sup>126</sup> Resor was specifically worried about the danger to the My Lai prosecutions posed by an application of the Jenks Act.<sup>127</sup> 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 material pre-trial statements that the witness made and that are in the possession of the United States.<sup>128</sup> 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.”<sup>129</sup> Despite the pleas of Resor and numerous congressmen,<sup>130</sup> 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,<sup>131</sup> 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.”<sup>132</sup> 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.

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<sup>126</sup> Letter from Stanley R. Resor, Sec’y of the Army, to Hon. F. Edward Hébert (Jan. 6, 1970), *cited in* Eckhardt, *supra* note 40, at 684 n.50; *see* BELKNAP, *supra* note 36, at 141.

<sup>127</sup> 18 U.S.C. § 3500 (2006).

<sup>128</sup> *Id.* § 3500(b).

<sup>129</sup> *Id.* § 3500(c).

<sup>130</sup> Letter from Donald M. Fraser [et al.], Members of Congress, to Hon. R. Edward Hébert, Chairman, House Armed Servs. Comm., Subcomm. No. 2, at 1 (Nov. 24, 1970), *cited in* Eckhardt, *supra* note 40, at 684 n.50).

<sup>131</sup> Letter from Abner J. Mikva, Member of Congress, to Hon. L. Mendel Rivers, Chairman, Comm. on Armed Servs. 4 (Dec. 7, 1970), *cited in* Eckhardt, *supra* note 40, 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.”).

<sup>132</sup> Richard Halloran, *Sonny Trial Move is Called a ‘Ploy,’* N.Y. TIMES, Oct. 18, 1970, at 10.

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 necessary witnesses, it would be prevented from prosecuting the My Lai Incident.<sup>133</sup>

Not surprisingly, Resor's and Eckhardt's concerns about the implications of the Jenks Act proved to be well-founded.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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."<sup>137</sup> 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.'"<sup>138</sup> Dickinson's ostensible confidence in the power of the military justice system might have appeared more plausible had he not immediately

<sup>133</sup> Eckhardt, *supra* note 40, at 684–85.

<sup>134</sup> See, e.g., Davidson, *supra* note 11, 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.").

<sup>135</sup> BELKNAP, *supra* note 36, at 224; William Greider, *Ruling Stuns My Lai Case*, ATLANTA J., Oct. 16, 1970, at 8-B, *cited in* Eckhardt, *supra* note 40, at 685 n.53.

<sup>136</sup> BELKNAP, *supra* note 36, at 224.

<sup>137</sup> *Id.* at 224–25.

<sup>138</sup> Halloran, *supra* note 132, at 10.

added to the reporter interviewing him that he would personally be pleased if none of the soldiers involved were brought to trial.<sup>139</sup>

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.<sup>140</sup> "[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."<sup>141</sup> After an extensive trial, on 29 March 1971, a military court martial found Lieutenant Calley guilty of murdering twenty-two Vietnamese civilians and assaulting a two-year-old boy with the intent to kill.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> 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,"<sup>145</sup> but that, even if it did apply, any error by the trial court in failing to enforce it was harmless.<sup>146</sup> 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.<sup>147</sup> "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 *New York Times*.<sup>148</sup> The serious constitutional question posed by the Hébert Subcommittee's refusal to release transcripts of the House hearings was

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<sup>139</sup> *Id.*

<sup>140</sup> For descriptions of the Calley court-martial, see BELKNAP, *supra* note 36, at 168–90; LEWY, *supra* note 41, at 356–64; Davidson, *supra* note 11, at 304–08.

<sup>141</sup> Eckhardt, *supra* note 40, at 684–86.

<sup>142</sup> Davidson, *supra* note 11, at 304.

<sup>143</sup> *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)).

<sup>144</sup> Editorial, *High Court Gets Calley's Appeal*, N.Y. TIMES, Nov. 29, 1975, at 13.

<sup>145</sup> *Id.* at 306 (citing *Calley*, 46 C.M.R. at 1192).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 307 (citing *Calley v. Calloway*, 382 F. Supp. 650, 700–01 (M.D. Ga. 1974)).

<sup>148</sup> Daniel J. Kornstein, Op-Ed., *Amnesty and Calley*, N.Y. TIMES, Mar. 22, 1975, at 31.

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 *Calley* trial judge’s decision not to strike the testimony of prosecution witnesses was in fact harmless error.<sup>149</sup>

### 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.”<sup>150</sup> Despite the numerous allegations—many coming *from the alleged perpetrators*—that groups such as the Citizens Commission of Inquiry<sup>151</sup> and the Vietnam Veterans Against the War (VVAW) aired over the following few years,<sup>152</sup> however, it is a mistake to believe that all or even most Americans in Vietnam committed war crimes or atrocities.<sup>153</sup> 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

<sup>149</sup> *Calley v. Calloway*, 519 F.2d 184, 184 (5th Cir. 1975).

<sup>150</sup> HERSH, *supra* note 37, at 140.

<sup>151</sup> *Contra* LEWY, *supra* note 41, at 313–15 (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.).

<sup>152</sup> *See, e.g.*, VIETNAM VETERANS AGAINST THE WAR, THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES (1972).

<sup>153</sup> *But cf.* Robert N. Strassfeld, *American Innocence*, 37 CASE W. RES. J. INT’L L. 277, 290–91 (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.”).

popular culture portrayals of Vietnam-era soldiers.<sup>154</sup> 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.<sup>155</sup> 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,<sup>156</sup> and while (with rare exceptions)<sup>157</sup> 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

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<sup>154</sup> See, e.g., LEWY, *supra* note 41, 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 U.S. 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, at 19. After publishing *Conversations with Americans*, Mark Lane became involved with numerous fringe organizations and individuals.

<sup>155</sup> See, e.g., Tod Ensign, *Organizing Veterans Through War Crimes Documentation*, in VIET NAM GENERATION, Mar. 1994, available at [http://www3.iath.virginia.edu/sixties/HTML\\_docs/Texts/Narrative/Ensign\\_War\\_Crimes.html](http://www3.iath.virginia.edu/sixties/HTML_docs/Texts/Narrative/Ensign_War_Crimes.html).

<sup>156</sup> See, e.g., Sheehan, *supra* note 99, at 11.

<sup>157</sup> See, e.g., Complete Testimony of LT. John Kerry to Senate Foreign Relations Committee on Behalf of Vietnam Veterans Against the War, available at [http://www.wintersoldier.com/graphics/Kerry\\_1971\\_Testimony.pdf](http://www.wintersoldier.com/graphics/Kerry_1971_Testimony.pdf) (reprinting testimony of 22 Apr. 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.



the height of congressional interest in the Calley court-martial and the My Lai investigation.<sup>158</sup> 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,<sup>159</sup> 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.<sup>160</sup> "If your definition of radical means a departure from the status quo, then yes, I am a radical," Dellums, a Marine Corps veteran and former Berkeley city councilman, retorted to challengers.<sup>161</sup> Even under less equivocal definitions, Dellums was certainly a radical. When John E. Healy, Dellums's Republican opponent in the general election, attacked Dellums's 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.<sup>162</sup> Dellums did, however, go so far as to say that he considered violence, "particularly 'bombing' and 'trashing' [property destruction]" to be "really counter-productive."<sup>163</sup>

<sup>158</sup> Editorial, *supra* note 15, at 10.

<sup>159</sup> Earl Caldwell, *Black Insurgent Who Won Berkeley Race Is an Outspoken Radical*, N.Y. TIMES, June 14, 1970, at 46.

<sup>160</sup> 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. Caldwell, *supra* note 159, at 46.

<sup>161</sup> Caldwell, *supra* note 159, at 46.

<sup>162</sup> R.W. Apple Jr., *Negro Candidate Succeeds Too Well*, N.Y. TIMES, Sept. 24, 1970, at 32.

<sup>163</sup> *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 reentered the political arena, taking office as the mayor of Oakland, California, succeeding former (and now current) California Governor Jerry Brown. J. Douglas Allen-Taylor, *Ron Dellums Takes the Helm in Oakland*, BERKELEY DAILY PLANET, Jan. 9, 2007, <http://www.berkeleydailyplanet.com/article.cfm?archiveDate=01-09-07&storyID=26048>. For controversy during the mayoral

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.<sup>164</sup> Within months after taking office, Dellums announced plans to conduct public, informal hearings into the “command responsibility” for U.S. “war atrocities” in Vietnam.<sup>165</sup> 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 inquiry into American war crimes in the Indochina war.”<sup>166</sup> 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.<sup>167</sup> “We believe it to be the function of Congress to undertake open study of the responsibilities for war atrocities,” Dellums explained.<sup>168</sup> “Of course, we would rather have official inquiry, but Congressional leadership has ignored all our requests. So, we are calling ad hoc hearings.”<sup>169</sup>

The Dellums Committee hearings, which were attended by up to twenty congressmen at various times,<sup>170</sup> drew significant national media

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race over Dellums’s post-congressional career as a lobbyist, see Phillip Matier & Andrew Ross, *In Oakland, Dellums Draws Fire in Mayor’s Race*, S.F. CHRON., Mar. 27, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/03/27/MNR.TMP>.

<sup>164</sup> 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. See, e.g., Ensign, *supra* note 155 (“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.”); DELLUMS HEARINGS, *supra* note 15, 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.”).

<sup>165</sup> Op-Ed, *supra* note 17, at 10.

<sup>166</sup> *Id.*

<sup>167</sup> See, e.g., Ensign, *supra* note 155; Robert N. Stassfeld, “Lose in Vietnam, Bring the Boys Home,” 82 N.C. L. REV. 1891, 1922–23 (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.”).

<sup>168</sup> Editorial, *supra* note 15, at 10.

<sup>169</sup> *Id.*

<sup>170</sup> Ensign, *supra* note 155.

attention,<sup>171</sup> but were also plagued by the same sorts of concerns about accuracy that had discredited Mark Lane's *Conversations With Americans*.<sup>172</sup> One former Army Sergeant, Danny S. Notley, testified that he took part in the killing of about thirty Vietnamese men, women, and children in a village called Truong Kahn, near My Lai, in April of 1969.<sup>173</sup> While five Vietnamese women later came forward with a story that, in some particulars, seemed to match Notley's,<sup>174</sup> 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.<sup>175</sup> "Typically, the Army responded by trying to get Notley to 'name names,'" Tod Ensign of the Citizens' Commission of Inquiry later wrote derisively.<sup>176</sup> "No less a luminary than Nixon's Counsel Fred Buzhardt contacted me seeking Notley's cooperation in identifying the guilty (read: low-ranking) parties."<sup>177</sup> 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's atrocity oversight efforts in the eyes of Nixon's still-extant "silent majority."<sup>178</sup>

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<sup>171</sup> See, e.g., Editorial, *supra* note 15, at 10; Richard Halloran, *Ex-G.I. Alleges 30 Slayings Near Mylai*, N.Y. TIMES, Apr. 29, 1971, at 10.

<sup>172</sup> See, e.g., LEWY, *supra* note 41, at 317–18. But see Robert N. Strassfeld, *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.").

<sup>173</sup> Halloran, *supra* note 171, at 10.

<sup>174</sup> Editorial, *5 Vietnamese Women Support Former G.I.'s Report of Slayings*, N.Y. TIMES, May 10, 1971, at 12.

<sup>175</sup> Editorial, *Inquiry is Thwarted by Ex-G.I.'s Silence*, N.Y. TIMES, May 8, 1971, at 11.

<sup>176</sup> Ensign, *supra* note 155.

<sup>177</sup> *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.

<sup>178</sup> See, e.g., LEWY, *supra* note 41, at 317–18.

### 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.<sup>179</sup> 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 7 April 1971, for example, the Gallup Poll reported that only nine percent of Americans approved of the court-martial's findings, while seventy-nine percent disapproved.<sup>180</sup> "Terry Nelson and C-Company" released (on the Plantation Label) a particularly hagiographic record entitled *The Battle Hymn of Lieutenant Calley*.<sup>181</sup> The album reportedly sold 202,000

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<sup>179</sup> E.g., Editorial, *The Clamor of Calley: Who Shares the Guilt?*, TIME, Apr. 12, 1971, <http://www.time.com/time/magazine/article/0,9171,904957,00.html> [hereinafter Guilt Editorial] ("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.'"); Editorial, *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., Editorial, *Peace Group to Set UP Panels on Atrocity Charges*, N.Y. TIMES, Nov. 30, 1969, at 30.

<sup>180</sup> BELKNAP, *supra* note 36, at 193.

<sup>181</sup> Guilt Editorial, *supra* note 179. 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 36, at 191; *The Battle Hymn of Lieutenant Calley*, available at <http://www.youtube.com/watch?v=iXNsXIxBkqs> (last visited Oct. 24, 2008).

copies in the first three days after the verdict.<sup>182</sup> 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.<sup>183</sup> While Nixon never pardoned him, Calley was ultimately released on parole after his case had wound its way through the courts.<sup>184</sup> In the end, Calley served only a few months in prison.<sup>185</sup>

### III. Iraq War Crimes and Oversight

"The photographs did not lie," wrote *New York Times* reporter Craig R. Whitney.<sup>186</sup> 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 the situation 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.<sup>187</sup> The story emerged in the public eye after the relatives of 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.<sup>188</sup> At around the same time, someone leaked a critical report on the incident to

<sup>182</sup> Guilt Editorial, *supra* note 179.

<sup>183</sup> See, e.g., Linda Charlton, *President Orders Calley Released from Stockade*, N.Y. TIMES, Apr. 2, 1971, at 1.

<sup>184</sup> See BELKNAP, *supra* note 36, at 225–56.

<sup>185</sup> *Id.*

<sup>186</sup> Craig R. Whitney, *Introduction to THE ABU GHRAIB INVESTIGATIONS*, at vii (Steven Strasser ed., 2004).

<sup>187</sup> See, e.g., Dawn Bryan, *Abu Ghraib Whistleblower's Ordeal*, BBC NEWS, Aug. 5, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6930197.stm](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, <http://www.baltimoresun.com/news/bal-te.pentagon06may06,0,6156935.story>; 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, <http://www.washingtonpost.com/wp-dyn/articles/A32048-2004May16.html>.

<sup>188</sup> James Dao & Eric Lichtblau, *Soldier's Family Set in Motion Chain of Events on Disclosure*, N.Y. TIMES, May 8, 2004, <http://www.nytimes.com/2004/05/08/national/08IMAG.html>. Mark Benjamin, *Sympathy for Charles Graner*, SALON.COM, Dec. 1, 2008.

Seymour Hersh, the journalist who had broken the My Lai story, and who was now a regular contributor to the *New Yorker*.<sup>189</sup>

In response to the allegations, which were quickly followed by additional news stories and interviews, some legislators 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 pressure 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 influential 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. Part III.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. Part III.B examines congressional oversight of the Abu Ghraib abuse,

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<sup>189</sup> See, e.g., CBS, *Abuse of Iraqi POWs by GIs Probed: 60 Minutes II Has Exclusive Report on Alleged Mistreatment*, 60 Minutes II, Apr. 28, 2004; Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?*, NEW YORKER, May 10, 2004, [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact?currentPage=all](http://www.newyorker.com/archive/2004/05/10/040510fa_fact?currentPage=all).

including Waxman's attempts to engage in oversight outside the normal congressional committee system. Part III.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"<sup>190</sup>

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 also 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.<sup>191</sup> Given that the events at Abu Ghraib happened so recently, moreover, passions have had little 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,<sup>192</sup> and the pictures that

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<sup>190</sup> Kern Statement, *supra* note 3.

<sup>191</sup> Cf. Scott Wilson & Sewell Chan, *As Insurgency Grew, So Did Prison Abuse*, WASH. POST, May 10, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A13065-2004May9?2004May9?language=printer>. For a book-length treatment of the Abu Ghraib investigation, coauthored by a lead criminal investigator and the JAG attorney who prosecuted some of those responsible for the prisoner abuse, see CHRISTOPHER GRAVELINE & MICHAEL CLEMENS, *THE SECRETS OF ABU GHRAIB REVEALED* (2010).

<sup>192</sup> This includes, especially, the report of Army Major General Antonio M. Taguba, which is probably the most trustworthy of the investigations. See, e.g., Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade [hereinafter Taguba Report] (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf); Douglas Jehl, *Head of Inquiry on Iraq Abuses Now in Spotlight*, N.Y. TIMES, May 11, 2004, <http://www.nytimes.com/2004/05/11/politics/11TAGU.html> ("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."); Seymour M. Hersh, *The General's Report*, NEWSWEEK, June 25, 2007, [http://www.newyorker.com/reporting/2007/06/25/070625fa\\_fact\\_hersh?currentPage=all](http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh?currentPage=all) ("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."). Late in 2008, the Senate Armed Services Committee finally approved a long report detailing what occurred at Abu Ghraib; that report was declassified in significant part in April of 2009.

were seared into the memories of many around the world,<sup>193</sup> 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 U.S. Army Material Command, later concluded was “the failure of a relatively small number of soldiers who served at Abu Ghraib prison.”<sup>194</sup>

*1. Prisoner Abuse at Abu Ghraib: Fall of 2003*

In October of 2003, the 320th Military Police (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.”<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup> 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.<sup>198</sup> On 30 June 2003, Brigadier General Janis L. Karpinski assumed command of the 800th MP Brigade, thus becoming the first female U.S. general to command troops in a combat theater.<sup>199</sup> Karpinski had no experience with running a prison; with rare exceptions, her 3400 subordinates were equally inexperienced.<sup>200</sup> The 372nd MP Company, for example, which

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<sup>193</sup> See, e.g., Editorial, *Ugly Americans*, CHI. TRIB., 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)).

<sup>194</sup> Kern Statement, *supra* note 3.

<sup>195</sup> Taguba Report, *supra* note 192, at 16, 36.

<sup>196</sup> *Id.* at 16; Editorial, *Former Abu Ghraib Reserve Unit Returns Home*, N.Y. TIMES, Aug. 3, 2004, at A8. The 372d 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 192, at 16, 36.

<sup>197</sup> Taguba Report, *supra* note 192, at 36.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* 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.”).



had been handling traffic and police duties, was entirely untrained and unprepared for its mission of guarding prisoners.<sup>201</sup>

The 372d 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”<sup>202</sup> on an advisor trip with (according to Karpinski) the goal of “Gitmoizing” detention practices in Iraq.<sup>203</sup> This meant that MPs would essentially be involved in “preparing” and “softening-up” detainees for interrogation.<sup>204</sup> During that trip, Miller also suggested that the guard force should “be actively engaged in setting the conditions for successful exploitation of the internees”<sup>205</sup> and reportedly suggested that the prison guards at Abu Ghraib obtain military working dogs for use in interrogations—which they did shortly thereafter.<sup>206</sup> The situation, and the chain of command, was further confused after 19 November 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.<sup>207</sup> As Major David W. DiNenna, the 320th MP Battalion’s operations,

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<sup>201</sup> Hersh, *supra* note 189.

<sup>202</sup> Taguba Report, *supra* note 192, at 7.

<sup>203</sup> Wilson & Chan, *supra* note 191. See also Janis Karpinski, Testimony to the “International Commission of Inquiry on Crimes Against Humanity Committed by the Bush Administration,” Jan. 21, 2006, available at <http://www.bushcommission.org/?q=node/2>.

<sup>204</sup> See Wilson & Chan, *supra* note 191.

<sup>205</sup> Taguba Report, *supra* note 192, at 8. This recommendation, the Taguba Report concluded, “would appear to be in conflict with the recommendations . . . that military police ‘do not participate in military intelligence supervised interrogation sessions.’” *Id.*

<sup>206</sup> Josh White, *Army General Advised Using Dogs at Abu Ghraib, Officer Testifies*, WASH. POST, July 28, 2005, at A18. R. Jeffrey Smith, *General Is Said to Have Urged Use of Dogs*, WASH. POST, May 26, 2004, at A01.

<sup>207</sup> Taguba Report, *supra* note 192, at 38; see also Eric Schmitt, *The Struggle for Iraq: Testimony; Two U.S. Generals Outline a Lag in Notification on Reports of Abuse in Iraqi Prisons*, N.Y. TIMES, May 20, 2004, <http://www.nytimes.com/2004/05/20/world/struggle-for-iraq-testimony-two-us-generals-outline-lag-notification-reports.html?pagewanted=all> (“General [Ricardo] Sanchez also sought to clarify the intent of an order . . . which put some of the military police at the prison under the command of the 205th Military Intelligence Brigade. . . . General Sanchez said he had only meant to put responsibility for the prison’s security under an active-duty Army officer.”).

training, and intelligence officer, later testified, the command situation at the base in the fall of 2003 was “extremely confusing.”<sup>208</sup>

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.”<sup>209</sup> On Cell Block I, this meant that MPs in the 372nd MP Company looked to Specialist Charles A. Graner, a thirty-five-year-old former state prison guard,<sup>210</sup> and Staff Sergeant Ivan L. “Chip” Frederick II, who had similarly worked as a corrections officer in Pennsylvania.<sup>211</sup> 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.”<sup>212</sup> 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.”<sup>213</sup> Among those

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<sup>208</sup> Gail Gibson, *Confusion Reigns Inside Iraqi Prison, Army Major Testifies*, BALTIMORE SUN, Feb. 3, 2005, <http://www.baltimoresun.com/news/bal-te.abuse03feb03,0,1566920.story>.

<sup>209</sup> Taguba Report, *supra* note 192, at 37.

<sup>210</sup> Paul von Zielbauer & James Dad, *Guard Left Troubled Life for Duty in Iraq*, N.Y. TIMES, May 14, 2004, at A9.

<sup>211</sup> Edward Wong, *Sergeant Is Sentenced to 8 Years in Abuse Case*, N.Y. TIMES, Oct. 22, 2004, <http://www.nytimes.com/2004/10/22/international/middleeast/22abuse.html>.

<sup>212</sup> Taguba Report, *supra* note 192, at 16.

<sup>213</sup> *Id.* at 16–17. In his report, Taguba found that the abuse by military police personnel included: (1) punching, slapping, and kicking detainees, and jumping on the naked feet of detainees; (2) videotaping and photographing naked male and female detainees; (3) forcibly arranging detainees in various sexually explicit positions for photographing; (4) forcing detainees to remove their clothing and keeping detainees naked for several days at a time; (5) forcing naked male detainees to wear women’s underwear; (6) forcing groups of male detainees to masturbate themselves while being photographed and videotaped; (7) arranging naked male detainees in a pile and then jumping on them; (8) positioning a naked detainee on a Meal Ready-to-Eat (MRE) Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture; (9) writing “I am a Rapest” (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked; (10) placing a dog chain or strap around a naked detainee’s neck and having a female soldier pose for a picture; (11) a male MP guard having sex with a female detainee; (12) using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; and (13) taking photographs of dead Iraqi detainees. Taguba also noted that he had found credible evidence to support claims by some detainees that

participating in the abuse and torture were, in addition to Graner and Frederick, Specialists Sabrina Harman, Megan Ambuhl, and Roman Krol, Sergeants Santos Cardona<sup>214</sup> and Michael Smith, and Private First Class Lynndie England, who was Graner's girlfriend.<sup>215</sup> 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.<sup>216</sup> 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."<sup>217</sup> 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."<sup>218</sup> 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

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American military prison guards: (1) broke chemical lights and poured the phosphoric liquid on detainees; (2) threatened detainees with a charged 9mm pistol; (3) poured cold water on naked detainees; (4) beat detainees with a broom handle and a chair; (5) threatened male detainees with rape; (6) allowed a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; and (7) sodomized a detainee with a chemical light and perhaps a broom stick. The descriptions of the abuses reported by Taguba are taken almost verbatim from the *Taguba Report*. *Id.* at 16–18.

<sup>214</sup> Adam Zagorin, *An Abu Ghraib Offender's Return to Iraq Is Stopped*, TIME, Nov. 2, 2006, <http://www.time.com/time/world/article/0,8599,1554326,00.html>.

<sup>215</sup> Tara McKelvey, *A Soldier's Tale: Lynndie England*, MARIE CLAIRE, 2006, [http://www.marieclaire.com/world/news/lynndie-england-1?click=main\\_sr](http://www.marieclaire.com/world/news/lynndie-england-1?click=main_sr). England later gave birth to Graner's son. *Id.*

<sup>216</sup> 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.").

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

doing at Abu Ghraib.<sup>219</sup> More startlingly, Graner apparently shared all his photographs by e-mail 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.<sup>220</sup> “I saw the rope. I saw the naked guy.”<sup>221</sup> 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.”<sup>222</sup>

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 leader.”<sup>223</sup> “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.”<sup>224</sup> 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.<sup>225</sup> Many soldiers in the 800th MP Brigade and the 372nd MP Company ignored uniform standards and failed to regularly salute officers<sup>226</sup>—both indications of a breakdown in

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<sup>219</sup> McKelvey, *supra* note 215.

<sup>220</sup> Benjamin, *supra* note 188.

<sup>221</sup> *Id.*

<sup>222</sup> *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.” von Zielbauer & Dad, *supra* note 210, at A9.

<sup>223</sup> Taguba Report, *supra* note 192, at 39.

<sup>224</sup> *Id.* at 39–40.

<sup>225</sup> *Id.* at 40–41.

<sup>226</sup> *Id.* at 41, 43.

unit discipline.<sup>227</sup> 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.”<sup>228</sup> 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.”<sup>229</sup> 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 (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.”<sup>230</sup>

What remains unclear, even after the Taguba investigation and the media investigations into Abu Ghraib, is 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

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<sup>227</sup> 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 192, 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, <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 192, 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.

<sup>228</sup> Taguba Report, *supra* note 192, at 40.

<sup>229</sup> Joseph L. Galloway, *U.S. General Defends His Adherence to Geneva Conventions in Iraq*, KNIGHT RIDDER NEWSPAPERS, May 5, 2006.

<sup>230</sup> *Id.*

*Salon*.<sup>231</sup> “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.”<sup>232</sup> 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.<sup>233</sup> “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.”<sup>234</sup>

## 2. *The Whistleblowers, the Media and the Public*

On 13 January 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 U.S. 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.<sup>235</sup> 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 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

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<sup>231</sup> Benjamin, *supra* note 188.

<sup>232</sup> *Id.*

<sup>233</sup> Hersh, *supra* note 192.

<sup>234</sup> *Id.* In 2008, when he was no longer with the military, Taguba authored a preface for a report by *Physicians for Human Rights* in which he was far more direct and explicit. “After years of disclosures by government investigations, media accounts, and reports from human rights organizations,” he wrote, “there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.” Dan Froomkin, *General Accuses WH of War Crimes*, WASH. POST, June 18, 2008, <http://www.washingtonpost.com/wp-dyn/content/blog/2008/06/18/BL2008061801546.html>.

<sup>235</sup> See, e.g., SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* 25 (2004); Bryan, *supra* note 187; Bowman, *supra* note 187; Rosin, *supra* note 187; Zernike, *supra* note 216.

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."<sup>236</sup> 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.<sup>237</sup> Within days, Lieutenant General Sanchez suspended Karpinski and sixteen others pending investigation.<sup>238</sup> On 31 January Lieutenant General David D. McKiernan, the Commander of Coalition Forces Land Component Command, appointed Taguba to conduct that investigation.<sup>239</sup>

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.<sup>240</sup> 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.<sup>241</sup>) 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,<sup>242</sup> 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.<sup>243</sup> 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

<sup>236</sup> HERSH, *supra* note 235, at 25.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> See, e.g., Taguba Report, *supra* note 192, at 6.

<sup>240</sup> But see James Ridgeway, *Congress Questions Rummy's Coverup*, VILLAGE VOICE, May 7, 2004, <http://www.villagevoice.com/2004-04-27/news/congress-questions-rummy-s-coverup/> ("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.'").

<sup>241</sup> Hersh, *supra* note 192.

<sup>242</sup> Dao & Lichtblau, *supra* note 188.

<sup>243</sup> *Id.*

conservative Fox News *O'Reilly Factor*, but “nobody wanted to touch the story.”<sup>244</sup> 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.<sup>245</sup> Even then, the military managed to delay publication of the story. While CBS was prepared to air the story on 14 April 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.<sup>246</sup> 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.”<sup>247</sup> According to a lawsuit Dan Rather later filed against CBS after essentially being fired, the network only gave approval to air the story on 28 April 2004, when it became clear that Hersh was close to publishing his article in *Newsweek*.<sup>248</sup> 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*.”<sup>249</sup>

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 6 May 2004, *the night before Rumsfeld was scheduled to testify to Congress* about Abu Ghraib, Rumsfeld claimed neither to have received a copy of

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<sup>244</sup> 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, illiberalism and irrationalism in all their ancient and modern forms.” About *Spiked*, available at <http://www.spiked-online.com/index.php?/about/article/336/> (last visited Feb. 10, 2010). Brendan O’Neill, the magazine’s editor, claimed to have spoken to Hackworth directly.

<sup>245</sup> Dao & Lichtblau, *supra* note 188; see also Editorial, *Hackworth Exposed Abuse Scandal*, WORLDNETDAILY, May 8, 2008, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=38407](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=38407). *WorldNetDaily* describes itself as an “independent conservative news website.” It is possible, but unconfirmed, that CBS received the photographs from Frederick and his family.

<sup>246</sup> DAVID DADGE, *THE WAR IN IRAQ AND WHY THE MEDIA FAILED US* 86 (2006).

<sup>247</sup> Sidney Blumenthal, *Dan Rather Stands By His Story*, SALON.COM, Sept. 27, 2007.

<sup>248</sup> Complaint, *Dan Rather v. CBS Corp.*, No. 603121/07, at 12 (N.Y. Sup. Ct. Sept. 19, 2007).

<sup>249</sup> *Id.*



Taguba's three-month-old report nor to have seen any of the photographs from the investigation.<sup>250</sup> 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.<sup>251</sup> Apparently, not one of the officials or officers had read Taguba's report or seen any evidence.<sup>252</sup> "At best," Taguba told Hersh, "Rumsfeld was in denial."<sup>253</sup> 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!"<sup>254</sup> During the meeting, Rumsfeld also seemed particularly concerned about how Taguba's report had become public.<sup>255</sup> 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.<sup>256</sup>

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 7 May 2004, 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.<sup>257</sup> 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.<sup>258</sup>

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<sup>250</sup> Hersh, *supra* note 192.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *See, e.g.,* Ridgeway, *supra* note 240 ("But under questioning . . . Rummy began to crumble, unable to describe for the senators such basic things as the chain of command and what instructions the guards had been given.").

<sup>257</sup> *Id.* According to Justine Sharrock, "Seymour Hersh had already published his name, but as Darby says, 'Who reads the damn *New Yorker*?'"<sup>257</sup> Justine Sharrock, *Am I a Torturer?*, MOTHER JONES, Mar. 3, 2008.

<sup>258</sup> Sharrock, *supra* note 257; Bryan, *supra* note 187.

## 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 tell the people of the Middle East that the abuses “represent the actions of a few people.”<sup>259</sup> “It’s important for people to understand,” Bush added, “that in a democracy that [*sic*] there will be a full investigation.”<sup>260</sup> 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.<sup>261</sup> “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.”<sup>262</sup> 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.<sup>263</sup> “The way you do that,” explained McCain, “is by having hearings, find out who is responsible, get it done and get it behind us.”<sup>264</sup> 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.

A number of senators, including most importantly Warner, but also other Republicans, such as McCain, Susan Collins of Maine, and Lindsey Graham of South Carolina,<sup>265</sup> and Democrats, such as Edward

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<sup>259</sup> Christine Hauser, *Many Iraqis Are Skeptical of Bush TV Appeal*, N.Y. TIMES, May 6, 2004, at A16.

<sup>260</sup> *Id.*; Derrick Z. Jackson, *The Buck Stops with Lynndie: But What About Those At the Top?*, CHI. TRIB., Oct. 3, 2005.

<sup>261</sup> *See, e.g.*, Editorial, *supra* note 193 (“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).

<sup>262</sup> Carl Hulse & Christopher Marquis, *G.O.P. Split Over Inquiry on Prisoner Abuse*, N.Y. TIMES, May 19, 2004, <http://www.nytimes.com/2004/05/19/world/the-struggle-for-iraq-congress-gop-split-over-inquiry-on-prisoner-abuse.html>.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *See, e.g.*, Editorial, *General: More Prison Abuse Charges Possible*, MSNBC NEWS SERVS., May 19, 2004 [hereinafter Editorial, *Charges Possible*]; *Senators to Question Top Generals on Abuse*, BALT. SUN, May 19, 2004, <http://www.baltimoresun.com/news/bal-te.congress19may19,1,4594408.story> [hereinafter *Senators to Question Top Generals*].

Kennedy of Massachusetts and Carl M. Levin of Michigan, initially supported holding hearings in the Senate. Ultimately, however, Warner apparently buckled to party pressure, effectively suspended hearings for the election season, and ended the hearings after only four sessions.<sup>266</sup> In the House, meanwhile, California Republican Duncan Hunter, the Chairman of the House Armed Services Committee, accused Warner and other Senate members of becoming “mesmerized by cameras,”<sup>267</sup> and essentially blocked hearings, allowing a total of only fourteen hours of sworn testimony about Abu Ghraib over the course of two years.<sup>268</sup> 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.<sup>269</sup> 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 public display of the Abu Ghraib photographs on *60 Minutes II* and the publication of those photographs in

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<sup>266</sup> Editorial, *Abu Ghraib Whitewash*, *supra* note 14 (“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, <http://www.nytimes.com/2004/09/10/opinion/10fri1.html> [hereinafter *Accountability Editorial*] (“[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.”).

<sup>267</sup> Dewar & Hsu, *supra* note 13, at A01; *see also* Hulse & Marquis, *supra* note 262.

<sup>268</sup> Milligan, *supra* note 17. 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.*

<sup>269</sup> *See, 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.”); Waxman, *supra* note 17, 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.’”).

*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 four years after beginning its investigation—released a report (approved in November by unanimous voice vote of the seventeen members of the twenty-five-member committee present for the vote) concluding that Rumsfeld and other senior U.S. officials shared much of the blame for the detainee abuse.<sup>270</sup>

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 4 May 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.<sup>271</sup> “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.”<sup>272</sup> 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

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<sup>270</sup> David Morgan, *U.S. Senate Report Ties Rumsfeld to Abu Ghraib Abuse*, REUTERS, Dec. 11, 2008. The report, which was largely declassified in April of 2009, can be found at [http://armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf).

<sup>271</sup> Senator Robert C. Byrd (D-W. Va.), CONG. REC., May 4, 2004, at S4824.

<sup>272</sup> *Id.*

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 7th. “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.”<sup>273</sup> The Armed Services Committee, he explained, has a “solemn responsibility” to discover what went wrong and “to make sure it never, never happens again.”<sup>274</sup> 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.”<sup>275</sup> 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.<sup>276</sup> He shows “a penchant for bucking his party, taking heat and surviving,” concluded the *Washington Post*.<sup>277</sup>

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.<sup>278</sup> Warner made his anger clear by requiring Rumsfeld to testify under oath—a requirement usually waived as a courtesy for the Secretary of Defense.<sup>279</sup> 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.<sup>280</sup> “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

<sup>273</sup> Jacoby, *supra* note 13; Transcript, *Rumsfeld Testifies Before Senate Armed Services Committee*, WASH. POST, May 7, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A8575-2004May7?language=printer>.

<sup>274</sup> Dewar & Hsu, *supra* note 13, at A01.

<sup>275</sup> Jacoby, *supra* note 13.

<sup>276</sup> *Id.*

<sup>277</sup> Dewar & Hsu, *supra* note 13, at A01.

<sup>278</sup> Jacoby, *supra* note 13.

<sup>279</sup> *Id.*

<sup>280</sup> Carl Hulse, *Senate Panel Will Summon 3 Generals for Hearing*, N.Y. TIMES, May 18, 2004, <http://www.nytimes.com/2004/05/18/national/18SPEN.html?pagewanted=1>.

avenues that need to be explored.”<sup>281</sup> As of May 21st, Warner had “a lengthy list of Pentagon officials he would like to call” to testify before the committee.<sup>282</sup> “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 17th.<sup>283</sup> “When this situation broke,” Warner explained, “I felt it was the responsibility of the Congress, a co-equal branch of government, to start hearings.”<sup>284</sup> 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,<sup>285</sup> and as the witnesses claimed to know little about key documents and events, the senators asking questions were unable to follow-up.<sup>286</sup> Still, Warner was certainly not the only senator—or even the most forceful 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.<sup>287</sup>

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

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<sup>281</sup> *Id.*

<sup>282</sup> George Edmonson, *Rumsfeld: Scandal a Drain*, ATLANTA J.–CONST., May 21, 2004, at A7.

<sup>283</sup> Richard Simon & Elizabeth Shogren, *Senators to Press Scandal*, L.A. TIMES, May 17, 2004.

<sup>284</sup> Hulse & Marquis, *supra* note 262.

<sup>285</sup> See, e.g., John Tierney, *Hot Seat Grows Lukewarm Under Capital’s Fog of War*, N.Y. TIMES, May 20, 2004, at A14 (“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.”).

<sup>286</sup> 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.”).

<sup>287</sup> Dewar & Hsu, *supra* note 13, at A01; see also Richard Simon, *S.C. Republican Digging for Iraq Abuse Answers: Sen. Lindsey Graham Rankles Party Elders with His Pursuit of Truth in the Scandal that Many Others Wish Would Fade Away*, L.A. TIMES, June 29, 2004, at A20.

the White House and Democrats.”<sup>288</sup> 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.<sup>289</sup> “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 19th.<sup>290</sup> These hearings, Cornyn explained, represent “a real distraction from trying to win the war, especially at this most fragile time.”<sup>291</sup> “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.<sup>292</sup> “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.”<sup>293</sup>

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 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.’”<sup>294</sup> Warner’s spokesman acknowledged that Warner had been pressured, but said that Warner had resisted that pressure.<sup>295</sup> 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.”<sup>296</sup> Numerous factors, including “the calendar, the preferences of some of Mr. Warner’s Republican colleagues and the pace

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<sup>288</sup> Sheryl Gay Stolberg, *Warner, Courtly Republican, Guides Panel in Rough Seas*, N.Y. TIMES, May 12, 2004, at A14.

<sup>289</sup> See *infra* Part III.B.2.

<sup>290</sup> Hulse & Marquis, *supra* note 262.

<sup>291</sup> Dewar & Hsu, *supra* note 13, at A01.

<sup>292</sup> Stolberg, *supra* note 288.

<sup>293</sup> *Id.*

<sup>294</sup> Hersh, *supra* note 192.

<sup>295</sup> *Id.*

<sup>296</sup> Eric Schmitt, *Congress’s Inquiry Into Abuse of Iraqi Prisoners Bogs Down*, N.Y. TIMES, July 16, 2004, <http://www.nytimes.com/2004/07/16/politics/16abus.html>.

of the military investigations, many of which are behind schedule,” contributed to prevent Warner from holding new hearings.<sup>297</sup>

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.<sup>298</sup> 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.<sup>299</sup> 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: 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.”<sup>300</sup> “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.”<sup>301</sup>

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 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.<sup>302</sup> “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.”<sup>303</sup> Some observers, however, such as the *Washington Post*’s Jackson Diehl, were nonetheless

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> Editorial, *Unanswered Questions*, WASH. POST, July 11, 2004, at B06; see also Editorial, *Abu Ghraib Whitewash*, *supra* note 14 (“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.”).

<sup>301</sup> Editorial, *Abu Ghraib Whitewash*, *supra* note 14.

<sup>302</sup> Accountability Editorial, *supra* note 266.

<sup>303</sup> *Id.*



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.”<sup>304</sup> Still, despite the day of hearings in September—and despite at least one suggestion in 2006 that senators were still interested in investigating<sup>305</sup>—it seemed clear that the Senate hearings had amounted to little; witnesses had testified while saying almost nothing, and there seemed no clear path toward 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 [sic] held during the spring of 2004.”<sup>306</sup>

While Warner and his fellow interested members of the Armed Services Committee appear to fit the mold of the False Start Senators<sup>307</sup>—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 the investigation into Abu Ghraib continued, though almost entirely outside the public eye. On 11 December 2008, over four-and-a-half years after beginning their investigation, the Armed Services Committee released a report harshly critical of Rumsfeld and other senior military officers.<sup>308</sup> “The abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own,” the report’s Executive Summary states.<sup>309</sup> “The fact is that senior officials in the

<sup>304</sup> Jackson Diehl, *Refusing to Whitewash Abu Ghraib*, WASH. POST, Sept. 13, 2004, at A21.

<sup>305</sup> 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.”).

<sup>306</sup> *Id.*

<sup>307</sup> See *infra* Part IV.4.

<sup>308</sup> Morgan, *supra* note 270; see also [http://armed-services.senate.gov/Publications/Detainee\\_Report\\_Final\\_April\\_22\\_2009.pdf](http://armed-services.senate.gov/Publications/Detainee_Report_Final_April_22_2009.pdf).

<sup>309</sup> SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY Executive Summary, at xii (2008) [hereinafter Executive Summary], available at [http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS\\_For%20Release\\_12%20December%202008.pdf](http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS_For%20Release_12%20December%202008.pdf). The Senate Armed

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.”<sup>310</sup> 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.<sup>311</sup>

## 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. These critics 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 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 outrage everybody seems to have about the treatment

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Services Committee initially released only the executive summary in December of 2008; the great majority of the report remained classified until April of 2009. Morgan, *supra* note 270.

<sup>310</sup> Morgan, *supra* note 270.

<sup>311</sup> James Rowley, *Coercive Interrogation Was Common in Iraq, Senate Report Says*, BLOOMBERG, Apr. 21, 2009.

of these prisoners.”<sup>312</sup> “I’m probably not the only one up at this table that is more outraged by the outrage, than we are by, the treatment.”<sup>313</sup> “[T]hese prisoners—they’re murderers, they’re terrorists, they’re insurgents,” Inhofe announced.<sup>314</sup> “Many of them probably have American blood on their hands. And here we’re so concerned about the treatment of those individuals.”<sup>315</sup> 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.”<sup>316</sup> The Cable News Network (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.<sup>317</sup> “Asked outside the meeting room whether he agreed with Inhofe, McCain replied, ‘No way.’”<sup>318</sup>

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 19th 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.”<sup>319</sup> “I think he [Warner] should stop the hearings at this point; we’ve heard enough,” Inhofe added near the end of May.<sup>320</sup> “We have a war to win, and we need to keep our talents

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<sup>312</sup> Walter Shapiro, Op-Ed, *Senator “Outraged” by Reaction to Prisoner Abuse*, USA TODAY, May 11, 2004, [http://www.usatoday.com/news/opinion/columnist/shapiro/2004-05-11-hype\\_x.htm](http://www.usatoday.com/news/opinion/columnist/shapiro/2004-05-11-hype_x.htm).

<sup>313</sup> *Id.*

<sup>314</sup> Editorial, *GOP Senator Labels Abused Prisoners “Terrorists,”* CNN.COM, May 12, 2004, <http://www.cnn.com/2004/ALLPOLITICS/05/11/inhofe.abuse/index.html>

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Prison Abuse Scandal Divides US President’s Party*, AGENCE FRANCE PRESSE, May 20, 2004 [hereinafter *Prison Abuse Scandal*].

<sup>320</sup> Dewar & Hsu, *supra* note 13, at A01.

concentrated on winning the war as opposed to prisoner treatment.”<sup>321</sup> 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 John Cornyn, a member of the Armed Services Committee, “which can be a distraction from fighting and winning the war.”<sup>322</sup>

Unlike Inhofe, who seemed to think that the detainees at Abu Ghraib had deserved the abuse and torture they suffered,<sup>323</sup> 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, “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.”<sup>324</sup> The Senate Committee is “basically driving the story” of prisoner abuse, Hunter concluded.<sup>325</sup> “We are at this point diserving our military operation in theater,” he added.<sup>326</sup> “It is time to refocus on winning the war and not pull our battlefield leadership out of the theater.”<sup>327</sup> 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.<sup>328</sup> “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.”<sup>329</sup> Just as Inhofe was

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<sup>321</sup> *Id.*

<sup>322</sup> Hulse & Marquis, *supra* note 262.

<sup>323</sup> Shapiro, *supra* note 312 (“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.’”).

<sup>324</sup> *Senators to Question Top Generals*, *supra* note 265; Dewar & Hsu, *supra* note 13, at A01.

<sup>325</sup> *Senators to Question Top Generals*, *supra* note 265.

<sup>326</sup> *Prison Abuse Scandal*, *supra* note 319; Editorial, *Charges Possible*, *supra* note 265.

<sup>327</sup> Hulse & Marquis, *supra* note 262.

<sup>328</sup> Editorial, *Senators to View Abuse Images Wednesday*, CNN.COM, May 12, 2004, <http://www.cnn.com/2004/ALLPOLITICS/05/11/congress.abuse.photos/index.html>.

<sup>329</sup> *Id.*

not alone in the Senate in protesting that the investigations were harming American military interests, Hunter was not alone in the House. “We should not allow [an investigation] to distract us from the war at hand,” Texas Republican Tom DeLay agreed.<sup>330</sup>

### 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 U.S. forces, and was intended to harm Republican politicians.<sup>331</sup> “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.”<sup>332</sup> Apart from refusing to hold more than one public hearing,<sup>333</sup> 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 6000-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

<sup>330</sup> Hulse & Marquis, *supra* note 262.

<sup>331</sup> See *supra* Part III.B.2; Hulse & Marquis, *supra* note 262.

<sup>332</sup> Carl Hulse, *Even Some in G.O.P. Call for More Oversight of Bush*, N.Y. TIMES, May 21, 2004.

<sup>333</sup> 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.”).

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 than we can digest. So I don’t think we should start doing business by resolutions of inquiry.”<sup>334</sup> 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.<sup>335</sup>

Hunter was not the only House Republican seeking to stymie or avoid significant congressional oversight of the Abu Ghraib allegations. During the week of 11 May 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.”<sup>336</sup> Not surprisingly, given Waxman’s penchant for impassioned letter-writing,<sup>337</sup> 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.<sup>338</sup> The chairmen who received the letters, however, simply refused to engage in additional oversight, with Davis’s spokesman dismissing Waxman’s letter as “partisan mudslinging.”<sup>339</sup> “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.”<sup>340</sup>

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<sup>334</sup> *US Congressional Democrats Blocked in Effort to Widen Prison Torture Probe*, VOANEWS.COM, June 15, 2004; see also Milligan, *supra* note 17.

<sup>335</sup> *E.g.*, Milligan, *supra* note 17.

<sup>336</sup> Michael S. Gerber, *House Dems Demand More Iraq Hearings*, THE HILL, May 12, 2004.

<sup>337</sup> See *infra* Part III.B.4.

<sup>338</sup> Letter from Rep. Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, et al., to Rep. Tom Davis, Chairman, House Comm. on Gov’t Reform (May 11, 2004).

<sup>339</sup> Gerber, *supra* note 336.

<sup>340</sup> *Id.*

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 Jersey sent a letter directly to Speaker J. Dennis Hastert of Illinois.<sup>341</sup> 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.”<sup>342</sup> 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.”<sup>343</sup>

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’s 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.<sup>344</sup> “The last thing our nation needs now is for others to enflame this hatred by providing fodder and sound bites for our enemies.”<sup>345</sup> 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.<sup>346</sup>

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<sup>341</sup> Hulse, *supra* note 332.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> Waxman, *supra* note 17, at A19.

<sup>345</sup> Gerber, *supra* note 336; Editorial, *House GOP Defer to Bush on Iraq Abuses*, THE HILL, May 6, 2004; Waxman, *supra* note 17, at A19.

<sup>346</sup> Milligan, *supra* note 17 (“Since the minority party does not have subpoena power, the law is one of the few tools Democrats have to influence investigations.”).

#### 4. *Gadflies: The Waxman Letters and the Democratic Minority*

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 majority, gain additional media exposure, and even engage in effective oversight by pushing for additional hearings, holding unofficial hearings,<sup>347</sup> 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 and who 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.<sup>348</sup> In seeking to 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 4 May 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.<sup>349</sup> 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

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<sup>347</sup> 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 . . .”).

<sup>348</sup> See, e.g., Letter from Rep. 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 Rep. 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.”).

<sup>349</sup> Letter from Rep. 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). 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.



forces had done to detainees at Abu Ghraib.<sup>350</sup> “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.”<sup>351</sup>

Two months later, in an editorial in the *Washington Post*, Waxman publicly decried the manner in which Congress during the Bush Administration had “abdicated oversight responsibility altogether,” concluding that oversight during the Clinton and Bush years had “been driven by raw partisanship.”<sup>352</sup> “The House is even refusing to investigate the horrific Iraq prison abuses,” Waxman added, clearly hoping to anger and activate the *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.”<sup>353</sup>

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 11 May 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.<sup>354</sup> The following week, the three senior Democrats in the House sent a similar, though more general, letter to Dennis Hastert.<sup>355</sup> On 4 June 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.<sup>356</sup> “We are writing to inform you of our determination to investigate the prison abuses at Abu

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<sup>350</sup> *Id.* at 1–2.

<sup>351</sup> *Id.* at 3.

<sup>352</sup> Waxman, *supra* note 17, at A19.

<sup>353</sup> *Id.*

<sup>354</sup> Gerber, *supra* note 336; *see also supra* notes 336–40 and accompanying text.

<sup>355</sup> Hulse, *supra* note 316; *see also supra* notes 341–43 and accompanying text.

<sup>356</sup> Letter from Rep. Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, et al., to George W. Bush, President of the United States (June 3, 2004).

Ghraib,” the Democrats wrote<sup>357</sup> “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.”<sup>358</sup>

The eight ranking Democratic committee members who signed the letter<sup>359</sup> surely knew that their letter requesting 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. Such observers concluded that the actions of the Abu Ghraib jailors had not been all that bad in relative terms.<sup>360</sup> On his 4 May 2004 show, the conservative radio host Rush Limbaugh went

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<sup>357</sup> *Id.* at 1.

<sup>358</sup> *Id.*

<sup>359</sup> Those signing the letter were Representative 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. *Id.* at 5–6.

<sup>360</sup> See, e.g., Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES, May 23, 2004, <http://www.nytimes.com/2004/05/23/magazine/23PRISONS.html>.

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.<sup>361</sup> “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?”<sup>362</sup>

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 sixty percent of respondents in an ABC/*Washington Post* poll classifying what happened at Abu Ghraib as “abuse,” and only twenty-nine percent classifying what happened as “torture.”<sup>363</sup> “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.”<sup>364</sup>

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

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<sup>361</sup> LEIGH A. PAYNE, UNSETTLING ACCOUNTS: NEITHER TRUTH NOR RECONCILIATION IN CONFESSIONS OF STATE VIOLENCE 285 (2008) (quoting Rush Limbaugh, “*It’s Not About Us; This is War*” (Radio broadcast May 4, 2004).

<sup>362</sup> *Id.*

<sup>363</sup> Sharrock, *supra* note 257; ABC NEWS/WASHINGTON POST POLL: TORTURE—5/23/04, available at <http://abcnews.go.com/images/pdf/955a3Torture.pdf> (last visited July 1, 2010). The poll also revealed that:

Majorities identify three specific coercive practices as acceptable: sleep deprivation (66 percent call it acceptable), hooding (57 percent) and so-called “noise 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.*

<sup>364</sup> Rosin, *supra* note 187.

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.”<sup>365</sup> Nonetheless, at least some observers (including Major General Taguba, who became something of a pariah in the military after completing his report<sup>366</sup>) were convinced that the enlisted MPs of the 372nd MP Company had been punished while their superiors, equally responsible, had inappropriately escaped repercussions entirely.<sup>367</sup> 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.<sup>368</sup> “The president and the vice president, God forbid, were letting go with an umbrella of policy that said you could do what you want and that the gloves were off,” Wilkerson noted.<sup>369</sup>

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 of confinement; Frederick, who received a sentence of eight years confinement; and Lynndie England, who received a sentence of three years of confinement) served sentences of longer than ten months.<sup>370</sup> As of the end of 2008, only Graner remained in prison—

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<sup>365</sup> Hersh, *supra* note 192.

<sup>366</sup> *Id.*

<sup>367</sup> Jackson, *supra* note 260. 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.

<sup>368</sup> Jay Hamburg, *Torture Erodes U.S. Values, Military Leaders Say*, ORLANDO SENTINEL, Oct. 16, 2008, [http://articles.orlandosentinel.com/2008-10-16/news/torturetalk16\\_1torture-wilkerson-soyster](http://articles.orlandosentinel.com/2008-10-16/news/torturetalk16_1torture-wilkerson-soyster).

<sup>369</sup> *Id.*

<sup>370</sup> See, e.g., TA Badger, *Pfc. England Sentenced to 3 Years*, ASSOCIATED PRESS, Sept. 28, 2005; Josh White, *Army Dog Handler Gets Six Months in Prison; Penalty One of Lightest for Detainee Abuse*, 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. Jackson, *supra* note 260.

where he was repeatedly complaining about being forced to stay in a cell where the lights were kept on twenty-four hours a day.<sup>371</sup> 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.<sup>372</sup> Major General Taguba, only the second Filipino ever to achieve the rank of general in the U.S. 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.”<sup>373</sup> 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.<sup>374</sup> “They always shoot the messenger,” Taguba explained to Seymour Hersh.<sup>375</sup> “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.”<sup>376</sup>

#### IV. 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,”<sup>377</sup> 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:

<sup>371</sup> Benjamin, *supra* note 188.

<sup>372</sup> Editorial, *Shoplifting Charge Dogs Iraq Gen*, CBS, June 2, 2004; Editorial, *Ex-Abu Ghraib General Denies Shoplifting*, 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. JANIS KARPINSKI, *ONE WOMAN’S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY* (2005).

<sup>373</sup> Hersh, *supra* note 192.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> THUCYDIDES, *THE PELOPONNESIAN WAR* 1.22, 16 (Robert B. Strassler ed., Richard Crawley trans. 1996) (1874).

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 IV.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 IV.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 U.S. 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,<sup>378</sup> 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.

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<sup>378</sup> Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

### 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.”<sup>379</sup> 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.<sup>380</sup>

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.”<sup>381</sup> 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

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<sup>379</sup> *Id.* at 165.

<sup>380</sup> *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.”).

<sup>381</sup> *Id.* at 166.

model. “Justly or unjustly,” McCubbins and Schwarz note, “time spent putting out visible fires gains one more credit than the same time spent sniffing for smoke.”<sup>382</sup> 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,<sup>383</sup> 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.’”<sup>384</sup> 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.<sup>385</sup>

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<sup>382</sup> *Id.* at 168.

<sup>383</sup> Lydon, *supra* note 60, at 14; Osnos, *supra* note 64, at A10.

<sup>384</sup> Ron Ridenhour, “*Jesus Was a Gook*,” in *NOBODY GETS OFF THE BUS: THE VIET NAM GENERATION BIG BOOK* 138–40 (Kali Tal & Dan Duffy eds., 1994).

<sup>385</sup> See, e.g., Bryan, *supra* note 187; Bowman, *supra* note 187; Rosin, *supra* note 187. 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 both members of Charlie Company and others (including Calley, Paul Meadlow, Michael Bernhardt, Michael Terry, and photographer Ronald L. Haeberle) were willing to give additional details into the massacre. Braestrup & Klaidman, *supra* note 80, at A1; Editorial, *supra* note 75. 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. Dao & Lichtblau, *supra* note 188.



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,<sup>386</sup> however, one night while on patrol he spoke about My Lai to his long-time friend and military teammate Michael Terry, who on 16 March 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.<sup>387</sup> “Mike, Mike,” Ridenhour asked. “Didn’t you know that was wrong?”<sup>388</sup> Terry answered that he didn’t know, and that it was “just one of those things.”<sup>389</sup> After that conversation, however, Terry walled Ridenhour off—a potential problem in their six-man Long-Range Reconnaissance and Patrol unit.<sup>390</sup>

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,”<sup>391</sup> and was in some ways criticized by congressmen speaking to the media. Ridenhour, Thompson, and Haerberle 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.”<sup>392</sup> 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 whistleblowing 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

<sup>386</sup> See, e.g., Ron Ridenhour, Comments at the Conference on My Lai held at Tulane University (Dec. 1994).

<sup>387</sup> Ridenhour, *supra* note 384, at 138–40.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *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.”).

<sup>391</sup> PEERS, *supra* note 41, at 242.

<sup>392</sup> HÉBERT REPORT, *supra* note 2, at 7–8.

was anonymous. “I was afraid for retribution not only from them, but from other soldiers,” he later told the British Broadcasting Corporation (BBC).<sup>393</sup> After Rumsfeld, testifying before Congress on 7 May 2004, publicly identified Darby as the source of the information, Darby immediately “felt 400 pairs of eyes on him.”<sup>394</sup> Darby and those who protected him and his wife for the next six months<sup>395</sup> were not being paranoid: At least some of the residents of Darby’s hometown were highly critical of Darby’s decision to step forward,<sup>396</sup> and many in his hometown “called him a traitor.”<sup>397</sup> “I call him a rat,” announced Mike Simico, who was visiting relatives in Cresaptown.<sup>398</sup> “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.<sup>399</sup> Jones explained that she believed that if Darby had not stepped forward then al-Zarqawi would not have killed Nick Berg.<sup>400</sup> “[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-school home.<sup>401</sup> 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.”<sup>402</sup>

### 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.<sup>403</sup> In 1969, it was Seymour Hersh who went door-to-door at Fort Benning looking for William Calley,<sup>404</sup> and in 2004 it was the imminent publication of

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<sup>393</sup> Bryan, *supra* note 187.

<sup>394</sup> Sharrock, *supra* note 257.

<sup>395</sup> See Bryan, *supra* note 187.

<sup>396</sup> Rosin, *supra* note 187.

<sup>397</sup> Bryan, *supra* note 187.

<sup>398</sup> Rosin, *supra* note 187.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*; Editorial, ‘Zarqawi’ Beheaded US Man in Iraq, BBC, May 13, 2004, <http://news.bbc.co.uk/2/hi/3712421.stm>.

<sup>401</sup> Rosin, *supra* note 187.

<sup>402</sup> See Sharrock, *supra* note 257.

<sup>403</sup> See, e.g., HERSH, *supra* note 235, at xii (“With his stories on My Lai, Hersh joined a tradition of muckrakers . . .”); Hersh, *supra* note 37.

<sup>404</sup> HERSH, *supra* note 235, at x.

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<sup>405</sup>—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.<sup>406</sup> 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 story to *Ramparts* magazine despite his misgivings about the magazine's reputation.<sup>407</sup>

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.<sup>408</sup> Crusading investigative journalists Bob Woodward and Carl Bernstein had proven that there were scandals

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<sup>405</sup> HERSH, *supra* note 37, at 137–38; Editorial, *The My Lai Massacre*, *supra* note 75.

<sup>406</sup> BELKNAP, *supra* note 36, at 73–79; Eckhardt, *supra* note 40, at 700–03; Montgomery, *supra* note 58.

<sup>407</sup> Lydon, *supra* note 60, at 14.

<sup>408</sup> 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.”).

to be found even at the very highest levels of the U.S. Government.<sup>409</sup> 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 and that, as a result, he was forced to publish with the untried, untested Dispatch News Service.<sup>410</sup> 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.<sup>411</sup> 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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<sup>409</sup> See, e.g., CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974). Of course, not all muckraking stories about government or military cover-ups amount to anything. In January of 2010, attorney and *Harper's* contributor Scott Horton, recounted an involved story regarding what he believes were several murders of prisoners carried out at Guantánamo Bay in 2006. Scott Horton, *The Guantánamo "Suicides": A Camp Delta Sergeant Blows the Whistle*, HARPER'S, Jan. 18, 2010, <http://harpers.org/archive/2010/01/hbc-90006368>. As *Slate's* editor-at-large Jack Shafer wrote in noting that journalists had generally refused to follow up on the story, however, “Horton should be grateful for the relative silence greeting his 8,000-word article. While rich in detail, the piece never comes close to making its case . . . nor does it present persuasive evidence to show that multiple branches of the military, the FBI, the Justice Department, and two White Houses have deliberately concealed the true nature of the deaths.” Jack Shafer, *Suicide or Murder at Guantánamo? The Shortcomings of a Harper's Magazine "Exposé,"* SLATE, Jan. 28, 2010.

<sup>410</sup> HERSH, *supra* note 235, at ix; see also REPORTING VIETNAM, PART TWO: AMERICAN JOURNALISM 1969-1975, at 13-27 (Milton J. Bates et al. eds., 1998); HERSH, *supra* note 37, at 135.

<sup>411</sup> See, e.g., Editorial, *What Is A Journalist?*, CHRISTIAN SCI. MONITOR, Mar. 18, 2005, [www.csmonitor.com/2005/0318/p08s02-comv.html](http://www.csmonitor.com/2005/0318/p08s02-comv.html) (“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,<sup>412</sup> writing letters of support to the accused or their victims,<sup>413</sup> and even threatening the whistleblowers and muckrakers who broke the stories in the first place.<sup>414</sup> While members of Congress do not always respond to public opinion in crafting legislative agendas,<sup>415</sup> members of Congress often seek to respond to public concern and interest so as to maintain electability.<sup>416</sup> Once the public was activated after My Lai and Abu Ghraib, senators and representatives found it hard

<sup>412</sup> One poll, for example, released in July 2004, suggested that Americans roundly rejected torture under circumstances akin to those at Abu Ghraib. U.S. Public Rejects Nearly All Forms of Torture or Coercion Even in Face of Possible Terrorist Attack, *Program on International Policy Attitudes/Knowledge Networks*, July 22, 2004, available at [http://www.worldpublicopinion.org/pipa/articles/bjjusticehuman\\_rightsra/111.php](http://www.worldpublicopinion.org/pipa/articles/bjjusticehuman_rightsra/111.php) (last visited July 16, 2010).

<sup>413</sup> See *supra* notes 180–84 and accompanying text (describing the enormous public support for Lieutenant William Calley in the wake of the court martial guilty verdict).

<sup>414</sup> See, e.g., *supra* notes 393–402 and accompanying text (describing threats made against Joseph Darby for blowing the whistle on Abu Ghraib); HERSH, *supra* note 235, 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.").

<sup>415</sup> 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.").

<sup>416</sup> 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.").

to avoid engaging in war crimes oversight without being criticized by the media and attacked by at least part of the public.<sup>417</sup> To return to the fire-alarm model of congressional oversight: the public concern over My Lai and Abu Ghraib 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's 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 seventy-four surrendered Italian soldiers and two surrendered German soldiers after the capture of Biscari airfield in Sicily;<sup>418</sup> during the Second World War in the Pacific, some American soldiers killed surrendering Japanese soldiers and collected body parts from Japanese dead;<sup>419</sup> and early in the Korean War, American soldiers

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<sup>417</sup> See, e.g., Truth Editorial, *supra* note 14, at A22; BELKNAP, *supra* note 36, at 136; HERSH, *supra* note 37, at 169; Editorial, *supra* note 107, at 13 ("Asked about the 'whitewash' rumors, Mr. Rivers responded, 'I ought to count 10 before I answer this.'").

<sup>418</sup> RICK ATKINSON, *THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943-1944*, at 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 thirty-six 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 forty 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).

<sup>419</sup> See, e.g. JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 35 (1986) ("By 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, <http://www.telegraph.co.uk/news/>

allegedly indiscriminately killed Korean civilians at No Gun Ri.<sup>420</sup> The atrocities at My Lai and Abu Ghraib occurred during wars or conflicts that were enormously contentious and unpopular to large segments of the U.S. population. Both World Wars were viewed as far more necessary and, even, “good” wars,<sup>421</sup> and the American public clearly did not view the Korean police action as “bad” in the way that it later viewed Vietnam as bad.<sup>422</sup> 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

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worldnews/asia/japan/1495651/American-troops-murdered-Japanese-PoWs.html; 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: Transgressive Objects of Remembrance*, 12 *J. ROYAL ANTHROPOLOGICAL INST.* 817 (2006).

<sup>420</sup> 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, [http://www.bbc.co.uk/history/worldwars/coldwar/korea\\_usa\\_01.shtml](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*, S.F. CHRON., Apr. 7, 2002, [http://articles.sfgate.com/2002-04-07/opinion/17542177\\_1\\_gun-ri-korean-war-incident-robert-bateman](http://articles.sfgate.com/2002-04-07/opinion/17542177_1_gun-ri-korean-war-incident-robert-bateman). 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, Mar. 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 change. See, e.g., Charles J. Hanley & Jae-Soon Chang, *Commission Seeks U.S. Compensation for War Crimes*, ASSOCIATED PRESS, Aug. 4, 2008.

<sup>421</sup> See, e.g., STUDES TERKEL, *“THE GOOD WAR”: AN ORAL HISTORY OF WORLD WAR II* (1985).

<sup>422</sup> 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.”).

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.

## 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 addressing struggles between marginalized members of the majority party and their party leaders during the Vietnam era to addressing 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 U.S. 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.<sup>423</sup> In 1969, both Republican Senator Charles Goodell and Democratic Majority Leader Mike Mansfield called for investigations.<sup>424</sup> In 2004, Democratic Senator Robert C. Byrd similarly called for full and open hearings into prisoner abuse—a sentiment that 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.<sup>425</sup> Despite the early enthusiasm expressed by senators for oversight hearings, however, some of those same senators quickly pulled back from their stated goals of holding “full,” presumably public, hearings.<sup>426</sup> This hesitancy did not, of course, necessarily reflect a desire by the Senate to condone war crimes. That said, given Congress’s role as the overseer of the Executive Branch, Senator John Stennis’s observation that “a private study by an impartial group of ‘outstanding men’ would be preferable to a Congressional hearing,”<sup>427</sup> while not unreasonable, 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, but by the end of September of 2004, appeared to have abandoned their oversight investigation.<sup>428</sup> 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 the report by the Senate Armed Services Committee about Administration failures after Abu Ghraib, have suggested that the Senate never truly abandoned the investigation

<sup>423</sup> See *supra* Parts II.B.1, III.B.1.

<sup>424</sup> Smith, *supra* note 68, at 1; Editorial, *supra* note 83, at 3.

<sup>425</sup> Senator Robert C. Byrd (D-W.Va.), CONG. REC., May 4, 2004, at S4824; Richard Simon & Elizabeth Shogren, *Senators to Press Scandal*, L.A. TIMES, May 17, 2004, <http://articles.latimes.com/2004/may/17/nation/na-congress17>.

<sup>426</sup> See *supra* Parts II.B.1, III.B.1.

<sup>427</sup> *Id.* Perhaps Stennis’s 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 41 at 19.

<sup>428</sup> *Supra* Part III.B.1.

into the Abu Ghraib abuses.<sup>429</sup> 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 thirty.<sup>430</sup> “By contrast 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

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<sup>429</sup> See *id.*; Morgan, *supra* note 270; Executive Summary, *supra* note 309.

<sup>430</sup> See, e.g., Adam Clymer, *Senate's Role as "Saucer" Defines Clinton Strategy*, N.Y. TIMES, Dec. 21, 1998, <http://www.nytimes.com/1998/12/21/us/impeachment-the-process-senate-s-role-as-saucer-defines-clinton-strategy.html> (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 LEGIS. 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).

longer-run view, and a well-deliberated decision.”<sup>431</sup> 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.<sup>432</sup> While the Senate floor saw moments of antagonism and strife during the 1990s,<sup>433</sup> 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.<sup>434</sup>

## 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, pro-Administration, and pro-military representatives seemingly intent on

<sup>431</sup> COLTON C. CAMPBELL & NICOL C. RAE, *THE CONTENTIOUS SENATE: PARTISANSHIP, IDEOLOGY, AND THE MYTH OF COOL JUDGMENT*, at xi (2000). *But see id.* (questioning whether this reputation is a myth).

<sup>432</sup> 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.”).

<sup>433</sup> See, e.g., Adam Clymer, *Claim of P.O.W. Cover-Up Rends Senate Decorum*, N.Y. TIMES, Sept. 8, 1993, <http://www.nytimes.com/1993/09/08/us/claim-of-pow-cover-up-rends-senate-decorum.html>; Helen Dewar, *Suspicious Simmer in the Senate; Partisan Bickering Expected as Democrats Push Liberal Agenda*, WASH. POST, July 22, 1990, at A16; see also ERIC M. USLANER, *THE DECLINE OF COMITY IN CONGRESS* (1993).

<sup>434</sup> See, e.g., David Von Drehle, *Protecting Propriety in the Club*, WASH. POST, Jan. 9, 1999, at A10; Spencer S. Hsu, *Senate’s Partisan Lines Don’t Foreclose Partnerships*, WASH. POST, Jan. 31, 1999, at A20; Joel Achenbach, *The Proud Compromisers*, WASH. POST, Jan. 9, 1999, at A11; see also Eric M. Uslaner, “Is the Senate More Civil Than the House?,” Conference on Civility and Deliberation in the Senate, sponsored by the Robert J. Dole Institute and the Pew Foundation (July 16, 1999).

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.<sup>435</sup> In 1969, for example, Congressman L. Mendel Rivers clearly sought to forestall effective hearings—such that even when he was convinced to call off his white-washing hearings before the full Subcommittee, he appointed Representative Hébert to lead up the conservative, hawkish subcommittee that ultimately focused just as much on ways in which the military could prevent *news* of events such as My Lai from breaking as on how to actually prevent American atrocities in combat.<sup>436</sup> 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).<sup>437</sup> 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,<sup>438</sup> Hunter limited the committee to one day of televised hearings, and successfully prevented committee members from requesting additional documents from the Bush Administration.<sup>439</sup> Following Hunter's lead, other Republican committee chairmen in the House also refused to hold additional hearings, with Speaker J. Dennis Hastert, the ultimate authority in the hierarchical House, ultimately suggesting that the Democrats were actually seeking a series of "show trials" against American military personnel.<sup>440</sup>

Just as the emergence of the archetype of the False Start Senators can be explained by the nature of the U.S. Senate, the emergence of the

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<sup>435</sup> *Supra* Parts II.B.2, III.B.3.

<sup>436</sup> *Supra* Part II.B.2; HÉBERT REPORT, *supra* note 2, at 7–8.

<sup>437</sup> *See, e.g.*, Eckhardt, *supra* note 40, at 684–85.

<sup>438</sup> *See, e.g.*, *Prison Abuse Scandal*, *supra* note 319; Editorial, *Charges Possible*, *supra* note 265.

<sup>439</sup> Editorial, *US Congressional Democrats Blocked in Effort to Widen Prison Torture Probe*, VOANEWS.COM, June 15, 2004; *see also* Milligan, *supra* note 17.

<sup>440</sup> *Id.*

archetype of the Obstructionist House Leaders can be explained by the nature of the U.S. 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.<sup>441</sup> 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.”<sup>442</sup> Both after My Lai and after Abu Ghraib those representatives wanting to expand the oversight investigations were stymied by powerful conservative committee chairmen<sup>443</sup> “loyal” to the U.S. 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’s death in 1970, Rivers carefully suppressed dissenters on his committee “by maintaining a bipartisan majority of older conservative members.”<sup>444</sup> The disciplined and hierarchical nature of the House—which would never, for example, allow the undisciplined<sup>445</sup> 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

<sup>441</sup> GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 15 *passim* (1993).

<sup>442</sup> CAMPBELL & RAE, *supra* note 431, at xi. *But see id.* (questioning whether this reputation is a myth). This is opposed to a personal atmosphere, which can be notably rancorous and undisciplined.

<sup>443</sup> *See infra* note 461.

<sup>444</sup> Sheehan, *supra* note 99, at 11.

<sup>445</sup> *See, e.g.*, FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 4 (1965) (describing how, in 1935, Democratic Senator Huey P. Long of Louisiana verbally entered 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).

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.<sup>446</sup> 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, Senator Ernest Hollings and Representatives John R. Rarick and L. Mendel Rivers (along with 140 other conservative congressmen) made clear through statements and resolutions that they believed that, at worst, American Soldiers had been guilty of “a mistake of judgment”<sup>447</sup>—or that, as Representative Allen Ellender said, those slain at My Lai “got just what they deserved.”<sup>448</sup>

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 U.S. 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.

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<sup>446</sup> 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).

<sup>447</sup> Kenworthy, *supra* note 90, at 1.

<sup>448</sup> HERSH, *supra* note 37, at 155.

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.<sup>449</sup>

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 U.S. political culture, which, until recently, had historically favored the election of veterans,<sup>450</sup> 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.<sup>451</sup> “This veterans’ surplus ended in the mid-1990s in both the house and the Senate. Now, veterans are under-represented in both chambers.”<sup>452</sup> Seeking to understand what effects this change might have had, political scientists Christopher Guelphi 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.”<sup>453</sup>

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 of Congress, both in the House and in the Senate, were probably more likely than not to be military veterans. This fact cuts both

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<sup>449</sup> *Supra* Part IV.B.2.

<sup>450</sup> See, e.g., William Bianco & Jamie Markham, *Vanishing Veterans: The Decline in Military Service in the U.S. Congress*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 275–88 (Peter D. Feaver & Richard H. Kohn eds., 2001).

<sup>451</sup> *Id.* at 276.

<sup>452</sup> *Id.*

<sup>453</sup> Christopher Guelphi & Peter D. Feaver, *Speak Softly and Carry a Big Stick? Veterans in the Political Elite and the American Use of Force*, 94 *AM. POL. SCI. REV.* 779, 779 (2002).

ways: After Abu Ghraib, it was John Warner, a veteran of both the U.S. Navy and the U.S. Marine Corps, and of both World War II and the Korean War, who led the calls for real oversight.<sup>454</sup> 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.<sup>455</sup>

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,<sup>456</sup> 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.<sup>457</sup> 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

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<sup>454</sup> Dewar & Hsu, *supra* note 13, at A01. Warner was also joined by two other Republicans, John McCain and Lindsey Graham, with extensive military experience.

<sup>455</sup> Senators Hollings and Inhofe and Representatives Ellender, Rarick, and Hunter all served in the military; Senator Cornyn came from a military family.

<sup>456</sup> See, e.g., Ralph Blumenthal, *After Bitter Fight, Texas Senate Redraws Congressional Districts*, N.Y. TIMES, Oct. 13, 2003, <http://www.nytimes.com/2003/10/13/national/13/TEXA.html>.

<sup>457</sup> See, e.g., Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the US House of Representatives, 1952–82*, 31 AM. J. POL. SCI. 126 (1987)



Carolina<sup>458</sup>—states with strong conservative traditions and populations with significant military experience.

#### 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.<sup>459</sup> While

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<sup>458</sup> Senator Hollings represented South Carolina; Representatives Rivers, Ellender, and Rarick represented Louisiana; Senator Inhofe represents Oklahoma; and Senator Cornyn represents Texas. Representative Hunter represents a conservative district of California.

<sup>459</sup> Editorial, 4 in *House Plan Hearings*, *supra* note 15, at 10; 4 *Congressmen to Hold Inquiry on War Crimes*, WASH. POST, Apr. 7, 1971, at A8. Other representatives present for at least some of the Dellums Committee hearings included South Dakota Democrat (and later Senator) James Abourezk, New York Democrat Jonathan B. Bingham, New

Dellums, Abzug, Conyers, and Mitchell were all Democrats, all four extremely liberal, anti-war, and even radical legislators<sup>460</sup> found that in the late 1960s 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.<sup>461</sup> As former Louisiana Representative Billy Tauzin later

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York Democrat Shirley Chisholm, Don Edwards, Robert W Kastenmeier, Illinois Democrat Abner J. Mikva, and Ohio Democrat John F Seiberling.

<sup>460</sup> 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., Caldwell, *supra* note 159, at 46; Apple, *supra* note 162, at 32. Abzug, who was popularly known as “Battling Bella,” similarly gloried in the label of “radical.” “I am not a centrist,” she told the *New York Times* in 1986. “She brought with her a belligerent, exuberant politics that made her a national character.” Laura Mansnerus, *Bella Abzug, 77, Congresswoman And a Founding Feminist, Is Dead*, N.Y. TIMES, Apr. 1, 1998, <http://www.nytimes.com/1998/04/01/nyregion/bella-abzug-77-congresswoman-and-a-founding-feminist-is-dead.html>; see also SUZANNE LEVINE & MARY THOM, BELLA ABZUG: HOW ONE TOUGH BROAD FROM THE BRONX FOUGHT JIM CROW AND JOE MCCARTHY, PISSED OFF JIMMY CARTER, BATTLED FOR THE RIGHTS OF WOMEN AND WORKERS, RALLIED AGAINST WAR AND FOR THE PLANET, AND SHOOK UP POLITICS ALONG THE WAY (2007). Mitchell, like Dellums one of the leaders of the Congressional Black Caucus, was described by contemporaries as “one of God’s angry men.” See, e.g., Jacqueline Trescott, *One of God’s Angry Men*, WASH. POST, Sept. 23, 1977, at C1; Douglas Martin, *Parren Mitchell, 85, Congressman and Rights Leader, Dies*, N.Y. TIMES, May 30, 2007, <http://www.nytimes.com/2007/05/03/us/30mitchell.html>. Conyers, another founder of the Congressional Black Caucus, garnered the honor being listed 13th on Richard Nixon’s “enemies list.” JOHN C. CONYERS, JR. ET AL., THE CONSTITUTION IN CRISIS: THE HIGH CRIMES OF THE BUSH ADMINISTRATION AND A BLUEPRINT FOR IMPEACHMENT, at xiv (2007).

<sup>461</sup> 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

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.”<sup>462</sup> 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.’”<sup>463</sup> In part to gain attention, and presumably in part because they held their anti-war views sincerely,<sup>464</sup> Dellums, Abzug, Conyers, and Mitchell scheduled their war crimes hearings, which attracted significant attention and served both to further the anti-war movement and to advance the careers of those legislators involved with holding them.<sup>465</sup>

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.<sup>466</sup> 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. While they could not have hoped that their letters would have any real effect on their colleagues, 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

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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).

<sup>462</sup> Ben Evans, *Southern Clout in Congress Hits Low*, ASSOCIATED PRESS, Mar. 31, 2007.

<sup>463</sup> DELLUMS, *supra* note 461, at 4.

<sup>464</sup> “Within days after arriving in Washington,” for example, Dellums apparently “agreed to turn over part of his office for an exhibition of war crime materials.” Ensign, *supra* note 155.

<sup>465</sup> See, e.g., DELLUMS, *supra* note 461; SCHROEDER, *supra* note 461; JOHNSON, *supra* note 461.

<sup>466</sup> See, e.g., Carl Hulse, *In New G.O.P. Era, DeLay Drives Agenda for Congress*, N.Y. TIMES, Jan. 5, 2003, <http://www.nytimes.com/2003/01/05/us/in-new-gop-era-delay-drives-agenda-for-congress.html>.

represents the flip side of the archetype of the Obstructionist House Leaders. That hierarchical and disciplined nature<sup>467</sup> 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.

## V. Conclusion

As this article is being published in the *Military Law Review*, it seems reasonable to conclude with some observations for military attorneys. Understanding the archetypes of congressional war crimes oversight might not initially appear useful for military investigators and prosecutors, either because this examination is largely historical and theoretical or because, by the time Congress engages in oversight, the military’s role might be done. Such, of course, was not the case following My Lai, when the efforts of military prosecutors were being intentionally hindered by Rivers’s subcommittee—and such was not the case when the military continued to face the Abu Ghraib fallout long after most congressional oversight was finished. Military investigators and attorneys can, in fact, benefit in clear, tangible ways by understanding how congressional war crimes oversight might proceed, and by understanding how to negotiate the system of congressional oversight to ensure both that responsible parties are held accountable for committing atrocities and that it remains clear to the nation and the world that the U.S. military—and the United States itself—condemn war crimes and promote both justice and the rule of law. By functioning in this fashion, military attorneys can help prevent the inflammation of anti-American passions, enhance the safety and security of American troops on the battlefield, and support the counterinsurgency mission of winning the hearts and minds of civilian populations wherever the American military is operating. The examination of the archetypes of war crimes

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<sup>467</sup> See *supra* notes 441–42 and accompanying text.

oversight, then, stands as one example in which a historical, theoretical analysis strongly and necessarily informs practical concerns and action on the ground.

The history of political oversight of war crimes and allegations of war crimes during the Vietnam era and the Iraq War reveals that such oversight was exactly that—*political*.<sup>468</sup> 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 U.S. 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 contemplating or overseeing war crimes investigations than that they were “a bit sickened” by the photographs.<sup>469</sup>

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<sup>468</sup> See, e.g., Linda L Fowler & Seth Hill, Presentation at the Annual Meeting of the American Political Science Association, *Guarding the Guardians: Senate Oversight Activity in Foreign Affairs, 1947–2004* (Aug. 31, 2006) (“An extensive review of the literature is not necessary to stress two simple points, however. First, the ideological polarization . . . could extend readily to external relations with the executive branch. Second, when party reputation is the name of the game, we would expect sophisticated leaders to use every means available to claim success . . .”).

<sup>469</sup> Smith, *supra* note 1, at 1 (quoting Sen. Daniel K. Inouye, Haw.).