

PANEL I OF A HEARING OF THE SENATE JUDICIARY COMMITTEE SUBJECT: DETAINEES
CHAIR BY: SENATOR ARLEN SPECTER (R-PA) WITNESSES: BRIGADIER GENERAL THOMAS L.
HEMINGWAY, DOD OFFICE OF MILITARY COMMISSIONS; REAR ADMIRAL JAMES M. MCGARRAH,
DIRECTOR, ADMINISTRATIVE REVIEW OF THE DETENTION OF ENEMY COMBATANTS, NAVY; J.
MICHAEL WIGGINS, DEPUTY ASSOCIATE ATTORNEY GENERAL; GLENN A. FINE, DOJ
INSPECTOR GENERAL LOCATION: 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.
TIME: 9:30 A.M. EDT DATE: WEDNESDAY, JUNE 15, 2005

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SEN. SPECTER: Good morning, ladies and gentlemen. It's 9:30 on the button. We will proceed
the Judiciary Committee hearing on the question of detainees.

The starting point on this issue is the Constitution of the United States. Under Article I, Section 8,
Clauses 10 and 11, the Constitution explicitly confers upon Congress the power, quote, "to define and
punish offenses against the laws of nations," close quote, and, quote, "to make rules concerning captures
on land and water." The executive branch issued, on November 13th, 2001, under the caption
"Presidential Executive Military Order," rules promulgated for detention, treatment and trial of certain non-
citizens in the war against terrorism. And then on July 7th, 2004, seven days -- nine days after a trilogy of
Supreme Court cases, the Department of Defense issued -- created combat status review tribunals.

The focus of today's hearing is going to be on the procedures used with detainees. We do not have
within the scope of this hearing the issues of torture or mistreatment. The subject we have today is very,
very complicated in and of itself, and there will be sufficient time for later hearings on other related
matters.

The Supreme Court of the United States, on June 28th of 2004, came down with a complex series of
opinions in three cases, one of which only has a plurality opinion -- which means four justices agreed on
an opinion, so there isn't an opinion of the court; the two others were five-person majority opinions; and a
total of some 13 opinions were issued in all. And I think any fair analysis would say that we have a "crazy
quilt" which we're dealing with here.

And that's been supplemented by three opinions in the United States District Court for the District of
Columbia, two of which have said detainees' rights are being violated, one opinion saying detainees' rights
are being upheld. They've been sitting in the Court of Appeals for a very long period of time. They were
decided one before 2004 ended, and the other two in early 2005.

And the Judiciary Committee is going to consider a touchy subject, but we're going to consider
putting time limits on the disposition of these highly sensitive cases. Judges don't like that. We don't want
to interfere with their judicial independence, but the Congress does have the authority to establish time
parameters, which we have done in a number of situations.

The only unifying factor coming out of the multitude of opinions by the Supreme Court of the United
States was that it's really the job of the Congress. And I think they made a pretty good case for that.
Senator Durbin and I introduced legislation in 2002, and Congressman Frank introduced legislation, but
none of it has gone anywhere. And there's a real question as to why Congress hasn't handled it. It may
be that it's too hot to handle for Congress, it may be that it's too complex to handle for Congress, or it may
be that Congress wants to sit back -- as we, Congress, customarily do -- awaiting some action by the

court no matter how long it takes, from Plessy versus Ferguson in 1896, to Brown versus Board of Education in 1954. But at any rate, Congress hasn't acted, and that's really what the focus of our hearing is today, is to what ought to be done.

Justice Scalia wrote in an opinion, joined by Chief Justice -- the chief justice and Justice Thomas, quote, "Congress is in session. If it had wished to change federal judges' habeas jurisdiction from what this court held that to be, it could have done so." Which is certainly true.

Then Justice Scalia turned his wrath on his colleagues in the Supreme Court of the United States, saying, quote, "And it could have done so by intelligent revision of the statutes, instead of today's clumsy countertextual interpretation that confers upon wartime prisoners greater rights than domestic detainees."

I ordinarily stop at five minutes, but this is a complex subject. I'm going to take a very small amount of extra time, my colleagues.

Then Justice Scalia went on to say, in certainly not subdued language, quote, "For this court to create such a monstrous scheme in time of war and in frustration of our military commanders' reliance upon clearly stated prior law is judicial adventurism of the worst sort," close quote. We constantly complain that the court makes the law, and here we are, having sat back, with our constitutional mandate pretty clear.

In more circumspect language, Justice Stevens (sic) went on to make a point which is worth emphasizing here this morning. This opinion was joined in by Justice Stevens (sic), which -- in dissent in Hamdi, which may account for Justice Scalia's more temperate language. He wrote that he could not determine the, quote, "government security needs," close quote, or the necessity to, quote, "obtain intelligence through interrogation," concluding, quote, "It is far beyond my competence or the court's competence to determine that, but it is not beyond Congress's. If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of the court."

As noted in the Congressional Research Service, the Supreme Court decisions leave many questions unanswered for lower courts: the definition of the term "enemy combatant," the scope of legal procedures due persons designated as such. Would habeas corpus be foreclosed if a detainee is convicted by a military commission? Would a detainee have access to United States courts where held abroad by the United States military in locations where the United States does not exercise full jurisdiction and control?

And then in Judge Green's opinion -- and I won't take much more time -- Judge Green puts on the line many, many other critical issues which have yet to be defined, so that it seems to me that the Congress has its work cut out for -- as we look at a very, very tough issue on how we handle detainees.

That's a very abbreviated statement of what I'd like to say.

Senator Leahy.

SEN. PATRICK LEAHY (D-VT): Well, Mr. Chairman, I think it's a valuable one, because it's been well over three years since the administration began to hold detainees at Guantanamo. First batch of 20 arrived January 2002, and there's now more than 500 there, although nobody seems to be able to tell us what the exact number is.

So this is a welcome hearing for us to decide what we should do and I commend the chairman for holding it. I think the amount of interest around the country in the hearing shows how the American people feel. This policy on detainees is clearly not working. We seem to have a difficulty getting a coherent theory from the administration on how to proceed.

In 2001, military commissions were defended by the then-attorney general as tribunals that, quote,

"can dispense justice swiftly close to where our forces may be fighting without years of pre-trial proceedings or post-trial appeals," close quote.

Now that was three years ago. But far from assuring swift justice, we haven't seen any justice. There hasn't been a single military commission complete a hearing or convict a suspected terrorist in those three years.

Until a year ago, the administration seemed to hold tight to the notion that by detaining prisoners at Guantanamo Bay, a location where it was sure the prisoners had no right of access to the courts, it could shield itself from judicial challenge. But the Supreme Court, in *Rasul versus Bush*, rejected that legal theory.

Now, we hold to the theory -- well, they'll be there to the end of the war on terror. All of us know that war will not end in our lifetime.

What has become clear is that policies were poorly reasoned and, apparently, extremely short-sighted. The administration's insistence on unilateralism, a tendency and a problem that has colored and undermined so many of the policies, has led to poor decisions and poor practices in detention policies as well.

What they've said to us from the start is, "Trust us." "Trust us that we know the law and that we'll comply with it. Trust us to treat detainees humanely in accordance with our laws and treaties. Trust us that Guantanamo is going to make Americans safer."

Now, three years later, about the only thing we know for certain is that trust may well have been misplaced. Guantanamo Bay is an international embarrassment to our nation, to our ideals, and it remains a festering threat to our security.

Our great country, America, was once viewed as a leader in human rights and the rule of law, and justly so. But Guantanamo has underlined our leadership, has damaged our credibility, has drained the world's good will for America at alarming rates. I've talked -- I was recently in a meeting of NATO parliamentarians -- these are countries that are most closely allied with America, that have been our strongest supporters. First question each of them asked is, "What about Guantanamo? What about Afghanistan and Iraq?" And they tell us -- and I must agree -- that these are not the policies of a great and just nation, they're not the American system of justice.

Now, the administration didn't want to have Congress as a partner on the war on terror; it insisted on acting unilaterally following the start of combat in Afghanistan.

In October 2001, I urged President Bush to work with Congress to fashion appropriate rules and procedures for detaining and punishing suspected terrorists. That was not a partisan thing. Our chairman, Senator Specter, did the same. We both noted at the time that our government is at its strongest when executive and legislative branches of government act in concert. That was rejected.

So now I say, what is the administration's plan for Guantanamo Bay, assuming there is a plan; what does the administration intend to do with more than 500 detainees still imprisoned there; how many are going to be released and when; how many are going to be charged and tried and when. The administration says that these detainees pose a threat to the safety of Americans -- the vice president said that the other day. If that's true, if they pose a threat to us, then there has to be evidence to support that or our administration would not tell the world that. If there's evidence, then let's prosecute them; let's bring the evidence forward.

But we also know that some of these detainees have been wrongly detained, and I suspect that there are others who have not been released that have weak evidence at best. If they are being detained in accordance with Geneva Conventions, that's one thing. But that's not.

You know, and this idea of changing, changing the focus, producing props of chicken dinners and such, seeming to argue this is more a Club Med than a prison -- let's get real! These people have been locked up for three years, no end in sight, and no process to lead us out of there. Guantanamo Bay is causing immeasurable damage to our reputation as a defender of democracy and a beacon of human rights around the world. I'm proud of what our nation has accomplished. I want us to be that beacon of human rights, but we're not being it with Guantanamo. We don't have a plan to repair the damage. Congress has abdicated its oversight responsibilities for too long. I think it's time for Congress to demand a way out.

Mr. Chairman, I applaud you for holding these hearings.

SEN. SPECTER: Thank you very much, Senator Leahy.

We turn now to our first witness, who is Rear Admiral James McGarrah. He has a very, very distinguished record, which will be incorporated into our hearing record. But suffice it to say for these purposes, he has been designated by the secretary of the Navy as director of the administrative review of the detention of enemy combatants, going right to the heart of our subject.

Admiral, we have a standard policy of five minutes for opening statements. All of the statements will be made a part of the record, but that leaves us the maximum amount of time for questions and answers by the members of the committee. And you can see today that this is a hearing where there is a lot of interest, and there'll be a lot of questions.

Thank you for joining us, Admiral McGarrah. We appreciate the Department of Defense providing you and General Hemingway as experts, and the other witnesses who are here today, and we look forward to your testimony.

ADM. MCGARRAH: Senator Specter, Senator Leahy, members of the committee, I am Admiral Jim McGarrah, Civil Engineer Corps, United States Navy. And I really do appreciate the opportunity to be here today.

In May of last year, Deputy Secretary of Defense Paul Wolfowitz named Secretary of the Navy Gordon England the designated civilian official, or DCO, to supervise the process to review annually the cases of all detainees held under DOD control at Naval Base Guantanamo Bay Cuba.

Secretary England, in turn, appointed me as the director of the Office for the Administrative Review for the Detention of Enemy Combatants -- the organization that he charged with carrying out this review process.

At the time, we solicited input from the International Committee of the Red Cross, from nongovernmental organizations, and from ambassadors of the countries with detainees at Guantanamo Bay, and then worked across all U.S. government agencies to develop a rigorous and fair review process called the Administrative Review Board or ARB. The purpose of the ARB process is to assess annually whether each enemy combatant at Guantanamo continues to pose a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention. Based on this assessment, the ARB panel can recommend to Secretary England, in his role as DCO, that individual detainees be released, continue to be detained, or be transferred, with conditions, to their country of nationality. Secretary England, as the DCO, is the final decision-maker for this process.

While the ARB procedures were being developed last summer, the U.S. Supreme Court issued three rulings related to detained enemy combatants. Among other things, the court in one of those cases held that federal courts have jurisdiction under the federal habeas corpus statute to hear challenges to the legality of the detention of Guantanamo Bay detainees. In another one of those cases, a plurality of the court cited Section 1-6 of Army Regulation 190-8 as an example of military regulations that might suffice to satisfy the due process requirements that the plurality indicated would apply to a U.S. citizen held as an enemy combatant in the United States.

In light of those decisions, the deputy secretary of Defense established the Combatant Status Review Tribunals, or CSRT process, to assess formally whether each detainee was properly detained as an enemy combatant, and to permit each detainee the opportunity to contest their enemy combatant designation. The CSRT process was based on Army Regulation 190-8, which provides the policy procedures and responsibilities for handling of prisoners of war and other detainees. Specifically, it outlines provisions for tribunals that exceed the requirements of tribunals that implement Article 5 of the 1949 Geneva Convention, which requires a competent tribunal to determine the status of belligerents in cases where any doubt arises as to whether a belligerent satisfies the requirements for enemy prisoner of war status. The CSRT is a one-time process for each detainee and provides them opportunities: the opportunity for review and consideration by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. Tribunals make their decisions by majority vote based on preponderance of evidence. The opportunity to attend all open portions of the proceedings. The opportunity to call witnesses on his behalf, if those witnesses are relevant and reasonably available. The opportunity to question witnesses called by the tribunal. The opportunity to testify on his own behalf, if he desires. The opportunity to receive assistance of an interpreter, when necessary. And the opportunity freely to decline to testify.

The CSRT process also provides more process and protections than Army Regulation 190-8. The detainee is given an opportunity to receive assistance from a military officer to ensure he understands the process and the opportunities available, and to prepare for the hearing. The CSRT contained express qualifications to ensure the independence and lack of prejudgment of the tribunal members. The CSRT recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant. In advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant designation. And the result of every CSRT is automatically reviewed by a higher authority who is empowered to return the record to the tribunal for further proceedings, if appropriate.

Secretary England appointed me as the convening authority for this process. The tribunal panels were the decision-makers in this process. In my convening authority review, I could either approve the panel's decision or I could return it for further deliberation. In less than six months, tribunal hearings were conducted on all 558 detainees under Department of Defense control at Guantanamo Bay. Of those 558 cases heard, the CSRT panels determined that 520 of those detainees were properly classified as enemy combatants, and that 38 detainees no longer met the criteria for enemy combatant designation. Those found to no longer meet the criteria were processed for release. Twenty-three have been released, and the Department of Defense continues to work closely with the Department of State to effect the release of the remaining 15.

The first ARB was conducted in December of 2004. The ARB process is ongoing, with the expectation that we will complete the first annual review for all eligible detainees by the end of this calendar year. It provides each eligible detainee with opportunities --

SEN. SPECTER: Admiral McGarrah, could you summarize, please?

ADM. MCGARRAH: I will.

Sir, the ARB process is intended to be similar to the CSRT process in that it is rigorous and fair and will assess on an annual basis whether or not the detainees continue to pose a threat to the U.S. or its allies. The DCO is the decision-maker in that process and can continue to decide to continue to detain, to release, or to transfer. Because of the highly unusual nature of the global war on terror, and because we do not want to detain any person longer than is necessary, we've taken this unprecedented and historic action to establish this process to permit enemy combatants to be heard while a conflict is ongoing.

Mr. Chairman, thank you again for the opportunity to provide this information. I would ask that the remainder of my remarks be submitted to the record. And I'm happy to answer any questions that you or the committee members might have regarding the CSRT process or the ARB process.

SEN. SPECTER: All of your statement will be made a part of the record, as well the full statements of all of the witnesses.

We turn now to General Thomas L. Hemingway. He's the legal adviser to the appointing authority in the Department of Defense Office of Military Commissions. General Hemingway's responsibility covers providing legal advice to the appointing authority on referral of charges, questions that arise during trial, and other legal matters concerning military commissions.

Thank you for coming in this morning, General, and we look forward to your testimony.

GEN. HEMINGWAY: Thank you, Mr. Chairman, members of the committee. I'm pleased to discuss the operations of our Office of Military Commissions.

America is at war. It is not a metaphorical war.

It is as tangible as the blood, the rubble that littered the streets of Manhattan on September 11th, 2001. The reality of this war could be seen in the faces of those who stood in stark horror as they saw hopeless innocent people fall and jump to their deaths from the twin towers.

In response to the attacks on the United States on September 11, 2001, the president established military commissions to try those non-citizen members of al Qaeda and other persons engaged in specified terrorist activities who are alleged to have committed violations of the laws of war and related offenses.

The use of military commissions predates the formation of our republic. Since the Revolutionary War, the United States has used military commissions to try enemy combatants for the law of war violations. In the Mexican-American War, during the Civil War, following the Civil War, during and after World War II, military commissions were used to try enemy combatants for violations of the laws of war.

In the president's military order establishing military commissions, he mandated that the accused shall be afforded a full and fair trial. The president also determined that the federal rules of evidence are not practicable for military commissions, given the nature of this conflict. This determination is based on the unique factors present in conducting judicial proceedings against suspected war criminals at a time when the United States is actively engaged in an ongoing armed conflict.

Instead of the federal rules of evidence, military commissions have adopted the international accepted standard of admissibility of evidence, probative value. The military -- the president's military order focuses on the unique factors of the current ongoing hostilities and affirms the national security interests require the continued application of U.S. national security laws in developing commission instructions and orders, consistent with the accused (sic) right of a fair trial.

These orders, instructions and regulations afford an accused the following rights: the presumption of innocence; trial before an impartial and independent panel of three to seven officers; notification of charges in a language understood by the accused; call witnesses and present evidence; cross-examine witnesses and examine evidence; election not to testify, with no adverse interest; appointment of military counsel at no cost to the defendant and the right to hire a civilian counsel at no expense to the government; privileged communications with defense counsel; adequate support and resources to defense counsel; appointment of interpreters and translators; open proceedings, except as absolutely necessary to protect national security; proof of guilt beyond a reasonable doubt; review of the record of trial by a three-member review panel.

The rules of evidence and procedure established for trials by military commission compare favorably to those being used in the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia. These rules are consistent with our national commitment to adhere to the rule of law.

The Office of Military Commissions has taken key steps in moving the commission process forward. To date, the president has determined that 12 detainees currently at Guantanamo are subject to his order. The appointing authority, Mr. John D. Altenburg, has approved charges against four accused and referred these charges to military commissions for trial.

Those trials commenced late in the summer of 2004.

The Office of Military Commissions has been working diligently to convene military commissions; however, the trials are stayed pending an appellate court decision in the case of Mr. Hamdan. Military and civilian counsel for Mr. Hamdan brought an action in the United States District Court to review the legality of trial by military commissions. The District Court affirmed the legality of military commissions to try violators of the law of war and a review panel as an appeals mechanism; however, the court raised concerns about the commission process whereby an accused may be excluded from the hearing to protect classified and protected information. Because this protection is essential to the continued effectiveness in our current war on terror, the government has appealed this ruling.

The delays to the commission process are directly attributable to the exercise of the accused's ability to challenge that process in federal courts. While the appeal is pending, investigations and submission of charges against additional accused continue.

This is the first time since World War II that the United States has had a need to convene military commissions. While it's important to move quickly back to trial, the Office of Military Commissions' movement forward is measured with full awareness and consideration of the rights of an accused and the needs of our nation.

The ongoing global war on terrorism continues to impose many unique challenges in this asymmetrical battlefield. Neither the United States nor the international community contemplated a non-state organization having the capability to wage war on a global scale. Military commissions are the appropriate forum to preserve safety, protect national security and provide for full and fair trials consistent with our standards and those of the international community.

Thank you, Mr. Chairman.

SEN. SPECTER: Thank you very much, General Hemingway.

Our next witness is Mr. J. Michael Wiggins, deputy associate attorney general having the responsibility for overseeing the Department of Justice Civil Division, civil rights and criminal matters within the civil litigating divisions covering the areas of concern here. His full resume, a very distinguished record, will be included in our record overall. But we appreciate you coming in, Mr. Wiggins, and look forward to your testimony. The floor is now yours.

MR. WIGGINS: Mr. Chairman, members of the committee, I'm a deputy associate general at the Department of Justice, and I'm pleased to discuss the work of the department and the current status of litigation involving the U.S. government's detention of enemy combatants at Guantanamo Bay, Cuba, as part of the ongoing war on terror.

In response to the terrorist attacks of September 11, 2001, the president dispatched the U.S. armed forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the course of those hostilities, the U.S. captured or took custody of a number of enemy combatants.

As in virtually every other armed conflict in the nation's history, the military has determined that many of those individuals should be detained during the conflict as enemy combatants. Such detention is not for criminal justice purposes and is not part of our nation's criminal justice system. Rather the detention of enemy combatants serves the vital military objectives of preventing captured combatants

from rejoining the conflict and gathering intelligence to further the overall war effort and to prevent additional attacks against our country. Some of those individuals are being held at Guantanamo Bay, Cuba.

Each Guantanamo Bay detainee has received a formal hearing before a Combatant Status Review Tribunal, a CSRT, tasked with determining whether that individual remains properly classified as an enemy combatant. During a CSRT proceedings, each detainee has received substantial procedural protections.

In addition, a subset of combatants have been designated for trial by military commission. Since the founding of our nation, the United States military has used military commissions during wartime to try offenses against the laws of war. The Supreme Court has repeatedly upheld the use of these military commissions.

Against this backdrop of legal authority and historic practice, on November 13th, 2001, the president ordered the establishment of military commissions to try a subset of the detainees for violations of the laws of war and other applicable laws. Under the order, a military commission may not exercise jurisdiction over a detainee unless certain preconditions have been met, always including status as an alien and generally including a determination of connection to the violent enemies of the United States, and a specific violation of the laws of war.

On June 28th of '04, the Supreme Court issued a trio of decisions that defined the landscape for future litigation involving military detention of enemy combatants: Rasul, Hamdi, and Padilla. In the aftermath of the decision in Rasul, a large number of habeas petitions have been filed on behalf of Guantanamo Bay detainees. As of today, approximately 95 cases have been filed on behalf of 200 detainees.

While the government has taken the unprecedented steps to allow private lawyers to access these detainees and has produced factual returns consisting of the records of the CSRTs, including classified information, it has moved to dismiss the Guantanamo Bay habeas cases on the grounds that alien enemy combatants detained abroad lack rights under the United States Constitution. And even if Guantanamo Bay detainees do enjoy some rights under the Constitution -- the due process clause -- the CSRTs provide all the processes required.

Litigation in this area presents a number of important issues. The first is whether the due process clause or the Fifth Amendment is applicable to aliens captured abroad and detained at Guantanamo Bay. The government believes that a long line of Supreme Court and D.C. Circuit precedents foreclose such an application.

A second issue is that assuming the aliens detained by the military at Guantanamo Bay enjoy some constitutional rights, what is the scope of those rights, and how are they to be implemented in a judicial proceeding in the United States courts? Again, it's crucial to remember that preventative detention of enemy combatants has never been thought of as a criminal matter in which a full-blown trial would be held. The CSRTs exceed the procedural requirements that were laid out in Hamdi for detention of citizens. It surely cannot be the case that non-citizen enemy combatants, whose only connection to the United States is membership in a terrorist organization dedicating to destroying it, are entitled to more process than that which the Constitution requires for citizens.

As for the military commissions, the government believes the judge who enjoined them committed several legal errors, and we hope that the trials before military commissions for detainees will be permitted to proceed after the appeal is resolved. The president's military order is fully consistent with the Constitution, treaties, and laws of the United States, and the regulations established to govern the commission reflect proper balancing of the twin objectives of protecting the security of the U.S. and providing captured fighters a full and fair trial.

In sum, the unprecedented situation created by Rasul, in which enemy combatants detained at

Guantanamo Bay by the military have been permitted to pursue habeas claims against their custodians in the United States courts, has posed a number of challenges and a number of substantial legal issues that await resolution by the courts.

At this time, Mr. Chairman, I would be happy to address any questions you or the members of the committee may have.

SEN. SPECTER: Thank you. Thank you very much, Mr. Wiggins. Our final witness on this panel is inspector general of the Department of Justice.

Mr. Glenn A. Fine has had that position since the year 2000. We'll include in the record his distinguished resume. We have asked Mr. Fine to come in today, although not directly related to Guantanamo, it does relate to detainees, and there is a concern about the 723 aliens who were detained right after September 11th with respect to the basis for their detention.

And here again, the committee is fully aware that you don't have to have the evidence to proceed with probable cause for a prosecution or any necessarily high standard, but some reason for detention which has some overlapping import with respect to the detainee issue generally. Again, very flexible standards for what you need depending upon the risk involved, and we know what those risks are for terrorism. But we asked Mr. Fine to come in on that subject where we did have a hearing in 2003. But the Bureau of Prisons has been investigating the matter for a year and a half, and we thought this would be a good occasion for this committee to be informed as to what's happening now.

Thank you for joining us, Mr. Fine, and we look forward to your testimony.

MR. FINE: Mr. Chairman, Senator Leahy and members of the committee, thank you for inviting me to testify at this morning's hearing regarding two Office of the Inspector General reports which examine the treatment of aliens detained on immigration charges in connection with the terrorism investigations after the September 11th attacks.

My written statement summarizes the findings and recommendations from the OIG's June 2003 detainee report, as well as our December 2003 supplemental report on the treatment of detainees at the Metropolitan Detention Center in Brooklyn, New York. Given the focus of today's hearing, my testimony will highlight the major findings from these reports that relate to due process issues for these immigration detainees.

The OIG determined that the Department of Justice detained 762 aliens on immigration charges in connection with its terrorism investigation in the first 11 months after the September 11th attacks. Although our report recognized the difficulties and challenges that confronted the department in investigating the attacks, we found significant problems in how these detainees were treated. The FBI pursued thousands of leads in the terrorism investigation, ranging from information obtained from a search of the hijackers' cars to anonymous tips called in by people who were suspicious of Muslim or Arab neighbors who kept odd schedules.

Outside of New York, the FBI attempted to screen out cases in which aliens showed no indication of any connection to terrorism. We found that in contrast, the FBI in New York did not attempt to distinguish between aliens who were suspected of having a connection to the September 11th attacks or terrorism in general from aliens who were simply encountered coincidental to a terrorism lead. We also found that after their arrest, many of these September 11th detainees did not receive timely notice of the charges against them. These delays affected the detainees' ability to understand why they were being held or to obtain legal counsel.

With regard to the detainees' conditions of confinement, our review found serious problems in their treatment at the Metropolitan Detention Center in Brooklyn. We found that the Bureau of Prisons imposed a total communications blackout on the detainees from several weeks -- for several weeks after their initial detention, and then designated them as witness security inmates, which frustrated efforts by the

detainees' attorneys, families and even law enforcement officials to determine where they were being held.

The MDC's restrictive and inconsistent policies on telephone access also prevented many detainees from obtaining legal counsel in a timely manner. The MDC permitted detainees only one legal call per week, and calls that resulted in a busy signal or calls answered by voice mail counted as their single call. We found that many detainees could not obtain counsel for months after their arrests. We also found that MDC staff videotaped and audiotaped some detainees' meetings with their attorneys.

In addition, we found that some correctional officers physically and verbally abused some September 11th detainees at the MDC. While the detainees were not brutally beaten, some officers slammed detainees against the wall, twisted their arms and hands in painful ways, punished them by keeping them restrained for long periods, and made slurs and verbal threats against them.

We recommended that the BOP consider taking disciplinary action against approximately 15 MDC employees, yet more than 18 months after our report, the BOP still has not imposed discipline on any individual for any action we described in our report. In my view, this delay is inappropriate and unacceptable.

While I am told that the BOP's review of these matters is now in its final stages, I urge the BOP to complete its review expeditiously and take appropriate action.

In addition to recommending discipline for individuals, our two reports made a series of recommendations to address systemic problems in how the department, the FBI and the BOP handle immigration detainees. We are pleased that the department, the FBI and the BOP have agreed with most of our recommendations and have taken steps to implement them.

However, two recommendations still have not been sufficiently addressed. The first is the BOP's delay in implementing discipline for any MDC employees, which I've discussed. The second involves our recommendation the Department of Justice and the Department of Homeland Security enter into a memorandum of understanding to formalize policies, responsibilities and procedures for managing a national emergency that involves alien detainees.

Finally, one other matter that I wanted to note for the committee is the ongoing OIG review that is examining FBI employees' observations and actions regarding alleged abuse of military detainees in Guantanamo Bay, Abu Ghraib and Afghanistan. The OIG is examining whether FBI employees participated in any incident of detainee abuse in military facilities at these locations, whether FBI employees witnessed incidents of abuse, how FBI employees reported any observations of abuse, and how these reports were handled by the FBI. We recognize these are critical issues, and we have allocated substantial resources to conducting this important ongoing review.

I thank the committee for inviting me to testify about these OIG reviews, and I would be pleased to answer any questions.

SEN. SPECTER: Thank you very much, Mr. Fine.

We now turn to the questioning by members of the committee, which, in accordance with our tradition, is five minutes. Before proceeding to the first question, just a comment or two about some consideration which had been by the committee to using the Foreign Intelligence Surveillance Court as the court to consolidate these cases. Regrettably, an early draft was circulated and has led to a lot of speculation as to what might be done on that, and we are not going to proceed with the FISA Court. The initial thought had been that the Foreign Intelligence Surveillance Court had a lot of experience with classified information. And had we gone in that direction, it would not have been a secret court, but there's such an overtone of secrecy about FISA that it sounds too much like the Star Chamber. But we are going to take a look at consolidating these matters, so we don't have a proliferation of opinions by the district court and the very long delays to the circuit court and the very long delays to the Supreme Court as

well.

Turning now to the first question, I note, Admiral McGarrah, that among those who have been released from Guantanamo, that custody has been given up after the detainees signed pledges renouncing violence and promising not to bear arms against the United States forces or its allies.

I note that Vice President Cheney made a speech earlier this week identifying some 10 Guantanamo detainees who had been found in combat. Other estimates have gone as high as 25, and I think we really don't know the number. And while procedural due process is obviously important, we ought to be as sure as we can what steps are being taken so that we do not release detainees from Guantanamo who turn up on battlefields killing Americans. And what's the value of a promise not to bear arms against the United States or its allies?

ADM. MCGARRAH: Senator, my -- the process that I oversee, the CSRT process, is a rigorous process to look at all the evidence in the government's possession, and to make a determination as to enemy combatant status. It's the most recent and the most formalized review process, and follows a number of prior processes that made prior determinations. The releases that you refer to were made under the prior processes, and so I am not aware of the --

SEN. SPECTER: Are we not now releasing detainees on their promise not to go back to war. Doesn't seem to me that kind of a promise is worth anything. Is it?

ADM. MCGARRAH: I believe that that is one of the considerations that is in the decision-making process. Once these decisions are made --

SEN. SPECTER: But why? Why? What's the value of a detainee's promise not to go back to war? What indicators do we have -- this goes to the point which a number of the opinions -- especially Judge Green -- picks out as to what -- what is the information that these people are connected with al Qaeda? And she cites in her opinion a dialogue in the court where there is an assertion that this person is a member of al Qaeda, and the person comes back and says, "Well, who says I'm a member of al Qaeda? I'm not."

And I think you have to have the tribunal make that decisions beyond any question, and you can't accept a blanket denial. And the question is, what you know -- and we'll obviously get into that in some detail -- but where you have these detainees, there's presumptively some basis for having them to start with. And I'm at a loss to say why there would be any weight attached to a promise not to go back to war.

ADM. MCGARRAH: Yes, sir. The process examines all the evidence and information available within the U.S. government, in the government's possession. And it makes a determination based on the preponderance of that evidence. A statement of that sort in and of itself would not necessarily be sufficient for a determination of --

SEN. SPECTER: Admiral, would you supplement your answer with the other factors? I want to come to General Hemingway with a question and my time is almost up, and I intend to observe my time limit here.

General Hemingway, the Article V of the Third Geneva Convention provides that, quote, "should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, such a person shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal."

The court then concluded that the Combat Status Review Tribunal was not established for that purpose, and the government said, well, the president has decided that these are al Qaeda; are not prisoners of war under Geneva. And the court came back and said, quote, "The president is not a tribunal," close quote. Which obviously, the president isn't.

So where you have the president's conclusion, weighty as it is, under our view -- what do you anticipate with respect to compliance with the Geneva tribunal requirement?

GEN. HEMINGWAY: Senator, I think that's a question that's more appropriately addressed to the Department of Justice.

But as far as the Military Commissions are concerned, I think that we are in full compliance with the Geneva Convention and the manners in which we are conducting them. We are holding people who have been caught on the battlefield -- given a broad definition of battlefield -- and we are holding them humanely.

SEN. SPECTER: Well, my time has expired and I'm going to yield to Senator Leahy. They've started a vote. I'm going to excuse myself and go vote, but I will be back as promptly as I can. So let's retain the witnesses in place and we're going to try to proceed even through the votes we have this morning.

SEN. LEAHY: Tell them I'm on my way over. I going to finish mine first.

SEN. SPECTER: Okay, I'll tell them you're on your way.

SEN. LEAHY: Let me ask, General, the Department of Defense says there are approximately 520 detainees currently at Guantanamo. How many are there? I don't want an approximate number; give me the actual number.

GEN. HEMINGWAY: Senator, that's outside my scope of responsibility.

SEN. LEAHY: It seems to be outside the scope of everybody's responsibility at the DOD. We asked that question of everybody from the secretary on down. Is there anybody who knows? Give me the name of the person who knows how many are being detained.

GEN. HEMINGWAY: Well, I would suggest that you direct your question to the secretary of Defense.

SEN. LEAHY: The secretary of Defense doesn't seem -- we get approximate from the secretary of Defense.

Is there anybody else, other than the secretary of Defense, because he won't give us an answer, you won't give us an answer, is there anybody who knows the number?

GEN. HEMINGWAY: I've given you my best answer, Senator. SEN. LEAHY: Give me your best answer.

GEN. HEMINGWAY: I have.

SEN. LEAHY: How many do you think are there?

GEN. HEMINGWAY: In excess of 500.

SEN. LEAHY: Are any detainees being held at Guantanamo in the custody of government agencies other than the DOD?

GEN. HEMINGWAY: Not to my knowledge.

SEN. LEAHY: None being held at the custody of government agencies such as the CIA?

GEN. HEMINGWAY: Senator, not to my knowledge. You'd have to direct your questions in that

regard to some other agency.

SEN. LEAHY: How many of the detainees were not captured during combat in Afghanistan and Iraq, but were picked up from other battlefields, such as Bosnia?

GEN. HEMINGWAY: As I say, that's outside the scope of my responsibility. I haven't been given that information.

SEN. LEAHY: Admiral, can you answer any of these questions I've asked?

ADM. MCGARRAH: Sir, I don't have the specific numbers, but there were some that were picked up outside Afghanistan.

SEN. LEAHY: Where?

ADM. MCGARRAH: I don't have the locations at my fingertips, but I can get back to you on that, sir.

SEN. LEAHY: Other than Afghanistan or Iraq?

ADM. MCGARRAH: Sir, the Guantanamo detainees do not include detainees from Iraq. We're talking about the global war on terror.

SEN. LEAHY: That's what I'm trying to ask.

ADM. MCGARRAH: Yes, sir.

SEN. LEAHY: Do you have any idea what these other countries are? You will supply it for the record?

ADM. MCGARRAH: Yes, sir, we will get back to you.

SEN. LEAHY: The countries other than Afghanistan. ADM. MCGARRAH: We will get back to you, sir.

SEN. LEAHY: But there were countries other than Afghanistan?

ADM. MCGARRAH: Yes, sir, there were.

SEN. LEAHY: Do you know if there's anybody behind held there in custody by a government agency other than DOD?

ADM. MCGARRAH: No, sir, I'm not aware of any held outside DOD control.

SEN. LEAHY: Mr. Wiggins? (Pause.) You can't answer because you don't know?

MR. WIGGINS: Excuse me. I do not know, Senator.

SEN. LEAHY: Okay.

Mr. Fine?

MR. FINE: I don't know, Senator Leahy.

SEN. LEAHY: Okay.

General Hemingway said earlier the attorney general defended military commissions on the ground

they could deliver swift justice. That was back in 2001. Of course, now it's been nearly four years since 9/11; there hasn't been a single trial that's been completed. I realize three years after that, in November 2004, a federal court declared the current regulations for military commissions unlawful, and you're seeking to overrule that.

Why weren't any prosecutions begun for nearly three years? I mean, we were told that this was for -- swift and it would be the quickest way to go; but for three years, nothing.

GEN. HEMINGWAY: Senator, I think that we've moved with considerable dispatch. A lot of people think that all we did was dust off World War II procedures. We --

SEN. LEAHY: (That's not ?) my question. Why wasn't anything done for three years?

GEN. HEMINGWAY: We have built a whole judicial system to try these cases. And the appointing authority, John Altemus, came on in the spring of 2004, and by August, we were in trial. And the only reason we're not in trial today is because of the exercise of the defense counsel and the detainees' rights in federal courts. We are under a restraining order, or we would be trying cases right now down at Guantanamo.

SEN. LEAHY: Oh, those pesky rights. And they -- (laughter) -- GEN. HEMINGWAY: Well, you asked -- Senator, you asked me about delay, and that's the reason for the delay.

SEN. LEAHY: I was a prosecutor, General, and I have some idea of what's involved. And a three-year delay does seem rather strange when so many people are being held because it's vital to our security that they be held.

Now do we have a plan? I mean, do we have a plan of how much longer these people could be held without any charge?

GEN. HEMINGWAY: Senator, we have charges against four people. I can't tell you how long an unprivileged belligerent is going to be held, because I don't know how long this war is going to last. I do know that we are in compliance with the law by holding them.

SEN. LEAHY: Well, most say that the war will last for throughout our lifetime. Does that mean -- that we'll always face, as most other countries have faced, terrorist actions as long as you and I live -- does that mean we could hold them that long without any charges?

GEN. HEMINGWAY: I think that we can hold them as long as the conflict endures. But we have, as Admiral McGarrath has already pointed out, a very detailed process for releasing them if they no longer present a threat.

SEN. LEAHY: Well, we now have a government in Afghanistan, yet the conflict continues. Is that what you're saying?

GEN. HEMINGWAY: The conflict is not with the government of Afghanistan. The conflict is with a non-state organization.

SEN. LEAHY: The prisoners are from there, though.

GEN. HEMINGWAY: Well, they're from all over the place.

You know, we have citizens of 40 different countries, I think, has been publicly released --

SEN. LEAHY: Can you give me the list, then, of what other countries they're from?

GEN. HEMINGWAY: I don't have that --

SEN. LEAHY: The same question I asked Admiral McGarrah.

GEN. HEMINGWAY: Oh, the citizenship to the countries? We'll get back to you for the record.

SEN. LEAHY: Please. Thank you.

Senator Kyl.

SEN. JON KYL (R-AZ): Thank you. I think, in view of the fact that the vote is now about half over, and probably Senator Leahy and I should both go to vote, that on behalf of the chairman, I'm going to recess the committee until Chairman Specter returns, in which case, then, he can reconvene the hearing. So for the moment, the hearing is recessed.

(Recess.)

SEN. SPECTER: The hearing will resume. And we will, in accordance with our custom, alternate. If I could have the attention of Senator Cornyn, if I could have the attention of Senator Cornyn, we're alternating, and all of these empty chairs for people who are out voting mean you're next.

SEN. JOHN CORNYN (R-TX): Thank you very much. (Off mike) -- an unexpected pleasure, Mr. Chairman. Thank you for letting me ask a few questions.

And we've concluded all the statements of the panel. I was out for part of it, but I caught most of it. I just want to ask -- maybe I'd start with Mr. Wiggins. You know, time after time after 9/11, we heard experts talk about how we needed to change our framework, our -- to adopt to a post-9/11 environment. We heard in the intelligence arena that we needed to do more information sharing. We remember testimony -- former Attorney General Janet Reno and others -- about bringing down the wall that separated the ability to share certain critical intelligence between our counterterrorism officials and law enforcement officials.

And I wanted to ask you in particular -- a lot of the concerns that I hear expressed about detention and interrogation start from the perspective of a law enforcement framework. In other words, the framework, the procedures, the constitutional requirements for someone who's accused of a crime are pretty clearly spelled out over 200 years of decisions by the Supreme Court and other courts, and spelled out by federal statute.

But could you explain to us how this is a different paradigm, based on the president's authority under Article II, Section 2, of the Constitution, as commander in chief, and why it's important for us to understand that we have a new post-9/11 paradigm that we need to deal with?

MR. WIGGINS: I'll try, Senator. The Supreme Court has made plain that the president's commander in chief powers include all those powers necessary and proper to conduct war, to win war and to defend the country. Not only does he have the power, he has the duty to do that. And incident -- a necessary and important incident of that power, also confirmed by the Supreme Court, is the power to detain enemy combatants for the duration of hostilities, most recently confirmed by the Hamdi decision, including those enemy combatants who are United States citizens, and as commander in chief of the military, the necessary and proper and essential authority to hold for trial those combatants who are unlawful belligerents or unprivileged belligerents, for those crimes that violate the laws of war or other crimes that are regularly tried before military commissions.

That power is not only resident in the Constitution; it's been confirmed by this body in the Uniform Code of Military Justice, which expressly recognizes and approves the military commission aspect of that authority. And it's been recognized and confirmed by the court.

SEN. CORNYN: Let me interject. In other words, the people who are currently detained at

Guantanamo Bay are not accused of a crime per se, but are enemy combatants, unlawful combatants, most who don't wear a uniform, recognize the laws of war, aren't a representative of a nation -- nation's military. So they fall into a unique category under Article II, Section 2, of the Constitution and the president's power as commander of (sic) chief to conduct military operations. Is that a rough summary?

MR. WIGGINS: That's correct, Senator.

SEN. CORNYN: Okay. Thank you.

Well, let me ask maybe both Admiral McGarrah and General Hemingway to respond to this question.

The people who are at Guantanamo now are -- have been categorized as terrorist trainers, bomb-makers, recruiters and facilitators, terrorist financiers, bodyguards of Osama bin Laden and would-be suicide bombers. And I've been apprised that the U.S. has actually learned through interrogating these terrorists that -- the organizational structure of al Qaeda and other terrorist groups; the extent of terrorist presence in Europe, the U.S. and the Middle East; al Qaeda's pursuit of weapons of mass destruction; methods of recruitment and location of recruitment centers; terrorist skill sets; general and specialized operative training, and how legitimate financial activities are used to hide terrorist operations.

I'd like, perhaps, for you to comment on to what extent has using every lawful means available to the United States to secure actionable intelligence from detainees at Guantanamo Bay made America safer and saved American lives.

ADM. MCGARRAH: Sir, I think the primary basis for detaining individuals, whether it be at Guantanamo or elsewhere, is their determination as enemy combatant and the authorization under the law of armed conflict and the acceptable laws of war to keep those combatants from returning to the battlefield. In addition to that, the interrogation that might provide us information to avoid future attacks and to understand our enemy is important, but the primary basis is to detain the combatants and to prevent them from returning to the conflict.

GEN. HEMINGWAY: Senator, I can't comment on what the intelligence community has gained in this particular process, but I can tell you that -- and I'm somewhat limited, since I'm on the government side of the house, in discussing evidence of cases that haven't been brought to trial yet. But I think it's safe to say that the evidence that the government will present in each trials by military commission will be consistent with the statements that you've made.

SEN. SPECTER: Thank you very much, Senator Cornyn.

Senator Graham has commented that he's due in the chair at 11:00, and I'm going go to Senator Biden next on our alternate approach. But I just wanted to ask Senator Kyl, who's been here at the very start, and Senator DeWine, if they would mind yielding to Senator Graham, so that he can question next and then fulfill his obligation to the chair. Senator Biden.

SEN. BIDEN: Thank you, Mr. Chairman. Thank you for holding this hearing, and thank you for the way you characterized the purpose of the hearing; I think it's overdue. And I can't think of anybody be in better hands to try to work out -- I mean it sincerely -- the Congress's responsibility and role in dealing with these issues, and I'm glad you're in the chair; and I'm glad you've called the hearings. And the only thing I can say that I don't miss about being in the majority is having to sit in another chair on the floor of the Senate.

But, gentlemen, we have a legitimate need for a facility to deal with enemy combatants, and there's no question about that in my mind. We also have a real problem though, guys. We have a war, as you said, General, but we have two wars going on.

We have a war that actually relates to people who are trying to do bad things to us and strapping

bombs on themselves, and planning on how to run planes into buildings, et cetera. But we also have a war for the hearts and minds of those folks, because you know at your Staff College they point out you cannot win that war by a military response alone. We have to dry up those pools where they recruit. We have to deal with the 1.2 billion Muslims in the world. And guess what, General, we're doing real badly. We're doing real badly on that part of the war. Matter of fact, it's a disaster.

And my concern -- and I know it's broad and we'll get back to it in another -- hopefully, another context -- my concern relates to the fact that rightly, wrongly, good, bad or indifferent, the reality is that the vast majority of the rest of the world, and particularly the Muslim world, thinks what we're doing at Guantanamo is very bad. All you had to do was hear an article written in a thing called Periscope about the treatment of the Koran and you got 100,000 people in our allies' streets -- in our allies' street -- in Pakistan.

We got ourselves a problem, as they say in those old movies -- we got ourselves a communications problem. So we better figure something out, whether or not it is totally appropriate under every international law and constitutional prescription that we do exactly what we're doing in Guantanamo. We've got a problem. And if -- I realize it's above each of your pay grades. In a sense, it's above my pay grade; I'm not the president. None of us here are. Not much you can do about it.

But that's why I've called for an independent commission. The first bill introduced, S. 12, we called for an independent commission to be set up so we take it out of the partisan realm, move it into a realm where we have a group like the 9/11 commission give us some real live recommendations about how we should proceed from here, what we should do. Because anybody who thinks it's not causing us some difficulty around the world I think is not reading the press or traveling around the world, as I have been, and many of us up here have been.

So I want to let you know that's the backdrop of my questions here. It's not -- I'm not going to spend the remaining four minutes, or whatever I have, on the detail that we're going to have to go into in terms of how to rewrite legislation consistent with our desires, as the court has suggested. But the first question I have -- and as briefly as you can answer, I'd appreciate it -- this is an ongoing conflict. What is the definition of when the conflict ends? Because if there is no definition as to when the conflict ends, that means forever, forever, forever these folks get held at Guantanamo Bay. That's part of the problem here. And I realize it's difficult, General. You point out this is not the same kind of war. Before, you'd end a war with an armistice; there's an agreement, the war is over, detainees go home.

Has anybody at Justice defined when there's the end of conflict?

MR. WIGGINS (?): (No, Senator ?).

SEN. BIDEN: Now, does that mean that it is the administration's position that the folks who we consider a danger, 550 or so folks at Guantanamo, will be held in perpetuity?

MR. WIGGINS: It's our position that legally they could be held in perpetuity. What in fact is happening is the annual review boards, the CSRT process. In fact, many have been released, and prior to the institution of those proceedings.

SEN. BIDEN: Well, I think for the record it would be useful -- my time is up -- that, if not in this committee, through the Intelligence Committee if they tell us we can't do it here, is we should know what the criteria of a threat is. The admiral answered the question absolutely accurately when asked by my colleague from Texas what is the reason we're holding these people. They're enemy combatants. Not that they're terrorists, not that they present an extraordinary danger. The rationale is they're enemy combatants. (Pause.) And -- I thought my colleague was telling me to stop, but I should stop anyway.

At any rate, so I would like to know at some point, if it means even in a classified context, what the definition applied for the criteria as to why we're keeping these folks if it is anything beyond the fact that they're designated as enemy combatants. Because there's a lot of rhetoric, that gets the American people

all juiced up, that they are terrorists who are going to do these horrible things to us. You don't have to get to that point, I don't think, to hold them. I think all you got to do is determine they're enemy combatants. So I'd like to know what the criteria is.

And I thank the chair. My time's up.

SEN. SPECTER: Thank you very much, Senator Biden.

Senator Graham?

SEN. LINDSEY GRAHAM (R-SC): Thank you, Mr. Chairman.

Sort of building on what Senator Biden said, one thing we've learned in this war is that what happens at Gitmo and Abu Ghraib doesn't stay at Gitmo or Abu Ghraib. It's kind of like the old rule, "What happens TDY, stays TDY." We've learned that if Newsweek gets it wrong, people can get killed. So image is very important. And there's a side to Gitmo that you probably can't tell us about. I do believe we're safer by having a Gitmo.

There's three goals that I would like to articulate here and see how we can come up with a legislative buy-in.

Number one, it should be a place where you can gather good intelligence to make this country safer. And I think you've done a pretty good job of doing that, but some of the techniques have seeped out and created problems. The idea of physical or psychological stress to get good information, to me, is acceptable under international norms. And we need to look at a way to standardize that because I worry about some of our own troops getting prosecuted under our own laws if we don't have standardization.

Accountability. An enemy combatant in this war, almost there's a per se assumption that you're involved in terrorist activity. So once a determination that an enemy combatant status has been conferred upon someone, to me it is almost impossible not to envision that some form of prosecution would follow.

I think it is very important for the people who join up with these terrorist organizations to know that their day of reckoning is coming, either on the battlefield, as a casualty, or in some courtroom somewhere; that they can't do this without some accountability.

So I do hope that we don't lose sight that accountability is very important. And there's some information down there that would be good for the world to hear about who we have, and the best way to hear it is through an open process called a military tribunal.

And the third is that we can do this and be a rule-of-law nation. We can prove to the world that even among the worst people in the world, the rule of law is not an inconsistent concept.

So my question basically goes to this proposition. There is not enough buy-in by the Congress to what's going on at Gitmo. There is a buy-in on my part and, I think, many others that we need this place desperately to protect us in this war on terror, to hold people accountable, to get good intelligence. And the rule-of-law aspects of how it's working is not well known or is not hitting on all cylinders, because we're in court arguing about this.

Do you believe, each of you, that if the Congress developed some statutory provisions defining enemy combatant status and standardizing intelligence-gathering techniques and detention policy, it would help our cause, it would help what you're doing?

What is your view of the Congress's involvement in this?

SEN. GRAHAM: (Off mike) -- why don't we just do it by rank? Starting with the admiral, go to the general, and all the way down.

ADM. MCGARRAH: Sir, I have no idea what you meant about TDY -- about TDY.

SEN. GRAHAM: Good answer. (Light laughter.)

ADM. MCGARRAH: Sir, I do think we need a internationally accepted definition of enemy combatant. And I think the definition we're using has precedent. I was not involved in -- (off mike) --

SEN. GRAHAM: Think if the Congress got involved to write a statute defining enemy combatant -- that if the Congress bought into this whole concept -- it would help your effort or not?

ADM. MCGARRAH: I think the concept already exists in international law. I think anything that can be done to help clarify this would help.

SEN. GRAHAM: General?

GEN. HEMINGWAY: Senator, I think --

SEN. GRAHAM: For disclosure, he was my first boss in the Air Force.

(Chuckling.)

GEN. HEMINGWAY: Senator, I think it's fair to say that the Department of Defense is always willing to consider anything that Congress wants to propose.

SEN. GRAHAM: Thank you, sir.

ADM. MCGARRAH: (Off mike) -- I concur with General Hemingway on --

SEN. : (Off mike.)

MR. WIGGINS: Excuse me. I agree with General Hemingway. We're happy, as always, the Justice Department would be to review any proposed legislation, sir. MR. FINE: I don't have a position on that. I'm going to have to defer to the Department of Justice on that. That's not really within my jurisdiction, Senator.

SEN. GRAHAM: Well, I'm going to yield back my 50 seconds by concluding with this. I think it would be tremendously helpful if the Congress and the administration came together with some general statutory language to help define what's going on at Guantanamo Bay; to better define what an enemy combatant is, to make sure that due process is affordable.

But the main goal of this war is to protect Americans, and it's not inconsistent with the rule of law -- the more buy-in, the better. So that would be my recommendation to this panel and to the committee, that we jointly work on this problem. Because if we don't have the buy-in across the country and all three branches of government, we're going to lose this war if we don't watch it.

SEN. SPECTER: Thank you, Senator Graham.

Senator Kennedy?

SEN. EDWARD KENNEDY (D-MA): Thank you very much, Mr. Chairman. I'm going to make a brief comment, then just have a question or two for my time.

I first of all want to commend you, Mr. Chairman, for having -- calling this hearing. For too long, we've had no genuine inquiry into the abuses of Guantanamo and how they happened. And those abuses have shamed the nation in the eyes of the world, and made the war on terror harder to win. And in many

parts of the world, we're no longer viewed as the nation of Jefferson, Hamilton and Madison. Instead, we are seen as a country that imprisons people without trial, and degrades and tortures them. Our moral authority went into a free-fall.

The FBI has reported the use of torture as an interrogation tool at Guantanamo, and complained to the Justice Department and the Defense Department about its use. And the Red Cross has documented scores of abuses at Guantanamo and elsewhere. Top officials in the administrations have endorsed and defended interrogation that we've condemned in other countries, including forcing prisoners into painful stress position for hours, threatening them with dogs, depriving them of sleep, using so-called water boarding to simulate drowning.

We've degraded and exploited our own female military personnel by encouraging them to use sexually degrading methods of interrogation.

We've locked people away without creating an adequate process to distinguish who belongs and who should be released. Detainees have been held for year after year under the worst possible conditions, and we fail to provide any to determine whether they're guilty or -- of anything. The endless detention without safeguards is an additional shameful abuse that has to be corrected.

There is no question that Guantanamo has undermined our efforts in the war on terrorism. It's stained our reputation on human rights. It's inflamed the Muslim world and became a powerful recruiting tool for terrorists. Its continued existence only makes it more likely that Americans will be attacked by terrorists at home or in other nations throughout the world.

Closing Guantanamo makes sense. It's become a symbol of U.S. hypocrisy on human rights. But merely emptying the prison and bulldozing its walls will not cure the illegality. We need a thorough investigation what happened there and in other detention and interrogation facilities around the world. And particularly we need to know whether it was approved at the highest levels of our government.

Closing the facility without a full investigation only makes it easier to pretend that the executive branch is above the law. We also need to make sure that the administration doesn't send these and future detainees to places unknown that are even more difficult to monitor.

Guantanamo was conceived and created to be a place beyond judicial review, and the administration tried to ensure that it would be accountable to no one in deciding who should be detained and how they would be interrogated. The resulting physical abuses and denial of due process were the direct result of this misguided policy that thumbed its nose at the rule of law.

One of the great tragedies of Guantanamo is that the consequences were so foreseeable and avoidable if the administration had simply chosen to use the existing legal framework already in place both to protect our security and to grant due process. William Taft, the State Department's legal adviser in President Bush's first term, recently called it a source of amazement and disappointment that the Justice Department severely limited the applicability of the Geneva Conventions to the detainees. In an address at American University, he said the decision to do so unhinged those responsible for the treatment of detainees from the legal guidelines for interrogation embodied in the Army Field Manual for decades.

Set adrift in uncharted waters and under pressure from their leaders to develop information on the plans and practices of al Qaeda, it was predictable that those managing the interrogation would eventually go too far. That's why we have checks and balances in our democracy. What happened at Guantanamo is proof of the famous truth that power corrupts and absolute power corrupts absolutely.

Laws enacted long before 9/11 tragedy authorized effective interrogation and legitimate detention of prisoners. The Geneva Convention permits interrogation. The criminal laws permit interrogation. The Army Field Manual provides long-standing guidelines for interrogation. But indefinite and unreviewable detention to interrogate prisoners is not permissible, and we have learned how dangerous (sic) it is to our ideals and our respect in the world.

Administration tried to redefine torture to make many abuses permissible. They rejected the Geneva Convention over the objections of the secretary of State, Colin Powell. They abandoned traditional military justice in favor of a system that experts warned would be unworkable and unjust. We can't stay silent while the administration prosecutes a few lower-level soldiers and tell us that no one else bears responsibility for the abuses, or while CIA plans -- planes fly detainees in secret to other countries that we know engage in torture.

It's wrong to hold detainees indefinitely, deny them the same rights that we would want for our own captured servicemen and -women. Guantanamo symbolizes reprehensible policies and a set of values that are unacceptable and un-American. It reflects the standards of behavior well below what we have tried to achieve for 200 years, and those who are responsible for designing this system must be held accountable.

So I'll -- realize my time is up, Mr. Chairman. I'll wait till the next round.

Thank you.

SEN. SPECTER: Thank you, Senator Kennedy.

Senator Kyl.

SEN. JON KYL (R-AZ): Thank you, Mr. Chairman.

I would like to, before I pose a question, get back to a couple of basics. We're talking, first of all, about people who have been captured on the battlefield right after they've been shooting at our soldiers. And, you know, we all like to immediately join in healthy applause when someone mentions our young men and women that we've sent into battle. It's the thing to do. It's heartfelt. And yet, for some reason, immediately after doing that, we are prepared to jump to conclusions that U.S. officials, including people in the military, are prone to violate people's human rights. Now, they've been shot at, people have been captured on the battlefield, and you got to have a place to hold them. There has to be some place to do two key things: prevent them from causing further damage -- killing American service people, among other people; and secondly, to use the appropriate interrogation techniques to learn everything you can in order to save additional lives. And so that's the basic thing we're talking about here.

I want to ask a question based upon a declaration of Vice Admiral Lowell Jacoby, who's the director of the Defense Intelligence Agency, and ask unanimous consent, Mr. Chairman, to put this entire declaration into the record.

SEN. SPECTER: Without objection, it will be made a part of the record.

SEN. KYL: Thank you, sir.

Just a couple of provisions of it. He says, "Interrogation is a fundamental tool used in the gathering of intelligence. Interrogations are vital in all combat operations, regardless of the intensity of the conflict. When done effectively, interrogation provides information that likely could not be gained from other source." He points out that after World War II that 43 percent of all the intelligence produced in the European theater was from human intelligence, and 84 percent of that was from interrogation, and that the majority of everyone surveyed agreed that interrogation was the most valuable of the collection techniques.

He points out that insertion of things which disrupt the trust and reliance which the captors need to establish with regard to detainees, prevents the effective gathering of intelligence, a process that he notes can take a long period of time. And just one quotation. He says, "Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even seemingly minor interruptions can have profound psychological

impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example, even if only for a limited duration or for a specific purpose, can undo months of work and may permanently shut down the interrogation process."

There's much more in this declaration. But he concludes by saying, "In summary, the war on terrorism cannot be won without timely, reliable and abundant intelligence. That intelligence cannot be obtained without robust interrogation efforts. Impairment of the interrogation tool, especially with respect to enemy combatants associated with al Qaeda, would undermine our nation's intelligence-gathering efforts, thus jeopardizing the national security of the United States."

Now, colleagues have talked about other aspects of the war on terror, how it's important to win hearts and minds, and we all agree that that's important too. It's important to win on the battlefield. There are a lot of things that are important.

But Admiral Jacoby points out that the war cannot be won without good intelligence, much of which comes from these very combatants that have been captured on the battlefield.

My question is, beginning with you, Admiral, and then, General, and Mr. Wiggins, if you'd like to respond, is whether you agree or disagree with what Admiral Jacoby has said with respect to interrogation and the problems that interruption of that interrogation can cause.

ADM. MCGARRAH: Senator, I think it's always important for operational commanders to have a situational awareness of their enemy and of their battlefield. And anything that can provide the kind of intelligence that we need to do the right thing is important.

SEN. KYL: General?

GEN. HEMINGWAY: Senator, the admiral is far more capable of making that point than I, and I agree with everything he said.

SEN. KYL: Thank you, sir.

Mr. Wiggins?

MR. WIGGINS: Senator, I have no basis -- no legal basis to judge the admiral's declaration. I will point out, however, that it was a part of the record in the Padilla case --

SEN. KYL: I'm sorry?

MR. WIGGINS: It was a part of the record in the Padilla case --

SEN. KYL: Yes indeed. And in fact, he specifically noted the problems that would arise in the Padilla case itself, were this interrogation system to be disrupted.

I gather, Mr. Fine, this is not something you want to discuss, based on your responsibilities? MR. FINE: No, sir.

SEN. KYL: And I understand that very much.

Mr. Chairman, I just think it's important to establish that you've got to keep the people off the battlefield if they're going to go right back and kill you, as approximately 5 percent of these folks have when they've been released -- to your important question, what makes you think that their promise of not wanting to kill you again is going to be kept.

And secondly, that this interrogation process is very important to saving American lives, both on the battlefield and here at home, and that we have to be mindful of the situations in which we can preserve

that kind of legitimate interrogation technique.

SEN. SPECTER: Thank you very much, Senator Kyl.

Senator Feinstein.

SEN. BARBARA FEINSTEIN (D-CA): Thank you very much, Mr. Chairman. Thank you also for holding this hearing.

I'd just like to respond to Senator Kyl's analysis of the battlefield and prisoners after shooting -- all of whom are shooting at our soldiers. I would submit that the battlefield is a very varied place in this war on terror. And I would also submit that people can be swept into the battlefield and be arrested and detainees who are not necessarily terrorists.

In any event, I've written a letter to the Department of Defense; asked 12 questions; have a response to four. I'd like to submit that for the record with an additional letter sent to the Intelligence Committee.

SEN. SPECTER: Without objection, they will be made a part of the record.

SEN. FEINSTEIN: Thanks, Mr. Chairman.

This letter says there are approximately 520 detainees at Guantanamo; 750 have been processed through the facility. As of April of '05, Defense has released 167 and transferred 67 to other governments, subject to conditions, and there have been no detainee deaths at Guantanamo.

I also asked questions about other places, about Guam -- everywhere that we have detainees sequestered. I have not had answers to these questions. I hope they will be forthcoming.

I'd like to call everybody's attention to the testimony about to come from Lieutenant Commander Swift. It is very brave testimony. And let me preface my remarks with the hope that there is no reprisal against Lieutenant Commander Swift. I think his testimony in writing is eloquent. It points out what's wrong, and it also points out what a remedy has to be. I'm going to try to very briefly synthesize his testimony, and I'd like to ask General Hemingway to respond.

Lieutenant Commander Swift is a 17-year Navy veteran, 11-years member of the JAG Corps. He was assigned to represent a Salim Ahmed Hamdan, a Yemeni national facing trial before this Military Commission. Let me quote from his remarks, "At the onset of my representation, I was deeply troubled by the fact that to ensure that Mr. Hamdan would plead guilty as planned, the chief prosecutor's request came with a critical condition, that the defense counsel was for the limited purpose of negotiating a guilty plea to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate such a plea."

Now, I'm skipping around, but it's all in the record here, and everyone can read it.

"I knew that I had to tell Mr. Hamdan that if he decided not to plead guilty he may never see me again. Upon meeting with him, I was confronted with the fact of the realities of his pretrial confinement. They did not live up to promises of humane conditions. Mr. Hamdan was held in isolation for more than seven months in violation of the Geneva Convention. His cell lacked both natural light and ventilation. For the first 60 days of pretrial detention, he was only permitted a half hour of exercise and only at night. He was not permitted any reading material," et cetera, "beyond the Koran or free exercise of religion."

"Despite Attorney General Ashcroft's assurances to Senator Edwards that the president's military order would not be used to detain a person for an unlimited period of time, General Hemingway rejected Mr. Hamdan's request for a speedy trial finding that he had no right to a speedy trial and could be held indefinitely. Mr. Hamdan's request for independent medical evaluation was rejected in favor of a cursory

20 minute psychiatric examination. The extent of damage done to Mr. Hamdan by the conditions of his confinement and the message utilized in his interrogation was able to be determined. Mr. Hamdan suffered from post-traumatic stress disorder as a result of the abuse he had suffered during his detention and had experienced major depression during his solitary confinement.

After four months in solitary, he was on the verge of being coerced into a guilty plea or deteriorating mentally to the point that he would be unable to assist in his defense if he ever came to trial."

The attorney goes on to say that he's filed a petition for writ of mandamus and habeas challenging both the lawfulness of procedures and the jurisdiction of the proceeding.

After the Supreme Court determined that detention in Guantanamo Bay was not a bar to habeas corpus, the prosecution hastily referred a single charge of conspiracy against Mr. Hamdan. And then it goes on to show the deterioration. The Department of Justice maintains that three military officers, two of whom had no legal training or experience, are better suited to determine a commission's lawful jurisdiction than a federal court. And it goes on and on.

I'd like to ask General Hemingway -- since you were mentioned, I'd like to ask for your response.

GEN. HEMINGWAY: Well, we could be here all afternoon. It's a fairly lengthy statement on Lieutenant Commander Swift's part.

In the first place, the chief defense counsel is the individual who appointed Lieutenant Commander Swift to defend Mr. Hamdan, not the prosecutor. And I am unaware of any threats whatsoever that were ever made through Mr. Swift to Mr. Hamdan of the nature that he recounts in his statement.

As far as the demand for speedy trial is concerned, he sent a letter to me last fall invoking Article X of the UCMJ. And I responded by informing him that Mr. Hamdan was held as an unprivileged belligerent and that Article X did not apply under those circumstances.

As far as his mental health is concerned, he was seen by a mental health professional, a psychiatrist, at Guantanamo Bay, and he accepted weekly mental health visits. And the information that's been provided to me by those people is that his mental health is satisfactory.

As far as referral is concerned, I can guarantee you that that was not done hastily in response to any federal court decision. The timing might have been coincidental, but the office of the chief prosecutor had been working that for quite some time. He also asserts that he was not given the names of the people who had interrogated or interviewed Mr. Hamdan. He signed a receipt on the 27th of September last year acknowledging receipt of the names of all of those people.

My time is up.

SEN. FEINSTEIN: Was his representation conditioned on pleading guilty?

GEN. HEMINGWAY: No.

SEN. FEINSTEIN: Thank you very much, Mr. Chairman.

SEN. SPECTER: Senator Feinstein, if you want to pursue this, you may.

SEN. FEINSTEIN: Well, what you've said to me, General, is that this man has no rights at all, essentially. He's charged with conspiracy. That's it. He's been there four months in isolation, contrary to Geneva Convention, and he could be there, essentially, forever.

That's what -- how I interpret what you've said. If it's different, please tell me.

GEN. HEMINGWAY: Well, he is not being held contrary to the Geneva Convention. He's being held humanely --

SEN. FEINSTEIN: The isolation -- (inaudible) --

GEN. HEMINGWAY: -- and it's my understanding that he is in the general population at Guantanamo Bay. As far as his rights are concerned, I've mentioned in some detail the rights that all of these people would have available before a military commission: the presumption of innocence, the appointment of an attorney free of charge, proof beyond a reasonable doubt, the right to call witnesses, the right to cross-examine, the right to review. And as far as resources are concerned, we have provided extraordinary resources to both Lieutenant Commander Swift and to the Office of the Chief Counsel -- Chief Defense Counsel.

SEN. FEINSTEIN: Well, that's not what this statement says.

GEN. HEMINGWAY: Oh, I understand that's not what it says. But his recollection of these events, in my view -- of the procedures, are considerably different than what he represents in that statement.

SEN. FEINSTEIN: Let me ask you this. So pre-commission, housing in solitary for seven months is not a violation of the Geneva Convention?

GEN. HEMINGWAY: I wouldn't consider the conditions under which he was held to be solitary confinement. I've seen the facilities. From what the people at Guantanamo Bay have told me about the conditions and the treatment he received, I wouldn't call it solitary confinement. He was removed from the general population, but I would not call what he was in solitary confinement.

SEN. FEINSTEIN: Would you call it isolation?

GEN. HEMINGWAY: I would call it segregation.

(Light laughter.)

SEN. FEINSTEIN: Well, I think, Mr. Chairman, if I might -- Lieutenant Commander Swift is going to come before us. I mean, this is a case study -- in everything that we've read, (it's ?) a case study in what Time magazine has just written about. If I understand the Supreme Court decision correctly, detainees do have habeas corpus rights. They do have a right to be brought before a process. And I would be rather surprised that Lieutenant Commander Swift would say that he had to plead guilty to get counsel if he did not, because that's a rather dramatic statement -- (inaudible) --

SEN. SPECTER: Senator Feinstein, as you noted, Lieutenant Commander Charles Swift will be on the second panel. And if it's not inconvenient, General Hemingway, we'd appreciate it if you would stay there, maybe follow up.

I've allowed you more time; it took --

SEN. FEINSTEIN: I appreciate that. Thank you.

SEN. SPECTER: -- your full amount of time to pose the question --

SEN. FEINSTEIN: You're very generous.

SEN. SPECTER: -- and then this panel waited because she went through a very detailed record.

SEN. FEINSTEIN: Thank you.

SEN. SPECTER: One of the difficulties of the whole hearing process is that we have many

witnesses, we have a second panel, and we have a lot of interest by members. And in five minutes, you don't get a whole lot done.

But when you raised the issue and those details, it seemed to me appropriate to have that extra latitude. But Lieutenant Commander Swift will be present. General Hemingway, would your schedule permit you staying through his testimony?

GEN. HEMINGWAY: Yes, senator.

SEN. SPECTER: Thank you. Okay, Senator DeWine.

SEN. MIKE DEWINE (R-OH): Thank you, Mr. Chairman.

Admiral and General, I have just one question for each one of you. Maybe you can clarify something for me. Admiral, I don't quite understand. How does a detainee go from being an enemy combatant to not being an enemy combatant? I mean, presumably this person has been detained all this time. What changes? I mean, how does the status change? I mean, was a mistake made originally? What changes the status?

ADM. MCGARRAH: Senator, my process is the latest and most formalized of the determinations of enemy-combatant status. Prior determinations were made based on the information that were available at the time that determined that these detainees were enemy combatants.

There are a variety of things that might change. There could be some additional information that is made available. These cases, for the most part, are not black and white. There are ambiguous facts. And the panels take the information, all the information available to the government at the time, and make the best determination that they can at the time. That doesn't mean that prior determinations were wrong. It means that, based on the information available to us, our panels made the determination.

SEN. DEWINE: Well, I appreciate that. I heard you say two things. I want to make sure I got it correctly, and you can tell me if I'm wrong. You indicated that your process was different. You also indicated that in some cases the facts were different. Now, is that correct? We have a different process; we have new facts.

ADM. MCGARRAH: I'm not familiar with the details of the prior processes, but my understanding is that ours is the most formalized of the determinations that have been made. The different facts would be due to additional information that might have been obtained subsequent to the original apprehension.

SEN. DEWINE: So your answer is that it could be because we have new facts; it could be because we have a new process -- could be.

ADM. MCGARRAH: Yes, sir, those are all factors. And the members of the tribunal look at all the information available and make the best determination they can at the time.

SEN. DEWINE: And you're not familiar with the previous process?

ADM. MCGARRAH: No, sir, I'm not familiar with the detailed mechanics of the previous processes.

SEN. DEWINE: General, you said that, I believe, 12 of the 520 detainees have been referred for trial before a military commission. Obviously that leaves the question about what about the other detainees? And I may have missed this in your testimony; I was voting. I apologize. But what happens to the other ones, and what's the process?

GEN. HEMINGWAY: Well, the --

SEN. DEWINE: And what can we expect?

GEN. HEMINGWAY: Well, you can expect that the office of the chief prosecutor will be sending more information forward for presidential determinations as to whether or not there's a reason to believe that there are people subject to trial by military commission. There are three currently in movement, and I know that the office of the chief prosecutor will be sending more information forward for presidential determinations as to whether or not there's a reason to believe that there are people subject to trial by military commission.

There are three currently in movement, and I know that the office of the chief prosecutor is working on more. And as the investigators present more and more evidence to the office of the prosecutors, they evaluate them to determine whether or not charges can be brought for violations of the law of war.

SEN. DEWINE: General, is this a case of not being able to process them fast enough? In other words, you don't have enough people? What is the situation?

GEN. HEMINGWAY: Currently --

SEN. DEWINE: It's kind of hard for a layperson sitting here to understand what's going on.

GEN. HEMINGWAY: Well --

SEN. DEWINE: Now, let me just finish, if I could, sir. You know, this is the Judiciary Committee. We're lawyers here. I'm a former prosecutor. We've got other former prosecutors up here. And, you know, our whole training, our whole system, is to get people to determine what the facts are, to charge them, and you move ahead.

Now, I understand that your life is not that simple. I appreciate that. But explain to me, you know, what's going on here. This seems to be a horribly slow process.

GEN. HEMINGWAY: Well, in the first place, the primary reason that we hold people is to get them off the battlefield, and secondarily to gain intelligence.

SEN. DEWINE: I understand that.

GEN. HEMINGWAY: Until the intelligence effort has concluded on any particular detainee, the law enforcement effort really doesn't commence. Once we know that the intelligence people have finished in their analysis of the individual, we look at what they have collected and make a determination whether or not this individual is a candidate for trial by military commission. As far as the current status is concerned, we're under a restraining order.

SEN. DEWINE: Oh, I understand that. But should we assume that in most of these cases you'd be telling us that the intelligence- gathering is continuing on most of these 500-and-some individuals?

GEN. HEMINGWAY: I'd have to say that's probably correct. When we get --

SEN. DEWINE: I don't want to --

GEN. HEMINGWAY: When we get files from --

SEN. DEWINE: Excuse me, sir. Is it probably or is it? I mean, do you know? If you don't know, that's fine.

GEN. HEMINGWAY: I don't know.

SEN. DEWINE: You don't know. GEN. HEMINGWAY: I don't know exactly how many people that they're done with. But I do know that the office of the chief prosecutor aggressively collects information to develop cases.

SEN. DEWINE: But as far as the question of how many of them, they've actually gotten all the intelligence they think they can get. You don't know what that figure is.

GEN. HEMINGWAY: I couldn't give you a good figure.

SEN. DEWINE: Well, my time is up, Mr. Chairman.

SEN. SPECTER: Thank you very much, Senator DeWine. Senator Durbin.

SEN. DICK DURBIN (D-IL): Mr. Chairman, let me thank you personally for holding this hearing. I've been hoping for such a hearing for a long time, and I think you show extraordinary courage in holding it. I appreciate it very much.

And let me say at the outset here that I'm troubled by what's happened at Guantanamo and I'm troubled by the recent debates about whether we need to close this piece of real estate. I don't think this hearing should be about a piece of real estate or where it's located. It should be about the conduct of the United States wherever prisoners are in our control. And I think that really gets to the heart of the issue, whether it's in Guantanamo, in Iraq, Afghanistan, or in undisclosed locations.

Before 9/11, we had signed on with the rest of the world to certain standards of conduct. We said civilized nations, even in the course of war, will play by certain rules to a certain level. And then, of course, we know what happened after 9/11. Without consulting Congress, this administration unilaterally set aside many of the provisions of these treaties that we had said were part of the law of the land. And it created a detention policy that violates many of those treaties. They claimed the right to seize anyone, including an American citizen, anywhere in the world, including the United States, and to hold them until the end of the war on terrorism, whenever that may be.

There were dissenters to that point of view, and it wasn't from civil libertarians. The dissent came first from Colin Powell, former chairman of the Joint Chiefs of Staff, who warned this administration this was a bad idea. Colin Powell said to the administration, "It will reverse over a century of U.S. policy and practice in support of the Geneva Conventions and undermine the protections of law of war for our troops, both in this specific conflict and in general."

But the administration persisted in this new approach, persisted until it reached the point where it came to the Supreme Court, and the Supreme Court ruled that the administration is wrong.

The question I'd like to ask Mr. Wiggins is this. Last year, in two landmark decisions, the Supreme Court rejected the administration's detention policy. The court held detainees at Guantanamo had the right to challenge their detention in federal court.

I'm troubled by your response -- the administration's response to these decisions. Your approach seems to be to interpret them as narrowly as possible, even when the interpretation doesn't withstand close scrutiny.

Let me give you an example. The administration now acknowledges that Guantanamo detainees can challenge their detention in federal court. But you still claim that once the detainees get to court, they have no legal rights. In other words, you believe a detainee can go to the courthouse but can't come inside. One federal court has already rejected your position.

Mr. Wiggins, the Supreme Court held that Guantanamo detainees' claims that they were detained for over two years without charge and without access to counsel, and I quote, "unquestionably describes custody in violation of the Constitution or laws or treaties of the United States," closed quote.

If the administration's position is that detainees have no legal rights, as you claim, how could the court say that the claims of detainees described violations of their rights?

MR. WIGGINS: Senator, the text that you quoted is from a footnote, footnote 15 of the Rosulo (sp) decision. The Supreme Court said numerous times during the course of this decision, including at the end, that the only issue they were deciding was the jurisdiction of United States courts to hear habeas petitions.

That footnote says what it says. It's appended to a paragraph that talks about facts pled for jurisdictional purposes. We think, and we've told the court in our pleadings, that we think that the most logical reading of that footnote is that it describes jurisdictional facts and it makes sense in that context.

It would not make sense in the context of an ambiguous paragraph overruling years of precedent in the --

SEN. DURBIN: Mr. Wiggins --

MR. WIGGINS: -- (inaudible) -- case, the Verdugo (sp) case, the Zaivadas (sp) case, all of which said that the --

SEN. DURBIN: Mr. Wiggins, I'm not carping on a trifle. I'm not sitting on a footnote here. How can you have a habeas right if you don't acknowledge that the detainee has some rights? I mean, that's what it boils down to. And I can't understand the administration's position of ignoring what the Supreme Court has said, even if it's from a jurisdictional viewpoint.

Let me go to another example. You claim that you're complying with Supreme Court decisions because you've created military tribunals -- the CSRTs. These tribunals are supposed to determine whether a detainee has been accurately designed as an enemy combatant. The detainee is not entitled to an attorney.

The CSRTs rely upon secret evidence that the detainee is not allowed to review. That doesn't seem like due process by any stretch. In fact, two federal courts have already held CSRTs failed to comply with Supreme Court rulings. One court concluded they deprived the detainees of sufficient notice of the factual basis for their detention and denied them a fair opportunity to challenge their incarceration.

How can a detainee challenge the grounds of his enemy-combatant designation if he does not have access to the evidence supporting that designation?

MR. WIGGINS: Senator, he does have access to the information. The procedures that are set up for the CSRT are procedures that the Supreme Court, in Hamdi, the plurality, expressed the view that those procedures would be sufficient; more than sufficiently, actually. They expressed the view that an Article V type hearing or a hearing set forward in the military regulations that provided very basic due process rights was all that was required.

The CSRT procedures, as established by the military order, provide that detainee will have the factual basis for his detention disclosed to him before the tribunal. SEN. DURBIN: Mr. Wiggins, my time is running out and I'd like to read to you from the decision so you understand what you just said is not true.

SEN. SPECTER: Senator Durbin, would you make this brief, please.

SEN. DURBIN: I'd be happy to, Mr. Chairman. Thank you. And I quote: "In sum, the CSRT's extensive reliance on classified information in its resolution of enemy-combatant status, the detainees' inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual basis of their detention and deny them a fair opportunity to challenge their incarceration." And what I just read to you is not in a footnote.

Thank you, Mr. Chairman.

SEN. SPECTER: Thank you very much, Senator Durbin.

Senator Feingold, I think I erred in not calling on you earlier. It's a little hard. We go by the early-bird rule about people who come and leave, and you were on the earlier list, so you'll be recognized next --

SEN. FEINGOLD: Thank you, Mr. Chairman.

SEN. COBURN: -- after we turn to Senator Coburn, who I think has early-bird --

SEN. LEAHY: I should also apologize to Senator Feingold. I didn't have the list until after --

SEN. : (Off mike.)

SEN. SPECTER: It's a juggling act under the early-bird rule and seniority and people who come and go. But I think you should have been recognized earlier.

Senator Coburn, you were here earlier.

SEN. COBURN: Thank you, Mr. Chairman.

SEN. SPECTER: Senator Sessions came a little later, and both of you have been in and out. Senator Sessions, will you yield to Senator Coburn?

SEN. SESSIONS: I would be pleased to.

SEN. TOM COBURN (R-OK): I just want to clarify for the record a couple things on the IG report in terms of the Manhattan detention center.

Mr. Fine, all these individuals were illegal aliens; is that correct?

MR. FINE: All but one had violated immigration law in some context, either by overstaying their visa or entering the country illegally, that's correct.

SEN. COBURN: And some of them had not come back for detention hearings; is that correct?

MR. FINE: Some of them had not been -- had absconded from detention -- (inaudible) -- SEN. COBURN: So they were twice violators of law.

MR. FINE: They were violators of law, that's correct.

SEN. COBURN: Multiple times.

MR. FINE: I don't know how many of them were in that category, but I believe there were some in that category.

SEN. COBURN: But the fact is, is they had already proven a disdain for the law. Is that true?

MR. FINE: They had violated immigration law, that's correct.

SEN. COBURN: Okay. Well, I don't see that any different than any other law. They had demonstrated disdain for the law because they had, in fact, violated the law; is that correct?

MR. FINE: They had -- that's correct, they had violated immigration law.

SEN. COBURN: I don't have any other questions, Mr. Chairman.

SEN. SPECTER: I was talking to Senator Kyl about asbestos. Every now and then we have another matter we have to consider.

SEN. COBURN: I have no additional questions.

SEN. SPECTER: No additional questions.

SEN. : Boy, do I miss those hearings, Mr. Chairman. (Laughter.)

SEN. SPECTER: Well, it's been a busy committee. Senator Kyl and I were coming to grips with one of the tough issues on asbestos, and pardon me for taking 10 seconds out.

Senator Feingold?

SEN. RUSSELL FEINGOLD: (D-WI): Thank you, Mr. Chairman. And thank you for holding this hearing.

I believe that the long-term detention of so-called enemy combatants at Guantanamo Bay is one of the most important national security and civil liberties issues facing us today. I've been concerned for a long time that Congress has not done as much oversight on this issue as it should, so I do appreciate hearing from these witnesses.

Mr. Chairman, the situation at Guantanamo Bay has become so troubling that a growing chorus of people are calling for that facility to be shut down entirely. It may be that the word "Guantanamo" has become so synonymous in the Arab and Muslim world with American abuses that we must close the prison down, but we did not have to reach this point.

If the administration had not argued that these detainees were not subject to the Geneva Conventions, if this administration had not argued that these detainees had no right to counsel or to make their case in federal court, if this administration had not insisted on trying a few of these detainees who are charged with crimes in military commissions lacking basic due process, if this administration had not sought to exploit every single ambiguity in the law to justify its unprecedented actions, we would not be where we are today. We would not be even talking about closing Guantanamo.

So when we talk about closing down this facility, let us remember that the problem is not just Guantanamo. The problem is an administration that thinks it does not have to play by the rules. Wherever these detainees are held, they must be accorded basic due process rights and treated humanely pursuant to universally respected standards.

And I would ask, Mr. Chairman, that my complete statement be included in the record.

SEN. SPECTER: Without objection, it will be made a part of the record.

SEN. FEINGOLD: Admiral McGarrah, many of the prisoners at Guantanamo Bay were first detained by the United States government three years or more ago on the theory that they are enemy combatants subject to indefinite detention. In Judge Joyce Hens Green's recent decision finding the procedures of the Combatant Status Review Tribunals unconstitutional, she noted that the government did not formally define the term "enemy combatant" until July 2004.

If the U.S. government did not formally define who is an enemy combatant until 2004, on what basis did it detain the hundreds of individuals picked up and transferred to Guantanamo Bay prior to that time?

ADM. MCGARRAH: Senator, I can't comment on the definitions that were used in prior reviews. I can only comment on the process for which I was responsible for. I would defer to Department of Justice for legal definitions.

SEN. FEINGOLD: General, do you have an answer to what basis these folks were held on, if the term wasn't defined until later?

GEN. HEMINGWAY: Senator, I wasn't responsible for making that. As far as my view at the present time, they are held because they are unprivileged belligerents who have been removed from the battlefield.

SEN. FEINGOLD: Mr. Wiggins, could you answer?

MR. WIGGINS: Could you repeat the question, please?

SEN. FEINGOLD: Yeah. Given the fact that the term "enemy combatant" was not defined until years later, on what basis were the hundreds of detainees held prior to that time? What was the basis?

MR. WIGGINS: I don't know the answer to that question, Senator.

SEN. FEINGOLD: Thank you.

Admiral, Judge Green's decision also stated that the government attorney in her case conceded that under the U.S. government's definition of enemy combatant, a quote, "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but what really is a front to finance al Qaeda activities," unquote, could be considered an enemy combatant. Do you agree with that?

ADM. MCGARRAH: Sir, that was extracted from the body of evidence in that particular case and was not the sole factor in that determination. Our panels looked at all the information available in the government's possession and made the determination based on a preponderance of evidence standard.

SEN. FEINGOLD: But do you agree with the conclusion that a person could be categorized in that way?

ADM. MCGARRAH: Sir, I agree with the conclusion that an enemy combatant status designation could be made based on a view of all the evidence if the preponderance of the evidence indicated that that classification was appropriate.

SEN. FEINGOLD: Right.

Mr. Wiggins, several witnesses on the second panel have submitted written testimony raising concerns that in the tribunals set up to try or evaluate the status of detainees at Guantanamo Bay, that the government may rely on evidence obtained through torture or coercive means. As assistant attorney general for Civil Rights at the Justice Department, doesn't that give you pause?

(Pause.) MR. WIGGINS: Senator, the president and the attorney general have made clear that the United States does not condone or commit torture, and that we will seek out and punish those who commit such acts. Beyond that, I --

SEN. FEINGOLD: But what about the reliance on evidence obtained through torture or coercive means? As a Justice Department official, doesn't it give you pause that we might use such evidence?

MR. WIGGINS: The training manual for al Qaeda encourages them to allege mistreatment. We take every -- the military, at least, as do we, take every allegation seriously. They look into it. But the tribunals are free to test the weight of that evidence, to -- they make the decision based on the weight of all the evidence that they have. And it would include perhaps, in some cases, evidence where a detainee has alleged that it was a product of mistreatment. But it's up to the tribunal to determine whether to accept that evidence or not.

Admiral McGarrah is more familiar with the details of the cases. But it's not uncommon.

SEN. FEINGOLD: I think the question's fairly straightforward. I don't think that's much of an answer. The question is whether evidence obtained through torture is something that ought to give somebody in our United States Justice Department pause. I would think it would give you pause.

Thank you, Mr. Chairman.

SEN. SPECTER: Thank you, Senator Feingold.

Senator Sessions.

SEN. JEFF SESSIONS (R-AL): Mr. Chairman, the thing that troubles me most about this hearing is that I believe it conveys a completely incorrect vision of how prisoners are being handled who are apprehended by the United States armed forces. And we're focusing on problems in due processes and things that suggest that these prisoners are being tortured, that they're being abused in unconscionable ways, and suggesting to our enemies around the world that this is occurring. And they're using that information to promote their own agenda to kill American soldiers. And we're adding -- we're placing them at greater risk, and we're making it more difficult for our policy to be successful.

So I feel very strongly that this is a legitimate hearing to find out how people are being held. But to suggest that our activities, as one member of the new left that compared it to -- or the left compared it to the gulag of our time, where, as the chairman notes, 30 million people were killed in Soviet prisons, and we had 700 in Guantanamo -- not a single one has died, not a single one has been shown to be seriously injured. And so I think we need some perspective here. We have high standards. We prosecuted people who violated prisons (sic). We cashiered out a fine Army colonel who fired a gun near somebody's head in combat to try to get information to save his life. We've prosecuted one officer who was found to be innocent. We prosecuted the people at Abu Ghraib, and they said the higher-ups were involved. And they had their trial, and they never showed any higher-ups ordered them to do that, just like the evidence was from the beginning.

Now I'm concerned about the tone of this hearing. First of all, our policy has been to treat detainees humanely, consistent with the principles of Geneva Convention, even though they are unlawful combatants or, as General Hemingway used the phrase, unprivileged belligerents. You know what that means? That means because they did not conduct their warfare against the United States consistent with the rules of war, they are not entitled to the protections of the Geneva Convention. They do not apply to them.

Is that not right, General Hemingway, that if they -- people come into this country surreptitiously or conduct activities to bomb civilians against the rules of war, they're not entitled to the protections of the Geneva Convention?

GEN. HEMINGWAY: That's precisely my position.

SEN. SESSIONS: And we have not violated a treaty, therefore, if we don't treat each one of these prisoners precisely in accordance with all the language in the Geneva Conventions that provides for libraries and things of that nature. I think that's important for us to know.

They are provided more due process than required, but the most important point here for us to remember -- these are not people charged with bank fraud in the Southern district of New York, American citizens entitled to a federal court trial. They are unlawful combatants, and they may be detained under the rules of war until the war is over.

And we know that they present a danger to us. We know at least 12 who have been released have been reapprehended for attacking the United States of America. We've spent \$109 million building a new facility in Guantanamo. I visited the old, temporary facility. And they showed me the site where the new

one would be. It would make a magnificent resort. It's a level land; it sits right out on the water. It's a beautiful site. They spent a lot of money on it; \$42 million more is going to be spent to upgrade it. We're spending \$140 million to improve housing and detention facilities in Iraq and Afghanistan.

Now, this country is not systematically abusing prisoners. We have no policy to do so. And it's wrong to suggest that. And it puts our soldiers at risk who are in this battle because we sent them there. And we have an obligation to them not to make this situation worse than it is.

If we made errors, we'll bring them up and we'll prosecute the people. But to suggest that we are in a wholesale violation of the rules of war, I suggest, is wrong.

Mr. Chairman, there are 520 individuals in Guantanamo today; 234 have been transferred out, 164 have been released outright, and 67 have been handed over to another government.

My time has expired. But I would just say that we have heard today that these individuals were screened before they were brought to Guantanamo. Ten thousand have been detained. Only, five, six, 700 have been brought to Guantanamo. They were screened before they were sent there to make sure that they were dangerous. We don't have any interest in bringing somebody of frivolous nature to house in Guantanamo. It's a burden on our military. They don't want that.

So I think some of them are entitled to be prosecuted, as they were an ex parte Quirin case, approved by President Franklin Roosevelt and the United States Supreme Court, for violations of rules of war. And some of them need to be executed. And I assume that when this dust settles on some of these court hearings, we'll be moving forward with that, if they deserve it. If they don't, so be it.

Thank you, Mr. Chairman.

SEN. SPECTER: Well, thank you very much, Senator Sessions. As I said at the outset on the parameter, we're looking at the procedures here. The committee is taking up about 15 Supreme Court opinions. One plurality, two five-person opinions and a bunch of concurring opinions, and a bunch of dissenting opinions. And then three District Court opinions. And it's a genuine crazy quilt to try to figure out where the due process rights lie. The Supreme Court has said there are due process rights.

And I think we've done a fair job today in staying away from the questions of torture, the questions of mistreatment. We've been pretty much within the parameter. There have been some comments --

SEN. SESSIONS: Well, these fine men in uniform here today and those out there at risk in these prisons are, I think, have been maligned. And frankly, I think, unfairly.

SEN. SPECTER: Well, and we're looking to try and keep some more that were questioned as to why they released some on a promise that they wouldn't go back to war, and what good that kind of a promise was. And I think that some congressional input is salutary. Because we're going to have a lot of work to do following this hearing, with the military commissions and with the Department of Justice and the parameters and the definitions and the procedures.

And we're going to have a second panel which will get into some of these questions in some greater detail.

There's no doubt that when you talk about evidence, you're not talking about evidence in a criminal trial or something in a United States District Court. But the question is how much and right to counsel. We've heard testimony about right to counsel, and these are issues which the Constitution says are for the Congress. And to read the opinions of the Supreme Court justices and the way we've left them hanging, trying to figure out where to go piece by piece, it's our responsibility and to make these judgments. We have to know much more about the facts.

SEN. SESSIONS (?): Mr. Chairman, I would just agree that it's fine for us to inquire into this, but I

would note in the history of warfare, we've not provided trials to prisoners who've been seized on the battlefield. That's been left to the military to handle.

SEN. SPECTER: Senator Kohl.

SEN. HERBERT KOHL (D-WI): Thank you, Mr. Chairman, for holding this hearing.

The stories coming out of the detention center at Guantanamo Bay continue to harm our image around the world. Guantanamo does not represent the America we know. Instead, it stands in stark contrast to the values that our nation symbolizes. Since the first prisoners were wheeled off the plane in 2002 of January, the detention center in Guantanamo has been on trial in two courts, our federal courts and the court of public opinion. It has not fared very well in either.

Indefinite detention of prisoners in Guantanamo has failed the test of fundamental fairness in our federal courts. Of great importance also is the fact that Guantanamo has proved to be a failure in the court of world opinion. To be sure, the goal is not to win a popularity contest. Of course, the goal is to defeat terrorism.

Yet to win the war on terrorism, we must engage in and win the battle of ideas in the Muslim world. Guantanamo is impeding our efforts to win this war of ideas. Shortly after 9/11, hundreds of people gathered in the streets of Iran and other countries around the world to honor the victims of those horrific attacks. Support for the United States at that time was at an all-time high. Yet today, less than four years later, we see a much different picture. Instead, it is anti-Americanism that has never been higher. The alleged abuses and incommunicado detentions at Guantanamo, which have come to define the United States around the world, eroded that support, adding fuel to the fire of anti-Americanism and making it easier for those seeking to do us harm to enlist recruits for their cause.

We believe that security and adherence to the rule of law are not mutually exclusive principles. We have the best justice system in the world, and I believe that we can find a way to make this work. Nobody is advocating the release of suspected terrorist, in fact, quite the opposite. They must be detained or prosecuted, but this must be done in a way that is consistent with our values and there is growing realizing that the policies Guantanamo has come to represent should not continue.

It is important to remember that Guantanamo is in large part a symbol. It is a symbol of bad acts and misguided policies that must be reviewed immediately. So I commend Senator Biden for calling for an independent commission to take a close look at Guantanamo and make recommendations on how to move forward. I believe this will lead us on a path towards fixing what is wrong with Guantanamo and moving us toward a system that can withstand international scrutiny as well as keep us safe from terrorist threats.

Thank you, Mr. Chairman.

SEN. SPECTER: Thank you very much, Senator Kohl. Thank you very much. It's been a lengthy panel.

SEN. LEAHY: Chairman?

SEN. SPECTER: Senator Leahy.

SEN. LEAHY: I just want to do a couple of quick --

SEN. SPECTER: Sure.

SEN. LEAHY: We've talked about these people being held as being captured on the battlefield. Admiral, you said this a very broad definition of a battlefield. Am I correct that some of the detainees were captured outside Afghanistan? Is that correct?

ADM. MCGARRAH: Yes, sir, that's correct.

SEN. LEAHY: And you're going to supply, for the record, the places they were captured.

ADM. MCGARRAH: We will follow up with you on that issue, sir.

SEN. LEAHY: But you will supply the places where they were captured? ADM. MCGARRAH: That's outside my responsibility, but I'll make sure that that gets referred to the right people, sir.

SEN. LEAHY: I appreciate that. We had three people arrested in the United States who are designated as enemy combatants by the president. I mention that because the battlefield is not somebody who's out there, necessarily in immediate armed combat with us. It seems to be the whole globe is the battlefield. Not all the detainees were captured during active combat. Am I correct in that, General Hemingway?

GEN. HEMINGWAY: I couldn't give you an accurate statement on that, Senator, because I haven't reviewed the files of every single one. The only ones I've looked at are those who've been referred for trial by military commission.

SEN. LEAHY: Is it your understanding that all the people there were in active combat?

GEN. HEMINGWAY: It's not my understanding, and I can't give you an accurate assessment of that because I haven't looked at those files and I wouldn't want to speculate.

SEN. LEAHY: Thank you.

Inspector General Fine, I want to thank you for your efforts over the past year to produce a declassified version of your investigation of FBI steps, many would say failures, leading up to September 11th. I know you originally produced a report last year. I think your efforts to declassify it prior to the elections had failed, but Senator Grassley and I, among others, requested a public version be released as released last week. I just wanted to publicly thank you. I know you worked hard to have that happen. I know both Senator Grassley and I appreciate it.

And you're currently conducting an investigation in the FBI's action at Guantanamo, what steps the FBI agents took to prevent the mistreatment of prisoners report misconduct. Does your investigation cover the question of the FBI's reporting of complaints to DOJ, Department of Justice lawyers? And then what Department of Justice reported to the Department of Defense?

MR. FINE: Yes, Senator. Our investigation is looking into what the FBI did, what they observed and what reports they made and how they were handled.

SEN. LEAHY: Have you interviewed the four Department of Justice lawyers who, according to the FBI e-mail, received the FBI complaints?

MR. FINE: We've interviewed some Department of Justice officials. We're in the middle of our investigation, so I don't believe we've interviewed all the people we need to. SEN. LEAHY: Do you know when a preliminary result of the inquiry might be available?

MR. FINE: It'd be impossible for me to predict that. We're going to do it as expeditiously as we can, and we've allocated substantial resources to it.

SEN. LEAHY: Thank you, Mr. Chairman. And I will count on Admiral McGarrah and General Hemingway to follow up with answers to the questions I've asked. We will refine those for you more if you'd like. Thank you. Thank you, Mr. Chairman.

SEN. SPECTER: Senator Biden asked me to say publicly that he has some questions for the record, and there may be some other Senators who will submit questions for the record.

SEN. JOHN CORNYN (R-TX): Mr. Chairman, may I be permitted just a couple of very quick questions for this --

SEN. SPECTER: Yes, Senator Cornyn.

SEN. CORNYN: I very much appreciate it. Thank you very much.

Mr. Chairman, I'm advised that we've had 11 members of the United States Senate visit Guantanamo Bay. And I was privileged to be one of those Senators who had a chance to actually see with my own eyes and to talk to the people in charge there as well as to observe the detainees and talk to some of the teams that conduct interrogations. It was a very edifying experience for me, and I would think, of course, any of us who have not yet had an opportunity to do that would benefit from that personal trip to Guantanamo Bay.

I would just agree with the Chairman when you say that the Supreme Court opinions and the federal court opinions in this area are a crazy quilt. And that we are struggling on this committee to try to figure out exactly what the rules are and what the parameters should be, what the court has said.

I would just suggest that we ought to provide the same opportunity for both the Department of Defense and the administration in trying to deal with in what in many ways is an unprecedented set of circumstances. We ought to engage in a presumption of innocence rather than the presumption of guilt, which our enemies seem to apply whenever a charge is made against the United States as regards Guantanamo Bay and our treatment of detainees.

There have been 10 different investigations conducted by the Department of Defense into interrogation practices and the alleged abuses and some factual instances of abuses at Abu Ghraib, but this has been extensively reviewed by impartial tribunals. And I think that, in the main, our Department of Defense and the people in charge of this facility have conducted themselves admirably under difficult circumstances. Thank you for giving me a couple of minutes.

SEN. SPECTER: Thank you, Senator Cornyn. There's no doubt about the need for inputs very heavily and very substantial from the Department of Defense, from the attorney general. There's one quotation that I did not start with, but I think it's worth just a moment of the committee's time even though it's late. And this is Justice Scalia's urging us to deal with this issue. And he puts it this way.

"There is a certain harmony of approach in the pluralities making up for Congress' failure to invoke the suspension clause and making up for the executive's failure to apply what it says are needed procedures, an approach that reflects on what might be called a Mr. Fix-It mentality. The plurality seems to view it as a mission to make everything come out right rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions."

"As the legislature failed to suspend the writ in the current dire emergency, well, we will remedy that failure by prescribing the regional conditions that a suspension should have been included. And as the executive failed to live up to those reasonable conditions, well, we will ourselves make up for that failure so that this dangerous fellow, is dangerous, need not be set free. The problem with this approach is not only that it steps out of the court's modest and limited role in a democratic society, but that by repeatedly doing what it thinks the political branches ought to do, it encourages their lassitude and saps the vitality of government by the people."

Lassitude's not a word too often used by the Congress. Probably ought to be used more often. But that's what we're confronting with the DOD and the military and the Department of Justice, grappling with these issues, and the court proliferating all over the place. Crazy quilt's the best word for it.

So we have our work cut out for us among a number of other subjects. Thank you for agreeing to stay, General Hemingway. Admiral McGarrah, to the extent you could stay, too, would be helpful.

END.