

# GOP Senators Assert Congressional Control Over Detainee Policy

by Edward Spannaus

The White House is threatening to veto the Defense Authorization bill, if it contains a provision being drafted by three key Senate Republicans, which would assert Congress's Constitutional role in defining U.S. policy on detainees and interrogations in the war on terrorism. In a statement issued on July 21, the White House insisted that Congress must not legislate on these matters, over which the Executive branch wrongly claims to have exclusive authority.

At the outset of the so-called war on terrorism, the White House—particularly the office of Vice President Dick Cheney—has insisted that the President has inherent powers as Commander-in-Chief in wartime to ignore or override Congressional enactments (such as the Federal anti-torture law and the War Crimes Act), and also to ignore international treaties (such as the Geneva Conventions) which were ratified by the U.S. Senate.

The three Republican Senators who are urging the Senate and Congress to assert their own responsibility under Article I, Section 8, of the U.S. Constitution, to set rules for captured prisoners, and to regulate the Armed Forces, are: John Warner (Va.), the chairman of the Senate Armed Services Committee; Lindsey Graham (S.C.), a former military prosecutor; and John McCain (Ariz.), a former prisoner-of-war.

In addition to the amendment on detainee policy, a group of Democratic Senators, led by Carl Levin (Mich.), the senior Democrat on the Armed Services Committee, announced on July 21 that they are introducing an amendment to create an independent commission to investigate prisoner abuse and examine the White House policies on detainees. The White House threatened to veto any bill containing this provision.

## What the Senate Hearings Revealed

On July 13 and 14, the Senate Armed Services Committee, of which Warner, Graham, and McCain are members, held two days of hearings on detainee policy. The first day was on the treatment of detainees at Guantanamo, and specifically on the Army's investigation of complaints in FBI e-mails of prisoner abuse and torture. There were three points demonstrated at the first day of the hearings:

1. The Army's investigation of the FBI complaints was a whitewash. Key witnesses from the FBI were not interviewed. Army investigators seem to have started from the assumption that, because of the clashes between FBI and military personnel, the FBI reports were unreliable, and required a high stan-

dard of proof to be upheld.

2. As long as coercive and abusive methods of interrogation had been approved by higher authorities, particularly Defense Secretary Donald Rumsfeld, such techniques were automatically deemed legal and proper. In other words, no one is to be held accountable. Even though Army investigators had recommended that the Commanding General at Guantanamo, Maj. Gen. Geoffrey Miller, be reprimanded, their recommendation was overruled by the Commander of the Southern Command, Gen. Bantz Craddock.

Senators Jack Reed (D-R.I.) and McCain were both highly critical of General Craddock for overriding the investigator's recommendation. Reed called it "ludicrous" that Miller was being exonerated, while a junior officer is being recommended for punishment, and he said he agreed with McCain "that we're in this hole because no one has taken responsibility at a senior level."

3. Abuses of prisoners at Abu Ghraib in Iraq, for which only low-level reservist soldiers were punished, had all been carried out first at Guantanamo. Sexual and religious abuse, physical coercion amounting to torture, threatening prisoners with dogs, and even dragging a prisoner around on a dog leash, had all been done first at Guantanamo, under Miller's direction and supervision.

Miller was then deployed by top Pentagon civilians to Iraq in August-September of 2003, where he embarked on a course of action to "Gitmo-ize" Abu Ghraib, with the result that the most serious abuses at Abu Ghraib took place within weeks of Miller's visit there.

## The Judge Advocates General Object

At the July 14 hearing, Senator Graham stated that Guantanamo is "a legal mess" because of confusion over the status of "enemy combatants" and legal disputes over the use of military tribunals. "Congress has been AWOL here," Graham declared: "We've criticized and we've applauded, but we've been absent when it comes to designing policies dealing with the capture of people on land and sea involved in a war. That is a Constitutional duty of the Congress."

Present as witnesses were the top legal officers of the uniformed services—the Judge Advocates General (JAGs) of the Army, Navy, and Air Force—and also the top legal officer of the U.S. Marines. Elicited in questioning, was that the JAGs had sharply objected to the interrogation policies

put forward by the Justice Department and the Department of Defense civilians in the Spring of 2003, and that they had been overridden by DOD General Counsel William Haynes.

That the JAGs had objected to the DOJ “torture” memos and their incorporation in DOD policy has been known for over a year, but this is the first time that the JAGs have been able to discuss their disagreements publicly. In the hearing, Sen. Ted Kennedy (D-Mass.) attempted to elicit testimony from the JAGs—who were understandably reluctant to openly air their disagreements with the civilian leadership. Senator Graham then insisted that they do so. Graham cited the fact that the DOJ’s position as to what would constitute torture, and what would be a violation of international or domestic law regarding interrogation techniques, had “alarmed” the JAGs who reviewed it. “Is that true or not?” Graham asked. “Speak up.”

At that point, the JAGs answered: “Yes, sir, that is true.”

A number of Senators, both Republican and Democrat, vowed to pursue their quest to obtain the memos that the JAGs wrote at the time. The Army JAG, Gen. Thomas Romig, pointed out that they had written memos, which have not been declassified, “laying out in very strong terms our opinion on some of these things.”

---

## Documentation

---

### Adm. John Hutson (ret.): ‘We Have a Serious Problem’

*This is testimony given to the Senate Armed Services Subcommittee on Personnel, at its July 14 hearing, by retired U.S. Navy Adm. John D. Hutson, former Judge Advocate General of the Navy, and now the president and dean of the Franklin Pierce Law Center, Concord, N.H.*

*Admiral Hutson’s more extensive prepared testimony is available on the Senate Armed Services Committee website.*

I think we’ve got a serious problem, and you have the opportunity to fix it if you care to take it, and I would agree that it is incumbent upon Congress to take this opportunity in its oversight capacity.

If there’s one thing that’s come out clearly in the hearing today, the hearing yesterday, and in the lead-up to all of this, it is confusion. . . .

I will bet that if you ask the Attorney General of the United States, and Secretary Rumsfeld, and the chairman of the Joint Chiefs, and the Judge Advocates General, and all the senior people who have worked on this issue, to write down what their definition of a combatant is, what they think the rules are that apply, to whom they apply, where they apply, when they apply—you would come up with as many different an-

swers as you would ask the question.

And if those people can’t write it down, if they don’t understand it clearly, you surely can’t expect the colonels, and the captains, and the staff sergeants to understand it, and if you can’t expect the staff sergeants to understand it, you’re going to have the kind of problems that we’ve seen.

Whatever it is we do, it has to be foolproof. We have to keep it simple. We are talking about these issues in terms of legal niceties, and that’s fine for law school. That’s fine for seasoned lawyers to try to do. It doesn’t work on the battlefield.

The other thing about the legality issues here is, I think, that in many respects it misses the more important issues. I like to think of the United States as being above the law—above the law in a sense that the law provides the floor. And we are in the basement at this point, in many respects.

But the law provides the floor, and the United States should be above that. We should be considering these things not so much from a legal point of view as from a moral point of view, a diplomatic point of view, what’s right militarily, what’s right practically, what makes common sense, what’s going to work not only in this war but in the next war and the war after that.

Because right now, we are looking at it in a very short-sighted way. We’re trying to deal with the very narrow, immediate issue and not doing that very well, and we have completely lost sight of what’s over the horizon.

And I think that’s why the Judge Advocates General had a different point of view than the political appointees, because the policymakers were looking immediately.

The Judge Advocates General were looking over the horizon and trying to figure out what’s going to be best for the United States. . . . We’re the ones who are running the risks here. It protects U.S. troops now and in the future for us to come to some sort of understanding about what the rules are going to be. And parsing the Convention Against Torture and the Geneva Conventions—your points about how you identify the Taliban and al-Qaeda were right on the mark, Senator. It just doesn’t work.

And it’s absolute necessary that we straighten this out. You know, what we need to say is, they may be terrorists; they may be evildoers; but they’re human beings, and we’re Americans, and we will treat them with the dignity and respect that Americans should always treat human beings, simply by virtue of their humanity.

And then in doing that, we can fix the Military Commission process. I was an early and ardent and vocal supporter of Military Commissions. I think they can be fixed. We can fix the interrogation policy. We can enact the Army Field Manual [34-52] so that it applies to every person, every place, in every interrogation.

We can do the things that are necessary for history when they write the chapter, “Treatment of Detainees,” in the book on the war on terror, the end of the chapter will be better than the beginning of the chapter.