

The Role of Congress

It is now evident that Congress did little to fulfill its primary obligations in addressing how the United States treated prisoners from Afghanistan, Iraq and other countries during the first few years of the Bush administration. At the very least, the first job of Congress in such a situation is oversight, finding out what may be going on and informing the public, through hearings and reports.

This was in notable contrast to two previous periods in U.S. history. In 1902, regarding Filipinos, and 1949, regarding Germans, it had confronted the unpopular issue of prisoner abuse openly. But this time Congress stepped aside, effectively ceding that task to the press.

There was one striking exception to this passivity. In late 2005, brushing off threats of a veto, Congress passed legislation restricting the military to the interrogation techniques listed in the Army Field Manual on interrogation, and banning “cruel, inhuman, or degrading treatment” by the CIA. But that shining moment aside, Congress’ approach to detainee treatment paralleled its reluctance to question the war in Iraq more generally.

That is not what the framers of the Constitution intended. They wanted the legislative branch to be coequal. That is why its powers are detailed in Article I, before the executive branch. But in 1787 the framers did not envision political parties, and now, more than two centuries later, Congress is a hyper-partisan institution, with lawmakers routinely placing loyalty to party above pride in their own institution.

This phenomenon flares most clearly in the attitude of some members if their own party holds the presidency. They yield to the president’s agenda and fail to exercise their historic oversight role. This is not specific to either party. Indeed, the GOP was largely unwilling to challenge the Bush administration from 2001 to 2006. But at least until recently, few Democrats expressed even a whisper of doubt about President Barack Obama deciding which alleged terrorists to kill with drone strikes.

Reaction to Post-September 11 Abuses

The first time the Congress generally displayed any concern about how detainees were handled came after the CBS News program “60 Minutes II”, on April 28, 2004, showed pictures of degrading treatment of prisoners at the Abu Ghraib prison near Baghdad. Outrage was heard from members of Congress ranging from Senators John McCain, Republican of Arizona, and Patrick Leahy, Democrat of Vermont, to Rep. Tom DeLay of Texas, the House Republican majority leader. After the din of congressional shock over Abu Ghraib, the Department of Defense (DOD) pointed out that several dozen lawmakers had visited the prison but showed little interest in how prisoners were treated.¹

This was hardly the first time Congress had heard of prisoner abuse, though it was the first with dramatic photographs. *The Washington Post* had run front-page articles — in March 2002, on how the United States transported terrorism suspects to countries where torture was used; in December 2002, on how prisoners in Afghanistan were kept in stress positions, like standing or kneeling for hours; and in November 2003, on how the United States had sent a Canadian suspect to be tortured in Syria.²

Two explanations for the earlier diffidence came from senior Republicans. Rep. Ray LaHood, a blunt-spoken Illinois congressman, said: “Our party controls the levers of government. We’re not about to go out and look beneath a bunch of rocks to try to cause heartburn.” Sen. John Warner of Virginia, chairman of the Armed Services Committee, said of the Pentagon, “We entrust to the department the wisdom to notify us when there is a situation that merits our attention.”³

Even so, when confronted by the disgusting photos from Abu Ghraib (and a *New York Times* story revealing waterboarding), Republicans promised to investigate. But Warner was quickly discouraged by the administration, agreeing that two hours was all Donald Rumsfeld, the secretary of defense, should have to spend testifying. Warner also moved to silence Sen. Edward M. Kennedy of Massachusetts when he tried to question Paul Wolfowitz, the deputy secretary of defense, about abuse of prisoners. *Congressional Quarterly* questioned whether Warner had the “will” to “conduct more than a perfunctory inquiry.”⁴

Sen. Pat Roberts of Kansas, chairman of the Intelligence Committee, also promised hearings and pledged a “more activist role” for his committee. But he never really followed through, leading to a remarkable confrontation months later with the committee’s Democratic vice chairman, Sen. Jay Rockefeller of West Virginia. On April 21, 2005, Rockefeller told the Senate that it should ask the committee to investigate because until then it had been “sitting on the sidelines.” He said, “Despite the critical importance of interrogation-derived intelligence and the growing controversy surrounding detention, interrogation, and rendition practices and policies, the Congress has largely ignored the issue, holding few hearings that have provided only limited insight.” Roberts sharply replied that the committee knew all that it needed to know, and the proposed investigation “will hinder ongoing intelligence collection, and I believe it will damage morale” and make interrogators “risk averse.” He said, “I am fast losing patience with what appears to me to be almost a pathological obsession with calling into question the actions of the men and women who are on the front line in the war on terror.”⁵

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In the House, there was no serious move to investigate the issue. Rep. Duncan Hunter of California, chairman of the House Armed Services Committee, even complained that Warner's desultory hearings were keeping generals from fighting the war.⁶

A few members of Congress had already been given information about what the administration called "enhanced interrogation techniques," although there is a partisan disagreement about how much. CIA records list six briefings of the chairman and ranking minority member of the Senate and House intelligence committees (sometimes called the "Gang of Four") between September 2002 and September 2003, long before the *Times* broke the story on waterboarding.⁷

Jose Rodriguez, the former director of the CIA's National Clandestine Service, later wrote: "A briefing was given on September 4, 2002, to the chairman of the House Intelligence Committee, Congressman Porter Goss, and the ranking member, Congresswoman Nancy Pelosi. ... We went through each of the specific techniques used in the interrogation of Abu Zubaydah that had been used for a couple of weeks in August. ... We held nothing back."⁸

Pelosi denied that account in April 2009, when she was no longer the senior Democrat on the committee, but Speaker of the House. She told a news conference: "[W]e were not — I repeat — were not told that waterboarding or any of these other enhanced interrogation methods were used. What they did tell us is that they had some legislative counsel — the Office of [Legal] Counsel opinions that they could be used, but not that they would. And they further — further the point was that if and when they would be used, they could brief Congress at that time."⁹ Pelosi also said, "The only mention of waterboarding at that briefing was that it was not being employed."¹⁰

Rep. Porter Goss of Florida, the House Intelligence Committee's 2002 chairman and later the head of the CIA, said Pelosi was suffering from "amnesia" about the briefing they received. Goss said that his colleagues "understood what the CIA was doing," and he could not "recall a single objection from my colleagues" about the CIA's interrogation techniques.¹¹ Goss, however, declined to specify whether the CIA told members of Congress that they had already used techniques including waterboarding on Abu Zubaydah.¹² Former Sen. Bob Graham, Democrat of Florida, then the chair of the Senate Intelligence Committee, said that when the CIA briefed him on detainee interrogations in September 2002, "There was no discussion of waterboarding, other excessive techniques or that they had applied these against any particular detainees." Graham, who is known for keeping detailed, meticulous notes of his daily activities in spiral notebooks, said that nothing the CIA told him "surprised me or has subsequently proven to be incorrect...It was a matter of omission, not commission."¹³ CIA documents show that agency personnel briefed Goss and Pelosi about interrogations on September 4, 2002, but due to redactions, omissions and errors in the publicly available documents, they do not resolve the discrepancy between Pelosi's and Rodriguez's accounts.¹⁴

The rules for such briefings are basically set by an administration, which decides whom to tell and how much. And whatever Pelosi and six other lawmakers were told in 2002 and 2003, the conditions of their briefings prohibited taking notes or discussing what they heard with other members, and clearly barred them from legislating on the subject. Yet even without their insights or any serious congressional investigation, some senators outside the intelligence committees had heard and read enough and were ready to act.

The first attempt to set higher standards for treating prisoners came on June 16, 2004. Without opposition or even a roll call, the Senate adopted an anti-torture amendment to the DOD authorization bill. It was proposed by Sen. Richard J. Durbin, the Illinois Democrat who served as his party's whip. Sen. Warner and Sen. Carl Levin of Michigan, the ranking Democrat on Armed Services Committee, joined Durbin in advocating the amendment. It said, "No person in the custody or under the physical control of the United States shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States."¹⁵

The amendment was sharply opposed by the administration, presumably because it covered interrogations by the CIA, which by mid-2004 was handling important detainees and using what it termed "enhanced interrogation techniques." It all but died in a House-Senate conference. The final version called on the Defense Department to establish firm rules on handling prisoners, which the DOD general counsel's office said it had already done.¹⁶

The Senate tried again that autumn. Sen. John McCain, who was tortured as a POW in Vietnam, and Sen. Joseph I. Lieberman, Democrat of Connecticut, worked with Durbin's staff and developed language for an amendment to a major bill that would reorganize the top levels of the intelligence community, following recommendations of the 9/11 Commission. Noting that the Durbin amendment was stalled in conference, McCain told the Senate:

We must continue pressing to ensure that America treats individuals in its custody humanely, as the Commission rightly advocates. As the 9/11 Commission rightly pointed out, allowing torture of prisoners only makes it more difficult to build the alliances and support we need to defeat terrorism. Portrayals of inhumane treatment of captured terrorists hinder our ability to engage in the wider struggle against them. The McCain-Lieberman amendment covered many issues, but its language on prisoners paralleled Durbin's.¹⁷

This amendment, adopted on September 30, 2004, led to a higher level of administration protests, in a letter from Condoleezza Rice, the president's national security adviser, and Joshua Bolten, director of the Office of Management and Budget. While the objections to the Durbin provision by the Defense Department had been chiefly that it duplicated current policy, Rice and Bolten said the new amendment would provide "legal protections to foreign prisoners to which they are not now entitled under applicable law and policy." Their letter did not mention the CIA. Again, House Republican conferees went along with the White House and the amendment died.¹⁸

The press, which basked in credit and prizes for revealing prisoner abuse, paid little attention to what the Senate was trying to do about it in 2004. Durbin's amendment got some attention from *Congressional Quarterly* and The Associated Press and an editorial urging its adoption in *The Washington Post*, but no news stories in a major newspaper like the *Post*, *The New York Times* or *The Wall Street Journal*. The McCain-Lieberman amendment got no coverage at all until January 2005. Its authors made no effort to publicize it, fearing to bring down the entire intelligence bill, but journalists who had penetrated official secrecy on prisoners failed to penetrate public Senate action.¹⁹

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That changed in 2005. First came a *Times* story in January reporting on the previous year's intelligence measure and the administration's effort to block the McCain-Lieberman anti-torture amendment. *The Post* reported the dispute between Rockefeller and Roberts. Then Durbin finally succeeded in getting a ban on torture and "cruel, inhuman, or degrading" treatment of prisoners into law, as part of a supplemental appropriation for the war. It applied only to the military, and the administration did not fight it. The *Times* reported its passage.²⁰

The central figure in Congress's attempt to end prisoner abuse was McCain. He asked Durbin if he could take the lead and Durbin agreed, recognizing that McCain's stature as a former Vietnam POW who had been tortured would give the cause great authority. McCain, working with Warner and Sen. Lindsey Graham of South Carolina, set out to recruit other Republicans in July. Their effort alarmed the administration, and Vice President Dick Cheney met with them and threatened a veto by President George W. Bush.²¹

The amendment required military personnel to follow the rules set out in the Army Field Manual. And it covered CIA agents by prohibiting "cruel, inhuman, or degrading treatment or punishment of persons under the detention, custody or control of the United States Government."²²

A false start in July showed the administration could not win in the Senate. The majority leader, Sen. Bill Frist of Tennessee, took the DOD authorization bill off the floor to block adoption of the McCain amendment. But McCain brought the measure up again when the Senate considered the separate Pentagon spending bill in October. The Bush administration suffered its worst defeat in the Senate when it passed, 90 to 9, with 46 Republicans, including Frist, voting for it.²³

So the administration turned to the House, where the leadership routinely provided support. It sought backing for a provision allowing the president to determine that the CIA should be exempted from the McCain amendment. McCain had rejected that idea when Cheney pressed for it earlier.²⁴

But McCain's amendment appealed to a surprisingly large number of the usually docile House Republicans. When a vote finally came in the House in December — on a motion urging conferees on the spending bill to accept the amendment — 107 Republicans voted yes, while 121 voted no. The measure, proposed by Rep. John P. Murtha of Pennsylvania, the senior Democrat on the Armed Services Committee, passed by a vote of 308 to 122.²⁵

Facing congressional majorities that could easily override a veto, Bush capitulated the next day. He said he had "been happy to work with" McCain and would sign the legislation. The final version also included a provision giving civilian interrogators protections from lawsuits and another, urged by Graham, barring detainees who were not U.S. citizens from access to federal courts.²⁶ Graham's amendment was an attempt to reverse the Supreme Court's decision in *Rasul v. Bush* that Guantánamo detainees could challenge their detention in federal courts by petitioning for a writ of *habeas corpus*. However the Supreme Court later interpreted the restriction on *habeas* not to apply to already-pending cases, in *Hamdan v. Rumsfeld*.²⁷

Congress returned to the issue of detainee treatment the next year, after the Supreme Court's *Hamdan* decision. The court held that the Guantánamo military commissions were not specifically authorized by Congress, and violated international law — specifically, Common Article 3 of the Geneva Conventions.²⁸ The Court's decision undermined not only the military

commissions, but the Bush administration's argument that detained Al Qaeda suspects were outside the protections of the Geneva Conventions. At the time, the War Crimes Act defined any violation of Common Article 3 as a criminal offense punishable by life in prison.

The administration asked Congress to reinvent the commissions on the same terms it had used, and to add several provisions. One stated that the writ of *habeas corpus* could not be used by detainees. Another asserted that the obligations created by the Geneva Conventions were satisfied as long as the United States complied with the McCain amendment — a provision that opponents saw as an improper unilateral redefinition of the Conventions. The Bush measure also sought to create a limited list of offenses against the Conventions that could be prosecuted in the United States under the War Crimes Act. And, it included two provisions denying defendants the right to be present at trial or to exclude hearsay evidence or evidence obtained by torture.²⁹

Congressional Democrats largely left it to Warner, McCain and Graham to spearhead opposition to the Bush proposal.³⁰ But the GOP senators quickly reached a compromise that gave the administration most of what it wanted. The final bill, the Military Commissions Act of 2006, passed easily in both houses after the Senate narrowly defeated a Democratic bid to allow *habeas corpus* rights to detainees. The Military Commissions Act did not limit the obligations imposed by Geneva, but it did narrow the reach of the War Crimes Act, and attempted to eliminate detainee's *habeas* rights (though the Supreme Court invalidated the *anti-habeas* provision in 2008 — as several senators predicted at the time). Another rewrite of the law in 2009 gave defendants greater procedural safeguards.³¹

Most of the early protests, aside from McCain's, came from Democrats. But the Senate minority was not nearly as united in criticism of detainee treatment as the majority was in defending, or ignoring, it. Sen. Tom Daschle of South Dakota, who was minority leader in 2004, said some Democrats' reluctance to challenge the policies was based on believing the practices were proper. For others, he said, fear of political damage cautioned silence, just as it had kept all but one of the Democratic senators running for president from voting against the war itself in 2002.³²

In any case, by the time Democrats regained control of both houses of Congress after the 2006 elections, their leaders had little appetite for a vast public re-examination of prisoner treatment. But the Senate Armed Service Committee, with bipartisan support, used staff for an 18-month effort that produced a thorough, 242-page report, made public in 2008 and 2009, that rehearsed the history of how the military used harsh methods to interrogate detainees. It put the blame squarely on Donald Rumsfeld, the secretary of defense when the policies were shaped.³³ The Senate Intelligence Committee's study of the CIA's detention and interrogation program was completed and adopted in December 2012. It is reportedly even more detailed than the Senate Armed Services Committee's report, but has yet to be publicly released in any form.

The only time Congress can be said to have acted swiftly and decisively about detainees came in 2009, when it blocked Obama's plans to try some detainees in federal district courts, and to resettle some innocent prisoners in the United States [see Chapter 10.] However, at John Brennan's confirmation hearing for the post of CIA Director, several Senators expressed

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frustration with the CIA for concealing or providing inaccurate information to Congress about the interrogation program. Senator Barbara Mikulski said that on her ten years in the intelligence committee, “with exception of Mr. Panetta, I feel I’ve been jerked around by every CIA director,” and that the CIA had “evaded” and “distorted” in response to the committee’s questions about the interrogation program. Senator Jay Rockefeller asked why the CIA had briefed only the “gang of four” and not the full committee or committee staff, and described the restrictions placed on briefings he did receive when he was the ranking Democratic member of the intelligence committee: “I can remember driving with Pat Roberts when he was chairman and I was vice chairman, we weren’t allowed to talk to each other driving up or driving back. You weren’t allowed to do that. Staff were a part of nothing.” Brennan acknowledged that the Senate Intelligence Committee’s still-classified report about the interrogation program “talked about mismanagement of the program, misrepresentation ... providing inaccurate information.” Brennan said he wanted to read the CIA’s response to the report before drawing conclusions.

Historical Perspective

This was not the first time Congress faced a decision on how to deal with accusations that Americans had abused prisoners in wartime. On at least two occasions — the war to subdue Filipino resistance against American conquest, from 1899 to 1902, and World War II — Congress investigated and held thorough public hearings.

The Philippine Insurrection

The Philippine-American War, or the Philippine Insurrection, as Americans called it, followed the Spanish-American war. The United States took the Philippines as spoils of war in 1899, seeing them as a naval base in the Pacific and valuable for trade with Asia.³⁴ But Filipinos who fought Spain with the Americans turned on the U.S. Army when their hopes of independence were dashed.

Guerilla warfare, with its surprise attacks and ambushes and a foe who did not wear uniforms, was new to the Americans and there were hundreds³⁵ of complaints, through soldiers’ letters home, of killings of prisoners and civilians, of burning of houses in rebel areas, and most notoriously, of the “water cure,”³⁶ in which gallons of water were forced down a prisoner’s throat and then his captors jumped on his stomach to make him confess or give up information. Most of the accusations could not be checked out. But Richard E. Welch, one of the foremost scholars on the subject, found that 57, including 14 water cures, could be verified.³⁷

The first of these accusations was printed in 1900 in the *Omaha World-Herald*,³⁸ but it had little impact until early in 1902. Then one of a handful of anti-imperialist Republican senators, George Frisbie Hoar of Massachusetts, urged the Senate to investigate. He wanted a special committee, but the other Massachusetts senator, Henry Cabot Lodge, arranged to have the task assigned to a standing committee he chaired, the Committee on the Philippines.³⁹ Lodge “made no secret of his impatience with those who would slander the American soldier,” Welch wrote.

The hearings began with officials. William Howard Taft, governor of the Philippines, testified in early February. Pressed by a Democratic senator, Taft conceded that “cruelties have been inflicted; that people have been shot when

they ought not to have been; that there have been in individual instances of water cure, that torture which I believe involves pouring water down the throat so that the man swells and gets the impression that he is going to be suffocated and then tells what he knows, which was a frequent treatment under the Spaniards, I am told — all these things are true.”⁴⁰

Theodore Roosevelt’s administration in Washington, more attuned than Taft to politics and growing press interest in the issue, responded sharply. Secretary of War Elihu Root told the committee that offenses were “few and far between” and always promptly and firmly dealt with. The war “has been conducted with scrupulous regard for the rules of civilized warfare with careful and genuine consideration for the prisoner and the non-combatant.”⁴¹

But the committee did not just hear from higher-ups during its sporadic hearings. On April 14, Charles S. Riley, a Northampton, Mass., clerk who had served as a sergeant, described the water cure treatment administered to the chief local official in the town of Igaras to get him to confess to being an insurgent.⁴² Two other soldiers from his unit testified and backed his story, adding that the town had been burned as punishment.⁴³ Several other veterans testified on the water cure over the next weeks.⁴⁴

But Roosevelt, in a Memorial Day speech, proclaimed torture “wholly exceptional” and defended troops against critics who denigrated them.⁴⁵ Lodge refused to reopen the hearings after a summer break,⁴⁶ and the committee dropped the subject without a report.⁴⁷ In retrospect, it appears that the Senate hearings on atrocities had little effect on American efforts in the Philippines. Courts martial continued for some enlisted men, but the penalties remained light.⁴⁸ In any case, the war was winding down, the anti-imperialists had lost, and the country wanted to forget.

The Malmedy Massacre

Forty-six years later, Congress dealt with charges of mistreatment of even less sympathetic prisoners — German SS troops convicted of shooting and killing more than 70 American POWs near Malmedy, Belgium, in 1944 during the Battle of the Bulge. It was probably the worst atrocity against American troops of the war in Europe. Seventy-three members of a notorious SS unit were convicted by a military court in 1946 of war crimes in connection with the incident. Forty-three were sentenced to be hanged.⁴⁹

But German clergymen and Willis M. Everett, an American lawyer who had unsuccessfully defended the SS members, protested that the confessions that convicted them had been coerced and the prisoners, rounded up from many places in Europe after the war, had been tortured and beaten.⁵⁰

Members of Congress with heavy concentrations of German-Americans in their constituencies, including Sen. Joseph R. McCarthy of Wisconsin, took up their cause. So did the National Council for the Prevention of War, a prominent pacifist organization, the American Civil Liberties Union, the Federal Council of Churches of Christ in America. *Time Magazine* was also sympathetic.⁵¹

The Senate Armed Services Committee took on the investigation through a subcommittee chaired by a Republican, Raymond A. Baldwin of Connecticut, along with two Democrats.

Over six months, the subcommittee sent investigators to Germany and followed to hear 108 witnesses there and in Washington, examined thousands of documents, and produced a 1700-page hearing record and a 35-page report.⁵²

One of the strongest elements of the committee report was its belief that the protests were part of a plot “to revive the German nationalistic spirit by discrediting the American military government.” It suggested there might be a plot “to bring parts of Germany into closer relationship with the Soviet Union.”⁵³ Those concerns came to the committee from a CIA operative who came to their quarters in Germany one night and later testified. The transcript of his secret testimony later disappeared.⁵⁴

On misconduct in the prosecutions and trials — the central question before it — the subcommittee sided largely with the Army. It rejected claims that prisoners were beaten, and charges that punitive solitary confinement, inadequate food and water, threats against prisoners’ families, and fake hangings were used as methods to coerce confessions. But it did find that conducting mock trials in a candlelit room to gain confessions was a “grave mistake.” It concluded that trying the accused *en masse* was unfair and that the defense attorneys had not been given adequate time to prepare for trial.⁵⁵

The report sparked three hours of angry debate on the Senate floor. McCarthy, who had called the inquiry a “whitewash” in July, termed the report “a farce.” Baldwin insisted the Army had gone to great lengths to be fair.⁵⁶

Thirty-seven of the original 43 death sentences had been commuted — chiefly because of the Army’s own concerns over the trials’ fairness — when the investigation ended. By then, the Army had enough of the controversy. In 1951, the remaining six death sentences were cancelled and by 1956 all the accused were freed.⁵⁷

The Senate hearings, with their charges and denials, had been covered extensively by the American press. *The New York Times* and *The Washington Post* ran many articles, mostly Associated Press dispatches. The most exhaustive coverage came in *The Chicago Tribune*, which took the charges far more seriously than the denials and trumpeted McCarthy’s attacks. A leading student of the case, Fred L. Borch, III, a former Guantánamo prosecutor, concluded: “It is clear that Gen. Lucius Clay and the Pentagon felt that the Senate hearings had cast such a bad light on the Malmedy proceedings that it would have been unwise to carry out the death sentences. More than anything, the Army wanted this story to go away.”⁵⁸ While defending the Army, the subcommittee had aided the prisoners, too.



History has largely forgotten the water cure and the prosecutions over the Malmedy Massacre. With modern communications and a worldwide web that never forgets, that hardly seems likely when future scholars examine how the United States treated detainees suspected of terrorism. And this time, Congress’s reluctance to take on the issue will entitle it to a significant share of the responsibility.